



Date and Time: Thursday, December 14, 2023 12:08:00 PM CST

Job Number: 212634102

## Documents (28)

### 1. [Messner v. Journeymen Barbers, etc., 53 Cal. 2d 873](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

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

### 2. [Chicago Title Ins. Co. v. Great Western Financial Corp., 69 Cal. 2d 305](#)

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

### 3. [Oakland-Alameda County Builders' Exchange v. F. P. Lathrop Constr. Co., 4 Cal. 3d 354](#)

**Client/Matter:** -None-

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

### 4. [Corwin v. Los Angeles Newspaper Service Bureau, Inc., 4 Cal. 3d 842](#)

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

### 5. [Marin County Bd. of Realtors, Inc. v. Palsson, 16 Cal. 3d 920](#)

**Client/Matter:** -None-

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6. [Corwin v. Los Angeles Newspaper Service Bureau, Inc., 22 Cal. 3d 302](#)

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

7. [Younger v. Jensen, 26 Cal. 3d 397](#)

**Client/Matter:** -None-

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

8. [Partee v. San Diego Chargers Football Co., 34 Cal. 3d 378](#)

**Client/Matter:** -None-

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

9. [Union Carbide Corp. v. Superior Court, 36 Cal. 3d 15](#)

**Client/Matter:** -None-

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

10. [Fisher v. City of Berkeley, 37 Cal. 3d 644](#)

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11. <a href="#"><u>Blank v. Kirwan, 39 Cal. 3d 311</u></a>	
<b>Client/Matter:</b> -None-	
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12. <a href="#"><u>State of California v. Levi Strauss &amp; Co., 41 Cal. 3d 460</u></a>	
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13. <a href="#"><u>King v. Meese, 43 Cal. 3d 1217</u></a>	
<b>Client/Matter:</b> -None-	
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Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: California > Supreme Court
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14. <a href="#"><u>Cal. ex rel. Van De Kamp v. Texaco, 46 Cal. 3d 1147</u></a>	
<b>Client/Matter:</b> -None-	
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Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: California > Supreme Court
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15. <a href="#"><u>Manufacturers Life Ins. Co. v. Superior Court, 10 Cal. 4th 257</u></a>	
<b>Client/Matter:</b> -None-	
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Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: California > Supreme Court

16. [ABC Internat. Traders, Inc. v. Matsushita Electric Corp., 14 Cal. 4th 1247](#)

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

17. [Pacific Gas & Electric Co. v. County of Stanislaus, 16 Cal. 4th 1143](#)

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

18. [Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163](#)

**Client/Matter:** -None-

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

19. [Aguilar v. Atlantic Richfield Co., 25 Cal. 4th 826](#)

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

20. [Cadence Design Systems, Inc. v. Avant! Corp., 29 Cal. 4th 215](#)

**Client/Matter:** -None-

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

21. [Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134](#)



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

22. [Bronco Wine Co. v. Jolly, 33 Cal. 4th 943](#)

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

23. [Soukup v. Law Offices of Herbert Hafif, 39 Cal. 4th 260](#)

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

24. [Clayworth v. Pfizer, Inc., 49 Cal. 4th 758](#)

**Client/Matter:** -None-

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

25. [In re Cipro Cases I & II, 61 Cal. 4th 116](#)

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

26. [Nationwide Biweekly Administration, Inc. v. Superior Court, 9 Cal. 5th 279](#)

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

27. [Ixcel Pharma, LLC v. Biogen, Inc., 9 Cal. 5th 1130](#)

**Client/Matter:** -None-

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Practice Areas & Topics: Antitrust & Trade Law; Court:  
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28. [Villanueva v. Fidelity National Title Co., 11 Cal. 5th 104](#)

**Client/Matter:** -None-

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## Messner v. Journeymen Barbers, etc.

Supreme Court of California

April 7, 1960

L. A. No. 25288

**Reporter**

53 Cal. 2d 873 \*; 351 P.2d 347 \*\*; 4 Cal. Rptr. 179 \*\*\*; 1960 Cal. LEXIS 262 \*\*\*\*; 45 L.R.R.M. 3135; 40 Lab. Cas. (CCH) P66,450

ROSS MESSNER, Respondent, v. JOURNEYMEN BARBERS, HAIRDRESSERS AND COSMETOLOGISTS, INTERNATIONAL UNION OF AMERICA, LOCAL 256, et al., Appellants

**Prior History:** [\*\*\*\*1] APPEAL from a judgment of the Superior Court of San Diego County. James C. Toothaker, Judge.

Action to enjoin defendants from picketing a barber shop.

**Disposition:** Reversed. Judgment for plaintiff reversed.

## **Core Terms**

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employees, picketing, join, barbers, cases, barber shop, labor organization, Cartwright Act, prices, shop, labor union, price-fixing, nonunion, courts, collective bargaining, peaceful picketing, wages, restraint of trade, union shop, bargaining, employes, union shop agreement, commodity, concerted, concerted activity, combinations, organize, coerce, union member, Taft-Hartley Act

## **LexisNexis® Headnotes**

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Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

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

### **HN1 [down arrow] Sales (Article 2), Remedies**

A union may use the various forms of concerted action, such as strike, picketing, or boycott, to enforce an objective that is reasonably related to any legitimate interest of organized labor. The object of concerted labor activity must be proper and that it must be sought by lawful means, otherwise the persons injured by such activity may obtain damages or injunctive relief.

Civil Procedure > US Supreme Court Review > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Protected Activities

Labor & Employment Law > Collective Bargaining & Labor Relations > Right to Organize

## **HN2** Civil Procedure, US Supreme Court Review

Basic to the right guaranteed to employees in [29 U.S.C.S. § 157](#) to form, join or assist labor organizations, is the right to engage in concerted activities to persuade other employees to join for their mutual aid and protection.

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

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

## **HN3** Collective Bargaining & Labor Relations, Unfair Labor Practices

Peaceful picketing for recognition by a union that does not represent a majority of the employees is not an unfair labor practice under [29 U.S.C.S. § 8 \(b\) \(1\) \(A\)](#).

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

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

The law of California is that if a plaintiff is offered the same rights of union membership as the employee members defendants' peaceful picketing to compel him to join the union is proper because the businessman-worker operating in an industry or field in which he competes with organized workmen may likewise be subjected to the same means of persuasion as any other workman to join the union and conform to the conditions regulating union labor.

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

## **HN5** Collective Bargaining & Labor Relations, Strikes & Work Stoppages

Organized labor may not, consistently with public policy, require store managers who are agents of management to divide their loyalties by becoming union members.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

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

## **HN6** Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Combinations entered into for the purpose of restraining competition and fixing prices are unlawful in California under the common law and the Cartwright Act, [Cal. Bus. & Prof. Code § 16700 et seq.](#) The real test in a particular case is the primary purpose of the agreement or combination in question. Thus, a labor union, acting alone, violates the Cartwright Act only when its primary purpose is to accomplish a restraint of trade not when its purpose is to obtain a valid labor objective.

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

**HN7[] Collective Bargaining & Labor Relations, Strikes & Work Stoppages**

See [Cal. Lab. Code § 1122.](#)

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Subjects

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

**HN8[] Collective Bargaining & Labor Relations, Bargaining Subjects**

Employers are prohibited from financing labor unions because such financing might render a union less independent and thus less able to represent its members effectively vis-a-vis the employer. When the employer is himself a workman, his dues are no different from those of any other member.

## **Headnotes/Summary**

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### **Headnotes**

#### **CALIFORNIA OFFICIAL REPORTS HEADNOTES**

**CA(1)[] (1)**

**Labor—Picketing—Law Governing.**

--A case involving the right of a union to picket a barber shop to secure a union shop agreement must be decided under state law, since a barber is not engaged in interstate commerce.

**CA(2)[] (2)**

**Id.—Right of Union to Engage in Concerted Activities.**

--A union may use the various forms of concerted action, such as strike, picketing or boycott, to enforce an objective that is reasonably related to any legitimate interest of organized labor.

**CA(3)[] (3)**

**Id.—Object of Concerted Labor Activity.**

--The object of concerted labor activity must be proper and must be sought by lawful means, otherwise the persons injured by such activity may obtain damages or injunctive relief.

**CA(4)[] (4)**

**Id.—Collective Bargaining Contracts.**

--Employers are not required by law to engage in collective bargaining, and closed or union shop agreements and concerted activities to achieve them are lawful whether or not a majority of the employees directly involved wish such agreements.

**CA(5) [ ] (5)**

**Id.—Right of Union to Engage in Concerted Activities.**

--The members of a labor organization may have a substantial interest in the employment relations of an employer although none of them is or ever was employed by him, and where union and nonunion employees are engaged in a similar occupation and their respective employers are engaged in trade competition with each other, the union's efforts to extend its membership to the employments in which it has no foothold is not an unreasonable aim.

**CA(6) [ ] (6)**

**Id.—Right of Union to Engage in Concerted Activities.**

--A union may use economic pressure to achieve a closed or union shop agreement though the employees in the picketed shop do not belong to the union and have no dispute with their employer.

**CA(7) [ ] (7)**

**Id.—Right of Union to Engage in Concerted Activities.**

--The hardship arising from a labor union's struggle for organization does not render less legitimate the objectives of the union in seeking organization or the objectives of a nonunion shop in resisting it, or the objectives of nonunion workers who may either join or resist. Confronted with the legitimate objectives of all parties concerned in such a struggle, it is not for the courts to abate it, however aware they may be of its inevitable hardships; they are bound to remain aware also that they cannot properly encroach on the function of regulation that belongs to the Legislature.

**CA(8) [ ] (8)**

**Id.—Labor Unions—Closed or Union Shop Agreements.**

--Lab. Code, §§ 920, 921, 923, relating to promises to join or remain in or withdraw from a labor organization and to public policy as to labor organizations, do not affect the propriety of closed or union shop agreements and concerted activities to obtain such agreements.

**CA(9) [ ] (9)**

**Id.—Jurisdictional Strikes—Labor Organizations.**

--Under Lab. Code, §§ 1117, 1118, relating to jurisdictional strikes, a labor organization is not formed merely by an agreement of employees not to be organized. A group whose sole purpose is to express the wish of its members not to deal as a group with the employer "concerning grievances, labor disputes, wages, hours of employment or conditions of work" is not an organization that exists for the purposes of § 1117, since it lacks the purpose "of dealing with employers concerning grievances, labor disputes, wages, hours of employment or conditions of work."

**CA(10)** [  ] (10)**Id.—Jurisdictional Strikes—Labor Organizations.**

--A jurisdictional strike can only arise out of a "controversy between two or more labor organizations as to which of them has or should have the exclusive right to bargain collectively with an employer . . . [or] to have its members perform work for an employer" ([Lab. Code, § 1118](#)); the wish of all or some of the employees to work in an open shop without collective bargaining is the antithesis of a demand for the "exclusive right to have [their] members perform work for [the] employer."

**CA(11)** [  ] (11)**Id.—Legislative Policy.**

--With the exception of enactments outlawing the employer's use of the yellow-dog contract ([Lab. Code, §§ 920-922](#)) and labor's use of the jurisdictional strike ([Lab. Code, §§ 1115-1122](#)), the legislative policy favors free competition for jobs by lawful, peaceful means.

**CA(12)** [  ] (12)**Id.—Picketing.**

--If plaintiff nonunion barber was offered the same rights of union membership as the employee members, defendants' peaceful picketing to compel him to join the union was proper because the businessman-worker operating in an industry or field in which he competes with organized workmen may be subjected to the same means of persuasion as any other workman to join the union and conform to the conditions regulating union labor.

**CA(13)** [  ] (13)**Monopolies and Combinations—Restraint of Trade: Cartwright Act.**

--Combinations entered into for the purpose of restraining competition and fixing prices are unlawful under the common law and the Cartwright Act. ([Bus. & Prof. Code, § 16700 et seq.](#))

**CA(14)** [  ] (14)**Id.—Cartwright Act—Agreements and Combinations Prohibited.**

--Although human labor is not a "commodity" under the Cartwright Act ([Bus. & Prof. Code, § 16703](#)), a service consisting in the main of human labor is.

**CA(15)** [  ] (15)**Id.—Cartwright Act—Agreements and Combinations Prohibited.**

--[Bus. & Prof. Code, § 16703](#), is not limited to exempting from the Cartwright Act agreements that set the price of labor; reasonably interpreted it was intended to except from the operation of the act combinations of laborers for purposes of furthering their interests by collective bargaining, when not otherwise unlawful.

**CA(16)** [  ] (16)

**Id.—Cartwright Act—Labor Unions.**

--A labor union, acting alone, violates the Cartwright Act only when its primary purpose is to accomplish a restraint of trade, not when its purpose is to obtain a valid labor objective.

**CA(17)** [  ] (17)

**Id.—Cartwright Act—Labor Unions.**

--Where a minimum price schedule in a union shop agreement setting percentage wages for barbers was not price-fixing but wage-fixing, the presence of employer-barbers in the union did not convert the contract into an agreement between labor groups and non-labor groups for the purpose of restraining trade.

**CA(18)** [  ] (18)

**Labor—Jurisdictional Strikes—Financial Factors.**

--The purpose of Lab. Code, § 1122, in the Jurisdictional Strike Act, providing that "any person who organizes an employee group which is financed in whole or in part, interfered with or dominated or controlled by the employer or any employer association, as well as such employer association, shall be liable to suit by any person who is injured thereby," is to give an action for damages to any person injured by the formation of a company union. Employers are prohibited from financing labor unions because such financing might render a union less independent and thus less able to represent its members effectively vis-a-vis the employer; but where the employer is himself a workman, his dues are no different from those of any other member and would not give him control over union power and policy.

**Counsel:** Todd & Todd and Henry C. Todd for Appellants.

Carroll, Davis, Burdick & McDonough, Roland C. Davis, John E. Thorne, Johnson, Thorne, Speed & Bamford, Morgan, Beauzay, Smith & Holmes, Robert Morgan, Charles P. Scully and Victor Van Bourg as Amici Curiae on behalf of Appellants.

Gray, Cary, Ames & Frye and Ward W. Waddell, Jr., for Respondent.

Severson, Davis & Larson, Nathan R. Berke and George Brunn as Amici Curiae on behalf of Respondent.

**Judges:** In Bank. Traynor, J. Gibson, C. J., Peters, J., and White, J., concurred. Schauer, J., dissenting. Spence, J., and McComb, J., concurred.

**Opinion by:** TRAYNOR

## **Opinion**

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[\*876] [\*\*349] [\*\*\*181] Defendants appeal from a judgment of the trial court enjoining them from picketing plaintiff's barber shop to secure a union shop agreement.

Plaintiff is a barber, working with the tools of the trade. During the summer of 1957 defendants attempted to organize all the barber shops in the San Diego area. They submitted a contract to plaintiff [\*\*\*\*2] that would have required him and his four barber employees to join defendants' organization. Defendants did not represent any of

plaintiff's employees, and the employees do not wish to join the union or to be represented by defendants. Plaintiff's refusal to sign the contract led to defendants' peaceful picketing. After about a week the pickets were removed by stipulation pending the decision in this case.

CA(1)[] (1) Since plaintiff is not engaged in interstate commerce, this case must be decided under state law. CA(2)[] (2) It is clear that "HN1[] a union may use the various forms of concerted action, such as strike, picketing, or boycott, to enforce an objective that is reasonably related to any legitimate interest of organized labor. . . . CA(3)[] (3) It is equally well settled that the object [\*877] of concerted labor activity must be proper and that it must be sought by lawful means, otherwise the persons injured by such activity may obtain damages or injunctive relief." (James v. Marinship Corp., 25 Cal.2d 721, 728-729 [155 P.2d 329, 160 A.L.R. 900] and cases cited.) If defendants' peaceful picketing was directed toward a proper object, the injunction was erroneously granted. The crucial issue [\*\*\*\*3] in this case, therefore, is whether a closed or union shop agreement is a proper objective of a labor union that does not represent any of the employees directly involved.

[\*\*350] [\*\*\*182] That issue was decided in C. S. Smith Met. Market Co. v. Lyons, 16 Cal.2d 389 [106 P.2d 414], and McKay v. Retail Automobile S. L. Union No. 1067, 16 Cal.2d 311 [106 P.2d 373], and was reaffirmed in Petri Cleaners, Inc. v. Automotive Employees, etc. Local No. 88, ante, pp. 455, 474-475 [2 Cal.Rptr. 470, 349 P.2d 76]. CA(4)[] (4) In the course of holding in the Petri case that an employer was not required to bargain collectively with a union representing a majority of his employees, this court said: "[we] conclude that employers are not required by law to engage in collective bargaining and that closed or union shop agreements and concerted activities to achieve them are lawful in this state whether or not a majority of the employees directly involved wish such agreements." Since the concerted activities in the Petri case were conducted by a union that represented a majority of the employees at the time the activities began, we were there concerned with the issue of this [\*\*\*\*4] case only inferentially. We deem it appropriate to set forth the law on this issue by a detailed discussion of the controlling authorities.

As early as J. F. Parkinson Co. v. Building Trades Council (1908), 154 Cal. 581 [98 P. 1027, 16 Ann.Cas. 1165, 21 L.R.A.N.S. 550], this court held that it was not unlawful for a union to call a strike of employees and order a boycott to bring pressure on an employer who retained a nonunion worker and thereby to enforce a closed shop. The elimination of the competition of nonunion workers was held a proper objective of concerted labor activity, and the court was unanimous in holding a strike a proper method of attaining this end. The conclusion of the Parkinson case that a closed shop is a proper labor objective was reaffirmed in Pierce v. Stablemen's Union, 156 Cal. 70 [103 P. 324], even though the picketing in that case was enjoined because it involved force and violence.

[\*878] The precise issue of this case was raised and decided in C. S. Smith Met. Market Co. v. Lyons, 16 Cal.2d 389 [106 P.2d 414], a suit to restrain a union from picketing and boycotting a food market to organize the nonunion butchers [\*\*\*\*5] and to obtain a closed shop agreement. No labor dispute existed between the employer and the butchers in that case and none of them wished to join the picketing union. CA(5)[] (5) The court held that the concerted activity was proper because "[the] members of a labor organization may have a substantial interest in the employment relations of an employer although none of them is or ever has been employed by him. The reason for this is that the employment relations of every employer affect the working conditions and bargaining power of employees throughout the industry in which he competes. Hence, where union and nonunion employees are engaged in a similar occupation and their respective employers are engaged in trade competition one with another, the efforts of the union to extend its membership to the employments in which it has no foothold is not an unreasonable aim." (Id., at 401.)

In McKay v. Retail Automobile S. L. Union No. 1067, 16 Cal.2d 311 [106 P.2d 373], this court held that a labor union that represented none of an employer's salesmen could lawfully engage in concerted activity to obtain a closed shop agreement since that objective had a reasonable relation to the [\*\*\*\*6] betterment of the condition of labor. Substantially the same conclusion was reached in Lund v. Auto Mechanics Union No. 1414, 16 Cal.2d 374, 378 [106 P.2d 408].

In *Shafer v. Registered Pharmacists Union*, 16 Cal.2d 379 [106 P.2d 403], involving a strike by plaintiff's union pharmacists to obtain a closed shop agreement, the propriety of the closed shop as a labor objective under common-law principles was conceded and the crucial question was whether sections 920, 921, and 923 of the Labor Code outlawed closed shop agreements. Recognizing that these sections were enacted to outlaw yellow-dog contracts, the court held that they "lay no statutory restraints upon the workers' efforts to secure a closed shop contract from [\*\*351] [\*\*\*183] an employer. . ." (*Id.* at 388.)

In *Sontag Chain Stores Co. v. Superior Court*, 18 Cal.2d 92 [113 P.2d 689], the court followed its earlier decisions by holding that the superior court had exceeded its jurisdiction in permanently restraining a union from peacefully picketing to obtain a union shop agreement. CA(6)[<sup>↑</sup>] (6) The principle that a union may use economic pressure to achieve a closed or union [\*879] shop [\*\*\*\*7] agreement even though the employees in the picketed shop do not belong to the union and have no dispute with their employer, established in the foregoing cases, has been restated in many cases not directly concerned with the point. ( *Magill Bros. v. Building Service etc. Union*, 20 Cal.2d 506, 508 [127 P.2d 542]; *James v. Marinship Corp.*, 25 Cal.2d 721, 730 [155 P.2d 329, 160 A.L.R. 900]; *Park & T. I. Corp. v. International etc. of Teamsters*, 27 Cal.2d 599, 604 [165 P.2d 891, 162 A.L.R. 1426] and cases cited; *DeMille v. American Fed. of Radio Artists*, 31 Cal.2d 139, 144-145 [187 P.2d 769, 175 A.L.R. 382]; *Charles H. Benton, Inc. v. Painters Union*, 45 Cal.2d 677, 683 [291 P.2d 13]; see *Fortenbury v. Superior Court*, 16 Cal.2d 405, 409 [106 P.2d 411]; *Williams v. International etc. of Boilermakers*, 27 Cal.2d 586 [165 P.2d 903]; *Thompson v. Moore Drydock Co.*, 27 Cal.2d 595 [165 P.2d 901].)

Thus, for 50 years, until the four-to-three decision of this court in *Garmon v. San Diego Building Trades Council*, 49 Cal.2d 595 [320 P.2d 473], in 1958, it was the settled law of this state that union labor could [\*\*\*\*8] freely compete for jobs in the labor market and seek to improve wages and working conditions by engaging in lawful concerted activities such as strikes and picketing. The law moreover recognized that union labor has a legitimate interest in organizing workmen in competing nonunion shops to insure the benefits of collective bargaining in union shops. Concerted activities such as picketing to achieve that goal were legitimate even when the employees in the nonunion shops did not wish to join or to be represented by the union. Just as the union had to reckon with the risk that it might lose its struggle for organization, so the nonunion employer risked loss of business, and hence his employees risked loss of employment, in resisting organization.

Such risks, grim as they are, are the price of lawful competition in a free enterprise system. The union plays for the high stakes of holding the gains it has made in union shops. The nonunion shop plays for the high stakes of holding the competitive advantages it has against union shops. The nonunion workers must then decide between alternatives neither of which is of their own choosing. They may welcome organization or merely accede [\*\*\*\*9] to it as the lesser of two evils. On the other hand they may dislike organization, or merely regard it as a lost cause, or resist it out of fear of losing what they presently hold or out of hope that they will emerge as free-riding [\*880] beneficiaries of organizations which their fellows will join and support.

In the absence of statutory regulation the struggle can be bitterly hard on all sides. CA(7)[<sup>↑</sup>] (7) The hardship does not render less legitimate the objectives of the union in seeking organization or the objectives of the nonunion shop in resisting it, or the objectives of the nonunion workers who may either join or resist. Confronted with the legitimate objectives of all parties concerned in such a struggle, it is not for the courts to abate it, however keenly aware they may be of its inevitable hardships. They are bound to remain aware also that they cannot properly encroach upon the function of regulation that belongs to the Legislature.

In *Chavez v. Sargent*, 52 Cal.2d 162 [339 P.2d 801], however, a majority of this court ignored the traditional doctrine of separation of powers to write a state law of labor relations based on the Taft-Hartley Act. That case suggested [\*\*\*\*10] that many of the earlier cases had been superseded [\*\*352] [\*\*\*184] by the subsequent enactment of the Jurisdictional Strike Act ( *Lab. Code, §§ 1115- 1120, 1122*). That conclusion was reached by interpreting section 1117, which defines a labor organization as "any organization or any agency or employee representation committee or any local unit thereof in which employees participate, and exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, hours of employment or conditions of work, which labor organization is not found to be or to have been financed in whole or in part, interfered with, dominated or controlled by the employer or any employer association within one year of the

commencement of any proceeding brought under this chapter . . ." to apply to a group of unorganized, nonunion employees who are satisfied with their terms and conditions of employment and therefore do not wish to engage in collective bargaining. ( *Chavez v. Sargent, supra, at 197-203.*) The controversy between this unorganized group and a national labor organization as to whether the former shall join the union was then converted into [\*\*\*\*11] a jurisdictional strike, defined by [section 1118](#) as "a concerted refusal to perform work for an employer or any other concerted interference with an employer's operation or business, arising out of a controversy between two or more labor organizations as to which of them has or should have the exclusive right to bargain collectively with an employer on behalf of his employees or any of them . . . [or] to [\*881] have its members perform work for an employer" so as to make the act applicable to the fact situations of the McKay, Shafer, Lyons and Fortenbury cases, *supra*.

Even under the *Chavez* interpretation of the act, however, its terms cannot possibly apply to the *Shafer* and *Fortenbury* situations. In *Shafer*, all of plaintiff's 14 pharmacists and assistant pharmacists who were eligible for membership were union members and all but one wanted the closed shop agreement. In *Fortenbury*, the strike was conducted by employees of the shop as well as other union members. There was no question in either case of a dispute between rival labor organizations; the only dispute was between the employees and the employer. [CA\(8\)\[↑\]](#) (8) The *Shafer* case therefore established that [\*\*\*12] [sections 920, 921](#), and [923 of the Labor Code](#) do not affect the propriety of closed or union shop agreements and concerted activities to obtain such agreements. (See [Park & T. I. Corp. v. International etc. of Teamsters, 27 Cal.2d 599, 609-613 /165 P.2d 891, 162 A.L.R. 1426.](#))

There is some reason, however, for the suggestion that the *McKay* case, *supra*, has been superseded by the act because the employees in that case had formed an inside union. The court held, however, that the employees had failed to sustain the burden of proving that their organization was a "*bona fide* independent labor union." (*Id., at 329-330.*) Whether the act has superseded that case on its facts therefore depends on whether the employee group was financed, interfered with, dominated or controlled by the employer. ( [Lab. Code, § 1117.](#))

The act did not supersede the *Lyons* case, *supra*, however. [CA\(9\)\[↑\]](#) (9) Under [sections 1117](#) and [1118 of the Labor Code](#) a labor organization is not formed merely by an agreement of employees not to be organized. A group whose the purpose is to express the wish of its members not to deal as a group with the employer "concerning grievances, labor disputes, wages, [\*\*\*\*13] hours of employment or conditions of work" is not an organization that exists for the purposes of [section 1117](#), for it lacks the purpose "of dealing with employers concerning grievances, labor disputes, wages, hours of employment or conditions of work." ( [Lab. Code, § 1117.](#)) Moreover, even if such a group could be a labor organization under [section 1117](#), its objection to organization of the shop could not give rise to a jurisdictional strike within the meaning of [section 1118](#). [CA\(10\)\[↑\]](#) (10) Such a [\*353] [\*\*\*185] strike can only arise out of a "controversy [\*882] between two or more labor organizations as to which of them has or should have the exclusive right to bargain collectively with an employer . . . [or] to have its members perform work for an employer." ( [Lab. Code, § 1118.](#)) The wish of all or some of the employees to work in an open shop without collective bargaining is the very antithesis of a demand for the "exclusive right to have [their] members perform work for [the] employer."

In 1960, in *Petri Cleaners, Inc. v. Automotive Employees, etc. Local No. 88, ante*, p. 455 [[2 Cal.Rptr. 470, 349 P.2d 76](#)], the court disapproved the sweeping pronouncement of the [\*\*\*\*14] *Chavez* case and retraced its steps to the *stare decisis* of half a century, reaffirming the cumulative decisions from 1908 to 1958.

When it made that reaffirmation the court was mindful that no decision was possible that would not entail some hardship. Nevertheless it felt bound to respect the traditional principle of separation of powers that gives to the Legislature the responsibility of making any major changes in social and economic policy. It made clear that the court would not establish by judicial legislation a little Taft-Hartley Act for California that only the Legislature can properly consider and enact. The Legislature is uniquely able to amass economic data and hold hearings where it can give heed to many representatives of the public besides parties to a controversy. It can best determine whether there should be further governmental regulation of peaceful competitive economic activity.

CA(11) [↑] (11) The Legislature has so far acted not only to outlaw the employer's use of the yellow-dog contract (Lab. Code, §§ 920- 922) but also labor's use of the jurisdictional strike (Lab. Code, §§ 1115- 1122.) With the exception of these practices the present legislative policy favors free [\*\*\*\*15] competition for jobs by lawful peaceful means. Additional restrictions such as those contained in "right-to-work" laws or little Taft-Hartley acts have been defeated by the people or the Legislature,<sup>1</sup> although they are always open to reconsideration. [\*883] The Petri case reaffirmed the traditional separation of powers that compels the judiciary to keep [\*\*354] [\*\*\*186] its distance from major formulations of policy.

[\*\*\*\*16] This court's interpretation of section 923 of the Labor Code (Shafer v. Registered Pharmacists Union, supra) is in accord with the United States Supreme Court's interpretation of a similar provision of the Taft-Hartley Act. (§ 7, 29 U.S.C. § 157.) Pointing out that HN2 [↑] "[basic] to the right guaranteed to employees in § 7 to form, join or assist labor organizations, is the right to engage in concerted activities to persuade other employees to join for their mutual aid and protection" the United States Supreme Court, after a review of the legislative materials, held that HN3 [↑] peaceful picketing for recognition by a union that does not represent a majority of the employees is not an unfair labor practice under § 8 (b) (1) (A). (N.L.R.B. v. Drivers' Local 639, 362 U.S. 274 [80 S.Ct. 706, 4 L.Ed.2d 710]; 28 U.S.L. Week 4217, 4219, 4222, March 28, 1960.) The court's opinion makes plain that the Labor-Management Reporting and Disclosure Act of 1959 does not ". . . relegate this litigation to the status of an unimportant controversy over the meaning of a statute which has been significantly changed." (*Id.*, at 4218.)

Since the judgment must be reversed, we deem it appropriate [\*\*\*\*17] to settle several questions of law that may arise on [\*884] remand. (Code Civ. Proc., § 53.) The picketing in this case was for a dual purpose: to achieve a union shop agreement and to compel plaintiff, as a barber working with the tools of the trade, to join the union. Despite the parties' contrary assumption, it is not clear whether the trial court enjoined picketing for the latter purpose. The judgment reads in part "[that] the defendants and each of them be and they hereby are enjoined from picketing the plaintiff's place of business . . . in order to compel the plaintiff to execute the form of agreement demanded by them or any other form of agreement, requiring the plaintiff to compel his employees to join the Defendant Union against the will of the said employees."

After defendants' national union amended its constitution to require that all barbers who work with the tools of the trade become members of a local union or an employers' guild, the courts of many states were called upon to determine whether a businessman-worker could properly be required to join a workman's union. Since many of the barber shops involved in these test cases had operated as union shops [\*\*\*\*18] before the amendment, several of the cases took the form of actions by the union to recover its union shop card or by the employer-barber to retain

<sup>1</sup> The California policy of course differs from policies of states with different statutory provisions. Twenty states have "right-to-work" laws that prohibit union security contracts. (See dissenting opinion herein, footnote 7.) Ten other states have statutes specifically requiring that union security contracts be supported by a majority vote of the employees directly involved. These states, all except Hawaii cited in footnote 4 of the dissenting opinion herein, include Colorado (Rev. Stats. § 80-5-6 (c), requiring approval of three-quarters); Connecticut (Gen. Stats. § 31-105 (5), 31-106(a)); Hawaii (1959 Session Laws, Act. 210, p. 141); Idaho (Code, § 44-107, 1959 Supp.); Kansas (Gen. Stat. § 44-809 (4), also included in the 20 states with "right-to-work" laws and not counted in these ten); Massachusetts (Ann. Laws, ch. 150A, §§ 4(3) and 5); Michigan (Stat. Ann. § 17. 454 (15)); Minnesota (Stat. Ann. §§ 179.12 (3), 179.16 (1); New York (Laws Ann. ch. 31, §§ 704 (5) 705); Pennsylvania (Stats. Ann. tit. 43, §§ 211.6 (1) (c), 211.7 (a)); and Wisconsin (Stat. Ann. § 111.06 (1) (c)). Six states not otherwise accounted for and having only a provision more or less similar to section 923 of the California Labor Code reach a result contrary to that of Shafer v. Registered Pharmacists Union, supra. (Kentucky, Maine, Missouri, New Jersey, Washington and Wyoming. See cases cited in footnote 4 of the dissenting opinion herein.) Of the remaining thirteen states, six have no specific statutes and of these three (New Mexico, Rhode Island, and West Virginia) support the majority view in this case while three (Ohio, Illinois, and perhaps New Hampshire) support the dissent's view. (See footnotes 6 and 8 of dissenting opinion herein. The New Hampshire case is unclear as to whether the union had majority support. That it had some support from the employees is clear. [*White Mt. Freezer Co. v. Murphy*] 78 N.H. 398 [101 A. 357, 358].) Of the remaining seven states, six apparently have not passed on the point (Alaska, Delaware, Maryland, Oklahoma, Vermont and Montana); and one (Oregon) has repealed its labor relations statute and not yet enacted another (Ore. Laws, 1959, ch. 55, § 1). Thus, nine states without special statutes are opposed to the California position.

the card. Some of the cases, therefore, hold only that the union may recover the card as an article of property and do not decide whether the employer-barber may be required to join the union. ( [Head v. Local Union No. 83, Journeymen Barbers, 262 Ala. 84, 87-89 \[77 So.2d 363\]; Rainwater v. Trimble, 207 Ga. 306, 307-308 \[61 S.E.2d 420\]; Journeymen Barbers, Hairdressers, etc., Local 687 v. Pollino, 22 N.J. 389, 398-401 \[126 A.2d 194\]; Foutts v. Journeymen Barbers, 155 Ohio St. 573, 577-581 \[99 N.E.2d 782\]](#); cf. [Wisconsin Employ. Rel. Board v. Journeymen Barbers, 272 Wis. 84, 90-94 \[74 N.W.2d 815\]](#).) One case holds that the payment of union dues and fees by an employer constitutes the contribution of financial support to the union in violation of state statutes. ( [Journeymen Barbers etc., Local Union No. 205 v. Industrial Comm., 128 Colo. 121, 131-132 \[260 P.2d 941\]](#).) A third group of cases decides on the merits either that a union may properly require that a businessman-worker who [\*\*\*\*19] competes with union labor join the union ( [Coons v. Journeymen Barbers, 222 Minn. 100, 102-105 \[23 N.W.2d 345\]; Romero v. Journeymen Barbers, 63 N.M. 443, 444-447 \[321 P.2d 628\]](#)) or that it may not do so ( [Kerkemeyer v. Midkiff, Mo. \[299 S.W.2d 409, 417\]; Grimaldi v. Local No. 9, \[\\*885\] Journeymen Barbers, 397 Pa. 1 \[153 A.2d 214, 215\]](#), cert. den., 361 U.S. 901 [80 S.Ct. 210, 4 L.Ed.2d 157].)

**CA(12)[] (12) HN4[]** The law of California is that if plaintiff was offered the same rights of union membership as the employee members ( [Rivello v. Journeymen Barbers etc. \[\\*\\*355\] \[\\*\\*\\*187\] Union, 88 Cal.App.2d 499, 504-507 \[199 P.2d 400\]](#); second opinion, [109 Cal.App.2d 123, 124, 129 \[240 P.2d 361\]](#)), defendants' peaceful picketing to compel him to join the union was proper because "[the] businessman-worker operating in an industry or field in which he competes with organized workmen may likewise be subjected to the same means of persuasion as any other workman to join the union and conform to the conditions regulating union labor." ( [Bautista v. Jones, 25 Cal.2d 746, 749 \[155 P.2d 343\]](#); see [Emde v. San Joaquin County \[\\*\\*\\*20\] etc. Council, 23 Cal.2d 146, 155 \[143 P.2d 20, 150 A.L.R. 916\]](#).) [Safeway Stores v. Retail Clerks etc. Assn., 41 Cal.2d 567 \[261 P.2d 721\]](#), is not to the contrary. That case holds that [HN5\[\]](#) organized labor may not, consistently with public policy, require store managers who are agents of management to divide their loyalties by becoming union members. ( [Id., at 575](#).) Plaintiff owes no loyalty to any principal and thus will not be placed in the same position as the store managers by becoming a union member. Moreover, the store managers did not normally perform the same duties as the store clerks in the Safeway case ( [Id., at 572](#)) and thus did not compete directly with the union members. Plaintiff, by choosing to compete on the same level as union barbers, threatens the union-won scale of terms and conditions, even if he voluntarily adheres to the same or a higher scale (see [C. S. Smith Met. Market Co. v. Lyons, 16 Cal.2d 389, 401 \[106 P.2d 414\]](#)).

Plaintiff contends that since employer-barbers and proprietor-barbers are members of the union, defendant union is not merely a labor organization but also a price-fixing organization of employers. The union contract, [\*\*\*\*21] offered to plaintiff in this case, sets the weekly wage of a full-time journeyman barber at 70 per cent of his gross receipts with a guaranteed minimum of \$ 50 per week. Clause 13 provides that "[whereas] wages are paid on a percentage basis the prices to be charged under this Agreement in all Union barber shops not to be less than the following: [listing the prices for barber shop services]."

**CA(13)[] (13) HN6[]** Combinations entered into for the purpose of restraining competition and fixing prices are unlawful in this [\*886] state under the common law ( [Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 44 \[172 P.2d 867\]](#)) and the Cartwright Act. ( [Bus. & Prof. Code, § 16700 et seq.](#)) **CA(14)[] (14)** Although human labor is not a "commodity" under the act (§ 16703), a service consisting in the main of human labor is. ( [People v. Building Maintenance etc. Assn., 41 Cal.2d 719, 723 \[264 P.2d 31\]](#).) **CA(15)[] (15)** Section 16703, however, is not limited to exempting from the act agreements that set the price of labor. "Reasonably interpreted, [it] must be held to have been intended to except from the operation of the act combinations of laborers for the purposes of furthering their interests by collective [\*\*\*\*22] bargaining, when not otherwise unlawful." ( [Schweizer v. Local Joint Executive Board, 121 Cal.App.2d 45, 53 \[262 P.2d 568\]](#).) Accordingly, "the real test in a particular case is the primary purpose of the agreement or combination in question." ( [Schweizer v. Local Joint Executive Board, supra, at 53](#).) **CA(16)[] (16)** Thus, a labor union, acting alone, violates the Cartwright Act only when its primary purpose is to accomplish a restraint of trade ( [Alpha Beta Food Mkts. v. Amalgamated Meat Cutters, 147 Cal.App.2d 343, 345-346 \[305 P.2d 163\]; Kold Kist v. Amalgamated Meat Cutters, 99 Cal.App.2d 191, 198-199 \[221 P.2d 724\]](#); cf. [O'Shea v. Tile Layers Union, 155 Cal.App.2d 373, 376-377 \[318 P.2d 102\]; Miracle Adhesives Corp. v. Peninsula Tile Contr. Assn., 157 Cal.App.2d 591, 594-595 \[321 P.2d 482\]](#); see also [Saveall v. Demers, 322 Mass. 70, 72-73 \[76 N.E.2d](#)

12]; Commonwealth v. McHugh, 326 Mass. 249, 263-264 [93 N.E.2d 751]; Purcell v. Journeymen Barbers, 234 Mo.App. 843, 860 [133 S.W.2d 662]; but see Cleaners, Dyers, etc. Union v. G.H.W. Cleaners & D., 200 La. 83, 90-91 [7 So.2d 623]), not when its purpose is [\*\*\*\*23] to obtain a valid [\*\*356] [\*\*\*188] labor objective ( Los Angeles Pie Bakers Assn. v. Bakery Drivers, 122 Cal.App.2d 237, 238, 243 [264 P.2d 615]; Schweizer v. Local Joint Board, *supra*; Local 24, Internat'l Broth. Teamsters v. Oliver, 358 U.S. 283, 292-295 [79 S.Ct. 297, 3 L.Ed.2d 312]). CA(17)↑ (17) As in the rent-fixing clause considered in Local 24, Internat'l Broth. Teamsters v. Oliver, *supra*, the point of clause 13 is not price-fixing, but wage-fixing, and the presence of employer-barbers in the union does not convert the contract into an agreement between labor groups and nonlabor groups for the purpose of restraining trade. (Cf. Alfred M. Lewis, Inc. v. Warehousemen etc. Local No. 542, 163 Cal.App.2d 771 [330 P.2d 53]; Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797 [65 S.Ct. 1533, 89 L.Ed. I\*887] 1939); Giboney v. Empire Storage Co., 336 U.S. 490 [69 S.Ct. 684, 93 L.Ed. 834].)

The conclusion we reach is not inconsistent with Overland Pub. Co. v. H. S. Crocker Co., 193 Cal. 109 [222 P. 812]. In holding the agreement there involved between labor and nonlabor groups a violation of the Cartwright Act, [\*\*\*\*24] this court said "[there] is no question in our minds but that the primary purpose of this agreement was to create or carry out restrictions in trade or commerce. . . ." ( *Id.*, at 115.) There is not a shred of evidence in the record in the present case to support a contention that such was the purpose of clause 13.

Nor is our conclusion inconsistent with the general statement in Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 44-45 [172 P.2d 867], that "[the] public interest requires free competition so that prices will not be dependent upon an understanding among suppliers of any given commodity, but upon the interplay of the economic forces of supply and demand." That statement cannot be wrenched from its context to condemn activity that the case did not contemplate. In the area of trade regulation the values of free competition themselves compete with the values of wage security. Clause 13 sought to secure certain wages as in any other union contract. The difficulty of setting a fixed wage that is fair and reasonable in a trade consisting entirely of personal services is apparent. The union's method of setting the cost of its labor to the employer in the [\*\*\*\*25] barber's trade by reference to price is appropriate in a service trade as it might not be in areas where the worker's labor is not so predominantly linked with costs.

Respondent does not contend that the contract, if entered into between the union and an employer who does not work with the tools of the trade and hence does not belong to the union, is a violation of the common-law rule against price-fixing. He contends only that the union itself is a price-fixing association because some employers belong to it who have agreed among themselves to support minimum prices. As noted earlier, however, the employer-barbers are required to join the union only because they work in direct competition with employee-barbers and could affect the wage scale adversely if they were not subjected to union responsibilities, even if their individually established price scales were above the union scale. (See C. S. Smith Met. Market Co. v. Lyons, 16 Cal.2d 389, 401 [106 P.2d 414].)

I\*888] CA(18)↑ (18) Plaintiff also contends that because employer-members are required to pay union dues and fees, defendant is an employee group financed in part by employers in violation of section 1122 of the Labor [\*\*\*\*261] Code. That section provides: HN7↑ "[any] person who organizes an employee group which is financed in whole or in part, interfered with or dominated or controlled by the employer or any employer association, as well as such employer or employer association, shall be liable to suit by any person who is injured thereby. Said injured party shall recover the damages sustained by him and the costs of suit." Section 1122 is part of the Jurisdictional Strike Act ( Lab. Code, §§ 1115- 1120, 1122) and its plain purpose is to give an action for damages to any person injured [\*\*357] [\*\*\*189] by the formation of a company union. Even were defendant partly financed by the dues of employer-members, their dues would not give them control over union power and policy. HN8↑ Employers are prohibited from financing labor unions because such financing might render a union less independent and thus less able to represent its members effectively vis-a-vis the employer. When, as here, the employer is himself a workman, his dues are no different from those of any other member. Plaintiff's reliance on Journeymen Barbers, etc. Local Union No. 205 v. Industrial Com., 128 Colo. 121, 131-132 [260 P.2d [\*\*\*\*27] 941], which reached a different result under a statute making the employer's contribution of financial support to a labor union an unfair labor practice ( Colo. Rev. Stat. 80-5-6(1) (b)), is misplaced. That case relied exclusively upon two

earlier cases ([\*Wisconsin Employ. Rel. Board v. Journeyman Barbers\*, 256 Wis. 77, 85-86 \[39 N.W.2d 725\]; \*DiLeo v. Daneault\*, 329 Mass. 590, 595-597 \[109 N.E.2d 824\]](#)) that have been superseded by subsequent legislation ([\*Wis. Stat. Ann. § 111.06 \(1-b\)\*](#) (1957); see [\*Wisconsin Employ. Rel. Board v. Journeyman Barbers\*, 272 Wis. 84, 89-90 \[74 N.W.2d 815\]](#); Ann. Laws of Mass. ch. 150A, § 4(2) (1956)).

In view of our conclusion that the trial court's judgment must be reversed, we need not consider defendant's contention that even if their picketing was directed toward an improper purpose the trial court lacked power to issue an injunction in the absence of proof that plaintiff had been injured by their conduct.

The judgment is reversed.

**Dissent by:** SCHAUER

## Dissent

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[\*889] SCHAUER, J., Dissenting. The majority today present the second installment of the ambitious project undertaken by them in *Petri Cleaners, Inc., v. Automotive* [\*\*\*\*28] *Employees, etc., Local No. 88* (1960), [\*ante, p. 455 \[2 Cal.Rptr. 470, 349 P.2d 761\]\*](#). "The crucial issue in this case," say the majority (*ante*, p. 877), "is whether a closed or union shop agreement is a proper objective of a labor union that does not represent any of the employees directly involved." This brief declaration appears, on further reading of the opinion, to be somewhat of an oversimplification of the problems involved.

A more revealing definition of the "crucial issue" would be: Is picketing by an unwanted union which represents none, or less than a majority, of the employees in the picketed shop, lawful when the objective of the picketing is to coerce the employer to himself join the union and in turn to coerce his employees to join it?

Another "crucial issue," undefined by the majority but actually disposed of by them, is: Shall this court refuse to apply the Cartwright Act<sup>1</sup> to price-fixing agreements among employers, and among employers and unions, in cases wherein the otherwise illegal agreement is demanded by a labor union in order to prevent the proprietors of either partially or exclusively self-owned and serviced barber shops from competing on a price [\*\*\*\*29] basis either among themselves or with any union shops? An ancillary question is: Shall this court, without statutory authorization, differentiate between the types of business activity in which it will give effect to the Cartwright Act? The holdings of the majority on these, and on even more fundamental, issues and my reasons for disagreement are hereinafter stated.

At the outset I wish to make it altogether clear that the grounds on which I challenge the majority do not involve any pro-labor or anti-labor factionalism. [\*Chavez v. Sargent\* \(1959\), 52 Cal.2d 162 \[339 P.2d 801\]](#) -- which in this case as well as in Petri [\*\*358] [\*\*\*190] is the principal target for [\*\*\*\*30] the majority's attack -- was not an anti-organized labor decision. It did not overrule a single previous decision of this court. It did not strike down or refuse to enforce any statute of California. A reading of the majority opinion in the Chavez case will demonstrate that [\*890] it staunchly defends the statutory proscription of yellow dog contracts, that it faithfully upholds the statutorily defined rights of workmen to self-organization and to collective bargaining and to union security contracts; likewise it sustains the use of labor's classic weapons -- the strike and peaceful picketing -- for all lawful objectives. The quarrel with my associates is on a more fundamental basis. It is on four basic points:

1. The new majority have refused reasonable respect for the doctrine of *stare decisis*. (See *Petri Cleaners, Inc. v. Automotive Employees, etc., Local No. 88* (1960), *supra, ante*, pp. 455, 475.)

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<sup>1</sup> Stats. 1907, ch. 530, p. 984 et seq., amended Stats. 1909, ch. 362, p. 593 et seq.; see also, for codification of statutes proscribing or regulating contracts in restraint of trade, ***Bus. & Prof. Code, § 16600 et seq.***, and combinations in restraint of trade, ***Bus. & Prof. Code, § 16700 et seq.*** (Stats. 1941, ch. 526, p. 1834 et seq.).

2. They have refused to abide by the elementary principle that reviewing courts will not find facts contrary to those found by the trial court on substantially conflicting evidence. (See Petri dissent, *ante*, pp. 475, 486-491, where the evidence in that [\*\*\*\*31] case relative to the issue of the Association of Petri employees as an independent or a company union is carefully reviewed and shown to be sufficient to support the trial court's implied findings. It may also be noted that the three justices of the District Court of Appeal who had previously reviewed the trial court's decision (1959, Cal.App.), [340 P.2d 731](#), as well as three justices of this court recognized the substantiality and sufficiency of the evidence upon which the trial judge acted.)<sup>2</sup>

[\*\*\*\*32] [\*891] 3. The new majority have refused to uphold and apply the plain language of our basic labor relations statutes ([Lab. Code, § 923](#), and related sections, all quoted and upheld in [Chavez v. Sargent, supra, pp. 179-182, 186, 190, 201-203](#) of 52 Cal.2d). Since [section 923](#) is unambiguous, is not unconstitutional, and has not been repealed, California is faced with a peculiar conflict of laws: On one hand, the [\*\*359] [\*\*\*191] above cited statute and implementing decisions; on the other hand, the Petri case and today's decision. Such conflict, active or potential, and productive of litigation, is likely to be a continuing one unless and until the majority yield to the statutes or the latter are amended to conform to the views of the majority.

4. In today's case the majority refuse to apply the Cartwright Act. To reach the result announced they disregard, without expressly disavowing, the principle declared by the same author in [Speegle v. Board of Fire Underwriters \(1946\), 29 Cal.2d 34, 44 \[172 P.2d 867\]](#), that "The public interest requires free competition so that prices be not dependent upon an understanding among suppliers of any given commodity [\*\*\*\*33] but upon the interplay of the economic forces of supply and demand."

The actions of the majority in Petri as to points 1, 2 and 3 above enumerated, have been disturbing to me as a lawyer and judge. Their action today, regrettably and regardless of the fact, appears to lend further credence to the fears of eminent counsel implicit in the following excerpt from their respectfully and earnestly urged petition for reconsideration by this court of its decision in Petri: "The overturning of Chavez and Retail Clerks by the present majority, within a few months after those cases were decided, has created confusion not only within the legal profession but also in labor-management relations and among the public generally. The disposition of those cases so soon after they were decided [less than nine months] raises a serious question as to whether in California we are a government of men rather than of laws."

[\*892] A comment in 47 Cal.L.Rev. 905, 916, which concerned Garmon, Chavez, and Retail Clerks' Union and which was prepared before the Petri decision, predicted that "In a field as controversial as labor relations, future

<sup>2</sup> Familiar rules for the guidance of a reviewing court in passing upon the question whether the evidence supports the determination of the trier of fact that the situation presented to him does or does not constitute a law-defined operative fact (e.g., in Petri, the employer's interference with a union; in the next quoted opinion, an injury "arising out of and in the course of employment") are stated in [Cardillo v. Liberty Mutual Ins. Co. \(1947\), 330 U.S. 469, 477-478 \[67 S.Ct. 801, 806-807, 91 L.Ed. 1028\]](#), as follows: "In determining [whether the legally operative ultimate fact existed, the trier of fact] . . . must necessarily draw an inference from what he has found to be the basic facts. . . . If supported by evidence and not inconsistent with the law, the . . . inference [of the operative fact by the finder] . . . is conclusive. No reviewing court can then set aside that inference because the opposite one is thought to be more reasonable; nor can the opposite inference be substituted by the court because of a belief that the one chosen by the [finder] . . . is factually questionable. [Citations.]

"It matters not that the basic facts from which the [finder] . . . draws this inference are undisputed rather than controverted. [Citation.] It is likewise immaterial that the facts permit the drawing of diverse inferences. The [trier of fact] . . . alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court. [Citation.] Moreover, the fact that the inference . . . involves an application of a broad statutory term or phrase to a specific set of facts gives rise to no greater scope of judicial review. [Citations.] Even if such an inference be considered more legal than factual in nature, the reviewing court's function is exhausted when it becomes evident that the [finder's] . . . choice has substantial roots in the evidence and is not forbidden by the law."

The foregoing rules are normally recognized and followed by this court as well as the high federal court. ( [Hamilton v. Pacific Elec. Ry. Co. \(1939\), 12 Cal.2d 598, 602 \[5\] \[86 P.2d 829\].](#))

developments are apt to be dependent on political [\*\*\*\*34] fortunes and changes in the personnel of the courts"; less accurate was its prediction that "It would seem, however, that at least the holdings of *Chavez* and *Retails Clerks' Union* will stand." <sup>3</sup>

[\*\*\*\*35] Further grave, constructive and merited criticism of the action of the court in *Petri* appears in the brief of amici curiae in support of respondent's request for a reconsideration of that decision: "The consequences of the dicta in the Court's opinion as to [Section 923](#) and *Garmon* are serious and far-reaching. At a time when national policy banning stranger picketing has been recently affirmed and strengthened, the [\*\*360] [\*\*\*192] Court's opinion sets California's small enterprises on a different path. The opinion condones what has cynically been termed 'vertical organizing', and does so despite the plain words of a plain statute. We believe that such a result should not be reached at all, but particularly should not be reached in a case wherein the issue is not squarely presented for decision."

Professor Bernard D. Meltzer of the University of Chicago Law School has pertinently said (*Recognition-Organizational [\*893] Picketing and Right-to-Work Laws* (1958), 9 Labor Law Journ. 55, 58), concerning the Taft-Hartley (pre-1959) Act, "Although the statutory scheme involves a limitation on the freedom of a dissenting minority, this limitation seems justifiable on [\*\*\*\*36] two grounds: First, it is necessary for orderly collective bargaining, which has important values. Secondly, the requirement that the bargaining agent have the support of the uncoerced majority makes his authority consistent with the generally accepted principles that the government of political or private groups should depend on the consent by a majority of those governed.

"There are those who would repudiate the requirement of majority support on the ground that a union, at least if it represents a substantial segment of an industry, is automatically entitled to the worker's allegiance and support. I find this argument unacceptable for several reasons: First it ignores the fact that the value of collective bargaining both to the enterprise and to the employees depends on consent, by the employees affected, to the bargaining agent's role and to the agreement he has negotiated. Majority support, although it is not sufficient, is generally necessary, for such consent. For the purpose of determining the existence of such support, the 'industry' is an abstraction far removed from the employee's interest, which is generally centered in the plant or the enterprise which employs him. [\*\*\*\*37] Accordingly, the plant or the enterprise and not the industry appears in general to be the largest unit which can be appropriately used in determining whether the necessary majority support exists. Secondly, the use of the smallest possible unit, consistent with orderly and stable collective bargaining, will minimize the need for subordinating the preferences of large and concentrated minorities to the requirements of majority rule. Minimizing the coercion of such minorities is still an important value in our society, despite the expansion of institutional arrangements which promote the subordination of the interests of individuals and minorities to those of larger groups. For these reasons, I believe that the architects of the federal policy were wise in rejecting the notion that unions, like the state, are entitled to any automatic allegiance. . . .

<sup>3</sup> The fact that the *Petri* opinion was filed less than nine months after *Chavez* brings to mind the protests of Mr. Justice Roberts in [\*Mahnich v. Southern S. S. Co. \(1944\)\*, 321 U.S. 96, 112-113 \[64 S.Ct. 455, 88 L.Ed. 561\]](#): "The evil resulting from overruling earlier considered decisions must be evident. In the present case, the court below naturally felt bound to follow and apply the law as clearly announced by this court. If litigants and lower federal courts are not to do so, the law becomes not a chart to govern conduct but a game of chance; instead of settling rights and liabilities it unsettles them. Counsel and parties will bring and prosecute actions in the teeth of the decisions that such actions are not maintainable on the not improbable chance that the asserted rule will be thrown overboard. Defendants will not know whether to litigate or to settle for they will have no assurance that a declared rule will be followed. But the more deplorable consequence will inevitably be that the administration of justice will fall into disrepute." And again in [\*Smith v. Allwright \(1944\)\*, 321 U.S. 649, 666, 669 \[64 S.Ct. 757, 88 L.Ed. 987, 151 A.L.R. 1110\]](#): The "policy of the court freely to disregard and to overrule considered decisions . . . indicates an intolerance for what those who have composed this court in the past have conscientiously and deliberately concluded, and involves an assumption that knowledge and wisdom reside in us which was denied to our predecessors. . . .

"The reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only."

"It is, I believe, fair to assume that most unorganized employers want to stay that way. Furthermore, the inherent limitations of the law, as well as bad administration, permit some employers, by unlawful coercion, to deny to unions the [\*894] bargaining status which they would have otherwise achieved. But these considerations, [\*\*\*\*38] troublesome as they are, do not warrant the indiscriminate use of coercive picketing against lawful as well as lawless employers and their employees."

The more specific reasons for my disagreement with the holding of the majority that, consonant with California law, an "outside" labor union can properly put economic pressure on an employer to compel him to execute a closed or union shop agreement although none of his employes wish to join or be represented by the union, are stated in the majority opinions in *Garmon v. San Diego Bldg. Trades Council* (1958), 49 Cal.2d 595 [320 P.2d 473]; *Chavez v. Sargent* (1959), *supra*, 52 Cal.2d 162; and *Retail Clerks' Union v. Superior Court* (1959), 52 Cal.2d 222 [339 P.2d 839]; and the dissenting opinion in *Petri Cleaners, Inc. v. Automotive Employees, etc. Local No. 88* (1960), *supra, ante*, pp. 455, 475. *Section 923 of the Labor Code* says that "the [\*\*361] individual [\*\*\*193] workman . . . shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of . . . [collective bargaining] representatives or in self-organization . . ." The majority [\*\*\*\*39] in Petri and in this case, in effect, add to the quoted clear and explicit statutory language an exception or proviso which, in my opinion, is not only beyond the proper function of a court but which does not promote the interests of either individual workmen or of organized labor. It seems to me that, when all or a majority of the subject employes of a particular employer choose not to join a union, the spirit and language of *section 923* are as much violated if the employer coerces them to do so because of the pressure of concerted union activity, such as peaceful picketing, as they would be if the employer acted at the mere suggestion of a single representative of the union, or upon his own initiative.

Because of the above noted conflict between the statutory law (*Lab. Code, § 923*, and related sections, as upheld and applied in the cases last hereinabove cited) and the decisional law declared in Petri and in this case, it has appeared desirable to comprehensively research the pertinent statutes and decisions of other jurisdictions to ascertain which view the weight of authority supports. The sources examined are listed in appropriately identified footnotes and the conclusions [\*\*\*\*40] reached are stated in the text which follows.

The view that it is unlawful for union members to engage [\*895] in peaceful but coercive picketing of the premises of an employer whose employes do not wish to join the union, for the purpose of compelling the employer to agree to, and in his turn to then compel, a closed or union shop, is not, as some of amici curiae supporting the defendant barbers' union here suggest, a strange and shocking aberration. On the contrary, such is the view of most of the states today, and the view of our national government to some as yet unclearly defined extent (see *N.L.R.B. v. Drivers Union Local 639* (1960), 362 U.S. 274 [80 S.Ct. 706, 4 L.Ed.2d 710] [28 Law Week 4217]; National Labor Management Relations Act, as amended 1959, *§ 8(b)(7)*); and in years recently past state courts (when they were not precluded on the facts of the particular case by federal preemption) often enjoined such picketing.

In a number of states it has been held that provisions of a state statute or constitution similar to *section 923* of our Labor Code make the object of such picketing unlawful.<sup>4</sup> [\*896] Some of these states mentioned [\*\*362]

<sup>4</sup> Alabama: The following cases consider title 26, Code, § 383 ("Every person shall be free to join or refrain from joining any labor organization . . . and in the exercise of such freedom shall be free from interference") prior to Alabama's enactment of a "right-to-work" statute: A closed or union shop was a lawful object of picketing where the picketing union represented a majority of the employes (*Hotel & Restaurant Employees v. Greenwood* (1947), 249 Ala. 265 [30 So.2d 696, 703 [12], 705 [17]]), but picketing for such object by a minority union could be enjoined (*Klibanoff v. Tri-Cities Retail Cl. Union* (1953), 258 Ala. 479 [64 So.2d 393, 398]).

Colorado: *Amalgamated Meat Cutters v. Green* (1948), 119 Colo. 92 [200 P.2d 924, 930-931], affirming injunction of picketing to compel an employer to enter into an "all-union contract" after a majority of his employes had voted against union representation; by executing such a contract the employer would have committed the unfair labor practices of interfering with employes' right to organize or remain unorganized (§ 80-5-6(1)(a)) and encouraging or discouraging membership in a labor organization, except where the employer enters into an "all-union" agreement as authorized by the provisions (§ 80-5-6(a)(c)) of the comprehensive

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[\*\*\*194] [\*\*\*\*41] in footnote 4 do and some do not have more or less detailed labor relations acts and agencies to

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Labor Peace Act (Rev. Stats., ch. 80, art. 5, §§ 1-22, enacted in 1943). See also [Building Const. Tr. Council v. American Bldrs., Inc. \(1959\), Colo.](#) [337 P.2d 953, 955-956].

Connecticut: [Lavery's Main Street Grill v. Hotel & Restaurant Emp. \(1959\), 146 Conn. 93 \[147 A.2d 902, 905-906](#) [2-4]]; [Kenmike Theatre v. Moving Picture Operators \(1952\), 139 Conn. 95 \[90 A.2d 881, 882-883\]](#). Connecticut has a comprehensive Labor Relations Act (Gen. Stats., 1949, §§ 7388-7399).

Idaho: [Poffenroth v. Culinary Workers Union \(1951\), 71 Idaho 412 \[232 P.2d 968, 969\]; J. J. Newberry Co. v. Retail Clerks International Ass'n \(1956\), 78 Idaho 85 \[298 P.2d 375, 379](#) [4]], reversed because of federal preemption, **352 U.S. 987**. The Idaho Code contains provisions (§§ 44-701, 44-702) like [sections 923](#) and [921](#) of our Labor Code, together with other provisions like those of the Norris-La Guardia Act which were omitted from our code.

Indiana (prior to enactment of a "right-to-work" law): [Roth v. Local Union No. 1400 \(1939\), 216 Ind. 363, 371 \[24 N.E.2d 280, 282-283](#) [5, 6]], applying Acts 1933, ch. 12, § 2 (Burns' Ann. Stat., 1933, § 40-502), a declaration of policy like [section 923](#) of our Labor Code, in the Indiana anti-injunction act.

Kansas (prior to 1958 "right-to-work" amendment to state Constitution): [Binder v. Construction etc. Union \(1957\), 181 Kan. 799 \[317 P.2d 371, 376-378](#) [2, 4]], applying G.S. 1949, § 44-803 (like [section 923](#) of our Labor Code, and also stating the right of employees "to refrain from . . . such activities"), G.S. 1955, § 44-808 (employer coercion of employees in the exercise of their rights under section 44-803 unlawful), G.S. 1955, § 44-809 (12) (such coercion of employees by "any person" unlawful).

Kentucky: [Blue Boar Cafeteria Co. v. Hotel & Restaurant Employees etc. Union \(1952\), Ky.](#) [254 S.W.2d 335, 338-339] [2]], cert. den. **346 U.S. 834** [74 S.Ct. 41, 98 L.Ed. 357]; [Hotel & Restaurant Employees etc. Union v. Lambert \(1953\), \(Ky.App.\) 258 S.W.2d 694](#) [1], applying [KRS 336.130](#) (Acts Gen. Assembly, 1940, ch. 105), which was rather like [section 923](#) of our Labor Code.

Maine: [Pappas v. Stacey \(1955\), 151 Me. 36 \[116 A.2d 497, 499-501](#) [3]], appeal dismissed, **350 U.S. 870** [76 S.Ct. 117, 100 L.Ed. 770], applying P.L. 1941, ch. 292 (R.S., ch. 30, § 15), like [California Labor Code, section 923](#).

Massachusetts: Ann. Laws, ch. 150A, is a comprehensive Labor Relations Act. The employer's compliance with a closed shop agreement between the employer and one not certified as the representative of his employees pursuant to the act would be an unfair labor practice and picketing to enforce such compliance can be enjoined. ( [R. H. White Co. v. Murphy \(1942\), 310 Mass. 510 \[38 N.E.2d 685, 690](#) [9, 10], 691].) Apart from the act closed shop agreements voluntarily made have "always" been recognized and enforced. But a strike for a closed shop "is for an unlawful labor objective" and peaceful picketing for such purpose can be enjoined. ( [Fashioncraft, Inc. v. Halpern \(1943\), 313 Mass. 385 \[48 N.E.2d 1, 3-4, 5\]](#).)

Michigan: [Way Baking Co. v. Teamsters & Truck Drivers \(1953\), 335 Mich. 478 \[56 N.W.2d 357, 362](#) [4, 5]], cert. den. **345 U.S. 957** [73 S.Ct. 939, 97 L.Ed. 1378], applying Stats. Ann., § 17.454(18) (C.L. 1948, § 423.17, as amended by P.A. 1949, No. 230), the state Labor Relations Act, which makes it unlawful for any person "by force or unlawful threats to . . . attempt to force any person to become or remain a member of a labor organization, or . . . to refrain from engaging in employment."

Minnesota: By Stats. Ann., ch. 179, as amended, a comprehensive labor relations statute, it is an unfair labor practice for an employer to sign a closed shop contract without the consent of his employees ( [Nemo v. Local etc. Board \(1949\), 227 Minn. 263 \[35 N.W.2d 337, 341\]](#)) and apparently picketing to induce such practice could be enjoined (see [Starr v. Cooks etc. Union \(1955\), 244 Minn. 558 \[70 N.W.2d 873, 879\]](#)).

Missouri: [Bellerive Country Club. v. McVey \(1955\), 365 Mo. 477 \[284 S.W.2d 492, 500](#) [2]] ["the right guaranteed to employees by [Art. I, Sec. 29, Mo. Const.](#) 1945, 'to organize and to bargain collectively through representatives of their own choosing' is a free choice, uncoerced by management . . ."]; [Swift & Company v. Doe \(1958\), Mo.](#) [311 S.W.2d 15, 21] [3]].

New Jersey: N.J. Const., 1947, art I, par. 19, provides, "Persons in private employment shall have the right to organize and bargain collectively." This provision is not implemented by statute, but by the courts. ( [Independent D.W. Union v. Milk Drivers etc. Local No. 680 \(1959\), 30 N.J. 173 \[152 A.2d 331, 336](#) [2], 336-337 [3, 4]] [subject type of picketing by stranger union enjoined at suit of freely organized independent union which had been selected as bargaining agent by employees at a secret election conducted by a "Fair Ballot Association"; the court rejects defendant union's contention that "the judiciary [should] be inert because it cannot provide a mechanism equal to the task of formulating and effectuating a fair pattern of labor-management

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administer them; in any event, the courts of such states [\*897] have concluded, [\*\*363] [\*\*\*195] they can and should provide a remedy against the statutory or constitutional violation, whether such remedy is the enforcement of a commission's cease and desist order [\*898] as spelled out by statute or, in the absence of statute, a typical exercise of the power of equity to enjoin against threatened wrongful infliction of irreparable injury.

[\*\*\*\*42] Some states have statutes which directly outlaw picketing by a minority or stranger union,<sup>5</sup> [\*\*\*\*43] and in a few states judicially [\*899] [\*\*364] [\*\*\*196] declared public policy forbids recognitional picketing by such a

relations"]; *id.* (1958), [49 N.J. Super. 78 \[139 A.2d 134\]](#); *id.* (1956), [23 N.J. 85 \[127 A.2d 869, 874-875\]](#) [3-4], 875-876 [5, 6] ("Freedom of choice in selecting one's bargaining agent is the very essence of collective bargaining" and "[If] the protection afforded to insure unfettered organizational processes by our Constitution is to have assistance . . . , the will of the majority may not be undermined by picketing where the sole object is economic duress upon the employer and the employees".)

New York: [Goodwins, Inc. v. Hagedorn \(1951\)](#), [303 N.Y. 300 \[101 N.E.2d 697, 32 A.L.R.2d 1019, 1021\]](#) [the Goodwins holding as to federal preemption no doubt could not stand today, but such holding is not pertinent to our present consideration]; [Wood v. O'Grady \(1954\)](#), [307 N.Y. 532, 539-540 \[122 N.E.2d 386\]](#); [Pleasant Valley Packing Co. v. Talarico \(1958\)](#), [5 N.Y.2d 40 \[152 N.E.2d 505, 507\]](#) [1]]. N. Y. Laws, Ann., 1948, tit. 30, art. 20, § 700 et seq., is a comprehensive Labor Relations Act.

Pennsylvania: [Wilbank v. Chester & Delaware etc. Union \(1948\)](#), [360 Pa. 48 \[60 A.2d 21, 23\]](#) [3, 4]]; [Sansom House Enterprises v. Waiters etc. Union \(1955\)](#), [382 Pa. 476 \[115 A.2d 746, 749\]](#) [3]], cert. den., [350 U.S. 896 \[76 S.Ct. 155, 100 L.Ed. 788\]](#); [School District v. International Brotherhood \(1958\)](#), [316 Pa. 408 \[145 A.2d 258, 262\]](#). Pa. Stats. Ann., tit. 43, § 211.1-211.12, is a comprehensive Labor Relations Act.

Washington: [Gazzam v. Building Service Employees Union \(1948\)](#), [29 Wash.2d 488 \[188 P.2d 97, 104, 11 A.L.R.2d 1330\]](#), (1949), [34 Wash.2d 38 \[207 P.2d 699\]](#), affirmed, [Building Service Union v. Gazzam \(1950\)](#), [339 U.S. 532, 538-539 \[70 S.Ct. 784, 94 L.Ed. 1045\]](#), applying an anti-injunction law like that of Indiana, *supra*, and also stating that stranger recognitional picketing violated "rules of common law"; [Audubon Homes v. Spokane Bldg. etc. Council \(1956\)](#), [49 Wash.2d 145 \[298 P.2d 1112, 1115\]](#) [1-3]], cert. den., [354 U.S. 942 \[77 S.Ct. 1392, 1 L.Ed.2d 1536\]](#).

Wisconsin: [Vogt, Inc. v. International Brotherhood of Teamsters \(1956\)](#), [270 Wis. 315 \[74 N.W.2d 749, 753\]](#) [5], 755 [6]], affirmed, [Teamsters Union v. Vogt, Inc. \(1957\)](#), [354 U.S. 284, 294 \[77 S.Ct. 1166, 1 L.Ed.2d 1347\]](#). Wisconsin's comprehensive Employment Peace Act provides (Stat. Ann., [§ 111.06\(2\)\(b\)](#)) that it is an unfair labor practice and against public policy for an employee individually or in concert with others "To coerce . . . any employer to interfere with any of his employees in the enjoyment of their legal rights, including those guaranteed by section 111.04"; the latter section guarantees to employees the right of self-organization, collective bargaining through representatives of their own choosing, concerted lawful activity, and the right to refrain from any such activities.

Wyoming: [Hagen v. Culinary Workers Alliance Local No. 337 \(1952\)](#), [70 Wyo. 165 \[246 P.2d 778, 788\]](#) [6]], applying the Wyoming "Little Norris-LaGuardia Act," W.C.S., § 54-501, like the Indiana and Washington statutes, *supra*.

<sup>5</sup> Arizona (also has a "right-to-work" law): Rev. Stat. Ann., ch. 8, § 23-1322: "It shall be unlawful for any labor organization to picket any establishment unless there exists between the employer and the majority of employees of such establishment a bona fide dispute regarding wages or working conditions."

Colorado: [Section 6\(2\)\(e\) of the Labor](#) Peace Act (Rev. Stats., ch. 80, art. 5, §§ 1-22) made a strike vote by a majority of the employees of the subject employer a condition precedent of picketing, and [section 7\(2\)](#) provided that the strike vote be taken "as is provided in this act." These sections were held inoperative because the only provision in "this act" for a strike vote was in section 20, which in turn was held unconstitutional because it required incorporation of unions. ( [American Federation of Labor v. Reilly \(1944\)](#), [113 Colo. 90 \[155 P.2d 145, 150\]](#) [9, 10], [160 A.L.R. 873](#).)

Hawaii: Rev. Laws, 1955, ch. 90, is a comprehensive Employment Relations Act. Section 90-8(e) provides that it is an unfair labor practice for an employee "To cooperate in engaging in, promoting or inducing picketing (not constituting an exercise of constitutionally guaranteed freedom of speech) . . . unless a majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike."

*Minnesota:* [Stat. Ann., § 179.11\(4\)](#) provides that it is an unfair labor practice "For any person to picket or cause to be picketed a place of employment of which place the person is not an employee while a strike is in progress affecting the place of

union.<sup>6</sup> In the many states which have made the union shop illegal by "right-to-work" statutes,<sup>7</sup> [\*\*\*\*44] [\*\*365] [\*\*\*197] picketing to compel execution of a union shop contract is of course for an unlawful object. The states

employment, unless the majority of persons engaged in picketing the place of employment at these times are employees of the place of employment."

Montana has a rather unusual statute (Rev. Code Ann., § 41-1801; L. 1959, ch. 160, § 1) which provides that "a sole proprietor or a member of a partnership consisting of not more than two partners who own a retail or amusement establishment and the members of his immediate family shall have the right to do any work in his place of business without interference by any union or any member thereof."

Oregon: Rev. Stats., 1953, ch. 662, §§ .610 through .790, a comprehensive labor code, specifically provides (§ .750) that "It shall be unlawful for any person directly or indirectly to . . . coerce . . . any employee in the exercise of said employee's free choice in selecting or rejecting a labor organization as the representative of employees for the purpose of collective bargaining, or . . . to coerce . . . any employer or employee because employees of said employer . . . have not selected a labor organization as their representative for said purpose. The word 'coerce' includes picketing." The constitutionality of this provision was upheld in [\*Gilbertson v. Culinary Alliance & Bartenders' Union \(1955\), 204 Ore. 326 \[282 P.2d 632, 652-653 \[15-18\]\]\*](#).

Pennsylvania: The state Labor Relations Act (Act of 1947, No. 484) provided that it is a union unfair labor practice for a labor organization or employes "To picket or cause to be picketed a place of employment by a person . . . who is not . . . an employee . . . of the place of employment." (Purdon's Stats. Ann., tit. 43, § 211.6(2)(d).) This statute was held an unconstitutional restraint on freedom of speech because its broad prohibition of picketing by nonemployes "leaves room for no exceptions based upon the lawfulness of the purpose of the picketing, its peaceful character, or the circumstances that the picketers have a legitimate economic interest to advance thereby." ( [\*Pennsylvania Labor Relations Board v. Chester & Del. etc. Union \(1949\), 361 Pa. 246 \[64 A.2d 834, 841 \[3\]\]\*](#).)

Texas (which has a "right-to-work" law) also sought to narrowly restrict peaceful picketing by the following provisions of Vernon's Ann. Civ. Stat., art. 5154f: "It shall be unlawful for any person . . . to . . . participate in, aid or abet . . . secondary picketing . . . as those terms are defined herein"; i.e., "the act of establishing a picket . . . near the premises of any employer where no labor dispute, as that term is defined in this Act, exists between such employer and his employees. . . . The term 'labor dispute' is limited to . . . any controversy between an employer and the majority of his employees concerning wages, hours or conditions of employment; provided that if any of the employees are members of a labor union, a controversy between such employer and a majority of the employees belonging to such union, concerning wages, hours or conditions of employment, shall be deemed, as to the employee members only of such union, a labor dispute within the meaning of this Act." In [\*\*\*International Union of Operating Engineers v. Cox \(1949\), 148 Tex. 42 \[219 S.W.2d 787, 793 \[10-12\]\]\*\*\*](#), it was held that the foregoing statutory definitions were so narrow as to constitute an unconstitutional deprivation of free speech, but the right to impose reasonable restrictions on peaceful picketing was recognized.

[\*Wisconsin: Stat. Ann., § 111.06\(2\)\(e\)\*](#), like the Hawaii statute, *supra*.

<sup>6</sup> New Hampshire (semble): [\*White Mt. Freezer Co. v. Murphy \(1917\), 78 N.H. 398 \[101 A. 357, 361 \[12\], 362 \[13\]\]\*](#).

Illinois: [\*Bitzer Motor Co. v. Local 604 \(1953\), 349 Ill.App. 283 \[110 N.E.2d 674, 677 \[4\]\]\*](#).

Ohio: [\*Chucales v. Royalty \(1956\), 164 Ohio St. 214 \[129 N.E.2d 823, 828 \[4\]\]\*](#), cert den., ***351 U.S. 926 [76 S.Ct. 781, 100 L.Ed. 1456]***.

Washington: [\*Gazzam v. Building Service Employees Union \(1948\), supra, 29 Wash.2d 488 \[188 P.2d 97, 104\]\*](#), holds that stranger recognitional picketing violated the "common law" as well as the statute referred to in footnote 4, *supra*.

<sup>7</sup> Alabama: Title 26, Code, § 375(2), (3); see [\*Alabama Highway Express, Inc. v. Local 612 \(1959\), 268 Ala. 392 \[108 So.2d 350, 356\]\*](#).

Arizona: 1946 amendment to Ariz. Const. (implemented by Ariz. Session Laws, 1947, ch. 81, p. 173); upheld in [\*American Federation of Labor v. American Sash & Door Co. \(1948\), 67 Ariz. 20 \[189 P.2d 912\]\*](#), affirmed, [\*American Federation of Labor v. American Sash Co. \(1949\), 335 U.S. 538 \[69 S.Ct. 258, 93 L.Ed. 222, 6 A.L.R.2d 481\]\*](#).

which uphold the legality of [\*900] recognitional picketing to compel an employer to force a union shop upon an unwilling majority of his employees are few.<sup>8</sup>

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Arkansas: Ark. Const., Amendment 34; Acts of Ark., 1947, Act No. 101; [Self v. Taylor \(1950\), 217 Ark. 953 \[235 S.W.2d 45, 49 \[2\]\]](#).

Florida: Fla. Const. Decl. of Rights, § 12, as amended, 1944; [Local No. 234, etc. v. Henley & Beckwith, Inc. \(1953, Fla.\), 66 So.2d 818, 820](#).

Georgia: Laws, 1947, No. 140 (Code Ann. 54-804, 66-9906); [Powers v. Courson \(1957\), 213 Ga. 20 \[96 S.E.2d 577\]](#).

Indiana: Acts 1957, ch. 19 (Burns' Ann. Stats. (1957 Supp), § 40-2701 et seq.); see [Smith v. General Motors Corp. \(1957\), 128 Ind.App. 310 \[143 N.E.2d 441, 449 \[7\]\]](#).

Iowa: Laws, 1947, ch. 296 (Code Ann., § 736A.1 et seq.).

Kansas: [Kan. Const., art. 15, § 12](#) (adopted 1958).

Louisiana: The general "right-to-work" law (LSA-R.S. 23:881-23:888; see [Piegrts v. Amalgamated Meat Cutters \(1955\), 228 La. 131 \[81 So.2d 835, 838 \[1, 2\]\]](#)) was repealed by Laws 1956, Act 16. Laws 1956, Act 397, is a "right-to-work" law for agricultural workers.

Mississippi: Code Ann., § 6984.5 (Laws, 1954, ch. 249, §§ 1, 2).

Nebraska: [Neb. Const., art. XV, §§ 13, 14, 15](#), adopted in 1946, upheld in [Lincoln Federal Labor Union v. Northwestern Iron & Metal Co. \(1948\), 149 Neb. 507 \[31 N.W.2d 477\]](#), affirmed, [Lincoln Union v. Northwestern Co. \(1949\), 335 U.S. 525 \[69 S.Ct. 251, 93 L.Ed. 212, 6 A.L.R.2d 473\]](#).

Nevada: Stats. 1953, ch. 1; [Building Trades Council v. Bonito \(1955\), 71 Nev. 84 \[280 P.2d 295, 297 \[3\]\]](#).

North Carolina: N.C. Session Laws, 1947, ch. 328, upheld in [State v. Whitaker \(1947\), 228 N.C. 352 \[45 S.E.2d 860\]](#), affirmed, [Lincoln Union v. Northwestern Co. and Whitaker v. North Carolina \(1949\), 335 U.S. 525 \[69 S.Ct. 251, 93 L.Ed. 212, 6 A.L.R.2d 473\]](#).

North Dakota: NDRC, 1949 Supp., § 34-0901; NDRC, 1953 Supp., § 34-0114; [Minor v. Bldg. and Constr. Trades Council \(1956\), N.D. \[75 N.W.2d 139, 149 \[12\]\]](#).

South Carolina: Code, §§ 40-46 through 40-46.11 (enacted 1954).

[South Dakota: Const., art. VI, § 2](#), as amended 1946; Laws, 1947, ch. 92, §§ 1-3; [Baumgartner's Electric Const. Co. v. DeVries \(1958\), S.D. \[91 N.W.2d 663, 672-673 \[9\]\]](#).

Tennessee: Public Acts, 1947, ch. 36 (T.C.A. § 50-209); [Finchum Steel Erection Corp. v. Local Union 384 \(1957\), 202 Tenn. 580 \[308 S.W.2d 381\]; Farnsworth & Chambers Co. v. Local Union 429 \(1957\), 201 Tenn. 329 \[299 S.W.2d 8, 11 \[9\]\]](#), reversed because of federal preemption, [353 U.S. 969 \[77 S.Ct. 1051, 1 L.Ed.2d 916\]](#).

Texas: Laws 1947, ch. 74 (Vernon's Ann. Civ. St., art. 5207a); [Local Union No. 324 v. Upshur-Rural Elec. Co-op Corp. \(1953, Tex.Civ.App.\) 261 S.W.2d 484, 485 \[3\]](#).

[Utah: Code Ann. §§ 34-16-1 through 34-16-18](#) (Laws 1955, ch. 54).

Virginia: Acts of Assembly, 1947, ch. 2, upheld in [Plumbers Union v. Graham \(1953\), 345 U.S. 192, 200-201 \[73 S.Ct. 585, 97 L.Ed. 946\]](#).

<sup>8</sup> New Mexico: [Romero v. Journeymen Barbers \(1958\), 63 N.M. 443 \[321 P.2d 628, 629\]](#), upholds such picketing as a court-declared rule.

[\*\*\*\*45] [\*\*366] [\*\*\*198] In situations preempted to the jurisdiction of the National [\*901] Labor Relations Board and the federal courts under the Taft-Hartley Act,<sup>9</sup> [\*\*\*47] however, *N.L.R.B. v. Drivers Union Local 639* [\*902] (1960), *supra*, 362 U.S. 274 [80 S.Ct. 706, 4 L.Ed. 2d 710] [28 Law Week 4217], has answered negatively the question "whether peaceful picketing by a union, which does not represent a majority of the employees, to compel immediate recognition as the employees' exclusive bargaining agent, is conduct of the union 'to restrain or coerce' the employees in the exercise of rights guaranteed in § 7, and thus an unfair labor practice under § 8(b)(1)(A)." The board there issued a cease and desist order against picketing which continued for six months after the employees of Curtis Bros. voted in favor of "no union." The board proceeded under section 8(b)(1)(A) prior to the 1959 amendment of Taft-Hartley, and although on oral argument to the United States Supreme Court counsel for the board stated that, had the case arisen under the 1959 act, the board might have proceeded under section 8(b)(7) thereof,<sup>10</sup> the majority refused [\*\*367] [\*\*\*199] [\*\*\*46] to remand the matter for reconsideration in the light of the new law. The court reaches its conclusion in the following manner:

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Rhode Island: The comprehensive state Labor Relations Act, Gen. Laws, tit. 28, ch. 7 (P. L. 1941, ch. 1066) resembles the Wagner Act (pre-Taft-Hartley). Section 28-7-2 thereof declares the public policy of self-organization and collective bargaining of employees through representatives of their own choosing "free from the interference, restraint or coercion of their employers" (§ 1) and provides that the act shall not be construed to diminish the right of employees to engage in "lawful, concerted activities." According to *Lindsey Tavern v. Hotel & Restaurant Employees* (1956), 85 R.I. 61 [125 A.2d 207, 209, 210] [4]], recognitional picketing, "unaccompanied by coercion, duress or intimidation, is lawful, . . . even if the picketing union represents no employees of the complainant."

West Virginia: *Blossom Dairy Co. v. International Brotherhood* (1942), 125 W.Va. 165 [23 S.E.2d 645, 649], where no statute is involved, holds (Syllabus 1 by the court, p. 646 of 23 S.E.2d) that "Picketing of the place of business of an employer by a labor union will not be enjoined on the ground that it tends, or is intended, to cause the breach of a labor contract between such employer and another labor organization, when such picketing is not otherwise unlawful."

Nevada (prior to enactment in 1953 of a "right-to-work" law) may also be mentioned here: *State ex rel. Culinary v. Eighth Judicial District Court* (1949), 66 Nev. 166 [207 P.2d 990, 996-998] [10-12]], upheld the legality of picketing by an outside union to compel a closed shop agreement under N.C.L., § 10473 (enacted 1911), which provided that "It shall be unlawful for any person . . . to make . . . any agreement . . . by the terms of which any employee of such person, . . . or any person about to enter the employ of such person, . . . as a condition for continuing or obtaining such employment, shall promise or agree not to become or continue . . . , or . . . to become or continue a member of a labor organization," and N.C.L., § 2825.31 (approved 1937), a statutory declaration of policy substantially identical with [section 923](#) of our Labor Code.

<sup>9</sup> Prior to its 1959 amendment [section 8 of the Labor](#) Management Relations Act of 1947, as amended ([29 U.S.C. § 158](#)), contained among the proscribed unfair labor practices (largely the same as those which, prior to the recent majority decision in the Petri Cleaners case were proscribed in California by [Labor Code, section 923](#), and related sections) the following which are here pertinent:

"(b) It shall be an unfair labor practice for a labor organization or its agents:

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in [section 7](#) [i.e., rights to self-organization, to bargain collectively through representatives of their own choosing, etc., and also to refrain from such activities except as the latter right may be affected by a union security agreement as authorized in section 8(a)(3)] . . .

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) [which provides that it is an unfair labor practice for an employer to discriminate in regard to employment to encourage or discourage membership in any labor organization, except that the employer can enter into a union security agreement as authorized by the act] . . .

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to . . . work on any . . . commodities or to perform any services, where an object thereof is: . . . (C) forcing . . . any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified . . ."

<sup>10</sup> The 1959 act adds a new union unfair labor practice to section 8(b); i.e., "(7) to picket or cause to be picketed . . . any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the

[P. 4219 of 28 Law Week.] [Tension] exists between the two rights of employees protected by § 7 -- [\*\*\*\*48] their right to form, join or assist labor organizations, and their right to refrain from doing so. . . . The Board stated: 'Because the object of the Union's picketing in this case was to force the Company to commit an act prohibited by the statute itself [that is, to recognize and contract with the Local although it was not the chosen representative of a majority of the Curtis Bros. employees] and directly to deprive the employees of a right expressly guaranteed to them by the same Act, there is no occasion here to balance conflicting interests or rights.' [\*903] The board's conclusion, as summarized by the court, was that "the threat to the employees' job security which was thought to be inherent in the economic pressure directed against the employer . . . was said to taint peaceful picketing as unlawful conduct to 'restrain or coerce' which the Board might forbid."

The high court's opinion continues as follows: "We first consider § 8(b)(1)(A) in the light of § 13 which provides, in substance, that the Taft-Hartley Act shall not be taken as restricting or expanding either the right to strike or the limitations or qualifications on that right, as these were understood [\*\*\*\*49] prior to 1947, unless 'specifically provided for' in the Act itself.<sup>11</sup> . . . [Before 1947] the full protection of the Norris-La Guardia Act extended to peaceful picketing by minority unions for recognition. [Citations.] Therefore, since the Board's order . . . would obviously 'impede' the right to strike it can only be sustained if such power is 'specifically provided for' in the Taft-Hartley Act, that is, in § 8(b)(1)(A)."

That section does not vest such power in the board. (P. 4220 of 28 Law Week.) The "general standard" of section 8(b)(1)(A) does not overlap the "rather specific" prohibitions of section 8(b)(4). (See particularly § 8(b)(4)(C), quoted *supra*, footnote 9.) The words "restrain or coerce" in section 8(b)(1) constitute "a 'restricted phrase' to be equated with 'threat of reprisal' [\*\*\*\*50] or force or promise of benefit," as contrasted with the words "induce or encourage" in section 8(b)(4). And the legislative history of section 8(b)(1)(A) as read by the high federal court does not support the board's view.

Finally, the court says (p. 4222 of 28 Law Week), "We are confirmed in our view by the action of Congress in passing the Labor-Management Reporting and Disclosure Act of 1959. That Act goes beyond the Taft-Hartley Act to legislate a comprehensive code governing organizational strikes and picketing and draws no distinction between 'organizational' and 'recognition' picketing. . . . Were § 8(b)(1)(A) to [\*904] have the sweep contended for by the Board, the Board might proceed against peaceful picketing in disregard of [the safeguards of § 8(b)(7) of the 1959 act, quoted *supra*, footnote 10]. . . . Courts may [\*\*368] [\*\*\*200] properly take into account the later Act when asked to extend the reach of the earlier Act's vague language to the limits which, read literally, the words might permit."

For the following reasons I cannot regard the foregoing decision as persuasive in its effect on the problem of state law which is under discussion: [\*\*\*\*51] To me, as to three justices of the federal Supreme Court (p. 4223 of 28 Law Week), section 8(b)(7) of the 1959 federal act "seems squarely to cover the type of conduct involved," and that

representative of his employees . . . unless such labor organization is currently certified as the representative of such employees:"

- (A) where the employer has lawfully recognized another union and a question concerning representation may not appropriately be raised under the act.
- (B) where a valid representation election has been conducted in the preceding 12 months.
- (C) where the picketing has been conducted without a representation petition being filed with the board "within a reasonable period of time not to exceed thirty days from the commencement of such picketing," with some provisos.

"Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section (8)(b)."

<sup>11</sup> "Section 13 provides:

"Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." 61 Stat. 151, 29 U.S.C. § 163.

"Picketing has been equated with striking for the purposes of § 13. [Citations.]"

matter has not been fully and fairly litigated. In any event, it is a generally accepted view that Congress by the 1959 amendments sought to curtail minority or stranger picketing for the purpose of causing organization "from the top." (See John H. Fanning, member of the NLRB, *The New Taft-Hartley Amendments* (1959), 10 Labor Law Journ. 763, 765; Harry H. Rains, New York attorney, *What the New Labor Law Means to Management* (1959), 10 Labor Law Journ. 753, 790-793; Benjamin Wyle, formerly general counsel of the Textile Workers' Union, now member of the Labor Arbitration Committee of the American Bar Association, *The New Law of Picketing* (1959), 10 Labor Law Journ. 889, 891, 894.) Nor am I able to predict what view the high court might take had the picketing in the above case been recognitionally but not organizationally effective and caused Curtis Bros. to violate section 8(a)(3) of the national act. Also I would note that the emphasis placed by the high court upon the protection afforded [\*\*\*\*52] the subject picketing by the Norris-La Guardia Act prior to 1947 is not pertinent in California, for in 1933 our Legislature refused to pass an anti-injunction bill similar to that act, and instead adopted only its declaration of policy ([Lab. Code, § 923](#)) and its provisions against yellow dog and company union activity of the employer.

Therefore, I reiterate my opinion that the majority's concept of "freedom" of self-organization "is definitely opposed not only to the statutes of California but also to widely expressed recent thinking in the field of labor-management-individual workman relations" (Petri dissent, *ante*, p. 480).

Giving effect to the plain language of [Labor Code, section 923](#) and related sections, upholding and applying them as was [\*905] done in California prior to the Petri decision, California law was in harmony with that of the vast majority of the sister states (footnotes 4 through 8, *supra*) and with what at least seems to be the clear purport of sections 8(b)(7)(B) and 8(b)(7)(C) of the federal act. In my research I have discovered only three other states (footnote 8, *supra*) which definitely accept the view enunciated by the majority in Petri [\*\*\*\*53] and reiterated today. The California statutes are, of course, still in our law books, and their clear language is still in harmony with the state law of the majority of states and with the most recent statutory developments of the federal law. Nevertheless, by the decree of four justices who refuse to uphold and apply that which was the established statutory and decisional law of this state, California in intrastate matters is currently retrograded to that small minority of states which persist in maintaining an ungoverned area in labor relations. Thus in California large enterprises which are engaged in interstate commerce have at least some measure of protection under federal law while small businesses, despite our statutory law, are left to "the free [and destructive] interaction of economic forces" (*Petri Cleaners, Inc. v. Automotive Employees, etc., Local No. 88* (1960), *supra, ante*, pp. 469, 473) which is more similar to the combat of tooth and nail than to the operation of a governed society.

The broad sweep of the majority's holdings in Petri and in the case at bench -- going far beyond the import of the succinct statement of "crucial issue" hereinabove quoted [\*\*\*\*54] -- requires from me some comment upon problems of application of California [antitrust law](#) to union price-fixing activities. Such comment appears appropriate because of the manner in which the majority [\*\*\*201] (pp. 885-887, *ante*<sup>12</sup>) [\*\*369] treat plaintiff's contention that defendant Local 256 "is not only a labor organization but also a price fixing organization of employers," a combination unlawful under the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)) and the common law of this state (*Speegle v. Board of Fire Underwriters* (1946), *supra, 29 Cal.2d 34, 44* [11]). Questions whether defendant was or was not engaged in illegal restraint of competition and price-fixing, or in an attempt to compel plaintiff to agree to such [\*906] restraint, were not raised by the pleadings or mentioned in the pretrial order or at the trial and, since they were not presented to the trial court, its findings of fact and conclusions of law are not directed to them.

[\*\*\*\*55] However, the question of the legality of the contract which was the object of defendants' economic pressure -- like the question of the legality of a contract which a plaintiff seeks to enforce or for breach of which he seeks damages ([Morey v. Paladini \(1922\), 187 Cal. 727, 733-734](#) [2] [[203 P. 760](#)]) -- can be raised at any stage of the proceeding, and "When the court discovers a fact which indicates that the contract is illegal and ought not to be

<sup>12</sup> The essence of the majority's holding (pp. 886-887, *ante*) is that "the point of clause thirteen [of the demanded contract] is not price-fixing, but wage-fixing, and the presence of employer-barbers in the union does not convert the contract into an agreement between labor groups and non-labor groups for the purpose of restraining trade."

enforced [or, here, its execution compelled], it will, of its own motion, instigate an inquiry in relation thereto" (*id.*, p. [734 \[3\]](#) of 187 Cal.).

In the present case the evidence showed and the trial court found that defendant Local 256 "is a labor organization whose membership includes . . . barbers employed by proprietors of barber shops" and also "barbers who are not employees, including operators of barber shops who employ other barbers and a very large number of proprietors of barber shops"; that defendants "were and are seeking to extend the membership of the Defendant Union to all barbers working with the tools of the trade within the territorial jurisdiction of the Defendant Union whether employers or journeymen [**\*\*\*\*56**] barbers"; and that the printed form of contract which defendants demanded of plaintiff states, "13. Whereas wages are paid on a percentage basis the prices to be charged under this Agreement in all Union barber shops not to be less than the following: [listing prices]."

There is no finding that the peaceful picketing of plaintiff by Local 256 was part of an effort by such union to induce all employers of barbers and self-employed barbers in the San Diego area to agree to the scale of minimum prices which, according to clause 13 of the form of agreement presented to plaintiff, are "to be charged under this Agreement in all Union barber shops." But the constitution of the Journeymen Barbers, Hairdressers, Cosmetologists and Proprietors' International Union of America, which is in evidence, shows that price-fixing is the method of wage-fixing used by the organization.<sup>13</sup> In these circumstances the question [**\*\*370**] [**\*\*\*202**] of restraint [**\*907**] of trade is before us, and I am impelled to state the reasons why I cannot join in implications in the majority opinion that the attainment by the local union of a price-fixing agreement with each employer in the San Diego area would [**\*\*\*\*57**] be a proper union objective because as to each employer the union would be "acting alone" (*ante*, p. 886) to fix minimum wages, not minimum prices.

[**\*\*\*\*58**] If the operator of every barber shop in the territorial jurisdiction of Local 256 were to enter into an agreement with Local 256 to conform to the minimum price scale set by the union then (whether the price scale was agreed to at the request of the operator, the behest of the union, or as a product of collective bargaining) prices would be just as fixed as if the operators, in their capacities as businessman, had agreed with one another to fix them. To my mind the illegality and undesirability of such a situation could not be removed by saying that no barber shop operator acting as a businessman combined with any other barber shop operator so acting, or that the control of prices was brought about by a labor union which acted for the purpose of fixing wages, and therefore should be deemed beyond the reach of the law. "The law respects form less than substance." ([Civ. Code, § 3528](#).)

The "point" of a union's obtaining from businessmen an agreement such as clause 13 of the form of contract here sought, is that the union had adopted price-fixing as a means of wage-fixing. Such price-fixing is more than a mere

<sup>13</sup> Among the provisions of the International's constitution are the following:

Article III, section 1: "The General Executive Board of the International Union is authorized to grant charters to local unions or employers' guilds . . .

"Sec. 3. In places where more than one union holds a charter, said unions and guilds shall form a joint committee to regulate prices, wages, hours of labor and other working conditions. . . ."

Article VII, [section 6](#): "No Shop recognized as a union shop . . . shall permit the following unfair trade practices: . . . 4. The rendering of any service in the trade area thereof for less than the minimum prices established in said trade area . . .

"Sec. 11. . . . Copies of the working agreement setting forth prices, wages and hours and other working conditions shall be signed by the owner or operator signing the Shop Card agreement . . .

"Sec. 12. The contract, or agreement, called for by these laws shall be so construed that the person . . . displaying the Shop Card shall specifically agree: . . . (b) To abide by the laws of the local union . . . with reference to prices, hours, wages, and working conditions. . . ."

Article XV, section 1. "Every local union or guild may make its own by-laws, which must, however, be in accordance with this Constitution. . . .

"Sec. 5. Every local union shall regulate the hours of labor, prices and wages in their respective locality . . ."

incident [**\*908**] reasonably related to the proper union objective [**\*\*\*\*59**] of securing a wage scale; <sup>14</sup> it is the very heart of the wage-fixing method chosen by the union. The line which unions cannot pass in restraining trade may sometimes be obscure but in such a situation, I think, the union would clearly have gone beyond that line. (*De Neri v. Gene Louis, Inc.* (1941), 261 App.Div. 920 [25 N.Y.S.2d 463], affirming (1940), [174 Misc. 1000 \[21 N.Y.S.2d 993, 995\]](#), modified on other grounds, (1942), [288 N.Y. 592 \[42 N.E.2d 602\]](#); *Reinman v. Jaffe* (1952), 280 App.Div. 837 [113 N.Y.S.2d 716, 717] [2, 3]]; *Commonwealth v. McHugh* (1950), 326 Mass. 249 [93 N.E.2d 751, 760] [8, 9]]; *Robison v. Hotel & Restaurant Employees* (1922), 35 Idaho 439 [207 P. 132, 136] [where "[the] purpose of [concerted union activity] was, not to fix the price, or regulate the production of any article of trade or commerce, but to better their own economic condition"].)

[**\*\*\*\*60**] As this court, speaking through Mr. Justice Traynor, unanimously recognized in *Speegle v. Board of Fire Underwriters* (1946), [supra, 29 Cal.2d 34, 44, 45](#), "The public interest requires free competition so that prices be not dependent upon an understanding among suppliers of any given commodity, but upon the interplay of the economic forces of supply and demand," and "[Combinations] between employers and employees present a particularly effective means of stifling competition. [**\*\*371**] [**\*\*\*203**] " Despite the dissimilarity between occupations of the persons in the Speegle case and those in this case, the foregoing statements of facts of economic life are true here if they were true there. And even if, as stated by the majority in the Petri Cleaners case (*ante*, p. 469), "An employer's decision whether or not to bargain with a labor organization has long been determined in this state by the free interaction of economic forces," there are in the opinion of the same majority today strong implications that the price of haircuts is not to be so determined.

And if a union can fix minimum prices of a service commodity as a means of fixing minimum wages, then why should [**\*\*\*\*61**] [**\*909**] it not fix maximum prices so as to prevent employers from pricing themselves out of the market, decreasing the number of their customers, and thus being compelled to reduce the number of their employees? Or if a union of workers who furnish a service commodity can fix minimum prices of such commodity so as to establish a wage based on a percentage of the price of the service produced by the worker, why should not a union of workers who make objects of trade adopt a similar method of fixing wages by fixing the price at which the employer shall sell the objects? In such a situation there would be literally, and in my opinion, as a matter of law, a "combination of capital, skill or acts by two or more persons" for the forbidden purpose of fixing prices ([Bus. & Prof. Code, § 16720](#)), with the union its nexus.

I recognize that the United States Supreme Court has taken a different view of the Sherman Act as amended by the Clayton Act (and as inevitably affected by the Norris-La Guardia, Wagner, and Taft-Hartley Acts) from that which I suggest concerning the Cartwright Act. ([Allen Bradley Co. v. Local Union No. 3 \(1945\), 325 U.S. 797, 809, 810 \[65 S.Ct. 1533, 89 L.Ed. 1\\*\\*\\*\\*621 1939\]](#)) Under federal law a union can combine to restrain commerce when it acts "alone" (e.g., does not enter into a competition-restraining agreement with a group of employers but rather "picks off" such employers one by one) and in union self-interest (e.g., to destroy an employer's business because of "personal antagonism" rather than to better working conditions; [Hunt v. Crumboch \(1945\), 325 U.S. 821, 824-825 \[65 S.Ct. 1545, 89 L.Ed. 1954\]](#)). I am not here concerned with and express no opinion as to the relevance of morals and emotions to some hypothetical case. I am concerned with, and cannot join in, implications of the majority that this court under California law should reach the same result concerning the propriety of a union which acts "alone" to restrain trade as the United States Supreme Court apparently has felt compelled to reach in reconciling federal acts which declare the policies of Congress on the one hand "to preserve a competitive business economy" and on the other hand "to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining" (*Allen Bradley Co. v. Local Union No. 3* (1945), [supra, p. 1\\*\\*\\*\\*631 806](#) of 325 U.S.).

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<sup>14</sup> Pertinent here is the view taken by the NLRB in making a cease and desist order as to conduct which it determined was a Taft-Hartley-defined unfair labor practice, and by the United States Supreme Court in upholding the board's determination, in *National Labor Relations Board v. Denver Bldg. & Const. Trades Council* (1951), 341 U.S. 675, 688, 689 [71 S.Ct. 943, 95 L.Ed. 1284]. The board found "That an object, if not the only object, of what transpired" was the proscribed unfair labor practice; the high court accepted this finding and held that "It is not necessary to find that the sole object of the strike was that [proscribed by the national act]."

Probably the California courts when they originally announced that the common law of this state forbade combinations [**\*910**] in restraint of trade (e.g., [Santa Clara Valley Mill & Lumber Co. v. Hayes \(1888\), 76 Cal. 387, 392 \[18 P. 391, 9 Am.St.Rep. 211\]](#)) and the Legislature when it enacted the Cartwright Act (Stats. 1907, ch. 530) were chiefly concerned with the dangers of combination of businessmen-capitalists, not of laborers (see similar comment as to the 1890 enactment of the Sherman Act in [Apex Hosiery Co. v. Leader \(1940\), 310 U.S. 469, 492 \[60 S.Ct. 982, 84 L.Ed. 1311, 128 A.L.R. 1044\]](#), although during the congressional debates preceding adoption of the Sherman Act, an amendment exempting labor unions was offered and rejected; see [Loewe v. Lawlor \(1908\), 208 U.S. 274, 301 \[28 S.Ct. 301, 52 L.Ed. 488\]](#), the Danbury Hatters' case). And probably the dangers of combinations among businessmen and organized labor to restrain trade were not much in the minds of the courts when they originally announced that under the common law of this [**\*\*372**] [**\*\*\*204**] state workmen could combine and act in concert against employers to better [**\*\*\*\*64**] working conditions ([J. F. Parkinson Co. v. Building Trades Council \(1908\), 154 Cal. 581 \[98 P. 1027, 16 Ann.Cas. 1165, 21 L.R.A.N.S. 550\]](#)), or much in the minds of the legislators when, recognizing that literally the Cartwright Act could be applied to outlaw labor unions, they promptly amended such act (Stats. 1909, ch. 362) to provide that labor was not a commodity within its meaning. But in [Overland Pub. Co. v. H. S. Crocker Co. \(1924\), 193 Cal. 109, 115 \[4\], 117 \[5, 6\] \[222 P. 812\]](#), this court was confronted with a combination between a price-fixing trade association and unions of workmen employed in the trade, by virtue of which combination the union employees of plaintiff, a businessman who refused to join the trade association, were called out for the purpose of compelling plaintiff to join such association or be destroyed. The court determined that the combination violated the Cartwright Act, and that neither that act's provision that labor was not a commodity within its meaning, nor the common-law right of workmen to organize and act in concert for betterment of their working conditions, gave immunity to the subject restraint of trade.

In today's economy [**\*\*\*\*65**] we are confronted with new alignments which have the inevitable effect, if not the avowed purpose, of restraining trade. The union's role in such alignments is neither that of a helpless tool of a combination of capitalists nor that of willing and equal coconspirator with businessmen. Rather, the union assumes the initiative and attempts to coerce [**\*911**] businessmen to restrain trade. I think (paraphrasing language of the Allen Bradley Co. case (1945), [supra, p. 808](#) of 325 U.S., with reference to the Sherman Act) that the California Legislature never intended that unions could, consistently with the Cartwright Act, coerce employers -- including employers who are also working union members -- to control the prices of goods and services; this principle is even more obviously true in respect to the many barber shops wherein there are no real employees and all service is furnished by the proprietors themselves.

As pointed out in my dissent in Petri (*ante*, pp. 475-476, 477-479), the majority there declined to give effect either to the decisional principles of *stare decisis* or to the statutory law as enacted in [Labor Code, section 923](#) and related sections; today, as hereinabove [**\*\*\*\*66**] shown, to the statutory law to be disregarded in labor relations cases, the same majority add the Cartwright Act. Daniel Webster said, at the funeral of Justice Story, "Justice is the great interest of man on earth." Regrettably, justice is not served by the majority's decision in Petri or their decision today.

By departing lightly from the principle of *stare decisis* the majority, in my view, strike at the stability of the law and the certainty with which its effect may be known; likewise, by failing to evenhandedly uphold and apply a valid statute, whether liked or disliked by the individual justices, they contribute further to the uncertainties of the law. And by refusing to accept the findings of basic facts and the drawing of reasonable inferences of ultimate, legally operative facts by a trial judge whose determinations in this regard rest upon evidence which, according to normal rules of appellate review, is legally sufficient, the majority encourage appeals -- already too frequent -- which improperly seek appellate invasion of the province of the trial judge, jury, or administrative fact-finder. All this, I fear, must tend not only to increase the financial burdens of [**\*\*\*\*67**] litigants, the case loads of courts, and the delays of the law but also, inevitably, to depreciate the esteem in which the law and its servitors -- the courts and the judges and the lawyers -- are held. It seems reasonable to suppose that the public will accord no higher respect to this court's decisions than the court itself examples.

For the reasons above stated, I would affirm the judgment.



## **Chicago Title Ins. Co. v. Great Western Financial Corp.**

Supreme Court of California

August 28, 1968

L. A. No. 29499

### **Reporter**

69 Cal. 2d 305 \*; 444 P.2d 481 \*\*; 70 Cal. Rptr. 849 \*\*\*; 1968 Cal. LEXIS 242 \*\*\*\*; 1968 Trade Cas. (CCH) P72,557

\* CHICAGO TITLE INSURANCE COMPANY et al., Plaintiffs and Appellants, v. GREAT WESTERN FINANCIAL CORPORATION et al., Defendants and Respondents

**Prior History:** [\*\*\*\*1] APPEAL from an order of the Superior Court of Los Angeles County dismissing an action for unfair trade practices and combinations in restraint in trade after demurrers to fourth amended complaint were sustained without leave to amend. Shirley M. Hufstedler, Judge.

**Disposition:** Affirmed.

## **Core Terms**

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conspiracy, allegations, antitrust, counts, cause of action, appellants', title company, Cartwright Act, damages, restraint of trade, title insurer, title insurance, constitutes, demurrs, policies, boycott, title policy, Sherman Act, conspired, general demurrer, escrow company, combinations, monopoly, cases, special demurrer, overt act, accomplished, customers, commerce, rebate

## **LexisNexis® Headnotes**

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Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Demurrsers

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

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

### **HN1 [blue icon] Defenses, Demurrsers & Objections, Demurrsers**

The court on appeal will not consider the sufficiency of a superseded complaint where plaintiff has amended it after demurrer sustained.

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\* Reporter's Note: This case was previously entitled, "Southern California Title Company et al. v. Great Western Financial Corporation et al."

69 Cal. 2d 305, \*305 444 P.2d 481, \*\*481 70 Cal. Rptr. 849, \*\*\*849 1968 Cal. LEXIS 242, \*\*\*\*1

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

## **HN2** [down] 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. In 1961 California incorporated in essence also [§ 3](#) of that federal legislation known as the Clayton Act, [Cal. Bus. & Prof. Code §16727](#), which goes beyond common law and the Sherman Act to inhibit trade restraints at their inception, and federal interpretations thereof are similarly persuasive.

Antitrust & Trade Law > Sherman Act > General Overview

## **HN3** [down] Antitrust & Trade Law, Sherman Act

Within the present Sherman Act there is no place for a doctrine of intra-enterprise conspiracy.

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

## **HN4** [down] Monopolies & Monopolization, Actual Monopolization

There is substantial justification for intercorporate divisions and affiliated corporations to do business with one another so long as their very corporate existence and structure do not violate the antitrust laws per se.

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

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

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

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

## **HN5** [down] Monopolies & Monopolization, Conspiracy to Monopolize

The gist of an action charging civil conspiracy is not the conspiracy but the damages suffered. A conspiracy, in and of itself, however atrocious, does not give rise to a cause of action unless a civil wrong has been committed resulting in damage. The conspiracy may be inferred from the nature of the acts done, the relations of the parties, the interests of the alleged conspirators, and other circumstances.

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

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

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

## **HN6** [down] Monopolies & Monopolization, Conspiracy to Monopolize

To state a cause of action for conspiracy, the complaint must allege (1) the formation and operation of the conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3) the damage resulting from such act or acts. General allegations of agreement have been held sufficient and the conspiracy averment has even been held unnecessary, providing the unlawful acts or civil wrongs are otherwise sufficiently alleged. Significantly, however, the activities condemned by the antitrust law are contracts, combinations, or conspiracies in restraint of trade or commerce. Such contracts, combinations or conspiracies in restraint of trade or commerce cannot be alleged generally in the words of the statute but the facts must be set forth which indicate the existence of such contracts, combinations or conspiracies.

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

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

#### [HN7](#) Monopolies & Monopolization, Conspiracy to Monopolize

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 Act, Cal. Bus. & Prof. Code §§ 16700- 16800, the California 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. General allegations of the existence and purpose of the conspiracy are insufficient and appellants must allege specific overt acts in furtherance thereof.

Torts > ... > Prospective Advantage > Intentional Interference > Defenses

Torts > Business Torts > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Torts > ... > Prospective Advantage > Intentional Interference > Elements

#### [HN8](#) Intentional Interference, Defenses

An action for interference with prospective business advantage lies on common law principles where the right to pursue a lawful business is intentionally interfered with either by unlawful means, or by means otherwise lawful when there is lack of sufficient justification, but only if it appears that the business advantage would otherwise have been realized. One with a financial interest in the business of another is privileged however, so long as he does not employ improper means but acts merely to protect his financial interest or promote the other's welfare, to induce the other not to enter a business relationship with a third party.

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

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

#### [HN9](#) Standing, Sherman Act

Private individuals, businesses or corporations have, in the absence of express statutory authority, no standing to enforce such regulatory statutes such as the Cartwright Act, [Cal. Bus. & Prof. §§ 16700- 16800](#). The Cartwright Act, [Cal. Bus. & Prof. Code §§ 17040- 17051](#), however, follows federal policy which expressly contemplates private civil litigation based upon statutes regulating antitrust and unfair trade practices, including illegitimate pricing practices.

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

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Creditors & Debtors

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

#### [HN10](#) **Price Fixing & Restraints of Trade, Tying Arrangements**

The term "tying-in" contract has been applied judicially to those agreements whereby the seller or lessor of patented, or unpatented, equipment requires the purchaser or lessee to use only those unpatented accessory items manufactured or sold by the seller or lessor. 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. A lending institution, however, has been traditionally entitled to require for its protection and as a condition of making the loan, a specific type of title policy from a particular source; the debtor-purchaser is free to obtain a policy to protect his equity from whatever source he chooses, though most frequently he relies upon the lender's policy.

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

Antitrust & Trade Law > Sherman Act > General Overview

#### [HN11](#) **Monopolies & Monopolization, Attempts to Monopolize**

Where complainants are unsuccessful in establishing an action for conduct which may tend to create a monopoly, they are a fortiori doomed to failure with respect to the full blown conduct they must allege to come within acts proscribed by statutes patterned on the Sherman Act. [Cal. Bus. & Prof. Code § 16720](#).

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Defects of Form

#### [HN12](#) **Defenses, Demurrsers & Objections, Defects of Form**

Defendants in an antitrust suit are entitled to know what acts constitute the alleged violations so that the time and expense involved in conducting an investigation and pursuing discovery may be reasonably limited, for the complaint might otherwise be construed as a blanket license to indulge in interrogatories, depositions, and motions to produce ad infinitum, ad nauseam.

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Defects of Form

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Demurrsers

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

#### [HN13](#) **Defenses, Demurrsers & Objections, Defects of Form**

Leave to amend further is properly denied when plaintiff fails to amend to correct defects on the basis of which special demurrers to a previous complaint were sustained, or as directed by the court when sustaining such demurrers.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > Appeals > Standards of Review > Reversible Errors

## **HN14** [ ] **Pleadings, Amendment of Pleadings**

Abuse of discretion by the trial court is not shown where it is not indicated as to the manner in which it is proposed to amend nor the nature of the proposed amendment to pleadings.

## **Headnotes/Summary**

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### **Headnotes**

#### **CALIFORNIA OFFICIAL REPORTS HEADNOTES**

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

###### **Pleading—Amendment—Effect—As Superseding Pleading.**

--A court, on appeal, will not consider the sufficiency of a superseded complaint where the plaintiff has amended it after demurrer is sustained.

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

###### **Appeal—Determination—When Court Will Affirm.**

--Unless at least one cause of action is clearly stated in a complaint, an appellate court will sustain an order of dismissal where the court below has sustained a general demurrer to the complaint and denied leave to amend after representation by plaintiff's counsel that no further facts could be alleged.

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

###### **Id.—Review—Scope—Demurrer.**

--On appeal from an order of dismissal after the trial court has sustained general demurrers to the complaint, the appellate court will determine only whether plaintiffs state a cause of action, not whether they might have been able to do so.

##### **CA(4)** [ ] (4)

###### **Id.—Determination—When Court Will Affirm.**

--In granting an order of dismissal after sustaining general demurrers to a complaint alleging unfair trade practices and combinations in restraint of trade, and denying leave to amend, the trial court must be held, on appeal, not to

have abused its discretion, where the complaint, evolved over a period of more than two years of argument through law and motion, was presented to the appellate court without a showing by brief that plaintiff could or would be willing to amend further, and where the pleadings were not susceptible to the construction that might have entitled plaintiffs either to injunctive relief or to damages.

#### CA(5) [ ] (5)

##### **Monopolies—Under Cartwright Act: Sherman Act.**

--The California antitrust law, commonly known as the Cartwright Act (Bus. & Prof. Code, §§ 16700-16800) is patterned upon the federal Sherman Act (15 U.S.C.A. §§ 1-7), both having their roots in the common law; federal cases interpreting the Sherman Act are applicable with respect to the Cartwright Act.

#### CA(6) [ ] (6)

##### **Id.—Under Cartwright Act.**

--California has incorporated in essence, under Bus. & Prof. Code, § 16727, section 3 of the federal Clayton Act (15 U.S.C.A. §§ 12-27) which goes beyond common law and the Sherman Act to inhibit trade restraints at their inception, and federal interpretations of such section are persuasive.

#### CA(7) [ ] (7)

##### **Id.—Particular Agreements and Combinations—Sherman Act.**

--In the context of the present Sherman Act, there is substantial justification for intercorporate divisions and affiliated corporations doing business with one another so long as their very corporate existence and structure do not violate the antitrust laws per se.

#### CA(8) [ ] (8)

##### **Conspiracy—When Action Will Lie—Damage as Gist of Action.**

--A conspiracy, in and of itself, however atrocious, does not give rise to a cause of action. The gist of an action charging civil conspiracy is not the conspiracy itself but the damages suffered.

#### CA(9) [ ] (9)

##### **Id.—Significance of Conspiracy—Liability of Parties.**

--The advantage to the pleader in charging a conspiracy is to implicate all participating in the common design and thus fasten liability on him who agreed to the plan to commit the wrong as well as on him who actually carried it out.

#### CA(10) [ ] (10)

##### **Id.—Evidence.**

--A conspiracy may be inferred from the nature of the acts done, the relations of the parties, the interests of the alleged conspirators, and other circumstances.

#### [CA\(11\)](#) [ ] (11)

**Id.—Pleading.**

--To state a cause of action for civil conspiracy, the complaint may *generally* allege the formation and operation of the conspiracy, but must sufficiently allege the wrongful act or acts done pursuant thereto, and the damage resulting from such act or acts.

#### [CA\(12\)](#) [ ] (12)

**Monopolies—Under Cartwright Act—Pleading and Proof.**

--Activities condemned by the **antitrust law** are contracts, combinations or conspiracies in restraint of trade or commerce, and in a civil action for damages based on the California antitrust statute ([Bus. & Prof. Code, § 16750](#)), it is incumbent on 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.

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

**Conspiracy—Pleading: Interference—With Contract Relations: With Trade.**

--Allegations to the general effect that one defendant corporation formed a second corporation at the instance of a third corporation in order to divert business from plaintiffs, and that a fourth corporation had prevailed on two other corporations to send their business to the third corporation which did business with yet another corporation, to plaintiffs' damage, were insufficient to constitute causes of action for conspiracy to interfere with plaintiffs' contractual relationships and prospective business advantages, where the conspiracy itself was insufficiently stated, and where, as to purported averments of specific overt acts, there was no allegation that plaintiffs had a contract with anyone which was breached as the result of the activities of defendants, or any of them, or that there was any interference by unlawful means.

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

**Interference—With Trade.**

--One with a financial interest in the business of another is privileged to induce the other not to enter a business relationship with a third party, so long as he does not employ improper means but acts merely to protect his financial interest or promote the other's welfare.

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

**Escrows—Regulation of Escrow-holder Business.**

--The owners of a corporate escrow company are authorized by statute to incorporate a separate title company which may then receive from the title insurer with which it does business a portion of the posted premium in exchange for its search and abstract services ([Ins. Code, § 12396 et seq](#)).

**CA(16)** [  ] (16)**Monopolies—Under Cartwright Act—Remedies of Individuals.**

--While private individuals, businesses or corporations have in the absence of express authority no standing to enforce regulatory statutes, the Cartwright Act follows federal policy which expressly contemplates private civil litigation based on statutes regulating antitrust and unfair trade practices, including illegitimate pricing practices ([Bus. & Prof. Code, §§ 17040-17051](#)).

**CA(17)** [  ] (17)**Id.—Under Cartwright Act: Insurance—Corporations—Regulation.**

--The common law and the Cartwright Act which once constituted the protection of the public against combinations in restraint of the insurance trade have been expressly superseded and contravened by the specific provisions of the Insurance Code.

**CA(18)** [  ] (18)**Id.—Under Cartwright Act—Remedies of Individuals—Pleading.**

--The pleading of a cause of action charging a title insurance company with transmitting secret rebates to an escrow company and based on a statute aimed at preventing a distributor from discriminating between customers ([Bus. & Prof. Code, § 17045](#)), was defective, where it failed to allege facts from which a court might properly infer that prices charged differed from customer to customer.

**CA(19)** [  ] (19)**Insurance—Agents and Brokers—Unlawful Rebates.**

--A court is not the appropriate initial arbiter of factors involved in insurance costs, and thus a cause of action was not stated by alleging that a title insurance company, by transmitting secret rebates to an escrow company, engaged in discriminatory pricing in violation of [Bus. & Prof. Code, §§ 17043, 17049](#).

**CA(20)** [  ] (20)**Id.—Agents and Brokers—Unlawful Rebates.**

--The statutory framework regulating title insurance specifically contemplates a division of fees between title insurers and title companies which shall be proper unless the method used renders such fee divisions illegal ([Ins. Code, §§ 12412, 12404.5, 12405.7](#)), and a complaint was insufficient, where, although it implied that an escrow company acted as agent for real property owners with whom title insurers and title companies were prohibited from splitting fees, and that because a title company was controlled by identical interests of the escrow company the receipt of a title policy from an interrelated title insurance company constituted an illegal rebate, it was not clear from the facts alleged that the discount rendered would or should be considered illegal by the insurance commissioner, or that the practice of extending secret rebates or engaging in an unreasonably low or discriminatory pricing policy was followed by the defendants or any of them.

**CA(21)** [ ] (21)**Monopolies—Under Cartwright Act—Agreements and Combinations Prohibited: Pleading.**

--Vertical distribution agreements are contemplated by the Insurance Code, and vertical integration, as such without more, cannot be held violative of the Sherman Act; thus, a complaint alleging that the operations of defendant title insurance companies in association with their financial holding companies constituted a boycott of plaintiff title insurance company in violation of [Bus. & Prof. Code, § 17046](#), was insufficient, where it failed to state that defendant companies or their superior interests had agreed on or accomplished by threat or violent means their alleged aim to coerce third parties not to deal with plaintiff.

**CA(22a)** [ ] (22a) **CA(22b)** [ ] (22b)**Id.—Under Cartwright Act—Pleading.**

--A complaint by a title insurance company that the operations of defendant title insurance companies in association with their financial holding companies constituted exclusive sales agreements and "tying-in" contracts substantially lessening competition or tending to create a monopoly ([Bus. & Prof. Code, § 16727](#)) was insufficient, where it failed to state facts from which it might be inferred that defendants controlled the title insurance market in their county or that they could substantially exclude plaintiff from such market or limit the availability of title insurance to the public.

**CA(23)** [ ] (23)**Words and Phrases—"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.

**CA(24)** [ ] (24)**Monopolies—Under Cartwright Act—Pleading.**

--Where allegations in a complaint were insufficient to establish a cause of action for conduct tending to create a monopoly ([Bus. & Prof. Code, § 16727](#)), the same allegations were *a fortiori* insufficient to support a cause of action for conduct creating a trust or combination in restraint of trade proscribed by statutes patterned on the Sherman Act ([Bus. & Prof. Code, § 16720](#)).

**CA(25a)** [ ] (25a) **CA(25b)** [ ] (25b)**Pleading—Demurrer to Complaint—Amendment After Demurrer Sustained—Refusal to Amend.**

--In an action seeking injunctive relief and damages for unfair trade practices and combinations in restraint of trade, leave to amend the complaint further was properly denied, and there was no abuse of discretion in ordering a dismissal, where, in spite of special demurrs being sustained on the grounds that each count was ambiguous, unintelligible and uncertain, and that certain counts either united or failed to state separately the alleged causes of action, plaintiffs continued to deal solely in broad generalities, legal conclusions and unsupported speculation, and at no time showed that they were willing or even able to cure the defects specified.

CA(26) [ ] (26)**Id.—Demurrer to Complaint—Matters Not Admitted.**

--A demurrer does not admit contentions, deductions or conclusions of facts or law which may be alleged in a complaint.

**Counsel:** Tremaine & Shenk and Jerrold A. Fadem for Plaintiffs and Appellants.

Hastings & Lasker, Edward Lasker, Milton Davis, McKenna & Fitting, Les Weinstein, Jones & Maupin, James C. Maupin, Milo V. Olson, H. Bradley Jones, Adams, Duque & Hazeltine, Lawrence T. Lydick, and Richard W. Luesebrink for Defendants and Respondents.

Thomas C. Lynch, Attorney General, Wallace Howland, Assistant Attorney General, Robert E. Murphy, Michael I. Spiegel and Harold J. Tomin, Deputy Attorneys General, as Amici Curiae.

**Judges:** In Bank. Sullivan, J. Traynor, C. J., McComb, J., Peters, J., Tobriner, J., and Burke, J., concurred. Mosk, J., dissents.

**Opinion by:** SULLIVAN

## **Opinion**

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**[\*310] [\*\*484] [\*\*\*852]** In this action seeking injunctive relief and damages for unfair trade practices and combinations in restraint of trade, plaintiffs appeal from an order of dismissal entered after the court sustained without leave to amend [\*\*\*\*2] defendants' several demurrers to plaintiffs' fourth amended complaint and granted defendants' motions to dismiss as to portions of said complaint.

The fourth amended complaint contains 11 counts and 78 paragraphs. Like its predecessors it has fallen to five separate general demurrers, each filed by a group of defendants jointly. Unlike the orders sustaining the previous demurrers, the last demurrers were sustained without leave to amend, the court noting in some instances that counsel for plaintiffs had represented that they could add nothing to the fourth amended complaint. Special demurrers, filed with the general demurrers in all cases, were not ruled upon by the court. Motions to dismiss all or portions of the complaint were variously granted in whole or in part as to defendants designated individually or by groups.<sup>1</sup>

**[\*\*\*3] [\*311] [\*\*485] [\*\*\*853]** After decision by the Court of Appeal, Second Appellate District, Division One, which affirmed the order of dismissal, this court on its own motion granted a hearing to give further study to the problems presented. After such study, we have concluded that the Court of Appeal has correctly disposed of the

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<sup>1</sup> The "fourth amended complaint" was amended by plaintiffs prior to attack thereon. As denoted herein, the "fourth amended complaint" is the fourth amended complaint as amended. The general demurrers were sustained and motions to strike granted as to various groups of defendants as parenthetically indicated: (1) Great Western Financial Corporation, Great Western Savings and Loan Association and 25 individual escrow companies referred to herein as Liberty Escrow (general demurrer sustained without leave to amend as to each count alleged, motion to strike complaint granted); (2) Sherwood Escrow Co., and Summit Title Company (general demurrer sustained without leave to amend as to each count alleged upon representations that no further facts could be added, motion to strike granted as to 10 specifications and denied as to 5 specifications); (3) American Title Company (general demurrer sustained without leave to amend as to each count alleged); (4) Security Title Insurance Company and Financial Corp. of America (demurrer of Financial Corp. sustained without leave to amend, general demurrer of Security Title Insurance sustained without leave to amend as to each count alleged upon representations that no further facts can be added, motion to strike granted as to 17 of 78 paragraphs); (5) Lehman Brothers (general demurrer sustained without leave to amend as to each count, motion to strike granted).

cause. Accordingly the opinion of the Court of Appeal, authored by Justice Fourt and concurred in by Presiding Justice Wood and Justice McCoy, is adopted (with some minor deletions and additional discussions of our own) as and for the opinion of this court. Such portion of the opinion (with appropriate deletions and additions as indicated) is as follows:<sup>2</sup>

[\*\*\*\*4] **CA(1)** (1) We confine our attention herein to the most recently filed fourth amended complaint since "**HN1**"<sup>3</sup> The court on appeal will not consider the sufficiency of a superseded complaint where the plaintiff has amended it after demurrer sustained." (*Rolley, Inc. v. Merle Norman Cosmetics, Inc.*, 129 Cal.App.2d 844, 852 [278 P.2d 63, 282 P.2d 991].) We are, moreover, not concerned with the grounds for special demurrer urged upon the trial court since the general demurrer was [\*312] sustained without leave to amend and the complaint was stricken upon appellants' representation that no further facts could be alleged. [3] **CA(2)** (2) We shall consider primarily the merits of that decision and, unless at least one cause [\*\*486] \*\*\*854 of action is clearly stated, sustain the order of dismissal. (*Southall v. Security Title Ins. etc. Co.*, 112 Cal.App.2d 321, 323 [246 P.2d 74]; *Morris v. National Federation of the Blind*, 192 Cal.App.2d 162, 164 [13 Cal.Rptr. 336].) **CA(3)** (3) We are constrained to determine only whether appellants state a cause of action, not whether they might have been able to do so. (*Lemoge Elec. v. County of San Mateo*, 46 Cal.2d 659, 664 [297 P.2d 638]; [\*\*\*\*5] **Levinson v. Bank of America**, 126 Cal.App.2d 122, 125 [271 P.2d 632].) **CA(4)** (4) The unverified fourth amended complaint, evolved over a period of more than two years of argument through law and motion, is presented to us without showing by brief that appellants could or would be willing to amend further. We conclude that the court did not, by the action [\*313] taken, abuse its discretion since the pleadings are not susceptible of a construction that might entitle appellants either to injunctive relief or to damages.

<sup>2</sup> Brackets together, in this manner [] *without enclosing material*, are used to indicate deletions from the opinion of the Court of Appeal; brackets *enclosing material* (other than editor's added parallel citations) are, unless otherwise indicated, used to denote insertions or additions by this court. We thus avoid the extension of quotation marks within quotation marks, which would be incident to the use of such conventional punctuation, and at the same time accurately indicate the matter quoted. In so doing, we adhere to a method of adoption employed by us in the past. (*People v. Lyons* (1956) 47 Cal.2d 311, 314, fn. 1 [303 P.2d 329]; *Simmons v. Civil Service Emp. Ins. Co.* (1962) 57 Cal.2d 381, 383, fn. 1 [19 Cal.Rptr. 662, 369 P.2d 262]; *Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 540, fn. 1 [63 Cal.Rptr. 21, 432 P.2d 717]; *Smith v. Anderson* (1967) 67 Cal.2d 635, 637, fn. 1 [63 Cal.Rptr. 391, 433 P.2d 183]; *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 517, fn. 3 [67 Cal.Rptr. 761, 439 P.2d 889].)

<sup>3</sup> On the record presented we are unable to evaluate the motions to dismiss granted by the trial court as to various defendants. Our examination of the record available persuades us that in major part the motions were granted on the ground that plaintiffs had consistently failed to allege factual matters with the particularity required to sustain a cause of action under the Cartwright Act and other acts on which plaintiffs relied. Accordingly, motions to dismiss all or portions of plaintiffs' fourth amended complaint were granted as to various defendants on grounds which appear to be related to those for sustaining the general demurrs. Although the instant record does not fully advise us of matters identical to those in *Lavine v. Jessup* (1957) 48 Cal.2d 611 [311 P.2d 8], plaintiffs assert that a "duplicate situation" exists. The following observations from that case are pertinent here: "This case presents an unusual situation in that the court simultaneously sustained general demurrs without leave to amend and granted motions to strike the complaint as sham and to dismiss the action. The motions were not supported by affidavits setting up any extrinsic matters and obviously were made upon the assumption that the complaint failed to state a cause of action and was merely repetitious of prior complaints which had been ruled insufficient. Defendants thus made their challenge solely on the fact of the pleadings, and it seems clear that the questions presented by the motions were identically the same as those presented by the demurrs, i.e., did the complaint state a cause of action and, if not, could the defects be cured by amendment. The normal method of resolving such issues in favor of a defendant is by ruling upon a demurrer and thereafter rendering a judgment based upon the ruling. It is, of course, unnecessary for the court, in addition, to grant a motion to dismiss. As we have seen, the court subsequently signed and filed a judgment of dismissal which, after reciting that the demurrs had been sustained and the motions had been granted, adjudged that the action be dismissed." (48 Cal.2d at p. 614.) As indicated, the court equated the *Lavine* order granting the motion to dismiss with the order sustaining the general demurser.

[For the foregoing reasons we do not pass upon the merits of the motions to dismiss or the propriety of the orders thereon as raising independent issues.]

[\*\*\*\*6] Appellants attempt by their complaint to impose upon respondents treble damages for asserted violations of the antitrust, price discrimination and unfair trade practices sections of the Business and Professions Code, and also accuse respondents of the common law tort of interference with advantageous business or contractual relations. The issues as framed by appellants' brief are (1) whether parties allegedly damaged by the wrongdoing of competitors in violation of the subject statutes are entitled to the civil remedies of injunction and/or indemnity, and (2) whether the allegedly injured parties are entitled to damages from certain competitors who, by a conspiracy to provide rebates, intentionally induce a prime customer to transfer its business to the wrongdoers. We must determine, more particularly, whether the superior court has jurisdiction to entertain an action based upon appellants' theories, or any of them, and, if so, whether appellants have stated a cause of action against any of the various named defendants. The latter finding, which is determinative, is in the negative.

The complaint alleges that Lehman Brothers, an investment firm and a partnership, owns a major [\*\*\*\*7] or controlling interest in Great Western Financial Corporation (hereinafter sometimes referred to as Great Western) and in Financial Corporation of America (hereinafter sometimes referred to as Financial) both of which are financial holding companies. Great Western, in turn, owns Great Western Savings and Loan (hereinafter sometimes referred to as Great Western S&L) and a group of 25 individually named escrow companies hereinafter referred to collectively as Liberty. Financial owns title insurer Security Title Insurance Company (hereinafter sometimes referred to as Security); Financial and Great Western together own American Title Company (sometimes hereinafter referred to as American). All of these interrelated businesses are named as defendants together with two other companies operating under the same, but distinct and independent, ownership known as Summit Title Company (hereinafter sometimes referred to as Summit) and Sherwood Escrow Company (hereinafter sometimes referred to as Sherwood).

[\*314] The complaint further alleges that appellants are corporations, each qualified to do business in California as an "underwritten title company." The "underwritten title company" [\*\*\*\*8] (hereinafter sometimes called "title company") is described by code as a "person engaged in the business of preparing title searches, title examinations, certificates or abstracts of title upon the basis of which a title insurer regularly writes title policies . . ." ( [Ins. Code, § 12402](#).) Title insurance, which is a customary incident of practically every [\*\*487] [\*\*\*855] California real estate transaction, may be sold either by a title insurer or a title company, and both are regulated by the Insurance Commissioner, must be licensed, meet certain minimum capital requirements, submit to examination and audit, and may have licenses seized or revoked for financial instability or other regulatory infractions. ( [Ins. Code, §§ 12396](#) and [12411](#).) The title insurer is entitled to perform the search and abstract functions, as well as to issue the policy. The title company, which performs only search and abstract work, may engage in the escrow business within statutory limitations. It is specifically contemplated that the title company shall contract to do the preliminary work for a title insurer and then distribute the policy of insurance, the risk of which is underwritten by the [\*\*\*\*9] title insurer, in return for an appropriate division of fees. ( [Ins. Code, § 12412](#).)

Appellant title companies, therefore, compete directly with both Summit and American in Los Angeles County. All three either must do business with or compete with Security, and it is common knowledge that all compete with the long dominant Title Insurance and Trust Company and every other concern qualified to transact title business in this county.

It is appellants' theory that all respondents, including the powerful Lehman Brothers investment banking company, have conspired under the impetus of common interest to violate statutory prohibitions and intentionally interfere with appellants' business to their financial damage. Appellants contend that by virtue of this combination respondents, all and variously, have interfered with their business relationships, violated the California law of antitrust and unfair trade practices, and the Insurance Code. In appellants' words, they charge that defendants "conspired to pay an illegal rebate to lure away customers of the Plaintiffs, and to boycott the Plaintiffs, along with a battery of other acts forbidden by statute." It is the thrust of these allegations [\*\*\*\*10] that [\*315] the acts of the various respondents constitute a fraud on appellants which justifies and, indeed, compels the piercing of corporate veils to disclose an identity of interests between the Lehman-owned companies on the one hand and the Sherwood and Summit shareholders on the other. The facts, however, are sparse and incomplete.

CA(5)[<sup>↑</sup>] (5) HN2[<sup>↑</sup>] 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. (Milton v. Hudson Sales Corp., 152 Cal.App.2d 418 [313 P.2d 936]; Rolley, Inc. v. Merle Norman Cosmetics, Inc., supra, 129 Cal.App.2d 844.) CA(6)[<sup>↑</sup>] (6) In 1961 California incorporated in essence also section 3 of that federal legislation known as the Clayton Act (Bus. & Prof. Code, § 16727) which goes beyond common law and the Sherman Act to inhibit trade restraints at their inception, and federal interpretations thereof are similarly persuasive. (Milton v. Hudson Sales Corp., supra.) We are persuaded by California and federal authorities [\*\*\*\*11] that appellants' vague and conclusionary pleadings fail to allege facts which might reasonably be construed to reveal a wrongful combination.

Indeed, as to Lehman Brothers, the only ultimate facts alleged are that Lehman Brothers is a partnership, that it owns stock in Great Western and Financial and that at times it has had two or more directors concurrently on the boards of Great Western and Financial, respectively. Thus, Lehman Brothers stands at the investment apex of a pyramid of control which can be reached only by means of factual allegations of conduct on the part of related defendants from which a conspiracy or combination with the intent to jeopardize appellants' business may be inferred. The same analysis applies to Great Western and Financial in their passive administrative role as holding companies, [\*\*488] [\*\*\*856] Great Western S & L as a lender relatively remote from the scene, and even Security which, as title insurer, merely issues title policies which constitute the subject matter of appellants' claims.

The corporate interrelationship alleged is not a wrong per se. CA(7)[<sup>↑</sup>] (7) HN3[<sup>↑</sup>] "Within the present Sherman Act there is no place for a doctrine of intra-enterprise conspiracy. [\*\*\*\*12] No logical stopping point exists short of giving a prosecutor carte blanche to attack virtually all multicorporate enterprises." McQuade, [\*316] Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act, 1955, 41 Va.L.Rev. 183, 216.) HN4[<sup>↑</sup>] There is substantial justification for intercorporate divisions and affiliated corporations to do business with one another so long as their very corporate existence and structure do not violate the antitrust laws per se (United States v. Yellow Cab Co., 338 U.S. 338 [94 L.Ed. 150, 70 S.Ct. 177]; United States v. Columbia Steel Co., 334 U.S. 495, 523, 527 [92 L.Ed. 1533, 1551, 1554, 68 S.Ct. 1107].) Since the mere existence of the Lehman power complex is not the evil under attack, nor its proper subject, we must require that appellants allege [] [the specific facts] constituting unfair competition or a conspiracy to engage in such unfair practices and the [] nature of the damages inflicted.

CA(8)[<sup>↑</sup>] (8) "HN5[<sup>↑</sup>] The gist of an action charging civil conspiracy is not the conspiracy but the damages suffered. [Citations.] It is the long established rule that a conspiracy, in and of itself, however atrocious, does not give [\*\*\*\*13] rise to a cause of action unless a civil wrong has been committed resulting in damage. [Citations.] . . . CA(9)[<sup>↑</sup>] (9) The advantage to the pleader in charging a conspiracy is to implicate all participating in the common design and thus fasten liability on him who agreed to the plan to commit the wrong as well as on him who actually carried it out. [Citations.] CA(10)[<sup>↑</sup>] (10) The conspiracy 'may be inferred from the nature of the acts done, the relations of the parties, the interests of the alleged conspirators, and other circumstances.' [Citations.]

CA(11)[<sup>↑</sup>] (11) "HN6[<sup>↑</sup>] To state a cause of action for conspiracy, the complaint must allege (1) the formation and operation of the conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3) the damage resulting from such act or acts. [Citations.]" (Wise v. Southern Pac. Co., 223 Cal.App.2d 50, 64-65 [35 Cal.Rptr. 652].) General allegations of agreement have been held sufficient (Farr v. Bramblett, 132 Cal.App.2d 36, 47 [281 P.2d 372].), and the conspiracy averment has even been held unnecessary, providing the unlawful acts or civil wrongs are otherwise sufficiently alleged. (Hege v. Worthington, Park & Worthington, 209 Cal.App.2d 670, [\*\*\*\*14] 678 [26 Cal.Rptr. 132].) CA(12)[<sup>↑</sup>] (12) Significantly, however, "[the] activities condemned by the anti-trust law are contracts, combinations, or conspiracies in restraint of . . . trade or commerce. Such contracts, combinations or conspiracies in restraint of . . . trade or commerce cannot be alleged generally in the words of [\*317] the statute but the facts must be set forth which indicate the existence of such contracts, combinations or conspiracies." (Westor Theatres v. Warner Bros. Pictures, Inc., 41 F.Supp. 757, 762.) [General allegations of a conspiracy, without a statement of the facts constituting the conspiracy, its object and accomplishment in the restraint of trade in civil actions are held by the federal courts to be but allegations of legal conclusions, insufficient to constitute a cause of action under the federal statutes. (Nelson Radio & Supply Co. v. Motorola, Inc. (1952) 200 F.2d 911, 913, 914;

[Floyd v. Gage \(1951\) 192 F.2d 137, 138-139; Feddersen Motors v. Ward \(1950\) 180 F.2d 519, 522; Beegle v. Thomson \(1943\) 138 F.2d 875, 880; Black & Yates v. Mahogany Assn. \(1941\) 129 F.2d 227, 231-232 \[148 A.L.R. 841\]; Encore \[\\*\\*\\*\\*15\] Stores, Inc. v. May Dept. Stores Co. \(1958\) 164 F.Supp. 82, 84-85; Leonard v. Socony-Vacuum Oil Co. \(1942\) 42 F.Supp. 369, 370; Bader v. Zurich General Acc. & Liab. Ins. Co. \(1952\) 12 F.R.D. 437, 438-439; 1 Toulmin, Anti-trust \[\\*\\*489\] \[\\*\\*\\*857\] Laws \(1949\), § 2019, p. 850; 1968 Supplement, § 20.7, pp. 42, 43, 44.\)\]](#)

Appellants themselves concede that they have not alleged facts but contend by reference to [Business and Professions Code, section 16756](#) [<sup>4</sup>] and a criminal decision ([People v. Sacramento Butchers' etc. Assn., 12 Cal.App. 471, 481 \[107 P. 712\]](#)), that general allegations of statutory violations are sufficient. The California and federal authorities, however, are contrary where plaintiffs base a civil action for damages upon antitrust legislation.

[HN7](#) [↑] "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 [\*\*\*\*16] 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 [\*318] prove that his business or property has been injured by the very fact of the existence and prosecution of such unlawful trust or combination." ([Munter v. Eastman Kodak Co., 28 Cal.App. 660, 664-665 \[153 P. 737\]](#).) General allegations of the existence and purpose of the conspiracy are insufficient and appellants must allege specific overt acts in furtherance thereof. "Conceding the formation of a conspiracy is charged, having for its object a common design and purpose, still we find no statement in the bill as to any specific overt acts done by defendants in pursuance of that design and purpose." ([Davitt v. American Bakers' Union, 124 Cal. 99, 101 \[56 P. 775\]](#).)

[\*\*\*\*17] [CA\(13a\)](#) [↑] (13a) Since the conspiracy allegations are insufficient in and of themselves, we turn to the purported averments of specific acts contained in the complaint and find them similarly lacking. The first count is directed primarily against Summit and Sherwood (hereinafter sometimes referred to as the Sherwood group), but the opening paragraphs allege appellants' corporate existence, Lehman Brothers' ownership of certain respondents and the conspiracy of those defendants to carry out the acts therein described for the purpose of unlawfully restraining trade and destroying competitors. There follow allegations that title insurance policies are customarily procured to insure buyer or lender upon the "transfer and encumbering" of real property; that title insurance business in Los Angeles County originates primarily with lenders or buyers of real property and those who perform escrow services; that Liberty is first and Sherwood second in volume of title activity generated by independent escrow companies; and that "[all] title companies and title insurance companies . . . compete for title insurance orders from lenders and escrow companies in Los Angeles County." Appellants then aver further [\*\*\*\*18] that after American "approached" Sherwood, its stockholders incorporated Summit and competition has been lessened because all of Sherwood's title insurance business now goes to Summit; that Security furnishes Summit "all search data needed to insure title" and that Summit issues only Security title policies; that Summit pays one-half the posted rates for such policies to Security but charges Sherwood and its customers the full rates; that Summit performs no substantial function in the issuance of title policies and was created to "mask" the illegality of the acts herein described. Finally, it is [\\*\\*490](#) [\\*\\*\\*858](#) alleged that all the above was [\*319] accomplished "with the intent and with the result of interfering with [appellants'] business relationship with Sherwood," that actual damages resulted, and that Security and American currently seek others "with whom to extend the scope of the kinds of activity described herein" which will further injure appellants so that "the remedy at law will thereby be inadequate." The second count merely incorporates the first and alleges that appellants used to receive most of Sherwood's business

<sup>4</sup> The following footnote appears in the opinion of the Court of Appeal as footnote No. 1.] [Section 16756 of the Business and Professions Code](#) provides as follows:

"[] Statements declared sufficient. In any indictment, information or complaint for any offense named in this chapter, it is sufficient to state the purpose or effects of the trust or combination, and that the accused is a member of, acted with, or in pursuance of it, or aided or assisted in carrying out its purposes, without giving its name or description, or how, when and where it was created."

but that now it all goes to Summit [\*\*\*\*19] "which issues only Security's policies." The gravamen of these two counts is that Sherwood formed Summit at the instance of American in order to divert to Summit and Security business which formerly went to appellants.

Each of these counts fails to state a cause of action for interference with contractual relationships because there is no allegation alleged that appellants had a contract with anyone which was breached as a result of the activities of defendants or any of them. ([Allen v. Powell, 248 Cal.App.2d 502, 505-506 \[56 Cal.Rptr. 715\].](#))

Appellants similarly fail in either count to state [HN8](#) [↑] an action for interference with prospective business advantage which will lie on common law principles where the right to pursue a lawful business is intentionally interfered with either by unlawful means, or by means otherwise lawful when there is lack of sufficient justification ([Willis v. Santa Ana etc. Hospital Assn., 58 Cal.2d 806 \[26 Cal.Rptr. 640, 376 P.2d 568\]](#)), but only if it appears that the business advantage would otherwise have been realized. ([Perati v. Atkinson, 213 Cal.App.2d 472 \[28 Cal.Rptr. 898\].](#)) [CA\(14\)](#) [↑] (14) One with a financial interest in the business [\*\*\*\*20] of another is privileged however, so long as he does not employ improper means but acts merely to protect his financial interest or promote the other's welfare, to induce the other not to enter a business relationship with a third party. (Rest., Torts, §§ 769, 770, 771.) The conduct of Sherwood and Summit is patently justified.

Appellants compete with Summit; Sherwood which owns Summit naturally sends its business there. Summit buys policies from Security and since appellants are not title insurers the business Security receives in this manner presumably does them no damage. [CA\(15\)](#) [↑] (15) We reiterate that the owners of a corporate escrow company, such as Sherwood, are authorized by statute to incorporate a separate title company which may then receive from the title insurer with which it does business [\*320] a portion of the posted premium in exchange for its search and abstract services. ([Ins. Code, § 12396 et seq.](#))

[CA\(13b\)](#) [↑] (13b) While it is difficult to isolate from the complaint the specific elements of any given legal action and virtually impossible to determine from each count the nature of the purported cause of action, a second category of circumstances is described in count eight. The gist [\*\*\*\*21] of this count is that Great Western Financial has prevailed upon Great Western Savings & Loan and the Liberty escrow companies to send their title business to American, which buys policies from Security, and this has damaged appellants. This count realleges the Lehman ownership and control of various defendants, the existence of their conspiracy, and the nature of the title insurance business in Los Angeles County. Thereafter, the complaint alleges generally that savings and loan associations are substantial sources of title business resulting from purchase money loans, refinancing, and the financing of their direct sales of real estate; that buyers of real property frequently select the title company before they know who their lender will be; that when Great Western makes purchase money loans it refuses appellants' policies and favors Security or American; that for this reason escrow officers, when uncertain as to who the lender ultimately may be, are reluctant to deal with appellants; that escrow officers influence buyers who have no preferences; that the Liberty escrow companies, which formerly requested title policies from appellants, now conspire with Great Western to refuse [\*\*\*\*22] to deal with appellants; [\*\*491] [\*\*\*859] that these companies instead divert business to American; that as a result, only in exceptional cases when the buyer demands appellants' services and the loan is not by Great Western, do appellants receive this business; and that Great Western prohibits the use of appellants' policies when it refinances or engages in direct sales of real estate. Count eight further alleges that "competition within Los Angeles County has thereby been substantially reduced"; that "refusal to accept the policies of . . . [appellants] constitutes a boycott," that "this was done" with the intent and result of interfering with appellants' business relationship with Liberty, and this "concerted refusal" violates [Business and Professions Code section 17046](#). Count nine incorporates all allegations of counts one and eight and further alleges that "until the acts of Financial" appellants received Liberty's title business which now goes to Security.

[\*321] Insofar as appellants attempt to state an action against the Lehman-controlled defendants for interference with contract, they fail, by reference to authorities previously cited, because they allege [\*\*\*\*23] no prior existing contract. The action for interference with prospective business advantage fails because they do not disclose wherein it is wrongful for Great Western, Great Western S&L, or Liberty to send business to American, any more than it is wrongful for Sherwood to purchase policies through Summit, since appellants had no reasonable

assurance that their advantageous relations with Liberty would otherwise continue. They relate no facts from which we might find it improper for Summit or American to purchase title policies from Security. Since Great Western and Financial allegedly own various interests in Great Western S&L, Security, American and Liberty, it is merely prudent business practice for the other companies to request title policies from American and Security just as we heretofore established that the common ownership of Sherwood and Summit justifies a similar business practice. (Rest., *Torts*, §§ 769, 770, 771, and cases cited, *supra*.)

While Security, Summit and American all compete with appellants for title business, only Summit and American compete on precisely the same business plane and, by purchasing Security's title insurance, these companies do not inhibit [\*\*\*\*24] appellants' access to the market. Appellants fail to join or allege the identity of the title insurer or insurers with whom they do business, and since they do not complain that they have been denied similar privileges or that Security refuses to sell them policies on terms equivalent to those tendered American and Summit, we must assume that appellants are not deprived of a competitive commodity. The only respondents, therefore, who might be accused of directly diverting business from appellants are Sherwood and Liberty, while the other defendants can be involved only by way of conspiracy. Appellants allude to no reasonable basis for assuming they enjoyed any prior right to do business with the customers of these escrow companies. Since the overt acts alleged are inadequate to establish an action for business interference against Sherwood and Liberty, respectively, the conspiracy allegations also fail.

The remaining counts incorporate successively the principal allegations of the first two counts, and final counts ten and eleven incorporate those of counts eight and nine as well. [\*322] These miscellaneous counts charge defendants with various allegedly unfair competitive [\*\*\*\*25] business practices. All except count seven, which deals with unlawful rebates ([Ins. Code, § 12404](#)), refer to the Cartwright Act ([Bus. & Prof. Code, §§ 16700-16800](#)). Count three charges that Security transmitted to Sherwood through Summit a secret rebate ([Bus. & Prof. Code, § 17045](#)). Count four suggests Security and Summit engaged in unreasonably low or discriminatory pricing ([Bus. & Prof. Code, §§ 17043](#) and [17049](#)). Counts five and ten charge defendants, acting through the Sherwood and [\*\*492] [\*\*\*860] Great Western groups, respectively, with tying-in contracts which lessen competition and tend to create a monopoly ([Bus. & Prof. Code, § 16727](#)). Counts six and eight charge a boycott or concerted refusal to deal with appellants on the parts of the Sherwood and the Great Western groups, respectively ([Bus. & Prof. Code, § 17046](#)). Count eleven incorporates the allegations of all prior counts and alleges that thus defendants entered an illegal combination ([Bus. & Prof. Code, § 16720](#)) with the intention to (1) restrict commerce, (2) prevent competition in the sale of a commodity, (3) establish prices which prevent free competition in Los Angeles County, and (4) reduce prices [\*\*\*\*26] to Sherwood by one-half.

**CA(16)[↑]** (16) The Cartwright Act, as previously mentioned, is similar in spirit and substance to that federal legislation encompassed by the Sherman ([15 U.S.C.A. §§ 1-7](#)) and Clayton Acts ([15 U.S.C.A. §§ 12-27](#)). **HN9[↑]** Private individuals, businesses or corporations have, in the absence of express statutory authority, no standing to enforce such regulatory statutes. (Cf. [Show Management v. Hearst Publishing Co.](#), [196 Cal.App.2d 606, 612-616 \[16 Cal.Rptr. 731\]](#); [West Coast Poultry Co. v. Glasner](#), [231 Cal.App.2d 747 \[42 Cal.Rptr. 297\]](#); [Hudson v. Craft](#), [33 Cal.2d 654 \[204 P.2d 1, 7 A.L.R.2d 696\]](#).) The Cartwright Act however follows federal policy which expressly contemplates private civil litigation based upon statutes regulating antitrust and unfair trade practices, including illegitimate pricing practices. ([Bus. & Prof. Code, §§ 17040- 17051](#).)

**CA(17)[↑]** (17) These statutes and the common law which once constituted the "protection of the public against combinations in restraint of the insurance trade" ([Speegle v. Board of Fire Underwriters](#), [29 Cal.2d 34, 45 \[172 P.2d 867\]](#)) are now expressly superseded and contravened by the specific provisions of the Insurance [\*\*\*\*27] Code. Counts three (secret rebate), four (discriminatory pricing) and seven (unlawful rebate) [\*323] clearly concern the regulation of rates charged by title insurers and title companies, and rate regulation has traditionally commanded administrative expertise applied to controlled industries. ([Ins. Code, §§ 12404- 12412](#); [County of Placer v. Aetna Cas. etc. Co.](#), [50 Cal.2d 182 \[323 P.2d 753\]](#); [Division of Labor Law Enforcement v. Moroney](#), [28 Cal.2d 344 \[170 P.2d 3\]](#).) **CA(18)[↑]** (18) Count three, for instance, is based upon a statute ([Bus. & Prof. Code, § 17045](#)) aimed at preventing a distributor from discriminating between customers, but fails to allege facts from which a court might properly infer that the prices charged by Security or Summit differ from customer to customer, and is

thus defective. ( *Federal Automotive Services v. Lane Buick Co.*, 204 Cal.App.2d 689 [22 Cal.Rptr. 603].) **CA(19)**[  
**↑**] (19) Count four, presumably based on the same facts, charges that the discount constitutes a sale of title insurance below cost which is an infraction only if done "for the purpose of injuring competitors" ( *Bus. & Prof. Code, §§ 17043, 17049*), but a court is not the appropriate initial [\*\*\*\*28] arbiter of factors involved in insurance costs. **CA(20)**[  
**↑**] (20) Count seven implies that Sherwood (an escrow company) acts as "agent" for real property owners with whom title insurers and title companies are prohibited from splitting fees and that because Summit is controlled by identical interests, the receipt of a title policy from Security at a discount constitutes an illegal rebate ( *Ins. Code, § 12404*) to Sherwood. The statutory framework, however, specifically contemplates a division of fees between title insurers and title companies which shall be proper unless the method used constitutes such fee divisions "illegal." ( *Ins. Code, §§ 12412, 12404.5, 12405.7*.) It is not clear from the facts alleged that the discount rendered would or should be considered illegal by the insurance commissioner, or that the practice of extending secret rebates, or engaging in unreasonably low or discriminatory pricing policy is followed by the defendants, or any of them. []

[The] factual allegations, as illustrated, fail in each instance to support the charge. Just as the earlier counts state [\*\*493] [\*\*\*861] facts insufficient to establish proscribed conduct on the parts of the alleged actors and [\*\*\*\*29] thus cannot reach their purported conspirators, so the final counts charging antitrust infringements fall for similar reasons. []

**CA(21)**[  
**↑**] (21) Appellants contend in counts six and eight that the conduct of the Sherwood and Great Western groups, respectively, [\*324] infringes *Business and Professions Code section 17046*. The attempted application of this section to the facts evidences appellants' misinterpretation of the nature of a boycott. The allegation of boycott cannot be supported in this instance because everyone has the unrestricted right to select customers and sources of supply. ( *Bus. & Prof. Code, § 17042; A.B.C. Distributing Co. v. Distillers Distributing Corp.*, 154 Cal.App.2d 175, 189 [316 P.2d 71].) There is not, and could not be an allegation that it is unreasonable for Sherwood to buy through Summit, or for Great Western Financial to require its subsidiaries in the savings and loan or escrow business to engage the services of the title company in which it likewise has an interest. 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, [\*\*\*\*30] cannot be held violative of the Sherman Act." ( *United States v. Columbia Steel Co., supra, 334 U.S. 495, 525 [92 L.Ed. 1533, 1553, 68 S.Ct. 1107]*.) Neither do exclusive dealing arrangements constitute boycotts ( *Rolley, Inc. v. Merle Norman Cosmetics, Inc., supra, 129 Cal.App.2d 844*), which consist, instead, of horizontal alliances between persons at the same level of distribution, who agree not to deal with some third person ( *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 [3 L.Ed.2d 741, 79 S.Ct. 705]; *Eastern States etc. Assn. v. United States*, 234 U.S. 600 [58 L.Ed. 1490, 34 S.Ct. 951, L.R.A. 1915A 788].) [] [No impropriety is alleged in the agreement of Sherwood to purchase from Summit and of Liberty to purchase from American.] An agreement between and among Sherwood and Liberty not to deal with appellants might, under proper circumstances, constitute a boycott, but there is no allegation that these parties or their superior interests agreed or accomplished by threat or violent means their alleged aim to coerce third parties not to deal with appellants. [( *Bus. & Prof. Code, § 17046*).] [] Once again, the claimed statutory [\*\*\*\*31] infraction is vague, conclusionary, and factually unsupported by the complaint.

[We have heretofore concluded that because plaintiffs' vague and conclusionary pleadings fail to allege sufficient facts, the complaint fails to state a violation of the Cartwright Act based on conduct, including boycotts, prohibited thereunder. ( *Bus. & Prof. Code, §§ 16720, 16727*.)] **CA(22a)**[  
**↑**] (22a) While the boycott statute ( *Bus. & Prof. Code, § 17046*) referred to in count eight makes it unlawful to use threats, [\*325] intimidation or boycott to effect a violation of the unfair trade practices laws, the complaint implies rather that respondents used the boycott to effect a restraint of trade ( *Bus. & Prof. Code, § 16727*). Counts five and ten allege that the facts of count one as to the activities of Sherwood and Summit, and of count eight with respect to the Lehman enterprises, respectively, constitute exclusive sales agreements and "tying-in" contracts which "may . . . substantially lessen competition or tend to create a monopoly. . . . ( *Bus. & Prof. Code, § 16727*.)

Again the allegations are inadequate. **HN10**[  
**↑**] The term "tying-in" contract has been applied judicially to those agreements whereby the seller or [\*\*\*\*32] lessor of patented, or unpatented, equipment requires the purchaser or

lessee to use only those unpatented accessory items manufactured or sold by the seller or lessor. ( [International Salt Co. v. United States, 332 U.S. 392 \[92 L.Ed. 20, 68 S.Ct. 12\]](#); [International Business Machines Corp. v. United States, 298 U.S. 131 \[80 L.Ed. 1085, 56 S.Ct. 701\]](#)).

**CA(23)[]** (23) "[A] tying arrangement may be defined as an agreement by a party to sell [\*\*494] [\*\*\*862] 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. Ry. Co. v. United States, 356 U.S. 1, 5-6 \[2 L.Ed.2d 545, 549-550, 78 S.Ct. 514\]](#).) A lending institution, however, has been traditionally entitled to require for its protection and as a condition of making the loan, a specific type of title policy from a particular source; the debtor-purchaser is free to obtain a policy to protect his equity from whatever source he chooses, though most frequently he relies upon the lender's policy.

**CA(22b)[]** (22b) Appellants fail to define the market by subject matter, total volume, proportion [\*\*\*\*33] controlled by defendants, availability to appellants of the subject matter or a competing subject matter, and availability to the public of the subject matter or a competing subject matter. ( [Apex Hosiery Co. v. Leader, 310 U.S. 469 \[84 L.Ed. 1311, 60 S.Ct. 982, 128 A.L.R. 1044\]](#); [Rolley, Inc. v. Merle Norman Cosmetics, Inc., supra, 129 Cal.App.2d 844, 851-852](#).) They fail to state facts from which it may be inferred that respondents control the title insurance market in Los Angeles County and can substantially exclude appellants from such market or limit the availability of title insurance to the public, and these matters are [\*326] essential to antitrust actions in which either monopoly or the attempt to create a monopoly in restraint of trade is charged. ( [A.B.C. Distributing Co. v. Distillers Distributing Corp., supra, 154 Cal.App.2d 175, 180, 190](#); [Milton v. Hudson Sales Corp., supra, 152 Cal.App.2d 418, 443-444](#); [Rolley, Inc., v. Merle Norman Cosmetics, Inc., supra, 129 Cal.App.2d 844](#).) We find no allegation that Security enjoys such a dominant position in the title industry that it can or does tie the sale of any other commodity to [\*\*\*\*34] the policies it sells. Presumably this the appellants cannot allege in view of the dominant position long occupied by Title Insurance and Trust Company in Los Angeles County, of which we may take judicial notice. Hence, there can be no unlawful tying agreement, and appellants do not allege that their rights to purchase freely on the open market have been thus infringed.

**CA(24)[]** (24) Finally, count eleven in grand finale incorporates all prior counts and concludes that by reason of everything so stated respondents have formed a trust or combination in restraint of trade ( [Bus. & Prof. Code, § 16720](#)), again a mere legal conclusion drawn from generalities. ( [Abouaf v. J. D. & A. B. Spreckels Co., 26 F.Supp. 830, 834](#); [Glenn Coal Co. v. Dickinson Fuel Co., 72 F.2d 885, 887](#).) **HN11[]** Where complainants are unsuccessful in establishing an action for conduct which "may . . . tend to create a monopoly" ( [Bus. & Prof. Code, § 16727](#)), they are a *fortiori* doomed to failure with respect to the full blown conduct they must allege to come within acts proscribed by statutes patterned on the Sherman Act ( [Bus. & Prof. Code, § 16720](#)); [Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 335 \[\\*\\*\\*\\*35\] \[5 L.Ed.2d 580, 591, 81 S.Ct. 623\]](#); cf. [Rolley, Inc. v. Merle Norman Cosmetics, Inc., supra, 129 Cal.App.2d 844](#).) There is a dangerous vice inherent in the complaint with which we are herein presented because it is ambiguous and investigatory in nature. **HN12[]** Respondents are entitled to know [] what acts constitute the alleged violations so that the time and expense involved in conducting an investigation and pursuing discovery may be reasonably limited, for the complaint might otherwise be construed as a blanket license to indulge in interrogatories, depositions, and motions to produce ad infinitum, ad nauseam. ( [Beegle v. Thompson, supra, 138 F.2d 875](#); [Leonard v. Socony-Vacuum Oil Co., supra, 42 F.Supp. 369](#); See: Yankwich, Leon R., "Short Cuts" in [Long Cases, 13 F.R.D. 41](#), and Committee Report of the Judicial Conference of the United States, "Procedure in Antitrust [\*327] and Other Protracted Cases" [13 F.R.D. 62](#).) This count which fails because of inadequate allegations of [\*\*495] [\*\*\*863] monopoly or monopoly power and lack of factual allegations of specific conduct in furtherance of a conspiracy or combination, is therefore insufficient as [\*\*\*\*36] to each of the defendants charged with conspiracy.

**CA(25a)[]** (25a) Appellants, by their conduct, demonstrate that they are unable or unwilling to amend to cure the defects specified in various special demurrers to their complaint which were sustained on similar grounds designated by two different trial judges. These include the ground that certain counts unite and fail to separately state several causes of action, that certain counts improperly unite several causes of action, and that each count is ambiguous, unintelligible and uncertain. We find each of these grounds well taken. **HN13[]** Leave to amend

further is properly denied when a plaintiff fails to amend to correct defects on the basis of which special demurrers to a previous complaint were sustained, or as directed by the court when sustaining such demurrers. ( [Aitken v. Southwest Finance Corp., 131 Cal.App. 95, 106 \[20 P.2d 1000\]](#); [Spencer v. Crocker First Nat. Bank, 86 Cal.App.2d 397, 401 \[194 P.2d 775\]](#).)

By irresponsible pleading containing unrestrained and unverified allegations, appellants attempt to secure the right by discovery to explore at random and at enormous expense to respondents, several large and important businesses [\*\*\*\*37] and their relationships with one another, namely, the savings and loan, escrow, title insurance and title businesses. The method used by appellants has been aptly characterized by Judge Kaus as a "shotgun" technique where plaintiffs deal solely in broad generalities and otherwise indulge in factual and legal conclusions, unsupported speculation and argumentative allegations. ( [Lesperance v. North American Aviation, Inc., 217 Cal.App.2d 336, 342-343 \[31 Cal.Rptr. 873\]](#).) [CA\(26\)\[↑\]](#) (26) "A demurrer does not . . . admit contentions, deductions or conclusions of facts or law which may be alleged in a complaint [citation]." ( [Marin v. Jacuzzi, 224 Cal.App.2d 549, 552 \[36 Cal.Rptr. 880\]](#).) As earlier signified by Judge Kaus, where the complaint is thus devoid of facts to support its legal conclusions of conspiracy "it is just as possible that the difficulty of the pleader arises from the fact that the events and relationships which would give rise to a cause of action never took place, as it is that they did take place but that the defendants did not tell plaintiffs about them" and the conclusion is inescapable [\*328] that "[the] failure to make a good pleading probably arises [\*\*\*\*38] in a lack of facts rather than in the fault of the pleader." ( [Dukes v. Kellogg, 127 Cal. 563, 565 \[60 P. 44\]](#).)

[CA\(25b\)\[↑\]](#) (25b) "HN14[↑] Abuse of discretion [by the trial court] is not shown where it is not indicated as to the manner in which it is proposed to amend nor the nature of the proposed amendment. [Citations.] Neither before the trial court nor before this court has plaintiff indicated the nature of a proposed amendment or the manner in which he would amend his complaint. Plaintiff has therefore failed to establish reversible error in the dismissal of the action. . ." ( [Starbird v. Lane, 203 Cal.App.2d 247, 262 \[21 Cal.Rptr. 280\]](#).) []

The order is affirmed.

**Dissent by:** MOSK

## Dissent

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MOSK, J. I dissent.

This case should not be decided on the pleadings; plaintiffs are entitled to a day in court in which to prove, if they can, the economic loss they allegedly suffered and continue to suffer as a result of the purported illegal acts of defendants. The court below, and now a majority of this court, impose upon plaintiffs a pleading straitjacket neither compelled by precedent nor consistent with the design of antitrust statutes.

After two demurrers were sustained, plaintiffs [\*\*\*\*39] filed a third amended complaint [\*\*496] [\*\*\*864] in which they comprehensively described the conduct of the defendants asserted to be unlawful. The complaint in essence charged that all of the activities were part of a single combination designed to injure plaintiffs. The trial court again sustained a demurrer, on the special ground that several causes of action were not separately stated.

Attempting to comply with the trial court's directions, plaintiffs divided their fourth amended complaint into 11 counts, and it is those counts which the trial court and the Court of Appeal dissected on general demurrer with the deft touch of a scalpel ordinarily reserved for a special demurrer or motion to strike. An order of dismissal was subsequently entered, and this appeal follows.

It is elementary that if a complaint can withstand a general demurrer, an order sustaining demurrers without leave to amend is erroneous even though special demurrers should be sustained and motions to strike granted. ( [Wennerholm v. \[\\*329\] Stanford University School of Medicine \(1942\) 20 Cal.2d 713, 718-719 \[128 P.2d 522, 141](#)

A.L.R. 1358.) I am convinced the complaint here states a cause [\*\*\*\*40] of action under the Cartwright Act and that regardless of infirmities in form revealed by the special demurrs, the general demurrer should not have been sustained without leave to amend. Even if all others failed, counts 1, 5, 10 and 11 effectively charge violations of the Cartwright Act when the complaint is viewed pursuant to the rules of liberal pleading permissible thereunder.

The Cartwright Act, generally proscribing combinations in restraint of trade, is patterned after the federal Sherman and Clayton Acts, and California decisions consistently rely on federal decisions in interpreting our act. ( People v. Building Maintenance etc. Assn. (1953) 41 Cal.2d 719, 724 et seq. [264 P.2d 31]; Speegle v. Board of Fire Underwriters (1946) 29 Cal.2d 34, 43 et seq. [172 P.2d 867]; People v. Santa Clara Valley Bowling etc. Assn. (1965) 238 Cal.App.2d 225, 232 [47 Cal.Rptr. 570]; People v. Inlaid Bid Depository (1965) 233 Cal.App.2d 851, 860-861 [44 Cal.Rptr. 206]; Shasta Douglas Oil Co. v. Work (1963) 212 Cal.App.2d 618, 625 [28 Cal.Rptr. 190].)

Although Cartwright is couched in terms of prohibited conduct with criminal sanctions and [\*\*\*\*41] the Attorney General is charged with its public enforcement, private enforcement is also authorized, deemed in the public interest, and encouraged. ( Radovich v. National Football League (1957) 352 U.S. 445, 453-454 [1 L.Ed.2d 456, 462-463, 77 S.Ct. 390]; Lawlor v. National Screen Service (1955) 349 U.S. 322, 329 [99 L.Ed. 1122, 1128, 75 S.Ct. 865]; Mach-Tronics, Inc. v. Zirpoli (9th Cir. 1963) 316 F.2d 820, 828.) Thus in Bruce's Juices v. American Can Co. (1947) 330 U.S. 743, 751-752 [91 L.Ed. 1219, 1225-1226, 67 S.Ct. 1015]. Justice Jackson emphasized the desirability of private enforcement of antitrust laws: "Where the interests of individuals or private groups or those who bear a special relation to the prohibition of a statute are identical with the public interest in having a statute enforced, it is not uncommon to permit them to invoke sanctions. This stimulates one set of private interest to combat transgressions by another without resort to governmental enforcement agencies. Such remedies have the advantage of putting back of such statutes a strong and reliable motive for enforcement which relieves the Government of cost of enforcement. [\*\*\*\*42] . . . It is clear Congress intended to use private self-interest as a means of enforcement and to arm injured persons with private [\*330] means to retribution when it gave to any injured party a private cause of action in which his damages are to be made good threefold, with costs of suit and reasonable attorney's fees." As in the federal acts, the California statute provides that a private party injured because of an antitrust violation may recover treble damages and attorney fees, as well as costs. ( Bus. & Prof. Code, § 16750, subd. (a).)

Pleading poses no unique problems under the Cartwright Act. By its express provisions, violations under the act may be [\*\*497] [\*\*\*865] pleaded in general terms: "In any indictment, information or *complaint* for any offense named in this chapter, it is sufficient to state the purpose or effects of the trust or combination, and that the accused is a member of, acted with, or in pursuance of it, or aided or assisted in carrying out its purposes, without giving its name or description, or how, when and where it was created." (Italics added.) ( Bus. & Prof. Code, § 16756.) In reviewing the sufficiency of an information in People [\*\*\*\*43] v. Sacramento Butchers' etc. Assn. (1910) 12 Cal.App. 471, 484-485 [107 P. 712], the court said: "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 the gist of the crime of conspiracy is in its formation for an unlawful purpose, . . . Therefore, the acts constituting the actual execution of the purpose of a criminal conspiracy are only evidence of the existence of such conspiracy, which is the ultimate fact to be proved in order to establish the wrongful act against which the statute inveighs." (See also United States v. Patten (1913) 226 U.S. 525 [57 L.Ed. 333, 33 S.Ct. 141, 44 L.R.A. N.S. 325].)

Although the code section does not qualify the word "complaint" as civil or criminal, defendants urge that the provisions for general pleading relate only to criminal charges and that one seeking treble damages in a civil action must allege with specificity the particular conduct constituting the claimed conspiracy in restraint of trade, the overt acts thereunder, and [\*\*\*\*44] the precise nature of the damages resulting therefrom. Thus, it is asserted, the instant complaint fails to allege a violation of the Cartwright Act because it avers only generally that the defendants conspired with the intent of unlawfully restraining trade and competition, without describing with particularity or clarity facts which are [\*331] descriptive of the claimed times, places, and other circumstances of the formation of the alleged illegal combinations, the role played therein by each defendant, or the specific overt acts committed in furtherance thereof.

I find no justification to hold that a private plaintiff, in seeking to assert an antitrust violation, must plead his cause with greater particularity than the state in an enforcement action. Although some earlier federal decisions held to a contrary view (*Beegle v. Thomson* (7th Cir. 1943) 138 F.2d 875, 881; *Leonard v. Socony-Vacuum Oil Co.* (W.D. Wis. 1942) 42 F.Supp. 369, 370-371; *Westor Theatres v. Warner Bros. Pictures* (D.N.J. 1941) 41 F.Supp. 757, 762), the more recent and prevailing federal cases hold that a private plaintiff need state no more than ultimate facts which, if true, would [\*\*\*\*45] entitle him to recovery. ( *Niagara of Buffalo, Inc. v. Niagara Mfg. & Distributing Corp.* (2d Cir. 1958) 262 F.2d 106, 107; *New Home Appliance Center, Inc. v. Thompson* (10th Cir. 1957) 250 F.2d 881, 883-884.) The question was considered in detail in *Nagler v. Admiral Corp.* (2d Cir. 1957) 248 F.2d 319. In rejecting the contention that an antitrust complaint must set out a detailed factual exposition, the court stated (at p. 325): "In testing whether this is a sufficient statement of claim upon which to base a lawsuit, we ought practically to consider the alternatives, both what can be expected and asked of antitrust plaintiffs and what can be accomplished by compulsive orders. Here seems to be the rock upon which attempts below to achieve more particularized pleading have definitely foundered; for the judges' directions double the bulk without increasing enlightenment, while they delay the cause and exhaust the time of several judges. . . ."

There is no basis for distinguishing between the nature of the prohibited conduct on the ground that the act is enforced in civil rather than criminal proceedings. The *Sacramento Butchers* case (1910) *supra*, 12 [\*\*\*\*461] *Cal.App. 471*, has been relied upon in support of the proposition in civil cases that "The gravamen of the offense [\*\*498] [\*\*\*866] against the Cartwright Act is the *mere formation of the combination or conspiracy for the unlawful purpose of restraining trade*. . . ." (Italics in original.) ( *People v. Santa Clara Valley Bowling etc. Assn.* (1965) *supra*, 238 Cal.App.2d 225, 238; cf. *Alfred M. Lewis, Inc. v. Warehousemen etc. Local No. 542* (1958) 163 Cal.App.2d 771, 783-784 [330 P.2d 53].) It is clear that the precise nature of the combination or conspiracy need not be alleged [\*332] or ultimately proved with particularity. "It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful." ( *American Tobacco Co. v. United States* (1946) 328 U.S. 781, 809 [90 L.Ed. 1575, 1594, 66 S.Ct. 1125]; see also *Eastern States Lbr. Assn. v. United States* (1914) 234 U.S. 600, 614 [58 L.Ed. 1490, 1500, 34 S.Ct. 951], L.R.A. 1915A 788.) Federal decisions, like the state [\*\*\*\*47] cases of *Santa Clara Valley* and *Alfred M. Lewis, Inc.*, make it abundantly clear that the conspiracy alone constitutes the actionable conduct. ( *United States v. Socony-Vacuum Oil Co.* (1940) 310 U.S. 150, 225, fn. 59 [84 L.Ed. 1129, 1168-1170, 60 S.Ct. 811].)

Defendant's contention that the complaint is insufficient because it fails to allege public injury resulting from the alleged restraints is not meritorious. "Congress [has] determined its own criteria of public harm and it [is] not for the courts to decide whether in an individual case injury [has] actually occurred. . . . Congress having thus prescribed the criteria of the prohibitions, the courts may not expand them. Therefore, to state a claim upon which relief can be granted . . . allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires." ( *Radiant Burners v. Peoples Gas Co.* (1961) 364 U.S. 656, 660 [5 L.Ed.2d 358, 361, 81 S.Ct. 365].) A contention similar to that of defendants here was rejected in *Klor's v. Broadway Hale Stores* (1959) 359 U.S. 207, 213-214 [3 L.Ed.2d 741, 745-746, 79 S.Ct. 705], [\*\*\*\*48] as follows: "Monopoly can as surely thrive by the elimination of such small businessmen, one at the time, as it can be driving them out in large groups. In recognition of this fact the Sherman Act has consistently been read to forbid all contracts and combinations which 'tend to create a monopoly,' whether 'the tendency is a creeping one' or 'one that proceeds at full gallop.' *International Salt Co. v. United States*, 332 U.S. 392, 396 [92 L.Ed. 20, 26, 68 S.Ct. 12]." (See also *People v. Santa Clara Valley Bowling etc. Assn.* (1965) *supra*, 238 Cal.App.2d 225, 235; *People v. Inland Bid Depository* (1965) *supra*, 233 Cal.App.2d 851, 860.)

In requiring specificity of allegations, the majority are apparently adapting classic conspiracy and fraud concepts to the Cartwright Act. In so doing, they improvidently muddy [\*333] the antitrust waters. While *section 1* of the Sherman Act outlaws every "contract, combination in the form of trust or otherwise, or conspiracy" in restraint of trade (15 U.S.C., § 1), the Cartwright Act makes no reference whatever to conspiracy. It outlaws, rather, every "trust" ( *Bus. & Prof. Code, § 16726*); and the term "trust" [\*\*\*\*49] is defined as "a combination of capital, skill or acts by two or more persons" for a number of specified purposes deemed by the Legislature to be detrimental to the economy of the state ( *Bus & Prof. Code, § 16720*).

Unstudied use of the term "conspiracy" in numerous Cartwright Act pleadings (see, e.g., [Willis v. Santa Ana etc. Hospital Assn. \(1962\) 58 Cal.2d 806, 808 \[26 Cal.Rptr. 640, 376 P.2d 568\]](#); *People v. Santa Clara Valley Bowling etc. Assn.* (1965) *supra*, [238 Cal.App.2d 225, 227](#)) may be the cause of misleading the defendants here and the courts below into insisting upon the pleading elements of an ordinary conspiracy charge in an antitrust complaint. Thus while [\[\\*\\*499\] \[\\*\\*\\*867\]](#) such cases as [Wise v. Southern Pac. Co. \(1963\) 223 Cal.App.2d 50, 65 \[35 Cal.Rptr. 652\]](#), demand not merely a conspiracy but also a "civil wrong producing damage to the plaintiff," the United States Supreme Court has made it abundantly clear that in reality no such requirement exists in the antitrust field: "It is not the form of the combination or the particular means used but the result to be achieved that the [antitrust] statute condemns. It is not of importance [\[\\*\\*\\*\\*50\]](#) whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition. . . ." ([American Tobacco Co. v. United States \(1946\) 328 U.S. 781, 809 \[90 L.Ed. 1575, 1594, 66 S.Ct. 1125\]](#).)

Such has always been the law of antitrust, in both public and private actions. Justice Day spoke for the Supreme Court to the same effect years ago in what is now the leading case on this question: "An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished if the result be hurtful to the public or to the individual against whom the concerted action is directed."

[\[\\*334\]](#) "When the retailer goes beyond his personal right, and, conspiring and combining with others of like purpose, seeks to obstruct the free course of interstate trade and commerce . . . he exceeds his lawful rights, and such action brings [\[\\*\\*\\*\\*51\]](#) him and those acting with him within the condemnation of the act of Congress. . ." (*Eastern States Lbr. Assn. v. United States* (1914) *supra*, [234 U.S. 600, 614 \[58 L.Ed. 1490, 1500\]](#).)

Any act, be it legal or illegal, when done pursuant to an agreement or combination the purpose or effect of which is to restrain trade in violation of the statute, is an act upon which relief can be granted to a private plaintiff as well as to a public agency. ([Simpson v. Union Oil Co. \(1964\) 377 U.S. 13 \[12 L.Ed.2d 98, 84 S.Ct. 1051\]](#); [Lessig v. Tidewater Oil Co. \(9th Cir. 1964\) 327 F.2d 459, 466](#).)

The distinction which the courts below failed to grasp is that, regardless of any need to allege overt acts in stating a cause of action for conspiracy under other statutes (cf. [Pen. Code, §§ 182, 184, 1104](#)), there is no such requirement in alleging an actionable antitrust violation. Fully applicable to a combination violative of the Cartwright Act is this summary of significant characteristics of federal requirements: "And it is likewise well settled that conspiracies under the Sherman Act are not dependent upon an overt act other than the act of conspiring. [Citations.] [\[\\*\\*\\*\\*52\]](#) It is the 'contract, combination . . . or conspiracy in restraint of trade or commerce' which [§ 1](#) of the Act strikes down, whether the concerted action be wholly nascent or abortive on the one hand, or successful on the other. [Citations.] And the amount of interstate or foreign trade involved is not material [citation] since [§ 1](#) of the Act brands as illegal the character of the restraint not the amount of commerce affected. [Citations.] In view of these considerations a conspiracy to fix prices violates [§ 1](#) of the Act though no overt act is shown, though it is not established that the conspirators had the means available for accomplishment of their objective, and though the conspiracy embraced but a part of the interstate or foreign commerce in the commodity." (*United States v. Socony-Vacuum Oil Co.* (1940) *supra*, [310 U.S. 150, fn. 59, at p. 225 \[84 L.Ed. at p. 1169\]](#).)

California practice unquestionably conforms to the foregoing rule, as indicated in *Alfred M. Lewis, Inc. v. Warehousemen etc. Local No. 542* (1958) *supra*, [163 Cal.App.2d 771, 783-784](#): [\[\\*335\]](#) "Under the Cartwright Act and similar antitrust [\[\\*\\*500\]](#) [\[\\*\\*\\*868\]](#) legislation, [\[\\*\\*\\*\\*53\]](#) the combination for a particular purpose constitutes the unlawful act. [Citations.] The prohibited combination comes into being through an agreement of two or more persons for the purpose of restraining trade or preventing competition. Conduct used to effect such an agreement may result in actionable damages or be the subject of an injunction, even though such conduct if not used to effect the agreement would be lawful."

In construing application of the federal Clayton Act, Justice Stone wrote in [Arrow-Hart & Hegeman Co. v. Commissioners \(1934\) 291 U.S. 587, 607 \[78 L.Ed. 1007, 1018, 54 S.Ct. 532\]](#) (dissenting opinion), "there must be a balance between the general and the particular. When the courts are faced with interpretation of the particular, administration breaks down and the manifest purpose of the legislature is defeated unless it is recognized that, surrounding granted powers, there must be a penumbra which will give scope for practical operation. In carrying such schemes into operation the function of courts is constructive, not destructive, to make them, wherever reasonably possible, effective agencies for law enforcement and not to destroy them."

For the [\*\*\*\*54] foregoing reasons, and in order to provide an effective means for implementing the state Cartwright Act, neither a private plaintiff nor the state need plead a cause of action thereunder with the particularity required in a conspiracy or fraud action. ( *People v. Sacramento Butchers' etc. Assn.* (1910) *supra*, [12 Cal.App. 471, 484-485.](#))

The instant complaint alleges in count 1, and incorporates into all the remaining counts, the following: "Defendants have jointly conspired to and in the execution of the goals of the conspiracy carried out the acts herein set forth with the intent and result of unlawfully restraining trade and competition by preventing [plaintiffs] from selling their title policies, with the intent and result of unlawfully injuring competitors and destroying competition and which constitute unfair methods of competition." While perhaps it could be phrased more artfully, this allegation, under settled rules of liberal construction ( *Speegle v. Board of Fire Underwriters* (1946) *supra*, [29 Cal.2d 34, 42](#)) sufficiently states the "purpose or effects of the trust or combination," and avers that each defendant "is a member of, acted with, or in pursuance [\*\*\*\*55] of" the combination. ( [Bus. & Prof. Code, I\\*3361 § 16756.](#)) Although the allegation may be conclusionary in nature, the inclusion of such conclusionary matters with ultimate facts is permissible in certain situations [Burks v. Poppy Constr. Co. \(1962\) 57 Cal.2d 463, 473-474 \[20 Cal.Rptr. 609, 370 P.2d 313\].](#)

It thus appears that plaintiffs have stated a cause of action under the Cartwright Act, a cause which has been incorporated into each of the 11 counts. The complaint may be specially demurrable, but it states at least one cause of action beyond the reach of a general demurrer. The sustaining of the general demurrs without leave to amend was therefore error. ( *Wennerholm v. Stanford University School of Medicine* (1942) *supra*, [20 Cal.2d 713, 718-719; Eustace v. Dechter \(1938\) 28 Cal.App.2d 706, 710-711 \[83 P.2d 523\].](#))

I would reverse the judgment with directions to the trial court to vacate the orders sustaining the demurrs and granting the motions to strike, to overrule the general demurrs, and to rule on the points presented by the special demurrs and the motions [\*\*\*\*56] to strike.



## Oakland-Alameda County Builders' Exchange v. F. P. Lathrop Constr. Co.

Supreme Court of California

March 23, 1971

S.F. No. 22763

### **Reporter**

4 Cal. 3d 354 \*; 482 P.2d 226 \*\*; 93 Cal. Rptr. 602 \*\*\*; 1971 Cal. LEXIS 318 \*\*\*\*; 1971 Trade Cas. (CCH) P73,524

OAKLAND-ALAMEDA COUNTY BUILDERS' EXCHANGE et al., Plaintiffs and Appellants, v. F. P. LATHROP CONSTRUCTION COMPANY, Defendant and Respondent

**Prior History:** [\*\*\*\*1] Superior Court of Alameda County, Lewis E. Lercara, Judge.

**Disposition:** We conclude that the rules of the Oakland-Alameda County Bid Depository impose requirements upon participating subcontractors and general contractors which involve illegal price tampering and group boycotts. Therefore the judgment of the trial court is affirmed.

## **Core Terms**

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bid, Depository, subcontractors, general contractor, subbids, price competition, lowest, classification, deposited, prices, participating, invalidated, withdraw, locked, box, group boycott, withdrawn, boycott, opening, closing time, practices, restrain, per se violation, sealed envelope, anti trust law, price-fixing, contractor, envelope, peddling, supplier

## **LexisNexis® Headnotes**

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

**HN1** [blue download icon] **Regulated Practices, Trade Practices & Unfair Competition**

See [Cal. Bus. & Prof. Code § 16720](#).

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

**HN2** [blue download icon] **Regulated Practices, Trade Practices & Unfair Competition**

See [Cal. Bus. & Prof. Code § 16726](#).

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

### **HN3[] Practices Governed by Per Se Rule, Boycotts**

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 the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements. 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.

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

### **HN4[] Sherman Act, Scope**

Under both California and federal law, agreements fixing or tampering with prices are illegal per se.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

### **HN5[] Regulated Practices, Price Fixing & Restraints of Trade**

The Cartwright Act merely articulates in greater detail a public policy against restraint of trade that has long been recognized at common law. The public interest requires free competition so that prices be not dependent upon an understanding among suppliers of any given commodity, but upon the interplay of the economic forces of supply and demand.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

### **HN6[] Horizontal Refusals to Deal, Boycotts**

Group boycotts are illegal per se under traditional antitrust principles. 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, parceled out or limited production, or brought about a deterioration in quality. Even when they operated to lower prices or temporarily to stimulate competition they were banned. For 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.

## Headnotes/Summary

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### Summary

#### CALIFORNIA OFFICIAL REPORTS SUMMARY

A builder's exchange and two subcontractors brought an action against a general contractor alleging that defendant had breached the rules of a "locked box" bid depository operated by the exchange and to which defendant had subscribed. The rules in question provided that subbids be sealed and unavailable to general contractors until after the deadline; and that general contractors using the depository must accept the lowest bid submitted through it. Plaintiff subcontractors' bids for painting and floor covering work in connection with construction of a college auditorium were the lowest placed through the depository in their respective trade categories, but defendant rejected them because it had received lower figures from two other subcontractors who had not submitted their offers through the depository. Defendant's answer admitted violation of the depository rules but alleged that the rules were unenforceable because they constituted per se violations of the Cartwright Act. The trial court agreed with defendant's allegation and granted it judgment on the pleadings on that basis. (Superior Court of Alameda County, Lewis E. Lercara, Judge.)

The Supreme Court affirmed the judgment of the trial court. After analyzing the challenged provisions in detail in light of established principles of **antitrust law** against price-fixing and group boycotts and in favor of free competition, the court discussed cases from other courts invalidating similar rules, and concluded that the challenged bid depository rules imposed requirements on participating subcontractors and general contractors which involved illegal price tampering and group boycotts. (Opinion by Mosk, J., expressing the unanimous view of the court.)

### Headnotes

#### CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to McKinney's Digest

##### CA(1) [blue] (1)

###### **Monopolies § 1—"Per Se" Doctrine.**

--The doctrine of "per se" illegality under **antitrust law** 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 and prohibited by the antitrust laws regardless of any asserted justification or alleged reasonableness.

##### CA(2) [blue] (2)

###### **Monopolies § 6—Under Cartwright Act—Agreements and Combinations Prohibited.**

--The rules of a "locked box" bid depository operated by a builder's exchange created a combination of subcontractors with the purpose and effect of restraining open price competition among subcontractors and thus constituted a per se violation of the Cartwright Act, where all subbids were sealed so that no subcontractor was aware of the bids of his competitors, where the subbids were not made available to the general contractors until after the deadline for the submission of further subbids, where subcontractors could not withdraw or revoke bids after the deadline, and where general contractors using the depository were compelled to accept the lowest bid submitted through it; thus, the rules constituted, in essence, an agreement by subscribing subcontractors not to

engage in open price competition in the submission of their bids to general contractors and an agreement by participating general contractors not to deal with non-cooperating subcontractors.

**CA(3) [ ] (3)**

**Monopolies § 6—Under Cartwright Act—Agreements and Combinations Prohibited.**

--A rule of a "locked box" bid depository operated by a builder's exchange resulted in a group boycott by participating general contractors against nonparticipating subcontractors and thus constituted a per se violation of the Cartwright Act, where it required a general contractor who elected to receive any bids for a craft or classification to agree that, if successful as the prime bidder, he would award the contract in the particular classification to the lowest bidder whose bid he received through the bid depository; thus the rule was the means by which subcontractors agreeing not to engage in open price competition enforced their methods against uncooperative subcontractors.

**CA(4) [ ] (4)**

**Monopolies § 6—Under Cartwright Act—Agreements and Combinations Prohibited.**

--A rule of a "locked box" bid depository operated by a builder's exchange resulted in a boycott by participating subcontractors of all general contractors who did not use the depository and thus constituted a per se violation of the Cartwright Act, where it required a subcontractor proposing to submit a bid through the depository to any person to submit to the depository sealed bids addressed to each general contractor to whom the subcontractor desired to bid; thus, no subcontractor using the depository for one or more bids could bid to a general contractor except through the depository. (Disapproving [Associated Plumbing Contractors of Marin etc. Counties, Inc. v. F. W. Spencer & Son, Inc. \(1963\) 213 Cal.App.2d 1 \[28 Cal.Rptr. 425\]](#) to the extent it is inconsistent herewith.)

**Counsel:** MacDonald, Brunsell & Walters and William Walters for Plaintiffs and Appellants.

Robert J. Foley, Foley, McIntosh & Foley, Foley, Saler & Doutt, William H. Orrick, Jr., and Orrick, Herrington, Rowley & Sutcliffe for Defendant and Respondent.

Thomas C. Lynch and Evelle J. Younger, Attorneys General, and Wallace Howland, Deputy Attorney General, as Amici Curiae on behalf of Defendant and Respondent.

**Judges:** In Bank. Opinion by Mosk, J., expressing the unanimous view of the court. Wright, C. J., McComb, J., Peters, J., Tobriner, J., Burke, J., and Sullivan, J., concurred.

**Opinion by:** MOSK

## **Opinion**

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[\*356] [\*227] [\*\*\*603] Plaintiffs appeal from a judgment on the pleadings rendered in favor of defendant in their action for declaratory relief and damages for breach of the rules of a bid depository. We here determine whether certain of the [\*\*\*\*2] rules of the bid depository constitute per se violations of the **antitrust law** of California.

Bid depositaries are creations of the construction industry, generally established by construction trades subcontractors to control the process of submitting subbids to general contractors who are bidding on large [\*357] construction jobs. The operation of a typical bid depository is succinctly described by a commentator as follows: "A 'locked box' procedure is the most common method of depository operation. Subcontractors wishing to bid to one or more general contractors on a certain job submit bids in sealed envelopes to the depository. An envelope

containing a bid addressed to each general contractor to whom the subcontractor wishes to bid is placed in the 'locked box,' and another envelope containing a copy of that bid is addressed to the depository itself and similarly deposited in the box or another secure receptacle. There will be a cut-off point, typically 4 hours or so before the prime bid opening time (i.e., the time by which all bids must be submitted to the owner or awarding authority), and after that cut-off point (or depository closing time) is reached, no more [\*\*\*\*3] bids may be received, and none received may be amended or withdrawn.

"Promptly at the depository closing time, the locked box is opened, and the envelopes contained therein are dispensed to the general contractors to whom addressed. Each general contractor then prepares his own bid to the owner or awarding authority based upon subbids received and his estimates of his own work costs." (Orrick, *Trade Associations Are Boycott-Prone -- Bid Depositories As A Case Study* (1968) 19 Hastings L.J. 505, 520.)

The "locked box" operation is said to serve several salutary purposes. It permits [\*\*228] [\*\*\*604] orderly preparation of bids and estimates by providing a reasonable time for computations, and thereby reduces error. Also, it tends to prevent "bid piracy" which occurs when one subcontractor is able to avoid the expense of preparing his own bid by using the bid submitted by another subcontractor as a starting vehicle. Most importantly, it inhibits practices known variously as "bid shopping," "bid peddling," and "bid chiseling." These pejorative expressions appear to be used interchangeably to describe (1) the practice of a general contractor who, before the [\*\*\*\*4] award of the prime contract, discloses to interested subcontractors the current low subbids on certain subcontracts in an effort to obtain lower subbids, (2) the identical practice of a general contractor engaged in after he has been awarded the prime contract, and (3) the practice of a subcontractor who determines the currently low subbid on a subcontract and then submits a lower bid to the general contractor in return for assurance from the general that the sub will receive the subcontract if the general is the successful prime bidder. (*Id.* at pp. 520-521; Schueller, *Bid Depositories* (1960) 58 Mich.L.Rev. 497, 498 and fn. 6, 499-500.)<sup>1</sup>

[\*\*\*\*5] [\*358] Plaintiffs in the instant action are the Oakland-Alameda County Builders' Exchange, which operates a "locked box" bid depository (Depository), and two subcontractors. Defendant is a general contractor. On March 1, 1966, defendant received bids from various subcontractors to be used by it in computing its prime bid for the construction of an auditorium at Chabot College. Most of the subbids received by defendant were submitted through the Depository. Defendant was awarded the construction contract, and it proceeded to award the various subcontracts on the basis of the bids received.

Plaintiff subcontractors had submitted their bids for the painting and floor covering work through the Depository, and their bids were the lowest placed through the Depository in their respective trade categories. Nevertheless, defendant did not accept the two bids because it had received lower painting and floor covering figures from two other subcontractors who had not submitted their offers through the Depository. As a consequence, defendant rejected the bids of plaintiff subcontractors and accepted the lower bids.

The Builders' Exchange and the two subcontractors brought suit against [\*\*\*\*6] defendant, alleging that defendant had breached the rules of the Depository to which it had subscribed and that plaintiff subcontractors were entitled to damages. Defendant answered, admitted the rules of the Depository and its violation of them, but alleged that the rules were unenforceable because they constituted per se violations of the Cartwright Act, *Business and Professions Code sections 16720, subdivisions (a)* and (e)(4), and 16726.<sup>2</sup> The trial court agreed with defendant's contention and granted judgment on the pleadings to defendant on that basis.

<sup>1</sup> Some authorities draw precise distinctions among the several expressions. "Bid chiseling" is limited to the practice of a general contractor who solicits lower sub-bids after he has been awarded the prime contract. "Bid shopping" is used to refer to such solicitation by general contractors before the award of the prime contract. And "bid peddling" applies to the conduct of a subcontractor. (See *People v. Inland Bid Depository* (1965) 233 Cal.App.2d 851, 863-864 [44 Cal.Rptr. 206]; Comment (1970) 18 U.C.L.A. L.Rev. 389, 394.)

<sup>2</sup> *Section 16720: HN1*  "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. . . . (e) To make or enter into or execute or carry out any

[\*\*\*\*7] [\*\*229] [\*\*\*605] The specific rules of the Oakland-Alameda Bid Depository which defendant [\*359] and the Attorney General of California, by amicus curiae brief, contend are in violation of *Business and Professions Code sections 16720* and *16726* are the following:

Rule 4. "All bids submitted through the Bid Depository shall be actually delivered to the Bid Custodian by mail, or in person, or otherwise, as follows. . ." The rule then sets forth a chart which establishes the Depository closing time as four hours prior to the prime opening time, when the prime bid opening time is between 1 p.m. and 5 p.m. on a business day. When the prime bid opening time is between 9 a.m. and 12 noon, the Depository closing time is 4 p.m. on the working day immediately previous.

Rule 6a. "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 [\*\*\*\*8] 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. . . ."

Rule 7. "Immediately upon receipt of any bid for a specified project it shall be deposited in a Bid Depository box in which sealed bids can be deposited but not removed when locked. The Bid Depository box for each project shall be locked upon deposit of the first bid deposited therein and shall be kept locked until the time for depositing bids upon that project as specified in Rule 4 hereof has expired."

Rule 8a. "Any bid deposited with the Bid Depository may be revoked by the person submitting the same at any time prior [\*\*\*\*9] to the expiration of the time for depositing bids upon the project involved as specified in Rule 4 hereof. . . . 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 . . . unless, prior to general bid opening . . . [the] subcontractor or supplier [\*360] gives notice to all general contractors to whom he has bid of a substantial mistake. . . . 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."

Rule 9a. "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 [\*\*\*\*10] 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 the general contractor may reject the bid of any subcontractor with whom he does not desire to contract . . . by immediately returning to the Bid Custodian, unopened, the envelope containing the bid of such subcontractor. . . . c. If a general contractor elects to receive delivery through the Bid Depository of one or more bids for a craft or [\*\*230] [\*\*\*606] 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. . . . 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

contracts, obligations or agreements of any kind or description, by which they do all 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 . . . article or commodity, that its price might in any manner be affected."

*Section 16726: HN2* [↑] "Except as provided in this chapter, every trust is unlawful, against public policy and void."

Depository. Such form shall require the general contractor to abide by the [\*\*\*\*11] Rules of the Bid Depository as to the particular project."

The defendant and the Attorney General contend that these rules, singularly and in combination, are per se violations of the Cartwright Act because they create (1) a combination of participating subcontractors and general contractors to restrain open price competition among subcontractors, (2) a group boycott by participating general contractors against nonparticipating subcontractors, and (3) a group boycott by participating subcontractors against nonparticipating general contractors. They assert that the illegality of the Depository rules may be established, first, by reference to general principles of antitrust law applicable in California and the federal courts and, second, by reference to three appellate decisions concerned specifically with the antitrust implications of bid depositories. We conclude that the contentions are meritorious and, therefore, we affirm the trial court's judgment.

**CA(1)** [↑] (1) At the outset, it may be helpful to review the concept of per se [\*361] illegality under antitrust law as aptly summarized in a recent Court of Appeal opinion: "In response to the attempts of antitrust defendants [\*\*\*\*12] 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 [citation]. 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, but rather encompasses certain practices that normally tend to eliminate competition. As the United States Supreme Court recently stated in Northern Pac. Ry. Co. v. United States, 356 U.S. 1 [2 L.Ed.2d 545, 78 S.Ct. 514]: '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 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 [\*\*\*\*13] 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 [2 L.Ed.2d at p. 549].)

"However, **HN3** [↑] 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 inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, [citation]; [\*\*\*\*14] division of markets, [citation]; [\*\*231] [\*\*\*607] group boycotts, [citation]; and tying arrangements, [citation].' ( P. 5 [2 L.Ed.2d at pp. 549-550].)

"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." ( People v. Santa Clara Valley Bowling etc. Assn. (1965) 238 Cal.App.2d 225, 233-234 [47 Cal.Rptr. 570]. ) (Fn. omitted.)<sup>3</sup>

**CA(2)** [↑] (2) The first contention of the defendant and the Attorney General is that the Oakland-Alameda Bid Depository [\*\*\*\*15] is a combination of subcontractors with the purpose and effect of restraining open price competition among subcontractors. We agree.

Plaintiffs' complaint states that the purpose of the Depository was to inhibit "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

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<sup>3</sup> Because the Cartwright Act is patterned after the federal Sherman Act and both have their roots in the common law, federal cases interpreting the Sherman Act are applicable in construing 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]. )

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." Plaintiffs contend that defendant engaged in "bid peddling" by soliciting lower subbids outside the Depository for the floor covering and painting work.<sup>4</sup> Instead of being a vice, however, it is readily apparent that the practice defined as "bid peddling" is illustrative of open price competition in its purest form. To the extent that general contractors disclose the lowest subbids to competing subcontractors and thereby induce the subcontractors to make still lower subbids, the general contractors are able to offer lower prime bids to the awarding authority. The awarding authority, the taxpayers in the case of public projects and consumers [\*\*\*\*16] in other instances, are the true beneficiaries. To obtain the lowest possible bid is the object of competitive bidding.

Rules 4, 6, 7, 8, and 9 of the Bid Depository combine to create [\*\*\*\*17] a system of bidding virtually devoid of open price competition. The subbids are sealed so that no subcontractor is aware of the bids of his competitors; the subbids are not made available to the general contractors until after the deadline for the submission of further subbids; subcontractors may not withdraw or revoke their bids after the deadline for submission of subbids [\*363] except in the case of mistake, and any withdrawal of a bid is penalized by the requirement that combination bids containing an item withdrawn must also be withdrawn; general contractors using the Depository to receive any subbids are compelled to accept the lowest bid submitted through the Depository. Thus, neither general contractors nor interested subcontractors who use the Depository are able to exercise initiative to instigate open price competition among subcontractors and by that means to stimulate lower subbids. If a general contractor believes the subbids he has received through the Depository are too high, he must nevertheless accept the lowest of them or withdraw from the bidding on the prime [\*\*232] [\*\*\*608] contract. In essence, the rules constitute an agreement by subscribing [\*\*\*\*18] subcontractors not to engage in open price competition in the submission of their bids to general contractors and an agreement by participating general contractors not to deal with subcontractors who do not cooperate.

**HN4**[] Under both California and federal law, agreements fixing or tampering with prices are illegal per se. The principle was stated clearly by the United States Supreme Court: "[For] over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense. . . . Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The [Sherman] Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference." ([U.S. v. Socony-Vacuum Oil Co. \(1940\) 310 U.S. 150, 218, 221 \[84 L.Ed. 1129, 1165, 1167, 60 S.Ct. 811\].](#)) [\*\*\*\*19]

In [Speegle v. Board of Fire Underwriters \(1946\) 29 Cal.2d 34, 44 \[172 P.2d 867\]](#), we delineated a similar policy underlying the Cartwright Act: **HN5**[] "The Cartwright Act merely articulates in greater detail a public policy against restraint of trade that has long been recognized at common law. . . . The public interest requires free competition so that prices be not dependent upon an understanding among suppliers of any given commodity, but upon the interplay of the economic forces of supply and demand." (See also [People v. Building Maintenance etc. Assn. \(1953\) 41 Cal.2d 719, 727 \[264 P.2d 31\]](#).) It should be apparent that the "economic forces of supply and demand" can have little impact on a bidding system which is conducted in secrecy and which leaves general

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<sup>4</sup>There is no contention that defendant engaged in the practice defined in the complaint as "bid shopping." Although also a form of price competition, bid shopping is less desirable than bid peddling because only the general contractor, and not the awarding authority or the public, benefits from this practice. Post-award bid shopping is prohibited in California on public works construction projects by [Government Code section 4104](#), which requires general contractors, at the time they submit their prime bids, to list the names of the subcontractors whose bids were accepted in the computation of their prime bids. Thus, general contractors are not free to solicit lower subbids once they have been awarded the prime contract. (See Comment (1970) *supra*, [18 U.C.L.A. L.Rev. 389, 396, 402-404.](#))

[\*364] contractors no alternative but to accept the lowest bids submitted through the Depository or withdraw from the bidding.<sup>5</sup>

[\*\*\*\*20] Relying on *Socony*, a federal circuit court invalidated a price-fixing scheme similar in its purpose and effect to the rules of the Depository. In [United States v. Gasoline Retailers Association, Inc. \(7th Cir. 1961\) 285 F.2d 688](#), an agreement among gas station operators not to advertise their retail prices for gasoline was invalidated as a price-fixing conspiracy. The court recognized that the purpose and effect of the agreement was to reduce open price competition among the operators, and was unimpressed with the operators' avowed intent of preventing the competitive evil of "gas wars." In the instant action, participants in the Depository impose a rule of silence no less stifling to open price competition than the agreement not to advertise, and they do so in the guise of preventing the competitive evil of "bid peddling." As in *Gasoline Retailers*, the sellers (subcontractors) agree not to publicize their prices (bids), and the buyers (general contractors) are deprived of the benefit of purchasing at the lowest price available in a free enterprise system of open price competition.

**CA(3)** (3) Related to the general charge that the rules of the Depository [\*\*\*\*21] restrain open price competition and unlawfully tamper with the pricing structure is the more specific assertion that rule 9c, in the context of the other rules, necessarily results in agreements by general contractors to boycott subcontractors whose bids are not processed through the Depository. Rule 9c requires [\*\*233] [\*\*\*609] a general contractor, who "elects to receive delivery through the Bid Depository of one or more bids for a craft or classification," to agree that, "if he is the successful prime bidder," he will award the contract in the particular classification "to the lowest bidder whose bid he receives through the Bid Depository." (Italics added.)

The unmistakable impact of rule 9c upon subcontractors who do not submit their bids through the Depository directly, or indirectly under rule 6b, is that they are boycotted by participating general contractors who are not permitted to accept such bids even when they are the lowest submitted in a particular classification. A general contractor who wishes to receive any bids through the Depository in a particular classification must promise to accept only bids submitted through the Depository in that classification; [\*\*\*\*22] general contractors must use the Depository exclusively or [\*365] not at all. Thus, rule 9c is the means by which subcontractors who have agreed not to engage in open price competition enforce their methods against uncooperative subcontractors.

We need not belabor the obvious in noting that **HN6** group boycotts are illegal per se under traditional antitrust principles. As stated by the United States Supreme Court in [Klor's v. Broadway-Hale Stores \(1959\) 359 U.S. 207 \[3 L.Ed.2d 741, 79 S.Ct. 705\]](#), at page 212 [[3 L.Ed.2d at p. 744](#)]: "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.' [Citations.] 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 \[95 L.Ed. 219, 223, 71 S.Ct. 259\]](#), [\*\*\*\*23] '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.'" (Fn. omitted.)

Plaintiffs respond that the provisions of rule 6b, which permit a general contractor to receive bids outside the Depository if he then submits them to the Depository, cure any illegal boycott effect of rule 9c. The contention is specious. Despite rule 6b, general contractors, must, as a condition precedent to receiving any bids through the Depository, agree to accept only those bids submitted through the Depository. In other words, general contractors must promise not to deal with subcontractors who refuse to abide by the Depository rules designed to restrain open price competition. All that rule 6b accomplishes is to reduce the number of outside subcontractors with whom a

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<sup>5</sup> In the system of bidding between general contractors and the awarding authority, the latter always has available the means by which it can increase competition among general contractors and arrive at lower prime bids. If, fortuitously or by collusion, all of the prime bids submitted on a particular project are too high, the awarding authority may simply reject all of them and reopen bidding on the project.

general contractor must refuse to deal under rule 9c by the number of subbids which he has timely deposited under rule 6b.

**CA(4) [4]** (4) The third contention made by defendant and the Attorney General is that rule 6a results in a boycott by participating subcontractors of all general contractors who do not use the Depository. [\*\*\*\*24] Analysis of the language of the rule would seem to justify their apprehension. Any subcontractor who proposes to submit a bid through the Depository "to any person" must submit to the Depository sealed bids addressed "to each general contractor to whom the subcontractor . . . desires to bid." Because the group of general contractors "to whom the subcontractor desires to bid" may embrace some general contractors who do not use the Depository as well as those who do, the effect of rule 6a is to require subcontractors using the Depository to submit to it all of the bids they desire to make on a particular [\*366] job. Thus, no subcontractor using the Depository for one or more bids may bid to a general contractor except [\*\*234] [\*\*\*610] through the Depository. Although plaintiffs deny that the Depository rules involve any boycott by subcontractors against nonparticipating general contractors, they do not deal specifically with the language of rule 6a or offer a rational alternative interpretation.

The foregoing analysis of the provisions of the Depository rules in light of the established principles of **antitrust law** against price-fixing and group boycotts and in favor [\*\*\*\*25] of free competition clearly justifies the conclusion reached by the trial court that the rules are illegal per se. However, we do not rely exclusively on our independent analysis of the Depository rules, nor do we here follow an uncharted course, for similar rules have been invalidated in persuasively reasoned opinions of other courts.

In *Christiansen v. Mechanical Contractors Bid Depository (D.C. Utah 1964) 230 F.Supp. 186*, affirmed (10th Cir. 1965) [352 F.2d 817](#), certiorari denied (1966) 384 U.S. 918 [16 L.Ed.2d 439, 86 S.Ct. 1365], the federal courts reflected upon organizational features of bid depositories. In rendering judgment in favor of a dissident subcontractor and against a bid depository, the district court specifically considered and invalidated three rules of the bid depository. Although two of the rules concerned matters not relevant to the instant action, the third (rule V) was the precise counterpart of rule 9c of the Oakland-Alameda Bid Depository and required subscribing general contractors to use only bids submitted through the depository in preparing their prime bids. The district court stated: "The Depository [\*\*\*\*26] argues that these restraints are reasonable and thus justified by a rule of reason. 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. . . . The rules tend to compel general contractors to affiliate with the Depository because of economic pressure in obtaining representative bids and to boycott subcontractors not bidding through the Bid Depository. They further encourage mechanical subcontractors bidding through the Bid Depository to boycott general contractors who do not sign the Depository Agreement. Also, they tend to limit and narrow the freedom of the general contractor to select his mechanical subcontractors." ([230 F.Supp. at pp. 189-190](#).) (Fns. omitted.)<sup>6</sup>

[\*\*\*\*27] [\*367] Appellants seek to avoid the devastating impact of *Christiansen* by attempting to distinguish the case. They contend that the district court in *Christiansen* heard evidence and found actual economic pressure on general contractors to boycott nondepositing subcontractors and other abusive practices, while in the instant case the trial court rendered judgment on the pleadings based on the depository rules alone. But the *Christiansen* court explicitly declared that its judgment was based solely on the illegality of the rules themselves: It "concluded that the latter contentions [of specific coercive practices and other abuses "beyond the purport of the rules"] have not been sufficiently sustained, beyond the purport and expressed intent of the formal Depository rules themselves, to establish Sherman Act liability. . . . The rules themselves, however, constitute the agreement or combination in

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<sup>6</sup> Despite this unequivocal language, the circuit court, in affirming the district court's decision, sought to limit the holding: "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](#).)

restraint of trade or in furtherance of monopoly upon which liability, if it exists, primarily must be founded." ([230 F.Supp. at p. 188.](#)) (Fn. omitted.)

[\*\*235] [\*\*\*611] It is also suggested that *Christiansen* may be distinguished because use of [\*\*\*\*28] the depository in that case was restricted to subcontractors who were members of the depository. Therefore, the argument runs, the requirement that the general contractor use the bid of a member served to boycott subcontractors who were not members of the depository. While this may be a minor factual difference from the case at bar, it is of no significance in evaluating the essential rule. The only requirement for "membership" in the depository in *Christiansen* was that the prospective member be a contractor in a subtrade serviced by the depository -- in other words, a subcontractor. Membership in the *Christiansen* bid depository denoted nothing more than that a subcontractor agreed to abide by depository rules, precisely as participating subcontractors did in the instant case. Here, the group of nonusing subcontractors who are boycotted under rule 9c is identical to the group of nonmember subcontractors boycotted in *Christiansen*.

[\*People v. Inland Bid Depository, supra, 233 Cal.App.2d 851,\*](#) followed *Christiansen* and provides California precedent in support of the trial court judgment. Reasonably read, *Inland Bid* constitutes persuasive [\*\*\*\*29] support for the views of the defendant and the Attorney General in the instant case. The Court of Appeal there affirmed the trial court's determination that depository rules similar to rule 9c and rule 6a were illegal per se under the [[\\*368](#)] Cartwright Act.<sup>7</sup> In addition, the court invalidated a rule identical to rule 4, establishing a four-hour bid depository closing time.

The third in the line of significant authorities is [\*Carl N. Swenson Co. v. E. C. Braun Co. \(1969\) 272 Cal.App.2d 366 \[77 Cal.Rptr. 378\].\*](#) In that case, plaintiff general contractor sued defendant [[\\*\\*\\*\\*30](#)] subcontractor for breach of depository rules when the defendant withdrew its bid after the expiration of the period authorized by the rules. Plaintiff conceded that depository rules identical to rules 4 and 9c were invalid under *Christiansen* and *Inland Bid*, but it argued that only the rules restricting the right of subcontractors to withdraw their bids after the bid depository closing time were directly involved in its appeal. The Court of Appeal agreed, but it held that the withdrawal rules were also illegal per se because they prevented subcontractors from competitively lowering their bids during the period just before the general bid opening time and they required withdrawal of combination bids. The withdrawal rules invalidated in *Swenson* were virtually identical to the provisions in rule 8, subdivisions b and d, of the Oakland-Alameda Bid Depository. Viewed with *Christiansen* and *Inland Bid*, *Swenson* is the third in a consistent line of cases in support of the trial court's judgment on the pleadings in the case at bar.

Plaintiffs rely on [\*Associated Plumbing Contractors of Marin etc. Counties, Inc. v. F. W. Spencer & Son, Inc. \(1963\) 213 Cal.App.2d 1 \[28 Cal.Rptr. 425\]\*](#) [\*\*\*\*31] and [\*United States v. Bakersfield Associated Plumbing Contractors, Inc.\*](#) (S.D. Cal. 1958) 1958 Trade Cases, par. 69087, 1959 Trade Cases, par. 69266. Reliance on *Spencer* is entirely misplaced because the case is easily distinguishable from the instant case and from *Christiansen*, *Inland Bid*, and *Swenson*. An earlier case than any of the foregoing, *Spencer* concerned only the practice of post-award bid shopping and validated depository rules which prohibited that practice. Furthermore, it is not evident that the depository rules in *Spencer* required general contractors to accept the lowest bids submitted through the depository. To the extent that the language of the [[\\*\\*236](#)] [[\\*\\*\\*612](#)] case or its general approach to the problem of the antitrust implications of bid depositories is inconsistent with the views we express herein, it is disapproved. The still earlier *Bakersfield* case, a district court decision, is distinguished in *Christiansen* ([230 F.Supp. at fn. 21, pp. 193-194](#)) and *Inland Bid* ([233 Cal.App.2d at p. 858](#)) on the basis [[\\*369](#)] of asserted factual differences among the rules involved and, in any [[\\*\\*\\*\\*32](#)] event, is unpersuasive.

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<sup>7</sup> Referring to the rule requiring general contractors to accept the lowest bid submitted through the depository, the Court of Appeal stated: "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 construction industry." ([233 Cal.App.2d at pp. 859-860.](#))

We conclude that the rules of the Oakland-Alameda County Bid Depository impose requirements upon participating subcontractors and general contractors which involve illegal price tampering and group boycotts. Therefore the judgment of the trial court is affirmed.

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End of Document



## Corwin v. Los Angeles Newspaper Service Bureau, Inc.

Supreme Court of California

May 17, 1971

L.A. No. 29799

**Reporter**

4 Cal. 3d 842 \*; 484 P.2d 953 \*\*; 94 Cal. Rptr. 785 \*\*\*; 1971 Cal. LEXIS 364 \*\*\*\*; 1971 Trade Cas. (CCH) P73,582

HAROLD CORWIN et al., Plaintiffs and Appellants, v. LOS ANGELES NEWSPAPER SERVICE BUREAU, INC., et al., Defendants and Respondents

**Subsequent History:** [\*\*\*\*1] Respondents' petition for a rehearing was denied June 16, 1971.

**Prior History:** Superior Court of Los Angeles County, No. 932697, Robert W. Kenny, Judge.

**Disposition:** The judgment is reversed.

## **Core Terms**

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advertising, newspapers, Statewide, notices, profits, tying arrangement, withdrawal, summary judgment, solicitation, declaration, percent commission, restraint of trade, triable, buyers, trustee sale, Cartwright Act, decisions

## **LexisNexis® Headnotes**

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Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

### [HN1](#) [down arrow] **Summary Judgment, Supporting Materials**

See [Cal. Code Civ. Proc. § 437c](#).

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Evidence > ... > Testimony > Lay Witnesses > Personal Knowledge

### [HN2](#) [down arrow] **Summary Judgment, Supporting Materials**

The affidavits of the moving party must contain facts sufficient to entitle it to a judgment in the action. [Cal. Code Civ. Proc. § 437c](#). To prevail, such affidavits must state facts establishing every element necessary to sustain a judgment in the moving party's favor. Such facts shall be set forth with particularity, [Cal. Code Civ. Proc. § 437c](#),

and shall be within the personal knowledge of the affiant, the affidavit to show that the affiant, if sworn as a witness, can testify competently thereto.

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

### [\*\*HN3\*\*](#) **Summary Judgment, Supporting Materials**

To satisfy the statutory requirement of "particularity," a movant's affidavits must state all the requisite evidentiary facts and not merely the ultimate facts. Moreover, neither conclusions of law nor conclusions of fact are sufficient to satisfy the statutory requirement.

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

### [\*\*HN4\*\*](#) **Supporting Materials, Affidavits**

It is therefore well settled that summary judgment cannot be ordered for the moving party, even though the affidavits of the opposing party be insufficient or absent, unless the moving party presents affidavits in support of his motion which comply with [\*Cal. Code Civ. Proc. § 437c\*](#) and show that he is entitled to judgment. There first must be a sufficiently supportive affidavit before the defects of any counter-affidavit, either of form or substance, need be examined.

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

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

### [\*\*HN5\*\*](#) **Private Actions, Remedies**

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. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury that so long has been the hallmark of even handed justice.

Antitrust & Trade Law > Sherman Act > General Overview

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

### [\*\*HN6\*\*](#) **Antitrust & Trade Law, Sherman Act**

4 Cal. 3d 842, \*842 484 P.2d 953, \*\*953 94 Cal. Rptr. 785, \*\*\*785 1971 Cal. LEXIS 364, \*\*\*\*1

Cal. Bus. & Prof. Code §§ 16720 and 16726 of the Cartwright Act were patterned after the Sherman Act, 15 U.S.C.S. § 1 et seq., and decisions under the latter act are applicable to the former. Both acts codify the general common law prohibition against restraints of trade.

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > General Overview

## [HN7](#) [] Antitrust & Trade Law, Clayton Act

The Cartwright Act, Cal. Bus. & Prof. Code § 16727, goes beyond the common law to interdict certain practices which have a tendency to lessen competition or promote monopolization. This section, enacted in 1961, is based on section 3 of the Clayton Act, 15 U.S.C.S. § 14. Hence, federal decisions interpreting section 3 of the Clayton Act are applicable to Cal. Bus. & Prof. Code § 16727.

Antitrust & Trade Law > Clayton Act > General Overview

## [HN8](#) [] Antitrust & Trade Law, Clayton Act

See [Cal. Bus. & Prof. Code § 16720](#).

Antitrust & Trade Law > Clayton Act > General Overview

## [HN9](#) [] Antitrust & Trade Law, Clayton Act

See [Cal. Bus. & Prof. Code 16727](#).

Antitrust & Trade Law > Sherman Act > General Overview

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

## [HN10](#) [] Antitrust & Trade Law, Sherman Act

Although the Sherman Act, 15 U.S.C.S. § 1 et seq., and the Cartwright Act, Cal. Bus. & Prof. Code § 16700 et seq., by their express terms forbid all restraints on trade, each has been interpreted to permit by implication those restraints found to be reasonable. 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 the practices which the courts have heretofore 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 > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

#### [HN11](#) [] Price Fixing & Restraints of Trade, Tying Arrangements

To determine whether trade 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 > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

#### [HN12](#) [] Price Fixing & Restraints of Trade, Tying Arrangements

Whether a restraint of trade is reasonable is a question of fact to be determined at trial.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

#### [HN13](#) [] 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, 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 > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

#### [HN14](#) [] Price Fixing & Restraints of Trade, Tying Arrangements

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

### **HN15** Price Fixing & Restraints of Trade, Tying Arrangements

The economic power over the tying product can be sufficient even though the power falls far short of dominance and even though the power exists only with respect to some of the buyers in the market. 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 > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

### **HN16** Price Fixing & Restraints of Trade, Tying Arrangements

In determining whether an illegal tying arrangement exists, the following factors should be taken into account: (1) whether competitors offer to sell the products or services separately or only as a unit; (2) whether the combined product or service is composed of varying assortments of component parts; (3) whether buyers are or can be charged separately for the allegedly separate products or services; (4) whether the defendant ever sells or offers to sell the products or services separately.

## **Headnotes/Summary**

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### **Summary**

#### **CALIFORNIA OFFICIAL REPORTS SUMMARY**

A partnership, operating a legal advertising business dealing almost exclusively with notices of sale by trustees under deeds of trust, brought an antitrust action against a countrywide newspaper service bureau that in addition to trustees' notices provided services covering all classes of legal advertising and lobbying. The partnership claimed that two clauses in that bureau's representation agreement with its member newspapers violated the Cartwright Act, notably [Bus. Prof. Code, §§ 16720, 16726](#), one of the clauses as an illegal tying agreement, and both clauses as a conspiracy and combination in restraint of trade. The former clause prohibited all participation in the bureau's distribution of profits if a member newspaper withdrew any class of legal advertising from the representation agreement. The other clause provided that a member newspaper must pay the the bureau a 15 percent commission on all legal advertising published, whether or not it was solicited, placed, or serviced by the bureau. The bureau moved for, and was granted, summary judgment. (Superior Court of Los Angeles County, No. 932697, Robert W. Kenny, Judge.)

The Supreme Court reversed. Covering in detail the pertinent antitrust factors to be considered, and pointing out that a summary judgment may not be granted if triable issues of facts are presented, the court held that in the instant case the clauses in the bureau's representation agreement undoubtedly constituted restraints upon trade, and that on the vital question whether they were unreasonable, several triable issues remained to be resolved, such as the relevant involved in the availability to the bureau of less restrictive restraints by which it could be compensated for services, such as lobbying, for which it did not charge directly. Similarly, on the tying arrangement question, the partnership, in its affidavits opposing the bureau's motion for summary judgment, raised such triable issues of facts as the question whether the bureau's servicing of trustee's notices was, in fact, part of a unitary service or a separate product tied to the others, and, if the latter, the dollar-volume of business foreclosed thereby. (Opinion by Sullivan, J., expressing the unanimous view of the court.)

**Headnotes****CALIFORNIA OFFICIAL REPORTS HEADNOTES**

Classified to McKinney's Digest

**CA(1) [L] (1)****Judgments § 8a(5)(b)—Summary Judgments—Issue to Be Determined by Trial Court.**

--In considering a motion for summary judgment, the matter to be determined by the trial court is whether defendant (or plaintiff) has presented any facts giving rise to a triable issue. The court may not pass upon the issue itself.

**CA(2) [L] (2)****Judgments § 8a(10)(f)—Summary Judgments—When Motion Properly Granted.**

--Summary judgment is proper only if the affidavits in support of the moving party would suffice to sustain a judgment in his favor and his opponent does not, by affidavit, show such facts as may be deemed, by the judge hearing the motion, sufficient to present a triable issue.

**CA(3) [L] (3)****Judgments § 8a(1)—Summary Judgment—Purpose.**

--The aim of the summary judgment procedure is to discover, through the media of affidavits, whether the parties possess evidence requiring the weighing procedures of a trial.

**CA(4) [L] (4)****Judgments §§ 8a(8)(d), 8a(9)(d)—Summary Judgments—Affidavits—Construction: Opposing Affidavits—Construction.**

--Affidavits in support of a motion for summary judgment are strictly construed, while affidavits in opposition to such a motion are liberally construed.

**CA(5) [L] (5)****Judgments § 8a(10)(h)—Summary Judgments—Determination—Rule in Doubtful Cases.**

--Doubts as to the propriety of granting a motion for summary judgment should be resolved in favor of the party opposing the motion.

**CA(6) [L] (6)****Judgments § 8a(1)—Summary Judgments—Nature.**

4 Cal. 3d 842, \*842 484 P.2d 953, \*\*953 94 Cal. Rptr. 785, \*\*\*785 1971 Cal. LEXIS 364, \*\*\*\*1

--The summary judgment procedure is drastic and should be used with caution so that it does not become a substitute for the open trial method of determining facts.

**CA(7) [ ] (7)**

**Monopolies and Combinations § 13—Under Cartwright Act—Summary Judgment.**

--In complex antitrust litigation, in which motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot, a summary judgment in favor of defendant is rarely warranted.

**CA(8) [ ] (8)**

**Monopolies and Combinations § 5—Under Cartwright Act—Where Comparable With Sherman Act.**

--The antitrust provisions of [Bus. & Prof. Code, §§ 16720](#) and [16726](#) (Cartwright Act), were patterned after the Sherman Act ([15 U.S.C. § 1 et seq.](#)); both acts codify the general common law prohibition against restraints of trade, and decisions under the latter act are applicable to the former.

**CA(9) [ ] (9)**

**Monopolies and Combinations § 5—Under Cartwright Act—Where Comparable With Clayton Act.**

-- [Bus. & Prof. Code, § 16727](#), which goes beyond the common law to interdict certain practices which have a tendency to lessen competition or promote monopolization, is based on, and thus subject to federal decisions interpreting, section 3 of the Clayton Act ([15 U.S.C. § 14](#)).

**CA(10) [ ] (10)**

**Monopolies and Combinations § 6—Under Cartwright Act—Agreements and Combinations Prohibited.**

--Although reasonable restraints of trade are impliedly permitted by the Sherman Act ([15 U.S.C. § 1 et seq.](#)) and the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)), there are certain agreements or practices, such as tying arrangements, that 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.

**CA(11a) [ ] (11a) CA(11b) [ ] (11b) CA(11c) [ ] (11c)**

**Monopolies and Combinations § 13—Under Cartwright Act—Proof: Judgments § 8a(10)(e)—Summary Judgments—Issues Precluding.**

--In an antitrust action brought against a countywide newspaper service bureau by a private partnership operating a legal advertising business dealing almost exclusively with notices of sales by trustees under deeds of trust, the partnership was entitled to a reversal of a summary judgment in the bureau's favor and to a trial on the partnership's general theory of a conspiracy and combination in restraint of trade ([Bus. & Prof. Code, §§ 16720, 16726](#)), where two clauses in the bureau's agreement with its member newspapers constituted restraints upon trade, and where, on the question of the reasonableness of such restraints, several triable issues of fact were presented, including the

relevant market or line of commerce involved and the availability to the bureau of less restrictive restraints by which it could be compensated for services, such as lobbying, for which it did not charge directly.

#### CA(12) [ ] (12)

##### **Monopolies and Combinations § 6—Under Cartwright Act—Agreements and Combinations Prohibited.**

--A clause in a representation agreement between a countywide newspaper service bureau and its member newspapers, providing that such members must pay the bureau a 15 percent commission on all legal advertising published whether or not it was solicited, placed, or serviced by the bureau, constituted a restraint upon trade as reducing, in effect, the profit margin and competitive strength of independent agencies engaged in legal advertising.

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

##### **Monopolies and Combinations § 6—Under Cartwright Act—Agreements and Combinations Prohibited.**

--A clause in a representation agreement between a countywide newspaper service bureau and its member newspapers, prohibiting all participation in the bureau's distribution of profits if a member withdrew any class of legal advertising from the agreement, constituted a restraint upon trade by penalizing a member wishing to have a different representative, or none at all, for specified classes of such advertising, thus forcing independent agencies engaged therein to compete, if at all, for representation with regard to all classes when they might wish to specialize in a limited field such as notices of sales by trustees under deeds of trust.

#### CA(14a) [ ] (14a) CA(14b) [ ] (14b)

##### **Monopolies and Combinations § 6—Under Cartwright Act—Agreements and Combinations Prohibited.**

--To determine whether restraints upon trade are reasonable in the context of the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)), a 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 percentage of business controlled, the strength of the remaining competition, and whether the action springs from business requirements or from a purpose to monopolize.

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

##### **Monopolies and Combinations § 11—Under Cartwright Act—Offenses—Evidence.**

--Relevant facts in determining whether restraints upon trade are reasonable in the context of the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)), include the history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, and the purpose or end sought to be obtained.

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

##### **Monopolies and Combinations § 6—Under Cartwright Act—Agreements and Combinations Prohibited.**

--Whether a restraint of trade is reasonable in the context of the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)), is a question of fact to be determined at trial.

[CA\(17a\)](#) [ ] (17a) [CA\(17b\)](#) [ ] (17b) [CA\(17c\)](#) [ ] (17c) [CA\(17d\)](#) [ ] (17d)**Monopolies and Combinations § 13—Under Cartwright Act—Proof: Judgments § 8a(10)(e)—Summary Judgments—Issues Precluding.**

--In an antitrust action brought against a countywide newspaper service bureau by a private partnership operating a legal advertising business dealing almost exclusively with notices of sales by trustees under deeds of trust, the partnership was entitled to a reversal of a summary judgment in the bureau's favor and to a trial on the partnership's theory that the bureau imposed on its members a tying arrangement illegal under [Bus. & Prof. Code, §§ 16720, 16726](#), where the bureau, in its affidavit supporting its motion for summary judgment, incorporated a copy of its representation agreement with its member newspapers including a clause that, in effect, tied the services rendered by the bureau with regard to any one class of advertising (such as trustees' notices) to the services rendered with regard to all other classes of legal advertising, where, furthermore, the bureau, although clearly possessing economic power to restrain competition appreciably, failed to show that this apparently illegal restraint did not in fact constitute a violation of the Cartwright Act, and where the partnership, in its opposing affidavits, clearly raised triable issues of fact, such as the question whether the bureau's servicing of trustees' notices was, in fact, part of a unitary service or a separate product tied to the others, and, if the latter, the dollar-volume of business foreclosed thereby.

[CA\(18\)](#) [ ] (18)**Monopolies and Combinations § 6—Under Cartwright Act—Agreements and Combinations Prohibited: Words and Phrases—“Tying Arrangement.”**

--A "tying arrangement," for antitrust purposes, 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.

[CA\(19a\)](#) [ ] (19a) [CA\(19b\)](#) [ ] (19b)**Monopolies and Combinations § 6—Under Cartwright Act—Agreements and Combinations Prohibited—Tying Arrangements Illegal Per Se.**

--In the antitrust context, tying arrangements are illegal per se whenever a party has sufficient economic power with respect to the tying product to impose an appreciable restraint on 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. The economic power over the tying product can be sufficient even though the power falls far short of dominance and even though the power exists only with respect to some of the buyers in the market.

[CA\(20\)](#) [ ] (20)**Monopolies and Combinations § 6—Under Cartwright Act—Agreements and Combinations Prohibited—Tying Arrangements—Factors Involved.**

--In determining, for antitrust purposes, whether there are legitimate reasons for selling normally separate items in a combined form or whether such sale is really a disguised tying arrangement, the factors that should be taken into account are whether competitors offer to sell the products or services separately or only as a unit, whether the combined product or service is composed of varying assortments of component parts, whether buyers are or can be charged separately for the allegedly separate products or services, and whether the defendant ever sells or offers to sell the products or services separately.

**Counsel:** Darling, Hall, Rae & Gute, Darling, Mack, Hall & Call and John R. Shiner for Plaintiffs and Appellants.  
Robert F. Tyler for Defendants and Respondents.

**Judges:** In Bank. Opinion by Sullivan, J., expressing the unanimous view of the court. Wright, C. J., McComb, J., Peters, J., Tobriner, J., Mosk, J., and Burke, J., concurred.

**Opinion by:** SULLIVAN

## Opinion

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[\*847] [\*\*955] [\*\*\*787] In this antitrust case, plaintiffs Harold Corwin and Allen Barr, doing business as Statewide Publication Service (Statewide), appeals from a summary judgment in favor of defendant Los Angeles Newspaper Service Bureau, Inc. (Bureau) and 40 of its member newspapers also joined as defendants. As will appear, we have concluded that upon the record presented the summary judgment was erroneously granted and should be reversed.

Statewide, a partnership formed in 1966, operates a publication service and legal advertising business dealing almost exclusively with notices of sales by trustees under deeds of trust. Generally [\*\*\*\*2] speaking, Statewide solicits, [\*848] services and places the notices of trustee sales for publication in newspapers. Its services include proofreading the notices, verifying legal descriptions of the subject property and checking the affidavits of publication. When Statewide places a legal advertisement with a newspaper, it pays the paper's publication charges and then obtains reimbursement from the trustee. Although it has no formal contract with any newspaper, Statewide [\*\*956] [\*\*\*788] seeks a commission from them in the amount of 15 percent of the cost of the publication.

Defendant Bureau was organized in 1934 to enable newspapers in Los Angeles County to acquire a share of the legal advertising market which until that time had been effectively monopolized by the Consolidated Printing and Publishing Company. Membership in the Bureau is open to any fully adjudicated legal newspaper in the county. From an original membership of 33 newspapers, the Bureau has grown to include 111. In 19 of the 26 judicial districts in the County of Los Angeles, every newspaper qualified to print legal advertisements is a member of the Bureau.

Each member newspaper executes with [\*\*\*\*3] the Bureau a written contract entitled a "Representation Agreement" designating the Bureau its representative in soliciting and servicing all classes of legal advertising. Under paragraph Eighth of the contract the member agrees to pay the Bureau a 15 percent commission on each legal advertisement published by the newspaper, whether or not the particular advertisement was placed by the Bureau.<sup>1</sup> In return the contract provides that each member shall own one share of stock in the Bureau and shall be entitled to an annual pro-rata distribution of the Bureau's net profits. The profits are divided among the member on the basis of each member's contribution to the total commissions paid to the Bureau during the year. In addition, each member of the Bureau is entitled to make use of all the services performed by the Bureau.

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<sup>1</sup> Paragraph Eighth provides in relevant part: "The Bureau shall and it is hereby authorized to deduct, as compensation for its services, fifteen (15%) per cent of all sums collected for the account of the Publisher. . . . In the event any sums are paid directly to the Publisher for any advertisements covered by this agreement, the Publisher shall render a true and correct account thereof to the Bureau and shall pay to the Bureau within thirty days after receipt of said sums, a sum equal to fifteen (15%) per cent of the amount paid to the Publisher." With reference to this paragraph of the contract, Telford Work, Secretary-Treasurer of the Bureau, in his affidavit in support of the motion for summary judgment, states: "Advertisers are of course free to go directly to the newspaper and place their legal advertising as many do, just as any other members of the general public also do, and there is no prohibition of any kind against this. However, the Bureau under its representation agreements would still be entitled to its 15% commission."

[\*\*\*\*4] Each member reserves the right to withdraw from the agreement any class of legal advertising. However, the contract provides in paragraph [\*849] Second <sup>2</sup> [\*\*\*\*5] that if the newspaper exercises such withdrawal privilege, it waives all right to participate in the annual distributions of the Bureau's net profits. This waiver extends not only to profits derived from classes of legal advertising which the member has excluded from his contract, but also to profits arising from nonexcluded classes of advertising.<sup>3</sup> The agreements have a term of three [\*\*957] [\*\*\*789] years and are renewed automatically unless, prior to expiration of a term, the newspaper indicates in writing its intent not to renew.

The Bureau processes all form of legal advertising including notices of trustee's sales, certificates of fictitious names, probate notices, tax sale lists, and solicitations for bids for government contracts. It works with the advertiser to make sure that the notice is properly phrased in accordance with applicable statutes and to ascertain which newspapers are qualified to carry the particular advertisement. It also proofreads the advertisement and [\*\*\*\*6] checks legal descriptions and affidavits of publication. The Bureau bills the advertisers on behalf of its member newspapers and remits the proceeds, minus its commission, to each newspaper at the end of the month. If an advertiser fails to pay, the Bureau absorbs the loss.

In addition to its services in processing legal advertisements, the Bureau also acts as a representative for its member newspapers in the area of public relations and public law. It maintains for its members a compendium of the more than 2,000 statutes governing the various types of legal advertisements and renders expert assistance to its members in complying with those statutes. It also acts as a lobbyist for its newspapers in seeking changes in legal publication statutes, and it contributes support to other newspaper associations representing publishers on a statewide level.

[\*850] While both the Bureau and Statewide operate as middlemen between legal advertisers and newspapers, the Bureau is primarily a representative of the newspapers and provides various services for their benefit. Statewide, on the other hand, primarily represents the trustees. Nevertheless, in the relatively narrow area of [\*\*\*\*7] publication of notices of trustee's sales, their businesses are essentially identical. Both place notices of sale in the appropriate newspapers and post the notices on the premises; both proofread the notices, check the legal descriptions and the affidavits of publication. Each organization bills the advertiser and pays the newspaper for its publication costs.

In general, newspapers which belong to the Bureau have refused to pay Statewide any commission or have paid only a small commission on advertisements placed with them, because of their contractual commitment to pay the Bureau a 15 percent commission on all advertising they publish, regardless of its source. Members are understandably reluctant to pay the double commission which would result if they also paid Statewide for the advertising it furnishes. Consequently, whenever possible Statewide patronizes papers which are not members of the Bureau, but often it must place advertising with members because they are the only newspapers qualified to print the advertisement, the only newspapers printed frequently enough to carry it, or the only newspapers acceptable to the trustee.

<sup>2</sup> Paragraph Second provides in relevant part: "The Publisher hereby retains the services of the Bureau as representative of the Publisher for soliciting and servicing of all legal advertising . . . provided, however, the Publisher reserves the right to withdraw, at any time by notification in writing to the Bureau, from the terms of this agreement, the following classes of legal advertising: \_\_ [Par.] In the event the Publisher exercises the withdrawal privilege herein contained, Publisher agrees to and does hereby waive during the period of such withdrawal the right to participate in the distributions and/or credits contemplated under paragraph Ninth hereof." Paragraph Ninth provides for the annual pro-rata distributions of the Bureau's profits as discussed above.

<sup>3</sup> In its supplemental brief filed in this court, the Bureau, for the first time herein, contends that while the literal language of the contract appears to dictate the total waiver of any right to profits as stated above, the actual practice has been to allow member newspapers which have excluded certain classes of legal advertising from their contract to participate in the distribution of net profits to the extent of the commissions they paid to the Bureau on nonexcluded classes. Since no such facts appear in the record, we cannot now consider this contention. However, to the extent that such facts are relevant, they may be proved at trial.

Statewide commenced the instant action against [\*\*\*\*8] the Bureau and 40 of its members<sup>4</sup> charging that the representation agreements between the Bureau and defendant publishers were entered into as part of a common plan and conspiracy violative of the Cartwright Act. (*Bus. & Prof. Code, § 16700 et seq.*)<sup>5</sup> Statewide asserts two bases for this claim: First, it contends that the agreements constitute a combination of capital, skill or acts to restrict trade in the soliciting and servicing of the publication of notices of trustee's sales in violation of [\*\*958] [\*\*\*790] sections 16720 and 16726. This restraint of trade is said to flow from two clauses of the contract -- paragraph Eighth (see fn. 1, *ante*) which provides that the member newspapers must pay the Bureau a 15 percent commission for every legal advertisement whether or not placed by the Bureau -- and paragraph Second (see fn. 2, *ante*), which provides that members waive all rights to distribution of the Bureau's profits if they exclude any category of legal advertising from the contract. Second, Statewide argues that paragraph Second itself is a tying arrangement constituting a per se violation of sections 16720 and 16726. Statewide [\*\*\*9] seeks three times the amount of its actual damages of \$ 15,586.29 plus attorney's [\*851] fees and costs. It also prays for an injunction forbidding defendants from enforcing or complying with their representation agreements and a declaration that the agreements are void as contrary to public policy, and that defendant publishers are not legally obligated to pay any commission to the Bureau for advertisements placed by Statewide.

Defendants demurred to the complaint and also moved for summary judgment. In support of the motion they filed two declarations of the secretary-treasurer of the Bureau; in opposition to the motion, Statewide filed a declaration of plaintiff Allen Barr. After examining [\*\*\*10] the declarations, which state the facts set forth above, the trial court granted defendants' motion for summary judgment, at the same time ordering the demurrer off calendar. Judgment was entered accordingly. This appeal followed.

**CA(1)**[<sup>↑</sup>] (1) We have summarized on a number of occasions the well-established rules governing summary judgment procedure. (*Code Civ. Proc., § 437c.*) **HN1**[<sup>↑</sup>] "The matter to be determined by the trial court in considering such a motion is whether the defendant (or the plaintiff) has presented any facts which give rise to a triable issue. The court may not pass upon the issue itself. **CA(2)**[<sup>↑</sup>] (2) Summary judgment is proper only if the affidavits in support of the moving party would be sufficient to sustain a judgment in his favor<sup>6</sup> and his opponent does not by affidavit show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue. **CA(3)**[<sup>↑</sup>] (3) The aim of the procedure is to discover, through the media of affidavits, whether the parties possess evidence requiring the weighing procedures of a trial. **CA(4)**[<sup>↑</sup>] (4) **CA(5)**[<sup>↑</sup>] (5) In examining the sufficiency of affidavits filed in connection with [\*\*\*11] the motion, the affidavits of the moving party are strictly construed and those of his opponent liberally construed, and doubts as to the propriety of [\*852] granting the motion should be resolved in favor of [\*\*959] [\*\*\*791] the party opposing the motion. **CA(6)**[<sup>↑</sup>] (6) Such

<sup>4</sup>The only member newspapers named as defendants in the complaint are those which publish in judicial districts in which every newspaper qualified to carry legal advertisements is a member of the Bureau.

<sup>5</sup>Hereafter, unless otherwise indicated, all section references are to the Business and Professions Code.

<sup>6</sup>"We first consider **HN2**[<sup>↑</sup>] the affidavits of the moving party. They 'must contain facts sufficient to entitle . . . defendant to a judgment in the action. . . .' (*Code Civ. Proc., § 437c.*) To prevail, therefore, such affidavits 'must state facts establishing every element necessary to sustain a judgment in his favor.' [Citation.] Such facts 'shall be set forth with particularity' (*Code Civ. Proc., § 437c*) and shall be within the personal knowledge of the affiant, the affidavit to show that the affiant, if sworn as a witness, can testify competently thereto. As the court stated in *House v. Lala, supra*, [180 Cal.App.2d 412 (4 Cal.Rptr. 366)] 'to' **HN3**[<sup>↑</sup>] satisfy the statutory requirement of "particularity," the movant's affidavits must state all the requisite evidentiary facts and not merely the ultimate facts. [Citations.] Moreover, neither conclusions of law nor conclusions of fact are sufficient to satisfy the statutory requirement. [Citation.]'" (*Snider v. Snider (1962) 200 Cal.App.2d 741, 748-749 [19 Cal.Rptr. 709].*)

**HN4**[<sup>↑</sup>] "It is therefore well settled that summary judgment cannot be ordered for the moving party, even though the affidavits of the opposing party be insufficient or absent, unless the moving party presents affidavits in support of his motion which comply with the statute and show that he is entitled to judgment. [Citations.] As is stated in *Southern Pacific Co. v. Fish, supra*, [166 Cal.App.2d 353 (333 P.2d 133)] 'there first must be a *sufficiently supportive affidavit* before the defects of any counteraffidavit, either of form or substance, need be examined; . . .'" (Original italics; de *Echeguren v. de Echeguren (1962) 210 Cal.App.2d 141, 147 [26 Cal.Rptr. 562].*)

summary procedure is drastic and should be used with caution so that it does not become a substitute for the open trial method of determining facts." ( [Stationers Corp. v. Dun & Bradstreet, Inc. \(1965\) 62 Cal.2d 412, 417 \[42 Cal.Rptr. 449, 398 P.2d 785\]](#); see [Joslin v. Marin Mun. Water Dist. \(1967\) 67 Cal.2d 132, 146-148 \[60 Cal.Rptr. 377, 429 P.2d 889\]](#).)

[\*\*\*\*12] [CA\(7\)\[↑\]](#) (7) In addition, the United States Supreme Court has observed that a summary judgment in favor of defendants is rarely warranted in antitrust cases. "We believe that [HN5\[↑\]](#) 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. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'" (Fn. omitted.) ( [Poller v. Columbia Broadcasting \(1962\) 368 U.S. 464, 473 \[7 L.Ed.2d 458, 464, 82 S.Ct. 486\]](#); quoted with approval in [Fortner Enterprises v. U.S. Steel \(1969\) 394 U.S. 495, 500 \[22 L.Ed.2d 495, 503, 89 S.Ct. 1252\]](#).)

Our task is to determine whether under these rules the declaration filed below disclose a triable issue of fact. However, we must first examine the legal underpinnings of the cause of action.

[CA\(8\)\[↑\]](#) (8) [Sections 16720](#) and [16726 HN6\[↑\]](#) of the Cartwright [\*\*\*\*13] Act<sup>7</sup> [\*\*\*\*14] were patterned after the Sherman Act (15 [13 U.S.C. § 1 et seq.](#)) and decisions under the latter act are applicable to the former. ( [Chicago Title Ins. Co. v. Great Western Financial Corp. \(1968\) 69 Cal.2d 305, 315 \[70 Cal.Rptr. 849, 444 P.2d 481\]](#).) Both acts codify the general common law prohibition against restraints of trade. [CA\(9\)\[↑\]](#) (9) [Section 16727 HN7\[↑\]](#) goes beyond the common law to interdict certain practices which have a tendency to lessen competition or promote monopolization.<sup>8</sup> This section, enacted in 1961 (Stats. [\*853] 1961, ch. 738), is based on section 3 of the Clayton Act ([15 U.S.C. § 14](#)). Hence, federal decisions interpreting section 3 are applicable to [section 16727](#). ([69 Cal.2d 305, 315](#).)

[CA\(10\)\[↑\]](#) (10) [HN10\[↑\]](#) Although the Sherman Act and the Cartwright Act by their express terms forbid all restraints on trade, each has been interpreted to permit by implication those restraints found to be reasonable. ( [Standard Oil Co. v. United States \(1911\) 221 U.S. 1, 60 \[55 L.Ed. 619, 645, 31 S.Ct. 502\]](#); [People v. Building Maintenance etc. Assn. \(1953\) 41 Cal.2d 719, 727 \[264 P.2d 31\]](#)). [\*\*\*\*15] "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 the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing [citation]; [\*\*960] [\*\*\*792] division of markets [citation]; group boycotts [citation]; and tying arrangements [citation]." ( [Northern Pac. R. Co. v. United States \(1958\) 356 U.S. 1, 5 \[2 L.Ed.2d 545, 549, 78 S.Ct. 514\]](#).)

[CA\(11a\)\[↑\]](#) (11a) Statewide's first claim -- namely, that the representation agreements constitute an illegal restraint of trade -- does not rely on an assertion that the agreements involve any of the practices deemed illegal per se. Accordingly, in order for Statewide to prevail in this contention, it must appear from the record not only that the

<sup>7</sup> [Section 16720](#) provides in relevant part: [HN8\[↑\]](#) "A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes: [Par.] (a) To create or carry out restrictions in trade or commerce. . . ." [Section 16726](#) provides: "Except as provided in this chapter, every trust is unlawful, against public policy and void."

<sup>8</sup> [Section 16727](#) provides in relevant part: [HN9\[↑\]](#) "It shall be unlawful for any person to . . . 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 . . . purchaser thereof shall not use or deal in the goods, merchandise, machinery, supplies, commodities, or services of a competitor . . . where the effect of such . . . 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."

agreements "create or carry out restrictions in trade" ([§ 16720, subd. \(a\)](#)) but also that such restrictions are unreasonable.<sup>9</sup>

[\*\*\*\*16] [CA\(12\)](#)<sup>↑</sup> (12) Defendants admit, as they must, that the representation agreements<sup>10</sup> involve some restraints of trade. As we noted above, paragraph Eighth of the agreement provides that the member newspapers must pay the Bureau a 15 percent commission on all legal advertising published, [\[\\*854\]](#) whether or not it was solicited, placed or serviced by the Bureau. Statewide asserts, and defendants do not deny, that as a result of this provision it is economically infeasible for the Bureau's member newspapers to pay independent agencies such as Statewide the normal 15 percent advertising commission. Member newspapers may occasionally pay Statewide and similar agencies a fraction of their normal commissions, but no newspaper could afford consistently to pay a total of 30 percent commissions (15 percent to the Bureau and 15 percent to the independent agency). Since Statewide cannot obtain the normal 15 percent commission from member newspapers, it is forced either to accept a reduced profit level or to charge its clients, the trustees, a higher fee. The more Statewide is compelled to charge its clients, the less able it will be to compete for their business. Clients will naturally [\[\\*\\*\\*\\*17\]](#) gravitate to the Bureau, which can charge a lesser fee. Thus, the effect of paragraph Eighth is to reduce the profit margin and competitive strength of independent agencies such as Statewide.

[CA\(13\)](#)<sup>↑</sup> (13) Paragraph Second of the Bureau's contracts (see fn. 2, *ante*) also imposes a restraint upon trade. By prohibiting *all* participation in the Bureau's distribution of profits if a member withdraws *any* class of advertising from the agreement, this provision severely penalizes a member newspaper which wishes to have a different representative or none at all for specified classes of legal advertising. Obviously, this penalty thwarts the exercise of the very privilege of withdrawal which the agreement feigns to confer. By so doing, paragraph Second forces [\[\\*\\*\\*\\*18\]](#) independent agencies to compete, if at all, for representation with regard to all classes of legal advertising, rather than for representation with regard to individual classes of advertising. This increase in the categories of services which a competitor must offer impedes and discourages the entry of others into the market.

[\[\\*\\*961\] \[\\*\\*\\*793\] CA\(11b\)](#)<sup>↑</sup> (11b) Since the agreements between the Bureau and its member newspapers constitute a restraint upon trade, they violate the Cartwright Act unless they are shown to be reasonable. [CA\(14a\)](#)<sup>↑</sup> (14a) [HN11](#)<sup>↑</sup> To determine 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. [CA\(15\)](#)<sup>↑</sup> (15) 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." ([Chicago Board of Trade v. United States \(1918\) 246 U.S. 231, 238 \[62 L.Ed. 683, 687, 38 S.Ct. 242\].](#)) [CA\(14b\)](#)<sup>↑</sup> (14b) The court should consider "the percentage [\[\\*\\*\\*\\*19\]](#) of business controlled, the strength of the remaining competition [and] whether the action springs from business requirements or purpose to monopolize. . . ." ([United States v. Steel Co. \(1948\) 334 U.S. 495, 527 \[92 L.Ed. 1533, 1554, 68 S.Ct. 1107\]](#); quoted with approval in [Times-Picayune \[\\*855\] v. United States \(1953\) 345 U.S. 594, 615 \[97 L.Ed. 1277, 1293, 73 S.Ct. 872\].](#)) [CA\(16\)](#)<sup>↑</sup> (16) [HN12](#)<sup>↑</sup> Whether a restraint of trade is reasonable is a question of fact to be determined at trial. ([Times-Picayune v. United States, \*supra\*](#); [Chicago Board of Trade v. United States, \*supra\*](#); [Winn Ave. Warehouse, Inc. v. Winchester Tobacco Ware. Co. \(6th Cir. 1964\) 339 F.2d 277, 280](#); [Rogers v. Douglas](#)

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<sup>9</sup> Defendants contend that Statewide has no standing to raise these claims because it does not compete with the Bureau and has therefore suffered no injury as a result of whatever restrictions in trade the agreements may generate. While it is true that Statewide does not offer to represent newspapers in the same manner as the Bureau, our summation of the facts demonstrates that in the area of publication of notices of trustee's sales; Statewide and the Bureau offer nearly identical services. Since they compete in the latter area, Statewide has standing to sue.

The Bureau also claims that Statewide has suffered no injury because its members were never under any obligation to pay commissions to Statewide. Statewide replies that the newspapers have a customary and quasicontractual duty to pay such commissions. These opposing arguments cannot be resolved on the basis of the declarations on file.

<sup>10</sup> A facsimile of the agreement has been attached as an exhibit to, and made a part of, the Bureau's declaration in support of its motion as well as Statewide's declaration in opposition to the motion. Thus, the terms of this document are undisputed.

Tobacco Board of Trade, Inc. (5th Cir. 1959) 266 F.2d 636, 643, cert. den. (1959) 361 U.S. 833 [4 L.Ed.2d 75, 80 S.Ct. 85].)

**CA(11c)<sup>11</sup>** (11c) This general rule is particularly appropriate in the instant case. Here, the Bureau contends that any restraint is, at worst, *de minimis* because the relevant line of commerce is the solicitation, placement and service of *all* [\*\*\*\*20] classes of legal advertisements. Statewide, however, argues that the relevant line of commerce, as defined by the cross-elasticity of demand, is the solicitation, placement and service *only* of notices of trustee's sales. Obviously, the restraint imposed by the Bureau's agreements has far greater impact in the market delineated by Statewide than in the market outlined by defendants. The definition of a relevant market or line of commerce presents a difficult question of law and fact which cannot properly be resolved on the basis of the limited record now before us.

The Bureau also argues that whatever restraining effect its agreements may have is justified by the fact that the Bureau provides services such as lobbying for which it cannot charge directly. This contention is partially contradicted by the Bureau's own brief, which states that "if the Bureau did not use the 15% commission method to pay its costs of operation, it would have to use some other method such as outright assessment of dues." The brief further asserts: "It is also true that the Bureau must have some means of remuneration to pay its costs. It could resort to a special assessment against all newspapers; [\*\*\*\*21] it could resort to annual dues; or it can as here, use a system of commissions. . ." If a less restrictive means can be used to recompense the Bureau for services such as lobbying, clearly the provision of those services cannot justify the restraints imposed by the present agreements. Whether less restrictive means are available and whether provision of services such as lobbying justifies the present restraints are questions of fact which should not have been decided upon a motion for summary judgment.

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[\*\*\*\*22] [\*856] [\*\*962] [\*\*\*794] Therefore we conclude that with respect to Statewide's general claim that the Bureau and its members have conspired and combined to restrict trade, there are presented several triable issues of fact which preclude entry of summary judgment.

**CA(17a)<sup>12</sup>** (17a) We now turn to examine Statewide's second and more particularized challenge to the representation agreement. In essence Statewide claims that paragraph Second (see fn. 2, *ante*) of the agreement (which provides that a member's withdrawal of any class of legal advertising from the terms of the agreement shall constitute a waiver, during the period of withdrawal, of the right to participate in the distribution of the Bureau's profits), constitutes a tying arrangement violative of sections 16720 and 16726.<sup>12</sup>

[\*\*\*\*23] **CA(18)<sup>13</sup>** (18) "For our purposes HN13<sup>14</sup> 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 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.) ( Northern Pac. R. Co. v. United States, supra, 356 U.S. 1,

<sup>11</sup> The Bureau also contends that any restrictive effect arising from its agreements is caused by the legally sanctioned monopoly held by newspapers qualified to publish legal advertisements. As we have seen, however, the restrictive effect flows from the terms of the agreements themselves, and not from the statutes governing "newspapers of general circulation" within the meaning of the Government Code. ( Gov. Code, §§ 6000-6078.)

The further argument that the contract provisions are justified because they allow the Bureau to act as a clearing house for legal notices in the County of Los Angeles again presents a question of fact which should be determined at trial.

<sup>12</sup> Since we find that there are triable issues of fact as to whether the representation agreements are tying arrangements violative of sections 16720 and 16726, we need not determine whether the agreements also independently violate section 16727.

5-6 [2 L.Ed.2d 545, 550].) CA(19a)<sup>13</sup> (19a) HN14<sup>14</sup>] Tying arrangements are illegal per se "whenever a party has sufficient economic power with respect to the tying product [\*\*\*\*24] 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, 499, 503* [22 L.Ed.2d 495, 502, 505]) and when "a total amount of business, substantial enough in terms of dollar-volume so as not to be merely *de minimis*, is foreclosed [\*857] 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(17b)<sup>15</sup> (17b) After reviewing the declarations of the parties, we are satisfied that triable issues have been raised, which, if resolved in Statewide's favor, will establish a tying arrangement condemned by the above decisions. Indeed, as we have already pointed out, the Bureau itself as the moving party incorporated the representation agreement in its own supporting declaration, thereby exposing the ingredients of a tying arrangement which are inherent in paragraph Second. Consequently, it was incumbent upon the Bureau to show that this apparently illegal restraint did not in fact constitute [\*\*\*\*25] a violation of the Cartwright Act, since there must first be a sufficient supportive affidavit in order that the party moving for summary judgment may prevail. (See fn. 6, *ante*, and accompanying text.) In addition, Statewide's declaration in opposition clearly raises triable issues of fact.

In this case, the "tie" arises from paragraph Second of the agreement which provides that if a member exercises its privilege of withdrawing one or more classes of advertising from the agreement, it waives, during the period of withdrawal, any right to participate in the annual pro-rata distributions of the Bureau's net profits. As we have noted above, the waiver extends [\*\*963] [\*\*\*795] not only to profits derived from the class or classes of advertising which are excluded, but also to profits arising from all nonexcluded classes. Since a member which exercises its withdrawal privilege must pay the same commission on nonexcluded classes, but is not entitled to distributions of profit, it must, in effect, pay more than is paid for the same services by newspapers which do not exclude any class of advertising. This increase in price for services on nonexcluded classes operates as [\*\*\*\*26] a powerful economic incentive against exercise of the withdrawal privilege. Thus paragraph Second ties the services rendered by the Bureau with regard to any one class of advertising to the services rendered with regard to all other classes of legal advertising.<sup>13</sup>

[\*\*\*\*27] On the record before us, it is beyond dispute that the Bureau provides unique and extensive services to an imposing array of newspapers in Los [\*858] Angeles County. As we have set forth in some detail, it processes all forms of legal notices for publication, acts as the publishers' representative in the areas of public relations and public law, offers expert supervision of compliance with pertinent statutory requirements, functions as a lobbyist for its members and even provides assistance to newspapers on a statewide basis. Since the Bureau is unique in providing this varied and comprehensive service, we are satisfied that it has sufficient economic power to restrain competition appreciably.

CA(19b)<sup>16</sup> (19b) Decisions of the United States Supreme Court "have made unmistakably clear that HN15<sup>17</sup> the economic power over the tying product can be sufficient even though the power falls far short of dominance and even though the power exists only with respect to some of the buyers in the market. . .'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.' [Par.] [\*\*\*\*28] These decisions rejecting the need for proof of truly dominant power over the tying product have all been based on a recognition that because tying arrangements generally serve

<sup>13</sup> However, we deem it unnecessary to determine whether this tying effect is sufficient to bring the agreement within the per se rule established by the United States Supreme Court cases cited above. Most cases involving tying arrangements have dealt with situations where the seller absolutely refused to sell one product separately from another. Here, there is no such refusal, but a higher price is exacted for the tying product if the tied product is not also purchased. Such an arrangement appears to present many of the same evils inherent in a classic tying arrangement within the prohibition of section 16726. ( *Federal Trade Com'n v. Paramount Famous-Lasky Corp. (2d Cir. 1932) 67 F.2d 152, 155*; *Washington Gas Light Co. v. Virginia Electric & Power Co. (E.D.Va. 1970) 309 F.Supp. 1119, 1125*; Turner, *The Validity of Tying Arrangements Under the Antitrust Laws* (1958) 72 Harv.L.Rev. 50, 65-73.)

no legitimate business purpose that cannot be achieved in some less restrictive way, the presence of any appreciable restraint on competition provides a sufficient reason for invalidating the tie. Such appreciable restraint results whenever the seller can exert some power over some of the buyers in the market, even if his power is not complete over them and over all other buyers in the market." ([\*Fortner Enterprises v. U.S. Steel, supra, 394 U.S. at pp. 502-503 \[22 L.Ed.2d at pp. 504-505\]\*](#).)

**CA(17c)** (17c) The Bureau asserts that its agreements cannot be illegal tying arrangements because it sells only a single, unitary service. **CA(20)** (20) This argument raises the difficult question whether this case "should be treated as a case of tying the sale of one product to the sale of another product or merely as the sale of a single product. . . . The facts must be examined to ascertain whether or not there are legitimate reasons for selling normally separate items in a combined form to dispel [\*\*\*\*29] any inferences that it is really a disguised tie-in." (Fns. omitted.) ([\*United States v. Jerrold Electronics Corporation \(E.D.Pa. 1960\) 187 F.Supp. 545, 559\*](#); affd. per curiam *sub. nom. Jerrold Electronics Corp. v. United States* (1961) [\[\\*\\*796\] 365 U.S. 567 \[\\*\\*964\]](#) [5 L.Ed.2d 806, 81 S.Ct. 755]; see [\*Times-Picayune v. United States, supra, 345 U.S. 594 \[97 L.Ed. 1277, 73 S.Ct. 872\]\*](#) and [\*Associated Press v. Taft-Ingalls Corporation \(6th Cir. 1965\) 340 F.2d 753, 759-766\*](#), cert. den. (1965) 382 U.S. 820 [15 L.Ed.2d 66, 86 S.Ct. 47].) Although we have not found, nor has our attention been directed to, any definitive test for the determination of this question, **HN16** the following factors should be taken into account: (1) Whether competitors offer to sell the products or services separately or only [\*859] as a unit. (2) Whether the combined product or service is composed of varying assortments of component parts. (3) Whether buyers are or can be charged separately for the allegedly separate products or services. (4) Whether the defendant ever sells or offers to sell the products or [\*\*\*\*30] services separately. ([\*United States v. Jerrold Electronics Corporation, supra; Associated Press v. Taft-Ingalls Corporation, supra, 340 F.2d 753, 764.\*](#))

**CA(17d)** (17d) The question whether the processing of legal advertising by the Bureau is a single product of which the servicing of trustees' notices is a part, or whether the latter service is a separate product which is tied to the others, is one of fact to be determined in the light of the particular circumstances. We cannot say as a matter of law on this record that it is not a tied product and we think that this must remain an issue to be resolved at trial.<sup>14</sup>

[\*\*\*\*31] In summary we conclude that Statewide is entitled to a trial not only on its general theory of a conspiracy and combination in restraint of trade ([§§ 16720, 16726](#)), but also on its more particularized claim of a tying arrangement illegal per se under those sections.

The judgment is reversed.

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<sup>14</sup> We also note that it will be necessary for the trial court to determine the dollar-volume of business foreclosed by any tying arrangement which it may find inherent in paragraph Second. (See [\*Fortner Enterprises v. U.S. Steel, supra, 394 U.S. 495, 501 \[22 L.Ed.2d 495, 503\]\*](#).) The declarations filed in this case are of no assistance on this vital issue.



## Marin County Bd. of Realtors, Inc. v. Palsson

Supreme Court of California

May 24, 1976

S.F. No. 23365

### **Reporter**

16 Cal. 3d 920 \*; 549 P.2d 833 \*\*; 130 Cal. Rptr. 1 \*\*\*; 1976 Cal. LEXIS 268 \*\*\*\*; 1976-1 Trade Cas. (CCH) P60,898

MARIN COUNTY BOARD OF REALTORS, INC., Plaintiff, Cross-defendant and Respondent, v. EUGENE PALSSON, Defendant, Cross-complainant and Appellant

**Prior History:** [\*\*\*\*1] Superior Court of Marin County, No. 56832, Joseph G. Wilson, Judge.

**Disposition:** The judgment, insofar as it grants declaratory relief on the complaint, is reversed. Insofar as it denies relief on the cross-complaint, the judgment is reversed and remanded with directions to determine the issue of damages and to fashion appropriate relief consistent with the views expressed in this opinion.

## **Core Terms**

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brokers, membership, nonmembers, practices, Cartwright Act, multiple listing service, Sherman Act, Realtors, anti trust law, listing, bylaws, rule of reason, residential, salesman, boycott, selling, access rule, consumers, county board, present case, real estate, anticompetitive, regulations, antitrust, part-time, licensed, damages, effects, courts, cases

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Governments > Local Governments > Administrative Boards

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

### **HN1 [blue icon] Exemptions & Immunities, Collectives & Cooperatives**

A California county board of realtors violates the Cartwright Act, [Cal. Bus. & Prof. Code §§ 16720, 16726](#), by limiting its membership to persons primarily engaged in the real estate business and by denying nonmembers access to its multiple listing service.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Police Powers

## [\*\*HN2\*\*](#) [] Antitrust & Trade Law, Sherman Act

The Cartwright Act, California's ***antitrust law***, is patterned after the Sherman Act, [\*\*\*15 U.S.C.S. § 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.

Antitrust & Trade Law > Sherman Act > General Overview

Constitutional Law > ... > Fundamental Rights > Search & Seizure > General Overview

## [\*\*HN3\*\*](#) [] Antitrust & Trade Law, Sherman Act

The Cartwright Act, [\*\*\*Cal. Bus. And Prof. Code §§ 16720, 16726\*\*\*](#), like the Sherman Act, [\*\*\*15 U.S.C.S. § 1 et seq.\*\*\*](#), is couched in comprehensive language and forbids combinations of the kind described with respect to every type of business. Like many constitutional provisions written in general language, the provisions of the act must be interpreted in light of their inductive policy and in the context of changing conditions of society.

Civil Procedure > ... > Justiciability > Mootness > Public Interest Exception

Civil Procedure > ... > Justiciability > Mootness > General Overview

## [\*\*HN4\*\*](#) [] Mootness, Public Interest Exception

The voluntary discontinuance of alleged illegal practices does not remove the pending charges of illegality from the sphere of judicial power or relieve the court of the duty of determining the validity of such charges where by the mere volition of a party the challenged practices may be resumed. An appeal will not be rendered moot if the parties raise substantial questions of public interest that are likely to recur.

Antitrust & Trade Law > Sherman Act > General Overview

## [\*\*HN5\*\*](#) [] Antitrust & Trade Law, Sherman Act

Antitrust laws are designed primarily to aid the consumer. They rest on the premise 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.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

## [\*\*HN6\*\*](#) [] Exemptions & Immunities, Collectives & Cooperatives

An association's freedom to exclude nonmembers from its activities is not absolute. It must yield to antitrust laws when its activities begin to correspond directly with and touch upon the business activities of its members; and the association has the power to shape and influence the economic environment of its particular market.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Business & Corporate Law > Unincorporated Associations

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

#### **HN7[] Exemptions & Immunities, Collectives & Cooperatives**

When membership in an association is a practical economic necessity, judicial review is available to examine bases for exclusion from membership.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

#### **HN8[] Exemptions & Immunities, Collectives & Cooperatives**

The rule of reason requires not only a demonstration that the anticompetitive practice relates to a legitimate purpose, but also that it is reasonably necessary to accomplish that purpose and narrowly tailored to do so.

## **Headnotes/Summary**

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### **Summary**

#### **CALIFORNIA OFFICIAL REPORTS SUMMARY**

A county board of realtors, composed of 75 percent of the brokers actively engaged in selling residential real property in a county, limited its membership to persons primarily engaged in the real estate business, and denied to nonmembers access to its multiple listing service. A part-time licensed real estate salesman, who had been denied membership in the board on the ground he was not primarily engaged in the real estate business, contested the board's decision, after which the board filed an action seeking a declaration that the exclusion was valid. The salesman filed a cross-complaint seeking declaratory relief, injunctions granting him board membership and access to the multiple listing service, and damages. After a nonjury trial, the trial court ruled in favor of the board on all issues, finding that the regulations in question were reasonable. (Superior Court of Marin County, No. 56832, Joseph G. Wilson, Judge.)

The Supreme Court reversed the judgment insofar as it granted declaratory relief on the complaint and denied relief on the cross-complaint, and reversed and remanded with directions to determine the issue of damages and to fashion appropriate relief. Initially, the court held that the state **antitrust law**, the Cartwright Act, applied to the real estate industry, and rejected the board's contention that the case was moot due to deletion of the bylaw requiring that associate members be primarily engaged in the real estate business. The court also held the practice of the board should be reviewed under the "rule of reason" standard, and not be judged per se violations of the Cartwright Act. The court then held both the access rule and the "primarily engaged" rule had serious anti-competitive effects without corresponding justifications. Accordingly, the court held the board's rules denying access of nonmembers to

the multiple listing service must be eliminated, and that as long as membership in the board was necessary for employment by an active member, the board should be enjoined from enforcing or promulgating any bylaw or other rule which conditions associate membership on primary engagement in the real estate industry. (Opinion by Mosk, J., expressing the unanimous view of the court.)

## Headnotes

### [CA\(1a\)](#) [ ] (1a) [CA\(1b\)](#) [ ] (1b)

#### **Monopolies and Restraints of Trade § 7—Under Cartwright Act—Prohibited Agreements and Combinations—Sale of Services.**

--The Cartwright Act applies to the sale of services, and was therefore applicable to certain restrictive practices of a county board of realtors, which bound its members as businessmen, and not as employees engaged in collective bargaining with employees.

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

#### **Monopolies and Restraints of Trade § 4—Sherman Act.**

--In light of the fact that the Cartwright Act is patterned after the Sherman Act and both statutes have their roots in the common law, federal cases interpreting the Sherman Act are applicable to problems arising under the Cartwright Act.

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

#### **Appellate Review § 120—Dismissal—Grounds—Mootness—What Constitutes.**

--An appeal from a judgment in favor of a county board of realtors, upholding its practices of limiting membership to persons primarily engaged in the real estate business and denying nonmembers access to its multiple listings service, was not rendered moot by the deletion of the bylaw requiring associate members to be primarily engaged in the real estate business, where the trial court had ruled not only on the board's prayer for declaratory relief, but also on a part-time salesman's cross-complaint to enjoin the board from denying him access to the multiple listings service; where the salesman maintained he sustained economic harm as a result of the board's refusal of his membership application; and where the question of the validity of the board's "primarily engaged" rule was justiciable, despite its deletion, since there was no assurance that the board would not re-enact it in the future.

### [CA\(4\)](#) [ ] (4)

#### **Monopolies and Restraints of Trade § 7—Under Cartwright Act—Prohibited Agreements and Combinations.**

--In determining whether a county board of realtors had violated the Cartwright Act by limiting its membership to persons primarily engaged in the real estate business, and by denying nonmembers access to its multiple listings service, the practices of the board were reviewable under the "rule of reason" standard, and were not per se violations of the act.

### [CA\(5a\)](#) [ ] (5a) [CA\(5b\)](#) [ ] (5b)

#### **Monopolies and Restraints of Trade § 7—Under Cartwright Act—Prohibited Agreements and Combinations.**

--A county board of realtors violated the Cartwright Act ([Bus. & Prof. Code, §§ 16720, 16726](#)) by limiting its membership to persons primarily engaged in the real estate business, and by denying nonmembers access to its multiple listings service, where, under the rule of reason standard, the board's practices seriously hampered the competitive effectiveness of nonmember licensed brokers and salesman, and part-time salesman, without any corresponding justification.

**CA(6)** [ ] (6)

**Monopolies and Restraints of Trade § 3—Associations.**

--An association's freedom to exclude nonmembers from its activities is not absolute; it must yield to antitrust laws when its activities begin to correspond directly with and touch upon the business activities of its members; and when the association has the power to shape and influence the economic environment of its particular market. Accordingly, while a board of realtors could permissibly provide some exclusive benefits to its members, it was required to grant to all licensed salesmen and brokers access to its multiple listing service, where access to the service was essential to nonmembers if they were to compete effectively.

**CA(7)** [ ] (7)

**Monopolies and Restraints of Trade § 10—Under Cartwright Act—Remedies of Individuals.**

--While it is not the law that a voluntary association may be forced to open its membership role to all who apply, nevertheless, when membership in an association is a practical economic necessity, judicial review is available to examine bases for exclusion from membership. Accordingly, a county board of realtor's rule excluding part-time salesmen from membership was subject to judicial review, where membership in the board of realtors was a practical economic necessity for real estate salesmen, in that without membership a salesman was denied employment with 75 percent of the residential real estate brokers in the county.

**CA(8)** [ ] (8)

**Monopolies and Restraints of Trade § 7—Under Cartwright Act—Prohibited Agreements and Combinations.**

--A rule of a county board of realtors limiting its membership to persons "primarily engaged" in the real estate business, which foreclosed part-time real estate salesmen from employment by 75 percent of the residential brokers in the county, could not be justified on the ground the rule operated to further the professional and ethical competency of the real estate profession, since the purported necessity for the "primarily engaged" was minimal in light of the extensive state regulation of the real estate industry, and where the board failed to establish that the rule facilitated an increase in professional or ethical competence in all or most cases.

**Counsel:** Harold L. Howard and Quantz & Howard for Defendant, Cross-complainant and Appellant.

Evelle J. Younger, Attorney General, Warren J. Abbott and Anthony C. Joseph, Assistant Attorneys General, Michael I. Spiegel and William S. Clark, Deputy Attorneys General, John K. Van de Kamp, District Attorney (Los Angeles), Harry B. Sondheim and Jay J. Becker, Deputy District Attorneys, as Amici Curiae on behalf of Defendant, Cross-complainant and Appellant.

Bianchi, Hoskins & Rosenberg, Bagley, Bianchi, Hoskins & Rosenberg, Albert Bianchi and Hugh J. Cadden for Plaintiff, Cross-defendant and Respondent.

Moses Lasky, Malcolm T. Dungan and Brobeck, Phleger & Harrison as Amici Curiae.

**Judges:** In Bank. Opinion by Mosk, J., expressing the unanimous view of the court. Wright, C. J., McComb, J., Tobriner, J., [\*\*\*\*2] Sullivan, J., Clark, J., and Richardson, J., concurred.

**Opinion by:** MOSK

## Opinion

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[\*923] [\*\*834] [\*\*\*2] We decide here for the first time the extent to which the state antitrust law circumscribes the practices of a multiple listing service [\*924] operated by a county board of realtors. We conclude that the HN1 [↑] Marin County Board of Realtors has violated the Cartwright Act (Bus. & Prof. Code, §§ 16720, 16726) by limiting its membership to persons primarily engaged in the real estate business and by denying nonmembers access to its multiple listing service.

The board is an incorporated real estate association affiliated with the California Real Estate Association and the National Association of Real Estate Boards. As of the time of trial in the present case, the board was composed of 777 associate members (salesmen), 255 active members (brokers), 50 affiliates and 4 honorary members. Three-fourths of the brokers actively engaged in selling residential real property in Marin County were members of the board.

The board provides a number of benefits to its members, the most important of which is the only multiple listing service for residential property operating exclusively in [\*\*\*3] Marin County.<sup>1</sup> The multiple listing service is a system for pooling each member's listing in a central registry. A member obtaining a client who desires to sell real property forwards the listing to the multiple listing service. If the sale is [\*\*\*3] eventually made through another member broker, the commission is divided between the selling and the listing broker.

The listings are available only to active and associate board members, who are prohibited by the board's bylaws from disseminating published listings to nonmembers. Although each active member may cooperate with nonmember brokers in selling his own listing, the actual extent of such cooperation is negligible. In 1972, out of 5,372 properties listed with the multiple listing service, only 51 were sold by nonmembers.

Eugene Palsson, a licensed [\*\*\*4] real estate salesman, applied to the board for membership [\*\*835] after obtaining employment with an active member. His application was denied because the board found that Palsson, an airline flight engineer, did not meet the requirements of one of the board's bylaws which provided that an associate member must be "primarily engaged in the real estate business." This provision was enforced through sanctions against an active member sharing offices with or employing a person denied membership in the board. Thus, a salesman [\*925] denied membership was also denied employment with 75 percent of the residential brokers in Marin County.<sup>2</sup>

When Palsson contested the board's decision, the board brought suit in [\*\*\*5] superior court, seeking a declaration that his exclusion was valid. Palsson filed a cross-complaint seeking declaratory relief, injunctions granting him board membership and access to the multiple listing service, and damages. The court, after nonjury trial, ruled in favor of the board on all issues, finding that the regulations in question were reasonable.

Before reaching the merits, we confront two preliminary issues. We must determine whether the Cartwright Act applies to the real estate industry and we must consider the board's contention that the case is now moot.

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<sup>1</sup> The board points out Marin County sellers may list their properties with other services, but these are regional services not likely to have a substantial impact on the sale of property in Marin County.

<sup>2</sup> Since a salesman must be employed by a broker in order to sell real estate (Bus. & Prof. Code, § 10132; Grand v. Griesinger (1958) 160 Cal.App.2d 397 [325 P.2d 475]), denial of membership and employment substantially hinders a salesman from pursuing a career in the real estate field.

I

**CA(1a)** (1a) While neither of the parties raise the issue, the California Association of Realtors (CAR), in an amicus brief, maintains that the Cartwright Act does not apply to the sale of services. This theory, raised here for the first time, appears to be contrary to federal and state authority. Indeed, the United States Supreme Court has expressly held that the Sherman Act applies to the activity of real estate brokers. ([United States v. Real Estate Boards \(1950\) 339 U.S. 485, 490-491 \[94 L.Ed. 1007, 1013-1014, 70 S.Ct. 711\]](#).) **CA(2)** (2) A long line of California cases has concluded that [HN2](#) the Cartwright Act is patterned [\*\*\*\*6] after the Sherman Act 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. (See, e.g., [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 \[117 Cal.Rptr. 188\]](#); [R. E. Spriggs Co. v. Adolph Coors Co. \(1974\) 37 Cal.App.3d 653, 659, fn. 5 \[112 Cal.Rptr. 585\]](#); [People v. Santa Clara Valley Bowling etc. Assn. \(1965\) 238 Cal.App.2d 225, 232 \[47 Cal.Rptr. 570\]](#).)

**CA(1b)** (1b) Despite this line of authority, CAR contends the legislative history behind the Cartwright Act and its language contradict its [\*926] application to a service-oriented industry. The state law, insists the CAR, was patterned not after the Sherman Act, but on the then existing identically worded antitrust statutes of a number of states, notably Michigan. CAR then cites a turn-of-the-century Michigan case for the proposition that that state's **antitrust law** does not apply to the sale of human services. ([Hunt v. Riverside Co-operative Club \(1905\) 140 Mich. 538 \[104 N.W. 40\]](#).)

[\*\*\*4] It is highly debatable that CAR's version of legislative history is accurate. Although the Cartwright Act is worded identically to Michigan's law, both statutes are near carbon copies of an earlier proposed amendment to the Sherman Act. The record of congressional debates reveals that [\*\*836] this unsuccessful amendment was designed not to narrow the scope of the Sherman Act but to broaden it. Its author, Senator Reagan, declared, "I confess to a little surprise at the suggestion . . . that the amendment which I have submitted is different in character from the measure which he has reported . . ." (21 Cong. Rec. 2564 (Mar. 24, 1890).) Indeed, he explained, "I have tried . . . to see if we could not devise a law that would arrest and prevent these trusts as far as the jurisdiction of Congress would go." (21 Cong. Rec. 2645 (Mar. 26, 1890).) Thus, it is difficult to infer from the annals of legislative history an intent to enact a law narrower in scope than the Sherman Act.

Even if CAR is correct in advising that we must look to the case law in states with identically worded statutes, the result is not helpful to its underlying theory. [\*\*\*8] *Hunt*, the Michigan case cited by CAR for the proposition that the **antitrust law** does not apply to the sale of human services, actually stands for the far more narrow holding that the **antitrust law** did not prevent employers from fixing the wages paid to plumbers.<sup>3</sup> A more recent Michigan opinion, commended by CAR in another portion of its brief as "extensive and careful," declared, "The Michigan Act is patterned after the Sherman Act . . ." and applied the state law to the activities of a multiple listing service operated by real estate brokers. ([Barrows v. Grand Rapids Real Estate Board \(1974\) 51 Mich.App. 75 \[214 N.W.2d 532, 536\]](#).) Other decisions construing statutes cast in the same language as the Cartwright Act have applied antitrust laws to realtors ([Bratcher v. Akron Area Board of Realtors \(6th Cir. 1967\) 381 F.2d 723](#)) and to insurance companies ([State v. American Surety Co. \(1912\) 91 Neb. 22 \[135 N.W. 365\]](#)).

[\*\*\*9] [\*927] CAR also refers to the provisions of [Business and Professions Code section 16720](#), which defines a trust as a combination of capital, skill or acts by two or more persons "(a) To create or carry out restrictions in trade or commerce." While that language is as broad as any found in the Sherman Act, CAR observes that subsequent subdivisions, defining specific types of trusts, speak primarily of problems relating to "merchandise" or "commodities." These terms refer to goods, not services, asserts CAR, and the broad language of subdivision (a) must be read in that light to exclude services from its scope.

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<sup>3</sup>Other state cases cited by CAR are similarly inapposite. They are based on statutes that are materially different from the Cartwright Act and, in most cases, are narrower than the California statute.

This inhibiting interpretation is insupportable in California case law, which has broadly defined "commodity" and just as liberally construed the provisions of the Cartwright Act. In [Speegle v. Board of Fire Underwriters \(1946\) 29 Cal.2d 34 \[172 P.2d 867\]](#), we applied the act to an agreement among insurance underwriters and agents, holding both that insurance is "commerce" under subdivision (a) and a "commodity" under subsequent subdivisions. We also applied the Cartwright Act in [People v. Building Maintenance etc. Assn. \(1953\) 41 Cal.2d 719 \[264 P.2d \\*\\*\\*\\*101\] 31](#) to the building maintenance contracting business, although only the sale of services was involved. And in [Messner v. Journeymen Barbers etc. International Union \(1960\) 53 Cal.2d 873, 886 \[4 Cal.Rptr. 179, 351 P.2d 347\]](#), we stated flatly, "Although human labor is not a 'commodity' under the act (§ 16703), a service consisting in the main of human labor is."

The only limitation on the broad sweep of the Cartwright Act can be found in section 16703, which provides, "Within the meaning of this chapter, labor, whether skilled or unskilled, is not a commodity." [\*\*\*5] This provision was apparently patterned after a similar portion of the federal Clayton Act ([15 U.S.C. § 17](#)) that was passed in [\*\*837] response to federal court decisions applying the Sherman Act to proscribe activities of labor unions. ([Allen Bradley Co. v. Union \(1945\) 325 U.S. 797, 802-803 \[89 L.Ed. 1939, 1944-1945, 65 S.Ct. 1533\]](#)) As the Messner decision emphasizes, section 16703 was not designed to exempt the sale of services from the scope of the act. (*Ibid.*) Nor, contrary to CAR's suggestion, is it a herculean task to determine when an activity is excepted from the act's [\*\*\*\*11] coverage. The relevant question, in every case, is whether the practice in question is meant to further the interest of tradesmen as employees in a collective bargaining context, or whether it is designed to advance their interests as entrepreneurs. While perhaps under some circumstances that distinction may be difficult to draw, in the present case it is beyond dispute that the practices of the Marin [\*928] County Board of Realtors bind the member as businessmen, not as employees engaged in collective bargaining with employers. Section 16703 is, then, inapplicable.

One can only speculate on CAR's insistence that the Legislature did not specifically consider the sale of services when it originally enacted the Cartwright Act. As CAR asserts, the act may have been passed in response to a Populist outcry against the commodity trusts that existed at the time of enactment. But [HN3](#)<sup>↑</sup> the Cartwright Act, like the Sherman Act, is "couched in . . . comprehensive language" and "forbids combinations of the kind described with respect to every type of business." ( [Speegle, supra, 29 Cal.2d at p. 43.](#)) Like many constitutional provisions written in general language, the provisions of the [\*\*\*\*12] act must be interpreted in light of their inductive policy and in the context of changing conditions of society. Just as our founding fathers could not have envisioned electronic eavesdropping technology when they enacted the Fourth Amendment's prohibition against unreasonable searches and seizures, the legislators who passed the Cartwright Act may not have foreseen the large scale emergence of service-oriented industries. But even as the Fourth Amendment has been applied to electronic eavesdropping ([Katz v. United States \(1967\) 389 U.S. 347 \[19 L.Ed.2d 576, 88 S.Ct. 507\]](#)), the policies behind the Cartwright Act compel its application to service industries. It is difficult to fancy the Populist authors of the act being indignant about cartels in the sugar beet industry and at the same time complacent if restraints of trade emerge in multi-million dollar insurance and real estate business enterprises. The conclusion is inescapable that the Cartwright Act applies to the present case.

## II

[CA\(3\)](#)<sup>↑</sup> (3) It is contended that the case before us is now moot. This claim is based on the board's assertion that while this case was pending appeal, the bylaw requiring that associate members be [\*\*\*\*13] primarily engaged in the real estate business was deleted. The board maintains that the appeal now "presents only academic or abstract questions" and is thus rendered moot. ( [Paul v. Milk Depots, Inc. \(1964\) 62 Cal.2d 129, 132 \[41 Cal.Rptr. 468, 396 P.2d 924\].](#))

The board's position ignores both the pleadings in the present case and the applicable law regarding mootness claims. The trial court ruled not only on the board's prayer for declaratory relief, but also on Palsson's suit for injunctive relief and damages. Palsson sought to enjoin the board [\*929] from denying him access to the multiple listing service, an action which brought into question the board's rules limiting access to its members. As there is

no indication that the board has changed the access rules, Palsson may still seek appellate relief. Moreover, he may also appeal on the issue of damages.

Palsson maintains he sustained economic harm as a result of the board's refusal of his membership application. This is a factual [\*\*838] [\*\*\*6] issue, which was not necessarily decided by the trial court. Although the court found, "Neither the Board nor any of its members have discriminated against [\*\*\*\*14] Palsson or acted to prevent him from listing or selling real properties or sought otherwise to impede his efforts in the real estate business in any manner," the import of the finding is unclear. It may mean that Palsson suffered no damages because he was treated as if he were a member of the board, or it may indicate that while Palsson has been injured he has no valid complaint because the board's exclusionary policies were reasonable. If the latter interpretation is correct,<sup>4</sup> then the issue of damages relates to the validity of the board's regulations and is not moot.

[\*\*\*15] Even the question of the validity of the board's "primarily engaged" rule is still justiciable, despite the board's deletion of the bylaw. Although the "primarily engaged" rule has been discontinued, there is no assurance that the board will not reenact it in the future. Indeed, it must be emphasized that the board itself initiated this lawsuit to have the rule declared valid and it prevailed in the courts below. As a federal court has pointed out in an antitrust case, "It is settled that [HN4](#) the voluntary discontinuance of alleged illegal practices does not remove the pending charges of illegality from the sphere of judicial power or relieve the court of the duty of determining the validity of such charges where by the mere volition of a party the challenged practices may be resumed." ([United States v. Insurance Board of Cleveland \(N.D.Ohio 1956\) 144 F.Supp. 684, 691](#).) It is equally well settled that an appeal will not be rendered moot if the parties raise substantial questions of public interest that are likely to recur. ([Id. at p. 691; Eye Dog Foundation v. State Board of Guide Dogs for the Blind \(1967\) 67 Cal.2d 536, 542 \[63 Cal.Rptr. 21, \\*930\] 432 \[\\*\\*\\*16\] P.2d 717](#).) In the case at bar, the importance of the questions involved is partly shown by the appearance of the California Association of Realtors, the Attorney General, and the District Attorney of Los Angeles County through amicus briefs. We are advised that a number of similar cases are pending in various trial courts. The issues raised are of substantial interest not only to real estate boards and home-buyers but also to all trade associations and their members, and to consumers in general. As the case is justiciable, we turn now to its merits.

### III

This matter is one of first impression in California,<sup>5</sup> [\*\*\*17] and only a handful of published opinions have dealt with the issues involved; these were decided in a variety of factual and legal contexts and reached divergent results based on varying rationales.<sup>6</sup> We must, therefore, rely extensively [\*\*839] [\*\*\*7] on the general principles underlying federal and state antitrust decisions.

<sup>4</sup> This appears to be the case, as the following portion of the record demonstrates: "The Court: . . . So, the question in this case is whether the action of the board was proper. There is no question that the action of the board imposed a disadvantage upon Mr. Palsson, and you are entitled -- you really don't have to show that. You are entitled to show the monetary extent of that disadvantage, if you can, and then the next question is whether that disadvantage is a result of proper or improper action on the part of the board."

<sup>5</sup> In [Jones v. San Bernardino Real Estate Board \(1959\) 168 Cal.App.2d 661 \[336 P.2d 606\]](#), the Court of Appeal upheld a real estate association's membership restriction similar to that in the case at bar. However, the court did not discuss either antitrust law or the possible relationship between membership in a real estate association and access to a multiple listing service. The decision, thus, is of little help to us.

<sup>6</sup> See [Barrows v. Grand Rapids Real Estate Board \(1974\) supra, 214 N.W.2d 532](#) (exclusion of nonmembers of real estate board from multiple listing service upheld under common law and state antitrust law, where nonmembers were substantially able to compete and majority of sales in the area were not made through the service); [Collins v. Main Line Board of Realtors \(1973\) 452 Pa. 342 \[304 A.2d 493\]](#) (exclusion of nonmembers from multiple listing service held per se common law restraint of trade); [Oates v. Eastern Bergen Co. Multiple List. Serv., Inc. \(1971\) 113 N.J.Super. 371 \[273 A.2d 795\]](#) (formation of closed corporation to operate multiple listing service involving substantial sales held per se violation of state antitrust laws); [Grempler v. Multiple List. Bureau \(1970\) 258 Md. 419 \[266 A.2d 1\]](#) (restriction of multiple listing service to members held reasonable, even though a

[\*\*\*\*18] **CA(4)** (4) The threshold question is whether the practices of the board should be judged per se violations of the Cartwright Act or reviewed under the "rule of reason" standard. In general, only unreasonable restraints of trade are prohibited. ([Standard Oil Co. v. United States \(1911\) 221 U.S. 1 \[55 L.Ed. 619, 31 S.Ct. 502\]](#)) 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 [\*931] 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 \[2 L.Ed.2d 545, 549, 78 S.Ct. 514\]](#)) Among these per se violations is the concerted refusal to deal with other traders, or, as it is often called, the group boycott. (*Ibid*; [Klor's v. Broadway-Hale Stores \(1959\) 359 U.S. 207, 212 \[3 L.Ed.2d 741, 744-745, 79 S.Ct. 705\]](#)).

Palsson asserts that the board's access rule and its "primarily engaged" by-law constitute a group boycott. Under the access rule, the members of the board have agreed to withhold from nonmembers [\*\*\*\*19] information on multiple listings, an agreement which could be interpreted as a concerted refusal to deal. The "primarily engaged rule," argues Palsson, is an agreement by member brokers not to employ licensed part-time salesmen, and, as such, is also a group boycott.

Although this proposition is superficially plausible, we hesitate before mechanically applying a per se rule. Adopting such a rule would establish the activities of the board to be illegal without any regard to their economic effects or possible justification. As applied to the access rule, the per se standard of review could lead to the conclusion that an association which provides any economic benefit to its members would be compelled to provide that same benefit to nonmembers. Two independent real estate brokers could not permissibly agree to share their listings with each other, unless they also provided for access to the other 250 brokers in their county. Similarly, if the "primarily engaged" rule were struck down without regard to its economic effect or possible justification, trade associations would be forced to open their doors to anyone permitted by law to practice the profession. Before acceding to the [\*\*\*\*20] demand for such a formidable rule, we must decide whether it is justified under applicable case law.

In the leading case of *Klor's v. Broadway-Hale Stores* (1959) *supra*, [359 U.S. 207](#), a large department store was charged with persuading wholesalers to refuse to sell to a smaller store on the same block or to sell to it at discriminatory prices. The court held that the activity alleged in the complaint constituted an unreasonable restraint of trade, irrespective of the magnitude of its economic effects or the justification for the alleged practices of the defendant.

The other leading case applying the per se standard to a boycott is [Fashion Guild v. Trade Comm'n \(1941\) 312 U.S. 457 \[85 L.Ed. 949, 61 S.Ct. 703\]](#), in which the court struck down an agreement by a [\*932] manufacturers' guild to refuse to sell to retailers who allegedly "pirated" their original dress designs. The court refused to consider the justification for the boycott, holding that the guild's agreement "has both as its necessary tendency and as its purpose and effect the direct suppression of competition from the sale of unregistered textiles and copied [\*\*840] [\*8] designs. [Citation.]" [\*\*\*\*21] ([Id. at p. 465 \[85 L.Ed. at p. 953\]](#).)

*Klor's* and *Fashion Guild* have been extensively analyzed both in legal journals and in the courts. Most of the commentators conclude that the practices condemned in the two cases represent a particular type of predatory activity distinguishable from many alleged boycotts.<sup>7</sup> The suggested distinction is between direct boycotts aimed at coercing parties to adopt noncompetitive practices and indirect boycotts which result in refusals to deal only as a by-product of the agreement. "When the element of purpose to coerce the trade policy of third parties or to secure

woman was denied membership on the basis that her main office was in another county); and [Grillo v. Bd. of Realtors of Plainfield Area \(1966\) 91 N.J.Super. 202 \[219 A.2d 635\]](#) (denial of access to nonmembers found to be unreasonable restraint of trade under common law principles).

<sup>7</sup> See, e.g., *Barrows v. Grand Rapids Real Estate Board* (1974) *supra*, [214 N.W.2d 532, 543](#); Austin, *Real Estate Board and Multiple Listing Systems as Restraints of Trade* (1970) 70 Colum.L.Rev. 1325, 1341 (hereinafter cited as Austin); Rahl, *Per Se Rules and Boycotts Under the Sherman Act: Some Reflections on the Klor's Case* (1959) 45 Va.L.Rev. 1165, 1172; Barber, *Refusals to Deal Under the Federal Antitrust Laws* (1955) 103 U.Pa.L.Rev. 847, 876; Case Comment (1967) 21 Rutgers L.Rev. 547, 558.

their removal from competition is absent, the policy question raised by agreements under which the parties mutually limit their own freedom to deal with outsiders becomes more difficult, and the courts have appropriately outlined wider limits before declaring such agreements illegal." (Barber, *Refusals to Deal Under the Federal Antitrust Laws* (1955) *supra*, 103 U.Pa.L.Rev. 847, 876.)

[\*\*\*\*22] This limitation on the per se rule is particularly applicable to trade association agreements not directly aimed at coercing third parties and eliminating competitors. In cases involving such agreements, courts have generally applied the rule of reason test. In [Associated Press v. United States \(1945\) 326 U.S. 1 \[89 L.Ed. 2013, 65 S.Ct. 1416\]](#), the bylaws of the Associated Press, a cooperative association engaged in gathering and distributing news, prohibited service of AP news to nonmembers, prohibited members from furnishing news to nonmembers, and empowered members to block the membership applications of competitors. The court affirmed a trial court finding that the bylaws limiting access to the wire service news, when combined with the membership restrictions, violated the Sherman Act. However, the court refused to hold that the access bylaws were by themselves antitrust violations, absent a more thorough exploration of the facts. ( *Id.*, at p. 22 [89 L.Ed. at \*933] pp. 2031-2032].) Throughout the opinion, the court stressed the predominance of the AP in the news-gathering field, noting that a restrictive agreement by the nation's largest news-gathering [\*\*\*\*23] agency presents a far different problem than would an exclusive news-sharing agreement between two newspapers in different cities. ( *Id.*, at p. 14 [89 L.Ed. at p. 2027].)

While *Associated Press* was decided prior to *Klor's*, most of the post-*Klor's* opinions have applied the rule of reason test to the noncoercive agreements of voluntary associations.<sup>8</sup> [\*\*\*\*24] This trend, while not universal,<sup>9</sup> [\*\*841]

<sup>8</sup> See, e.g., [Marjorie Webster Jr. Col. v. Middle States Assn. of C. & S. S. \(D.D.C. 1969\) 302 F.Supp. 459](#), reversed on other grounds, [Marjorie Webster Jr. Col. v. Middle States Assn. of C. & S. S. \(1970\) 432 F.2d 650 \[139 App.D.C. 217\]](#) (agreement to grant accreditation only to nonprofit colleges); [Deesen v. Professional Golfers' Association of America \(9th Cir. 1966\) 358 F.2d 165](#) (exclusion of golfer from PGA tournaments on grounds he was not good enough to compete); [Molinas v. National Basketball Association \(S.D.N.Y. 1961\) 190 F.Supp. 241](#) (exclusion of convicted gambler from NBA); [United States v. Insurance Board of Cleveland \(N.D.Ohio 1960\) 188 F.Supp. 949](#) (agreement by association of insurance agents excluding from membership agents who handled business of mutual agency companies); [Barrows v. Grand Rapids Real Estate Board \(1974\) supra, 214 N.W.2d 532](#) (exclusion of nonmembers of real estate board from multiple listing service); and [Union Circulation Company v. Federal Trade Com'n \(2d Cir. 1957\) 241 F.2d 652](#) (pre-*Klor's* decision applying rule of reason to agreement of magazine subscription agencies not to hire any salesman for a period of one year after he left employment of any member agency).

The rule of reason has also been used to evaluate alleged group boycotts outside of the voluntary association context. (See, e.g., [Dalmo Sales Co. v. Tysons Corner Regional Shopping Center \(D.D.C. 1970\) 308 F.Supp. 988](#) (action by department stores excluding plaintiff appliance dealer from shopping center); [Savon Gas Stations Number Six, Inc. v. Shell Oil Company \(4th Cir. 1962\) 309 F.2d 306](#) (restrictive covenant in lease agreement between shopping center and oil company providing that center would not lease to competitor of oil company).)

<sup>9</sup> Decisions applying the per se rule to associational noncoercive practices include the above-cited *Collins v. Main Line Board of Realtors* (1973) *supra*, [304 A.2d 493](#), and *Oates v. Eastern Bergen County Multiple List. Serv. Inc.* (1971) *supra*, [273 A.2d 795](#). In [People v. Santa Clara Valley Bowling etc. Assn. \(1965\) 238 Cal.App.2d 225 \[47 Cal.Rptr. 570\]](#), the Court of Appeal labeled as a per se violation a bowling proprietors' association rule providing that bowlers could compete in association tournaments only if they bowled a certain number of league games in member houses. The court found that such a rule was intended to coerce bowlers into abandoning nonmember establishments and frequent those owned by members.

[Silver v. New York Stock Exchange \(1963\) 373 U.S. 341 \[10 L.Ed.2d 389, 83 S.Ct. 1246\]](#), is also sometimes cited to show the general applicability of the per se rule. In that case, two Texas over-the -counter brokers and dealers in securities arranged with members of the New York Stock Exchange for direct telephone connections with a number of firms. The exchange told the firms to disconnect the telephones, substantially damaging the business of the Texans. The court found that the Sherman Act was violated, although its rationale is not entirely clear. While the opinion begins with language indicating the finding of a per se violation, the court then proceeds to examine and reject various justifications for the exchange's practice and also attacks the lack of procedural due process granted the plaintiffs. The latter part of the decision has led at least two commentators to conclude that *Silver* applied the rule of reason. (Note, *Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason* (1966) 66 Colum.L.Rev. 1486, 1487-1488; *The Supreme Court, 1962 Term* (1963) 77 Harv.L.Rev. 62, 156.) Others

[\*\*\*9] indicates a recognition by the courts that trade associations [\*934] may perform beneficial services for their members and society. (Austin, *op. cit., supra*, p. 1347, fn. 136.) In the course of providing these benefits, the associations often exclude nonmembers. But such exclusion, unless directly aimed at eliminating competition, can rarely be said to be so inherently destructive or so devoid of any discernible benefit that the courts must condemn the policy without exploring its effects or the underlying rationale.

[\*\*\*25] Thus, the rule of reason seems applicable to the present case. Neither the access rule nor the "primarily engaged" rule appears to be the type of predatory practice condemned in *Fashion Guild* and *Klor's*. As one commentator put it, "Real estate boards are basically self-restricting entities. . . . [The] primary intent of the association is to impose internal, not external, restraints. While nonmember brokers are excluded from the advantages of board facilities and, as a result of nonaccess to multiple listing services, foreclosed from market opportunities, these consequences are ancillary and incidental products of internal restraints. . . . Since the primary objective is not the destruction of particular brokers or of nonmember brokers as a class, the *Klor's* principle, that a group boycott designed to coerce directly is per se unlawful, should not apply." (Austin, *op. cit., supra*, pp. 1340-1341.) Thus, we proceed to analyze the board's policies under the rule of reason test.<sup>10</sup>

[\*\*\*26] [\*\*842] [\*\*\*10] IV

**CA(5a)** [↑] (5a) Under the rule of reason standard, pursuant to the salutary purposes of the **antitrust law**, we must analyze the economic effects of [\*935] the board's practices and then consider possible justifications for the practices. ( [Chicago Board of Trade v. United States \(1918\) 246 U.S. 231, 238 \[62 L.Ed. 683, 687, 38 S.Ct. 242\]](#).)

**HN5** [↑] Antitrust laws are designed primarily to aid the consumer. They rest "on the premise 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." ( *Northern Pac. R. Co. v. United States* (1958) *supra*, [356 U.S. 1, 4/2 L.Ed.2d 545, 549](#)).)

Another beneficiary of **antitrust law** is the competitor himself. The preservation of competition, while indirectly aiding society by producing lower prices and higher quality goods and services, directly aids the scrupulous trader by insuring him a fair opportunity to compete on the market. An anticompetitive practice [\*\*\*27] "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." ( *Klor's v. Broadway-Hale Stores* (1959) *supra*, [359 U.S. 207, 213 \[3 L.Ed.2d 741, 745\]](#).)

Viewed in the light of these purposes, the practices of the board pose serious anticompetitive dangers both to licensed real estate salesmen and brokers and to consumers. In evaluating the effects of the board's practices we consider as relevant the residential housing market in Marin County. In this market, the board and its multiple listing have substantial impact. Three-fourths of the brokers actively selling residential real property were members of the board at the time of trial. In 1972 alone, the multiple service listed 5,372 properties. Of those, 2,964 were sold through the multiple listing service for \$ 131,222,396, accounting for 35 percent of the total dollar sales of all real property in Marin County and a presumably much higher percentage of the sales dollars for residential property.

have interpreted *Silver* as a per se case, a circumstance which justifies the criticism of one writer that "The judgment of history must surely be that the courts and the legal profession have been far more successful in the results achieved in antitrust cases than in their efforts to articulate the ideas involved." (Rahl, *Per Se Rules and Boycotts Under the Sherman Act: Some Reflections on the Klor's Case* (1959) *supra*, 45 Va.L.Rev. 1165, 1168.)

<sup>10</sup> We recognize that in rejecting a per se rule in this case we are sacrificing some advantages, i.e., the facilitation of judicial certainty and the saving of litigation costs. ( *Northern Pac. R. Co. v. United States* (1958) *supra*, [356 U.S. 1, 5](#)) But the cost need not be significant. If a particular regulation is declared invalid under the rule of reason, both the courts and parties in a future case may contemplate that a similar rule in a comparable industry having like economic effects will also be held invalid. Adoption of the rule of reason does not preclude application of the doctrine of stare decisis.

The problems of a nonmember of the board in competing against this colossus are manifest. As the board's own advertising in [\*\*\*28] an area newspaper points out, Marin County homeowners selling through the multiple listing service in 1972 "got 225 Realtor members of the Marin County Board of Realtors and a sales force of over a thousand realty experts working for them. This makes short work of selling desirable [\*936] property at profitable prices." By contrast, the success of a nonmember "in obtaining listings or locating properties for sale -- his 'stock in trade' -- is governed and limited by his own efforts, contacts and abilities. He has only a limited supply of 'shoes on the shelves.' His commissions on selling are limited by that supply, and if buyers come to him to find out what he has to sell the same limitations apply." ( *Oates v. Eastern Bergen Co. Multiple List. Serv., Inc.* (1971) *supra*, [273 A.2d 795, 800](#).) Under these circumstances, one does not need an advanced degree in economics to predict whose services a buyer or seller of a home is likely to engage. The access rule, in short, seriously hampers the competitive effectiveness of nonmember licensed brokers and salesmen.<sup>11</sup>

[\*\*\*29] [\*\*843] [\*\*\*11] Moreover, the "primarily engaged" rule inflicts particularly severe economic detriment on a part-time salesman. Denied membership in the board, he may not be employed by three-fourths of the residential real estate brokers in Marin County. And, unless employed by a licensed broker, he may not legally sell real estate. ([Bus. & Prof. Code, § 10132](#).) Thus both rules seriously hamper a nonmember's ability to compete effectively in the real estate industry.

The buyer or seller of a home also suffers by the board's practices, although this injury is somewhat less evident. It may be argued that consumers are not being denied any housing information; all they must do is engage the services of a board member with access to the multiple listing service. A similar argument was answered by the Supreme Court in [Associated Press v. United States, supra, 326 U.S. at page 18 /89 L.Ed. at page 2029](#): "therefore, it is said, AP and its member publishers have not deprived the reading public of . . . news, since all they need do in any city to get it is to buy, on whatever terms they can in a protected market, the particular newspaper selected for the public by [\*\*\*30] AP and its members. We reject these contentions. [They] fly in the face of the language of the Sherman Act and all of our previous interpretations of it." The present case is comparable to *Associated Press* in that the board's practices, like [\*937] the AP bylaws, tend to limit entry into a competitive field by making it difficult for nonmembers to compete effectively with members.<sup>12</sup> Consumer choice is thereby narrowed. A person wishing to sell or buy a home may believe that a particular nonmember is more competent than available members. But if the consumer wishes to have ready access to a large market in a short period of time, he may be forced to deal with a less desirable member broker or salesman.

[\*\*\*31] This narrowing of choice may have an effect on the commissions a consumer must pay for brokerage service. Although no evidence has been offered on this issue, a nonmember, particularly a part-time broker not entirely dependent on real estate for his income, may be willing to accept a fee lower than the prevailing commission. Moreover, he may be less subject to the informal and often unspoken peer group pressure that some commentators indicate is responsible for maintaining standard prices in many industries. In short, the regulations imposed by the board have a deleterious effect both on competitors and consumers.

<sup>11</sup> Although this case deals primarily with a salesman, we see no reason to distinguish between a salesman and a broker with respect to the access rule. Nonmember brokers, like nonmember salesmen, are of course denied access to the multiple listing service and are thus injured by the rule to the same extent as salesmen. Moreover, the possible justifications for both rules -- insuring professional and ethical competence and preserving autonomy over provision of benefits and membership selection -- apply equally to both groups. The only difference between the two groups is in the injury caused by the "primarily engaged" rule. While part-time brokers are excluded from membership by a separate "primarily engaged" bylaw, such exclusion does not prevent them from earning a living to the same extent that it reacts upon salesmen, who may not sell real estate unless employed by a broker.

<sup>12</sup> It is not necessary for Palsson to prove that many brokers and salesmen have actually left the real estate field or declined to enter because of failure to obtain membership. When, as in the present case, a practice has a tendency to restrain trade, it may violate antitrust law, "whether it be 'wholly nascent or abortive on the one hand, or successful on the other.'" ( *Id. at p. 12 /89 L.Ed. at p. 2026*.)

We must weigh these anticompetitive effects against the possible justifications for the board's practices. The primary rationale for denying nonmembers access to the multiple listing service appears to be that the board has a right to make membership desirable by providing attractive benefits. Certainly, "an association cannot continue to exist if its activities are completely and unconditionally opened to outside participation. It is only through its activities that an association attracts and holds membership." (Bodner, *Antitrust Restrictions on Trade Association* [\*\*\*\*32] *Membership and Participation* (1968) 54 A.B.A.J. 27, 32.) An association may, for example, require membership eligibility for participation in an educational seminar, even when the seminar may provide an economic benefit.

**CA(6)[<sup>6</sup>] (6) HN6[<sup>6</sup>]** An association's freedom to exclude nonmembers from its activities is not absolute. It must yield to antitrust laws when (1) its activities begin to correspond directly with and touch upon the business activities of its members; and (2) the association has the power to shape and influence the economic environment of its particular market. (Austin, *op. cit.*, *supra*, p. 1345.) In the real estate field, "Since a [\*938] board-sponsored multiple is directly engaged in the buying and selling process, its duplicatory connection [\*\*844] [\*\*\*12] with the business interests of individual brokers is manifest." (*Id., at pp. 1345-1346*.) And, as we have seen, the board's ability to shape the economic environment of the Marin County residential brokerage market is substantial. While the Marin County Board of Realtors may permissibly provide some exclusive benefits to its members, access to the multiple listing service is so essential to nonmembers if they [\*\*\*\*33] are to compete effectively that such access must be granted to all licensed salesmen and brokers who choose to use the service.

The "primarily engaged" rule is sometimes justified on the grounds that the board has the right to choose its own members. **CA(7)[<sup>7</sup>] (7)** It has never been the law in California that a voluntary association may be forced to open its membership rolls to all who apply. On the other hand, **HN7[<sup>7</sup>]** when membership in an association is a practical economic necessity, judicial review is available to examine bases for exclusion from membership. ( *Pinsker v. Pacific Coast Soc. of Orthodontists* (1969) 1 Cal.3d 160, 165 [81 Cal.Rptr. 623, 460 P.2d 495], citing *Falcone v. Middlesex County Medical Soc.* (1961) 34 N.J. 582 [170 A.2d 791, 799, 89 A.L.R.2d 952].) In the case at bar, even if the access rule is eliminated, membership in the Marin County Board of Realtors must be termed a practical economic necessity for real estate salesmen. As noted above, without membership in the board, a salesman is denied employment with 75 percent of the residential real estate brokers in the county and a subsequent reasonable opportunity to earn a livelihood in real estate. The economic [\*\*\*\*34] benefits of membership mandate that exclusion be subject to judicial review.<sup>13</sup>

However, the availability of judicial review does not prevent the board from setting reasonable standards for admission. The issue becomes the type of standards which are permissible. In *Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 550 [116 Cal.Rptr. 245, 526 P.2d 253], we required only that an association's membership rules be rationally related to legitimate purposes and fairly applied. But in *Pinsker* we did not deal with allegations of antitrust violations and thus were not confronted with the same policy considerations facing us today. In the present [\*\*\*\*35] case, it has been demonstrated that the board's "primarily [\*939] engaged" rule poses serious anticompetitive dangers to society. In such a case, **HN8[<sup>8</sup>]** the rule of reason requires not only a demonstration that the anticompetitive practice relates to a legitimate purpose, but also that it is reasonably necessary to accomplish that purpose and narrowly tailored to do so.

In *Union Circulation Company v. Federal Trade Com'n* (2d Cir. 1957) *supra*, 241 F.2d 652, a federal court used the rule of reason to invalidate an agreement among magazine subscription solicitation agencies not to hire any salesman who had been employed by another agency during the past year. The agencies argued that the agreement was enacted to police the industry and was directed at personnel who had engaged in deceptive sales practices. But the court, noting that the agreements could be invoked against salesmen with unblemished records as well as against those targeted, declared, "The agreements here went beyond what was necessary to curtail and eliminate fraudulent practices." ( *Id., at p. 658*.)

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<sup>13</sup> We emphasize that the question before us concerns the validity of the "primarily engaged" rule in conjunction with other board bylaws effectively denying employment to nonmember salesmen. The question of availability of judicial review for an exclusion from membership, absent the access rule and the employment rules, is not before us.

**CA(8)** (8) In this case, the board claims that its "primarily engaged" rule operates to further the professional [\*\*\*36] and ethical competence of the real estate profession, surely a legitimate goal. A full-time salesman, maintains the board, will be more likely to educate himself on developments in the field and will have more time to devote to his clients.

[\*\*845] [\*\*\*13] This rationale can be challenged on two grounds. First, the purported necessity for the "primarily engaged" rule is minimal in light of the extensive state regulation of the real estate industry. ([Bus. & Prof. Code, §§ 10130- 10483](#)) These statutory regulations are comprehensive, covering everything from licensing and disciplining to out-of-state land promotions. One of the provisions includes a requirement that a real estate salesman can become a broker only after having been *actively* -- not necessarily *primarily* -- engaged in the business of real estate salesman for at least two years. ([Bus. & Prof. Code, § 10150.6](#)) While the existence of regulatory statutes does not per se preempt the field and prevent the Marin County board from setting its own internal standards, the legislatively enacted scheme does call into question the professional need for the board to act as an extra-governmental agency. (*Collins* [\*\*\*37] v. *Main Line Board of Realtors* (1973) *supra*, [304 A.2d 493, 497](#); *Grillo* v. *Bd. of Realtors of Plainfield Area* (1966) *supra*, [219 A.2d 635, 648](#); Case Comment (1967) *supra*, 21 Rutgers L.Rev. 547, 573.)

Second, the board has failed to establish that the "primarily engaged" rule facilitates an increase in professional or ethical competence in all or [\*940] most cases. *A priori*, there is no reason to believe that a full-time salesman will spend more time in self-education or with a particular client than would one serving part-time. Indeed, a part-time salesman, whose other sources of income may enable him to carry a much smaller clientele than his full-time counterpart, conceivably might have more leisure to devote to self-improvement or to aiding his client.

Even if the board's assumptions about part-time salesman were empirically valid in many cases, the "primarily engaged" rule is too broadly drawn in light of its anticompetitive effects. If the board seeks to encourage further professional education and devotion to clients, the board could consider regulations aimed directly at those goals. **CA(5b)** (5b) The "primarily engaged" rule, by excluding from membership [\*\*\*38] all part-time salesmen, including the most ethical, highly qualified and dedicated among them, is an anticompetitive regulation which, like the access rule, cannot be justified under the rule of reason.

V

We now ascertain the appropriate disposition of the various claims. The case, it will be remembered, arose in the context of a suit initiated by the board seeking a declaratory judgment that its exclusion of Palsson was valid and a cross-complaint by Palsson seeking damages and injunctive relief. The declaratory relief and damage issues are easily disposed of: the board is not entitled to the former and Palsson is entitled to a factual determination of the latter.

The injunctive aspect of the case is more difficult. The fashioning of a decree in an antitrust case in order to prevent future violations and eradicate existing evils is a matter for the trial court. (*Associated Press v. United States* (1945) *supra*, [326 U.S. 1, 22 /89 L.Ed. 2013, 2031-2032](#).) For the guidance of the court a broad framework for relief may be helpful. The board's rules denying access of nonmembers to the multiple listing service must be eliminated, although nonmembers may be charged a [\*\*\*39] reasonable fee for use of the service consistent with the per-capita costs of operation. In addition, as long as membership in the board is necessary for employment by an active member, the board should be enjoined from enforcing or promulgating any bylaw or other rule which conditions associate membership on primary engagement in the real estate industry.

[\*941] The judgment, insofar as it grants declaratory relief on the complaint, is reversed. Insofar as it denies relief on the cross-complaint, the judgment is reversed and remanded with directions to determine [\*\*846] [\*\*\*14] the issue of damages and to fashion appropriate relief consistent with the views expressed in this opinion.



## Corwin v. Los Angeles Newspaper Service Bureau, Inc.

Supreme Court of California

September 26, 1978

L.A. No. 30891

### **Reporter**

22 Cal. 3d 302 \*; 583 P.2d 777 \*\*; 148 Cal. Rptr. 918 \*\*\*; 1978 Cal. LEXIS 289 \*\*\*\*; 1978-2 Trade Cas. (CCH) P62,293

HAROLD CORWIN et al., Plaintiffs and Appellants, v. LOS ANGELES NEWSPAPER SERVICE BUREAU, INC., et al., Defendants and Respondents

**Prior History:** [\*\*\*\*1] Superior Court of Los Angeles County, No. C 932697, Lester E. Olson, Judge.

**Disposition:** *Corwin* I mandated the trial court to find the facts. After an extensive trial, the trial court found that the representation agreement neither restrained nor unreasonably restrained trade. Statewide does not question the factual basis of these findings. Since Statewide failed to establish by a preponderance of the evidence that either the purpose or the effect of the representation agreement was to restrain trade or unreasonably to restrain trade, we affirm the judgment of the trial court.<sup>19</sup>

## **Core Terms**

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Statewide, newspaper, advertising, restraint of trade, trial court, withdraw, unreasonable restraint, public notice, notices, across-the-board, summary judgment, wording, independent agency, illegal restraint, antitrust, profits, triable

## **LexisNexis® Headnotes**

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Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

### **HN1[] Appellate Review, Standards of Review**

An appellate court's role in reviewing a trial court's summary judgment is limited to a determination of whether the losing party had presented any facts giving rise to a triable issue.

Contracts Law > Contract Interpretation > General Overview

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<sup>19</sup> Because we affirm the judgment for defendants, it is unnecessary to consider the claim of defendant Copley Press, Inc., that it was entitled to a dismissal because of plaintiffs' failure to serve notice to them within three years after the commencement of this action.

## [\*\*HN2\*\*](#) Contracts Law, Contract Interpretation

In interpreting contracts, even if it be assumed that the words standing alone might mean one thing to the members of this court, where the parties have demonstrated by their actions that to them the contract means something quite different, the meaning and intent of the parties should be enforced.

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

## [\*\*HN3\*\*](#) Regulated Practices, Trade Practices & Unfair Competition

A contract, combination, or conspiracy is an illegal restraint of trade if it constitutes a per se violation of a statute or has as its purpose or effect an unreasonable restraint of trade.

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

## [\*\*HN4\*\*](#) Regulated Practices, Trade Practices & Unfair Competition

The determination of the existence of an illegal restraint of trade turns upon findings of fact and involves weighing all of the circumstances of a case.

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

## [\*\*HN5\*\*](#) Regulated Practices, Trade Practices & Unfair Competition

It is not the form of the combination or the particular means used but the result to be achieved that the antitrust law condemns.

## **Headnotes/Summary**

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### **Summary**

#### **CALIFORNIA OFFICIAL REPORTS SUMMARY**

In an antitrust suit by a partnership in the business of processing nonjudicial foreclosures of real property for its trustee clients against a newspaper service bureau and its 40 member newspapers, the trial court entered judgment for defendants, finding that representation agreements between the bureau and the newspaper publishers were not in violation of the antitrust provisions of the Cartwright Act, Bus. & Prof. Code, § 16700 et seq. The trial court found that the representation agreement did not in fact restrain trade. It also found that, although the wording of a paragraph in the representation agreement provided for forfeiture of the annual distribution of profits if a member newspaper excluded a class of advertising from the agreement, in actual practice no member had ever been penalized for excluding advertising from the agreement. Thus, the court found that since the right to exclude advertising was unfettered, the across-the-board commission arrangement of a second paragraph of the representation agreement did not operate as a restraint of trade. The court also expressly found that, even if the agreement did constitute a restraint of trade, such a restraint was reasonable, since the across-the-board commission provided for in the agreements was the only practical way to compensate the bureau for its services. The record indicated that the bureau worked with the public notice advertiser in placing the advertisement, that the bureau billed the advertisers on behalf of its members and remitted the proceeds, minus its commission, to each newspaper. Additionally, the bureau acted as a representative for its member newspapers in public relations and public law, and rendered expert assistance to its members in complying with statutes governing legal

advertisements. It also acted as a lobbyist for the newspapers. (Superior Court of Los Angeles County, No. C 932697, Lester E. Olson, Judge.)

The Supreme Court affirmed. The court held that the paragraph of the representation agreement providing for forfeiture of annual distribution of profits if a member newspaper excluded a class of advertising from the agreement did not constitute a restraint of trade. The court also held that the trial court's findings that the paragraph of the representation agreement providing for across-the-board commissions was not a restraint of trade, or, if a restraint of trade, not an unreasonable restraint, was supported by substantial evidence in light of the facts that the right of a member newspaper to withdraw a class of advertising from the agreement was in actual practice unfettered, and that plaintiff had never proposed to any bureau newspaper to serve as its representative for servicing trustee notices and had never performed any services for defendant newspapers. (Opinion by Tobriner, J., expressing the unanimous view of the court.)

## Headnotes

### CA(1) [ ] (1)

#### **Monopolies and Restraints of Trade § 10—Under Cartwright Act—Remedies of Individuals—Antitrust Actions—Sufficiency of Evidence.**

--In an antitrust action by a partnership in the business of processing nonjudicial foreclosures of real property for its trustee clients against a newspaper bureau and its member newspapers charging that the representation agreement between the bureau and the member newspapers under which the bureau processed the newspapers' public notice advertising violated the antitrust provisions of the Cartwright Act, Bus. & Prof. Code, § 16700 et seq., there was substantial evidence to support the trial court's findings that the relevant geographic market was limited to the State of California, and that the relevant product was the services of a newspaper representative in the field of public notice advertising. The record indicated that although the bureau's membership was limited to one specific county, over 40 percent of plaintiff's files involved property located outside of the county. As to the relevant product, the evidence showed that plaintiff neither attempted to represent newspapers for trustee sale notices or public notice advertising generally, nor performed any substantial services for the newspapers.

### CA(2a) [ ] (2a) CA(2b) [ ] (2b)

#### **Monopolies and Restraints of Trade § 8—Under Cartwright Act—Prohibited Agreements and Combinations—Representation Agreement Between Newspaper Bureau and Member Newspapers.**

--Where the parties to a contract have demonstrated by their actions that to them the contract means something quite different from the words of the contract standing alone, the meaning and intent of the parties should be enforced. Thus, in an action by a partnership in the business of processing nonjudicial foreclosures of real property for its trustee clients against a newspaper bureau and its member newspapers charging that a representation agreement between the bureau and the newspapers, under which the bureau processed public notice advertisements for the newspapers, was in violation of the antitrust provisions of the Cartwright Act, Bus. & Prof. Code, § 16700 et seq., there was substantial evidence to support the trial court's finding that a paragraph of the representation agreement providing for forfeiture of the annual distribution of profits if a member newspaper excluded a class of advertising from the agreement did not constitute a restraint of trade. The record indicated that in actual practice the paragraph had never been applied to penalize a member newspaper for excluding a class of advertising from the agreement, indicating that the bureau and the member newspapers interpreted the agreement to provide for no such penalty for withdrawal of a class of advertising. Furthermore, the record indicated that the paragraph of the representation agreement had neither the purpose nor the effect of restraining trade.

**CA(3) [ ] (3)****Monopolies and Restraints of Trade § 1—Mere Words of Agreement as Restraints of Trade.**

--The mere wording of a written agreement does not constitute a restraint of trade; the interpretation or application of the agreement, or its object and effect, must be taken into consideration as well.

**CA(4) [ ] (4)****Monopolies and Restraints of Trade § 1—Antitrust Laws—Purpose.**

--The basic purpose of the antitrust laws is to prevent undue restraints on trade which have a significant effect on competition. A contract, combination or conspiracy is an illegal restraint of trade if it constitutes a per se violation of a statute or has as its purpose or effect an unreasonable restraint of trade. The determination of the existence of such an illegal restraint of trade turns on findings of fact and involves weighing all of the circumstances of the case. Moreover, in reaching this determination, realities must dominate the judgment, and it is not the form of the combination or the particular means used, but the result to be achieved that the antitrust law condemns.

**CA(5) [ ] (5)****Monopolies and Restraints of Trade § 7—Under Cartwright Act—Prohibited Agreements and Combinations—Representation Agreement Between Newspaper Bureau and Member Newspapers—Provisions for Across-the-board Commissions.**

--In an action by a partnership in the business of processing nonjudicial foreclosures of real property for its trustee clients against a newspaper bureau and its member newspapers charging that a representation agreement between the bureau and the newspapers, under which the bureau processed public notice advertising for the newspapers, was in violation of the antitrust provisions of the Cartwright Act, Bus. & Prof. Code, § 16700 et seq., there was substantial evidence to support the findings of the trial court that a paragraph of the representation agreements, providing that the member agreed to pay the bureau a commission on each legal notice published by the newspaper, whether or not the particular advertisement was placed by the bureau, was not a restraint of trade, or, if a restraint of trade, not an unreasonable restraint. The record indicated that in actual practice the member newspapers had the right to withdraw a class of advertising from the agreement without penalty, and thus, the newspapers could, by excluding trustees' sales of the type handled by plaintiff, accept plaintiff's notices without paying a double commission. It further indicated that plaintiff was not in fact forced to reduce its profit level or charge its trustee clients a higher fee or offer representation for all types of public notice advertisements. Finally, it was undisputed that plaintiff never proposed to any bureau newspaper to serve as its representative for servicing trustee notices and did not perform any services for the newspapers.

**Counsel:** Darling, Hall, Rae & Gute and John R. Shiner for Plaintiffs and Appellants.

Robert F. Tyler, Ball, Hunt, Hart, Brown & Baerwitz, Albert H. Ebright, O'Melveny & Myers, Bertrand M. Cooper and Everett B. Clary for Defendants and Respondents.

**Judges:** Opinion by Tobriner, J., expressing the unanimous view of the court. Bird, [\*\*\*\*2] C. J., Mosk, J., Clark, J., Richardson, J., Manuel, J., and Newman, J., concurred.

**Opinion by:** TOBRINER

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**Opinion**

[\*306] [\*\*778] [\*\*\*920] Seven years ago in *Corwin v. Los Angeles Newspaper Service Bureau, Inc. (1971) 4 Cal.3d 842 [94 Cal.Rptr. 785, 484 P.2d 953]* (*Corwin I*), we reversed a summary judgment against plaintiffs Harold Corwin and Allen Barr (Statewide) and held that they were entitled to a trial in their antitrust suit against defendant Los Angeles Newspaper Service Bureau, Inc. (Bureau) and forty of its member newspapers. Statewide did not prevail in the trial below, and now appeals from the judgment in favor of defendants.

Statewide essentially contends that the trial court did not follow the mandate of *Corwin I* to find that the written agreement between the Bureau and its member newspapers was an unreasonable restraint of trade. As we explain, however, Statewide itself misconstrues *Corwin I* and the requirements of the antitrust laws. *Corwin I* merely held that Statewide had raised triable issues of fact; upon trial, plaintiff failed to establish that the agreement between the Bureau and its members pursued as its purpose, [\*\*\*3] or effectuated, a restraint of trade or an unreasonable restraint of trade. The judgment of the trial court must therefore be affirmed.

#### *Factual Background*

Statewide, a partnership formed in 1966, is in the business of processing nonjudicial foreclosures of real property for its trustee [\*\*779] clients. Statewide solicits business from trustees and charges them fees for posting notices of sale on properties, conducting sales, and arranging for newspaper publication of notices of default and notices of trustee sales.

[\*307] Statewide generally sends copies of such notices to designated newspapers, which charge Statewide for the price of publication. Some newspapers by agreement allow Statewide a commission which over the years has ranged between 10 and 30 percent.

The Bureau is a newspaper representative in the field of public notice advertising.<sup>1</sup> Its membership consists of 111 community newspapers published in Los Angeles County. Membership is open to any newspaper published in Los Angeles County which by decree of the superior court has been adjudicated a newspaper of general circulation. The Bureau was organized in 1934 for the purpose of helping community [\*\*\*4] newspapers solicit, publish, and compete for public notice advertising. Until the formation of the Bureau, such advertising had been monopolized to the exclusion of community newspapers by Consolidated Printing and Publishing Company.

The Bureau works with the advertiser to make sure a notice is properly phrased in accordance with applicable statutes and to ascertain which newspapers are qualified to carry the particular advertisement. It proofreads the advertisement and checks legal descriptions and affidavits of publication. The Bureau bills the advertisers on behalf of its members and remits the proceeds, minus its commission, to each newspaper. If an advertiser fails to pay, the Bureau absorbs the loss.

In addition to its services in processing legal advertisements, [\*\*\*5] the Bureau also acts as a representative for its member newspapers in the area of public relations and public law. It maintains for its members a compendium of the more than 2,000 statutes governing the various types of legal advertisements, and renders expert assistance to its members in complying with those statutes. It acts as a lobbyist for newspapers in seeking changes in legal publication statutes; it also contributes support to other newspaper associations representing publishers on a statewide level.

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<sup>1</sup> Public notice advertising includes advertising of such items as notices of trustee sales, certificates of fictitious names, probate notices, tax sale lists, solicitations for bids for government contracts and other notices required by law.

[\*\*\*921] Each Bureau member newspaper executes a representation agreement designating the Bureau its representative in soliciting and servicing all classes of public notice advertising.<sup>2</sup> Under paragraph Eighth of this [\*308] agreement the member agrees to pay the Bureau a 15 percent commission on each legal notice published by the newspaper, whether or not the particular advertisement was placed by the Bureau.<sup>3</sup> In return, the agreement provides that each member shall own one share of stock in the Bureau and shall be entitled to an annual pro rata distribution of the Bureau's net profits. Each member is also entitled to make use of all services performed by the [\*\*\*\*6] Bureau.

Each member reserves the right to withdraw any class of legal advertising from the agreement, in which case the Bureau receives no commission for the excluded class. The agreement provides in paragraph Second, however, that if the newspaper exercises its withdrawal privilege, it waives [\*\*\*7] [\*\*780] the right to participate in the annual distributions of the Bureau's net profits.<sup>4</sup>

[\*\*\*8] Statewide commenced the instant action against the Bureau and 40 of its members charging that the Bureau and defendant publishers entered into the representation agreements as part of a common plan and conspiracy violative of the Cartwright Act. ([Bus. & Prof. Code, § 16700 et seq.](#)) Statewide contended that the agreements constitute a combination to restrict trade in the soliciting and servicing of the publication of notices of trustee sales in violation of [Business and Professions Code sections I\\*3091](#) [16720](#) and [16726](#).<sup>5</sup> [\*\*\*9] In addition to treble damages plus attorney's fees and costs, Statewide sought an injunction forbidding defendants from enforcing or complying with their representation agreements and a declaration that the agreements are void as contrary to public policy.<sup>6</sup>

The trial court initially granted summary judgment in favor of defendants. We reversed this judgment in *Corwin I*. Because the instant appeal relies on our findings and holdings in *Corwin I*, an extended discussion of that case commands our attention before we examine the findings of the trial judge in the ensuing trial.

*Corwin I*.

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<sup>2</sup>The representation agreement has been modified over the years several times. With one exception (see *infra*, fn. 4), these modifications are not here relevant.

<sup>3</sup>Paragraph Eighth provides in relevant part: "The BUREAU shall and it is hereby authorized to deduct, as compensation for its services, fifteen (15%) per cent of all sums collected for the account of the PUBLISHER . . . . In the event any sums are paid directly to the PUBLISHER for any advertisements covered by this agreement, the PUBLISHER shall render a true and correct account thereof to the BUREAU and shall pay to the BUREAU within thirty days after receipt of said sums, a sum equal to fifteen (15%) per cent of the amount paid to the PUBLISHER."

<sup>4</sup>Paragraph Second provides in relevant part: "The PUBLISHER hereby retains the services of the BUREAU as representative of the PUBLISHER for soliciting and servicing of all legal advertising . . . ; provided, however, the PUBLISHER reserves the right to withdraw, at any time by notification in writing to the BUREAU, from the terms of this agreement, the following classes of legal advertising: ? [para. ] In the event the PUBLISHER exercises the withdrawal privilege herein contained, PUBLISHER agrees to and does hereby waive during the period of such withdrawal the right to participate in the distributions and/or credits contemplated under paragraph Ninth hereof." Paragraph Ninth provides for the annual pro rata distributions of the Bureau's profits as discussed above.

Following *Corwin I*, the Bureau amended paragraph Second to state that if the member exercised its withdrawal right it waived only that portion of the annual participation credit referable to the advertising withdrawn.

<sup>5</sup>[Section 16720](#) provides in relevant part: "A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes: [para. ] (a) To create or carry out restrictions in trade or commerce." [Section 16726](#) provides: "Except as provided in this chapter, every trust is unlawful, against public policy and void."

<sup>6</sup>Statewide also argued at trial that paragraph Second itself was a tying arrangement constituting a per se violation of [sections 16720](#) and [16726](#). The trial judge found, however, that no tying arrangement existed. Statewide does not challenge this finding on appeal.

In *Corwin I*, plaintiffs appealed from a summary judgment in favor of defendants. [\*\*\*922] The narrow issue before us, therefore, was "whether . . . the [declarations] filed below [disclosed] a triable issue of fact." ([4 Cal.3d at p. 852.](#))

The record before us in *Corwin I* was limited to the declarations of the parties and to the representation agreement. Taken alone, the representation agreement provided for the payment of an across-the-board commission on [\*\*\*\*10] all public notice advertising published by the member newspaper whether or not the particular advertisement was placed by the Bureau. Although each member had the right to withdraw a class of advertisement from the agreement, the agreement apparently provided that if such withdrawal privilege were exercised, the member waived all right to participate in the annual distribution of the Bureau's net profits. The limited record before us suggested that Bureau newspapers refused to pay Statewide a commission because of the across-the-board commission arrangement: "Members are understandably reluctant to pay the double commission which would result if they also paid Statewide for the advertising it furnishes." ([4 Cal.3d at p. 850.](#))

[\*310] We explained that Statewide would prevail in its appeal from the summary judgment if it demonstrated "not only that the agreements 'create or carry out restrictions in trade' ([§ 16720, subd. \(a\)](#)) but also that such restrictions are unreasonable. [Fn. [\*\*781] omitted.]" ([4 Cal.3d at p. 853.](#))

We found that paragraphs Second and Eighth of the representation agreements might involve restraints of trade. Paragraph [\*\*\*\*11] Eighth made it "economically infeasible for the Bureau's member newspapers to pay independent agencies such as Statewide the normal 15 percent advertising commission. . . . [No] newspaper could afford consistently to pay a total of 30 percent commissions (15 percent to the Bureau and 15 percent to the independent agency)." Thus Statewide might be "forced either to accept a reduced profit level or to charge its clients, the trustees, a higher fee. The more Statewide is compelled to charge its clients, the less able it will be to compete for their business. . . . Thus, the effect of paragraph Eighth is to reduce the profit margin and competitive strength of independent agencies such as Statewide." ([4 Cal.3d at p. 854.](#))

Paragraph Second of the agreement similarly appeared to impose a restraint of trade. As we noted, "By prohibiting *all* participation in the Bureau's distribution of profits if a member withdraws any class of advertising from the agreement, this provision severely penalizes a member newspaper which wishes to have a different representative or none at all for specified classes of legal advertising." ([4 Cal.3d at p. 854.](#))

Having determined [\*\*\*\*12] from the record before us that the representation agreements between the Bureau and its members apparently constituted a restraint of trade, we explained that the agreements violated the Cartwright Act unless shown to be reasonable. We explained that in determining whether a restriction is 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.' ([Chicago Board of Trade v. United States \(1918\) 246 U.S. 231, 238.](#)) . . . Whether a restraint of trade is reasonable is a question of fact to be determined at trial." ([4 Cal.3d at pp. 854-855.](#))

[\*311] We concluded that Statewide was entitled to a trial to determine whether the Bureau and its members had combined and conspired in restraint of trade.<sup>7</sup>

#### [\*\*\*\*13] [\*\*\*923] Findings of the Trial Court

After a 12-day trial in which 19 witnesses testified and 92 exhibits were received in evidence, the trial court entered judgment for defendants. The trial court supported its judgment with 36 detailed findings of fact.

<sup>7</sup> We also determined that Statewide had presented a triable issue of fact as to whether paragraph Second constituted an illegal tying arrangement ([4 Cal.3d at pp. 856-857.](#)) Statewide, however, does not challenge the trial judge's determination that no tying arrangement existed.

The trial court found that the representation agreement *did not in fact restrain trade*. Although the wording of paragraph Second provided for forfeiture of the annual distribution of profits if a member newspaper excluded a class of advertising from the agreement,<sup>8</sup> in actual practice no member had ever been penalized for excluding advertising from the agreement.<sup>9</sup> [\*\*\*\*14] Thus, [\*\*782] since the right to exclude advertising was "free and unfettered," the trial court found that the across-the-board commission arrangement of paragraph Eighth did not operate as a restraint of trade.<sup>10</sup>

While the trial court concluded that paragraphs Second and Eighth of the representation agreement did not constitute a restraint of trade, the court also expressly found that *if the agreement did constitute a restraint, such a restraint was reasonable* "under all the facts and circumstances." The across-the-board commission, the court found, was the only practical [\*312] way to compensate the Bureau for its services. The commission provided incentive to the Bureau to engage in a maximum sales effort to promote advertising rather than itself; eliminated disputes over the source of and credit for a particular notice; [\*\*\*\*15] and offered the fairest method of compensating the Bureau for its public relations and lobbying activities: "No practical way exists to make separate specific charges . . . for these additional activities."

**CA(1)** [1] (See fn. 11.) Appealing from the judgment below, Statewide contends that the trial judge erred by (1) failing to find that paragraph Second of the representation agreement on its face was a restraint of trade; and (2) failing to find that the across-the-board commission arrangement in paragraph Eighth was an unreasonable restraint of trade.<sup>11</sup> As we explain, however, Statewide misconstrues the import of *Corwin I*. The [\*\*\*924] undisputed findings of the trial judge clearly establish that neither paragraph Second nor Eighth constitutes an unreasonable restraint of trade.

[\*\*\*\*16] **CA(2a)** [2a] (2a) 1. *Paragraph Second of the representation agreement does not constitute a restraint of trade.*

Statewide does not challenge the trial court's finding that paragraph Second has never been applied to penalize a member newspaper for excluding a class of advertising from the agreement. Statewide contends, instead, that the wording of paragraph Second itself constitutes a restraint of trade regardless of the actual practice of the Bureau and its members. To support this contention, Statewide argues that the trial judge ignored our conclusion in *Corwin I* that "[since] the agreements between the Bureau and its member newspapers constitute a restraint upon trade,

<sup>8</sup> In 1972 this provision was eliminated from the representation agreement. (See fn. 4, *ante*.)

<sup>9</sup> The trial court found that "[throughout] the long history of the Bureau many members have excluded various kinds and classes of advertising from the agreement. The means of exclusion have varied -- some formal, others informal. The evidence is clear and convincing that no penalty of any kind whatsoever has been assessed by the Bureau or any of its members to any member for excluding any class or classes of advertising from the agreement and that the annual participation credit has been paid to each and every member of the Bureau regardless of whether that member had withdrawn or excluded any class or classes of advertising from the agreement."

<sup>10</sup> Moreover, as the trial court found, "STATEWIDE never made any effort to represent any newspaper published by the defendants in this case from 1966 to the present in the business of soliciting and servicing public notice advertising. STATEWIDE was not forced to offer representation for all public notice advertising. The withdrawal clause in the Representation Agreement permitted STATEWIDE to offer representation with regard to individual classes of such advertising."

<sup>11</sup> Statewide also challenges the trial court's finding that the "[relevant] geographic market is limited to the State of California" and that the "relevant product is the services of a newspaper representative in the field of public notice advertising." Statewide argues that the relevant geographic market must be limited to the County of Los Angeles and that the relevant line of commerce must be limited to notices of trustee's sales. In *Corwin I* we explained that the definition of the relevant market or line of commerce presents a question of law and fact. ([4 Cal.3d at p. 855](#).) Statewide does not explain how the trial court's definition fails as a matter of law. Moreover, the trial court's finding is supported by substantial evidence on the record. Although the Bureau's membership is limited to the County of Los Angeles, over 40 percent of Statewide's files involved property located outside Los Angeles. As to "relevant product," the evidence shows that Statewide neither attempted to represent newspapers for trustee sale notices or public notice advertising generally nor performed any substantial services for the newspapers.

they violate the Cartwright Act unless they are shown to be reasonable." ([4 Cal.3d at p. 854](#).) Statewide also maintains that our opinion in *Corwin I* [\*313] compels the conclusion that actual practice, although relevant, is not conclusive in determining the existence or nonexistence of a restraint.<sup>12</sup>

[\*\*\*\*17] [\*\*783] Statewide's first argument ignores the procedural posture of *Corwin I* and completely undercuts the fact-finding function of the trial court. As we explained in *Corwin I*, [HN1](#)<sup>13</sup> our role in reviewing the trial court's summary judgment was limited to a determination of whether the losing party had presented any facts giving rise to a triable issue. ([4 Cal.3d at p. 851](#).) Required to construe the affidavits of the moving party strictly and those of the opponent liberally, we found on the basis of the limited record before us that a triable issue of fact arose as to whether or not there was an unreasonable restraint of trade.

The record before us did not, however, indicate how paragraph Second was actually interpreted and applied. For this reason we merely noted the Bureau's tardy offer of proof concerning the interpretation and application of that paragraph, indicating our reluctance to consider a contention which was not supported by facts in the record before us and which had been raised at the eleventh hour; we specifically invited defendants to attempt to prove this contention at the subsequent trial.

Indeed, after a full presentation of the evidence, [\*\*\*\*18] the trial court did find the facts to be different from those which we were required to assume for purposes of reviewing the summary judgment in *Corwin I*. The undisputed findings of the trial court were that defendants had never assessed a penalty against a member newspaper which excluded a class of advertising from its agreement. Since the right to exclude a class of advertising was "unfettered," the trial court concluded that in fact no restraint of trade resulted from paragraph Second.<sup>14</sup>

[\*314] Thus the trial court in effect found a different [\*\*\*\*19] contract than the one we supposed in *Corwin I*. The consistent interpretation of the contract over a long period of [\*\*\*925] time so as not to provide for a penalty if a member newspaper withdraws a class of advertising from the agreement amounts to a practical construction of the contract. The wording of paragraph Second (see fn. 4, *ante*) is not so explicit as to foreclose this interpretation. We have explained that [HN2](#)<sup>15</sup> in interpreting contracts, "even if it be assumed that the words standing alone might mean one thing to the members of this court, where the parties have demonstrated by their actions . . . that to them the contract [means] something quite different, the meaning and intent of the parties should be enforced." ([Crestview Cemetery Assn. v. Dieden \(1960\) 54 Cal.2d 744, 754 \[8 Cal.Rptr. 427, 356 P.2d 171\]](#).)

Nevertheless, plaintiffs argue that the wording of an agreement, divorced from its interpretation or application by the parties, can constitute a restraint of trade. [CA\(3\)](#)<sup>16</sup> (3) We are unable to discover a single case which holds that the mere wording of a written agreement, regardless of its interpretation or application, or its [\*\*\*\*20] object and effect, constitutes a restraint of trade. Indeed, as we explain, the thrust of the antitrust laws completely negates this contention.

[CA\(4\)](#)<sup>17</sup> (4) The basic purpose of the antitrust laws is to prevent undue restraints upon trade which have a significant effect on competition. ([Apex Hosiery Co. v. Leader \(1940\) 310 U.S. 469, 483-495 \[84 L.Ed. 1311, 1316-1324, 60 S.Ct. 982, 128 A.L.R. 1044\]; \*Appalachian Coals, Inc. v. United States\* \(1933\) 288 U.S. 344, 359 \[77 L.Ed. 825, 829, 53 S.Ct. 471\].\)<sup>18</sup> \[HN3\]\(#\)<sup>19</sup> A contract, combination, or conspiracy is an illegal restraint of trade if](#)

<sup>12</sup> Statewide relies in particular on our footnote 3, which states, "In its supplemental brief filed in this court, the Bureau, for the first time herein, contends that while the literal language of the contract appears to dictate the total waiver of any right to profits as stated above, the actual practice has been to allow member newspapers which have excluded certain classes of legal advertising from their contract to participate in the distribution of net profits to the extent of the commissions they paid to the Bureau on nonexcluded classes. Since no such facts appear in the record, we cannot now consider this contention. However, to the extent that such facts are relevant, they may be proved at trial." (Italics added.) ([4 Cal.3d at p. 849, fn. 3](#).)

<sup>13</sup> The evidence presented at trial demonstrated that members could exclude classes of advertising from the agreement at any time by letter or telephone call or even by a refusal to pay for a class of advertising. The 14 member-newspaper representatives who testified at the trial stated that they knew about the withdrawal privilege. Their testimony indicated that nearly all member newspapers excluded at least one class of advertising from the agreement.

it constitutes a per se violation of the statute<sup>15</sup> or has as its *purpose or effect* an unreasonable restraint of trade. ([Cities Service Oil Company v. Coleman Oil Company, Inc. \(1st Cir. 1972\) 470 F.2d 925, 930-931](#), cert. den. (1973) 411 U.S. 967 [36 L.Ed.2d 688, 93 S.Ct. 2150].) [HN4](#)<sup>16</sup> The determination of the existence of such an illegal restraint of trade turns upon findings of fact and involves "[weighing] all of the circumstances of a case." ([Continental T. V., Inc. v. GTE Sylvania Inc. \(1977\) 433 U.S. 36, 49 \[\\*315\] \[53 L.Ed.2d 568, 580, 97 S.Ct. 2549\]](#).) [\*\*\*\*21] Moreover, in reaching this determination, "[realities] must dominate the judgment" ([Appalachian Coals, Inc. v. United States, supra, 288 U.S. 344, 360 \[77 L.Ed. 825, 830\]](#)): [HN5](#)<sup>17</sup> "It is not the form of the combination or the particular means used but the result to be achieved" that the **antitrust law** condemns. ([American Tobacco Co. v. U.S. \(1946\) 328 U.S. 781, 809 \[90 L.Ed. 1575, 1594, 66 S.Ct. 1125\]](#).)

[\*\*\*\*22] [CA\(2b\)](#)<sup>18</sup> (2b) In the present case, the trial court found that paragraph Second of the representation agreement had *neither the purpose nor the effect* of restraining trade. The trial court had the benefit of a 12-day trial and extensive exhibits. It made detailed findings of fact concerning every aspect of the public notice advertising business, the business practices of the Bureau, the relationship between the Bureau, the Bureau's members and competitors, and the history of the agreements between the Bureau and its members.<sup>19</sup> These findings are [\*\*\*926] not disputed, and they are supported by substantial evidence. The trial court correctly concluded, after examining all the facts and circumstances of the case, that paragraph Second of the agreement did not constitute a restraint of trade at all. We cannot say that the court erred as a matter of law in its conclusion.

[\*\*\*\*23] [CA\(5\)](#)<sup>20</sup> (5) 2. *The trial court's findings that paragraph Eighth of the representation agreement was not a restraint of trade, or, if a restraint of trade, not an unreasonable restraint, are supported by substantial evidence.*

Statewide also contends that paragraph Eighth, which provides for across-the-board commissions, is an illegal restraint of trade. Statewide claims that the trial court mistakenly assumed that paragraph Eighth [\*316] could not be an illegal restraint of trade if paragraph Second, providing for withdrawal for classes of advertising, were not a restraint of trade; Statewide claims that *Corwin I* treated each paragraph of the agreement as an independent illegal restraint.

[\*\*785] In *Corwin I*, we explained that paragraph Eighth appeared to require a member newspaper to pay a commission to the Bureau even if the advertising were placed by an independent agency such as Statewide. Although the agreement gave a member newspaper the right to withdraw a class of advertising from the agreement, in *Corwin I* we interpreted paragraph Second to provide for a prohibitive penalty if that withdrawal right were exercised. Thus, we explained, since no [\*\*\*\*24] newspaper would willingly pay a double commission, the effect of paragraph Eighth appeared to be to "reduce the profit margin and competitive strength of independent agencies such as Statewide." ([4 Cal.3d at p. 854](#)) We concluded that Statewide had presented a triable issue of fact as to whether the commission arrangement constituted an unreasonable restraint of trade.

<sup>14</sup> Since [sections 16720](#) and [16726](#) of the Cartwright Act were patterned after the Sherman Act ([15 U.S.C. § 1 et seq.](#)), decisions under the latter act apply to the former. ([Corwin I, 4 Cal.3d at p. 852](#).)

<sup>15</sup> Examples of per se violations include price fixing agreements ([U. S. v. Socony-Vacuum Oil Co. \(1940\) 310 U.S. 150 \[84 L.Ed. 1129, 60 S.Ct. 811\]](#)) and tying arrangements ([Northern Pac. R. Co. v. United States \(1958\) 356 U.S. 1 \[2 L.Ed.2d 545, 78 S.Ct. 514\]](#)). Statewide makes no claim of a per se violation in this appeal.

<sup>16</sup> In sum, the trial court found that the Bureau was originally organized in response to the monopolization of the public notice advertising business by a corporation which excluded community newspapers from the advertising. The underlying principle of the Bureau since its creation, the trial court found, has been to help community newspapers compete for public notice advertising. This policy, the trial court found, results in the publication of notices in the newspaper most likely to be effective. The trial court concluded that the Bureau substantially benefits both the public and the newspaper industry.

Moreover, the trial court found no evidence of any artificial barrier or restraint to competition. Representatives of member newspapers who testified at the trial stated that their agreement with the Bureau did not restrain them from dealing with Statewide or any other independent organization. Representatives of newspapers who did not pay Statewide a commission testified without exception that they paid no commission because Statewide did not provide them with any valuable services, and not because of any arrangement with the Bureau.

The trial court found, however, that the right to withdraw a class of advertising from the agreement was "unfettered"; therefore newspapers could, by excluding trustees' sales, accept Statewide's notices without paying a double commission.<sup>17</sup> [\*\*\*\*25] Statewide was *not* in fact forced to reduce its profit level or charge its trustee clients a higher fee or offer representation for all types of public notice advertisements. Statewide did not demonstrate below, and does not explain here how the commission arrangement operated as a restraint of trade in light of the fact that member newspapers were free at any time to withdraw a class of advertising from the agreement.<sup>18</sup>

Moreover, although the trial court concluded that paragraph Eighth did not operate as a restraint of trade, it nevertheless made detailed findings as to the *reasonableness* of the commission arrangement. As the court found, "The 15% commission provision in the Representation Agreement . . . is a reasonable provision. It operates fairly for the [\*317] newspaper and its representative. Such a commission arrangement provides for compensation on the basis of actual benefits received by the newspaper, . . . and furnishes a necessary and reasonable incentive to the Bureau to engage in a maximum sales effort to sell, promote and protect public notice advertising as opposed to selling the Bureau itself. . . . [para.] . . . The across-the-board [\*\*\*\*26] [\*\*\*927] commission arrangement is the only reasonable and practical way to compensate the Bureau for these services in a manner which is fair to the Bureau and to its members." Thus the trial court determined that even if paragraph Eighth, together with paragraph Second of the agreement, constituted an agreement in restraint of trade, the agreement did not effect an unreasonable restraint, and therefore did not violate the Cartwright Act.

As we explained above, *Corwin I* did not purport to find facts or require the trial court to ignore the evidence presented to it. Statewide neither disputes the trial court's factual findings nor explains how the commission arrangement operates as a restraint of trade or an unreasonable restraint of trade. Indeed, since Statewide apparently made no effort to offer a competitive service to the Bureau newspapers, we have difficulty in imagining how the agreement damaged Statewide. In sum, Statewide has not demonstrated error in the court below.

#### *Conclusion.*

*Corwin I* mandated the trial court to find the facts. After an extensive trial, the trial court found that the representation agreement [\*\*786] neither restrained nor unreasonably [\*\*\*\*27] restrained trade. Statewide does not question the factual basis of these findings. Since Statewide failed to establish by a preponderance of the evidence that either the purpose or the effect of the representation agreement was to restrain trade or unreasonably to restrain trade, we affirm the judgment of the trial court.<sup>19</sup>

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<sup>17</sup>Indeed testimony at trial suggested that a newspaper could withdraw "all advertising placed by Statewide" from the representation agreement.

<sup>18</sup>Particularly damaging to Statewide's case are the undisputed findings that, although Statewide knew of the withdrawal provision of the representation agreement, it never proposed to any Bureau newspaper to serve as the newspaper's representative for servicing trustee notices, and that Statewide did not perform any services for the newspapers.

<sup>19</sup>Because we affirm the judgment for defendants, it is unnecessary to consider the claim of defendant Copley Press, Inc., that it was entitled to a dismissal because of plaintiffs' failure to serve notice to them within three years after the commencement of this action.

## Younger v. Jensen

Supreme Court of California

January 31, 1980

L.A. No. 31024

**Reporter**

26 Cal. 3d 397 \*; 605 P.2d 813 \*\*; 161 Cal. Rptr. 905 \*\*\*; 1980 Cal. LEXIS 141 \*\*\*\*; 1980-1 Trade Cas. (CCH) P63,172

EVELLE J. YOUNGER, as Attorney General, etc., Plaintiff and Appellant, v. JOHN JENSEN et al., Defendants and Respondents

**Subsequent History:** [\*\*\*\*1] The petition of respondent Exxon Corporation for a rehearing was denied March 13, 1980. Tobriner, J., did not participate therein. White, J., \* participated therein. Clark, J., Richardson, J., and Manuel, J., were of the opinion that the petition should be granted.

**Prior History:** Superior Court of Los Angeles County, Nos. C-170995 and C-184173, John L. Cole, Judge.

**Disposition:** The orders denying enforcement of the subpoenas are reversed.

## Core Terms

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natural gas, attorney general, interstate, preempted, anti trust law, subpoenas, regulation, pipeline, transportation, antitrust, collateral estoppel, parties, subpoena, proceedings, producers, res judicata, investigate, contracts, federal district court, antitrust violation, circumstances, violations, state antitrust law, public interest, delegated, ownership, courts, investigatory power, restraint of trade, superior court

## LexisNexis® Headnotes

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Antitrust & Trade Law > Public Enforcement > US Department of Justice Actions > Investigations

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

### HN1 [down arrow] US Department of Justice Actions, Investigations

Cal. Gov't. Code § 11180 empowers the attorney general to investigate any subject under his department's jurisdiction. His power may be delegated to deputies and includes the right to subpoena witnesses and documentary evidence. If a subpoena is disobeyed he may petition the superior court for enforcement. After order to show cause and opportunity for hearing the court must require compliance if it appears that the subpoena was regularly issued.

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\* Assigned by the Chairperson of the Judicial Council.

26 Cal. 3d 397, \*397 605 P.2d 813, \*\*813 161 Cal. Rptr. 905, \*\*\*905 1980 Cal. LEXIS 141, \*\*\*\*1

Antitrust & Trade Law > Public Enforcement > US Department of Justice Actions > Investigations

## **HN2** [down] US Department of Justice Actions, Investigations

See [Cal. Gov't. Code § 11180\(a\), \(b\), and \(c\)](#).

Antitrust & Trade Law > Public Enforcement > State Civil Actions

## **HN3** [down] Public Enforcement, State Civil Actions

Possible antitrust violations are, of course, subjects under the state's chief law officer's jurisdiction.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > General Overview

Criminal Law & Procedure > ... > Grand Juries > Investigative Authority > General Overview

Criminal Law & Procedure > Commencement of Criminal Proceedings > Grand Juries > General Overview

## **HN4** [down] Public Enforcement, State Civil Actions

Because the state's chief law officer's investigative power extends to matters relating to antitrust violations it does not depend on any predetermination that violations actually or even probably have taken place. Mere investigation requires neither the filing of charges nor any formal proceedings. The power to make administrative inquiry is not derived from a judicial function but is more analogous to the power of a grand jury, which does not depend on a case or controversy in order to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

## **HN5** [down] Public Enforcement, State Civil Actions

Obviously there is an overlap between coverages of the Sherman Act, [15 U.S.C.S. § 1 et seq.](#) and state antitrust laws that prohibit substantially the same conduct, such as California's Cartwright Act, [Cal. Bus. & Prof. Code, § 16700 et seq.](#) Neither the Sherman Act nor the federal prohibition of undue burdens on interstate commerce prevents those state laws from reaching transactions that have interstate aspects but significantly affect state interests. The coordination of federal and state antitrust enforcement is a prime example of cooperative federalism.

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > Administrative Proceedings > General Overview

Energy & Utilities Law > Administrative Proceedings > Preemption

Energy & Utilities Law > Natural Gas Industry > General Overview

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

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Energy & Utilities Law > Natural Gas Industry > Marketing & Transportation > General Overview

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > Facility Abandonment

Energy & Utilities Law > Pipelines & Transportation > General Overview

Energy & Utilities Law > Pipelines & Transportation > Natural Gas Transportation

Energy & Utilities Law > Pipelines & Transportation > Pipelines > General Overview

Energy & Utilities Law > Pipelines & Transportation > Pipelines > Rates

## **HN6** Regulators, US Federal Energy Regulatory Commission

The Natural Gas Act, [15 U.S.C.S. §§ 717-717](#), gives the federal power commission (FPC) regulatory control over rates charged for interstate sale and transportation of natural gas and over the construction, connections, and abandonment of interstate gas pipelines. The act preempts state laws that would interfere with its regulatory scheme by fixing rates that are under FPC jurisdiction by requiring an interstate pipeline to purchase ratably from all connected wellheads or by ordering extension of an interstate pipeline to a local gas utility.

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Regulators > Public Utility Commissions > Ratemaking Procedures

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > General Overview

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > New York Stock Exchange

## **HN7** Energy & Utilities Law, Antitrust Issues

The Natural Gas Act, [15 U.S.C.S. §§ 717-717w](#), does not preclude application of federal antitrust laws to interstate gas transactions under federal power commission (FPC) regulation. Generally, subsequent federal statutes repeal federal antitrust laws only when there is plain repugnancy, and then only to the extent necessary to make the new statutory scheme work. The FPC's power over rates does not preclude federal antitrust proceedings against anticompetitive conduct that affects the ratemaking process.

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Regulators > Public Utility Commissions > Ratemaking Procedures

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > Facility Abandonment

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Energy & Utilities Law > Pipelines & Transportation > Pipelines > General Overview

Energy & Utilities Law > Pipelines & Transportation > Pipelines > Rates

## [\*\*HN8\*\*](#) [down] Energy & Utilities Law, Antitrust Issues

The federal power commission (FPC) fixes rates by approving or revising those initiated by the regulated companies. Proceedings to prevent or redress anticompetitive agreements or monopolizations that contaminate the private component of the ratemaking process do not undercut or impair the regulatory function. Similarly the FPC's control of market allocation through its authority over pipeline interconnections, acquisitions, construction, and abandonment does not preclude challenges to that allocation under federal antitrust law.

Antitrust & Trade Law > Regulated Industries > General Overview

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > State Regulation

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > Utility Companies

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Antitrust Issues > Administrative Considerations

Energy & Utilities Law > Cogeneration & Independent Companies > Utility Interconnection

Energy & Utilities Law > Utility Companies > Service Terminations

## [\*\*HN9\*\*](#) [down] Antitrust & Trade Law, Regulated Industries

Though the federal power commission must take antitrust considerations into account when it determines public interest and public convenience and necessity it has no power to insulate utilities under its regulation from the operation of the antitrust acts, or to determine when an antitrust violation has taken place.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

Energy & Utilities Law > Administrative Proceedings > Preemption

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > Antitrust Issues > Monopolization

Energy & Utilities Law > Antitrust Issues > Pricing Conduct

## [\*\*HN10\*\*](#) [down] Public Enforcement, State Civil Actions

No words in the Natural Gas Act, 15 U.S.C.S. § 717-717w, expressly prohibit investigation or other activity regarding state antitrust laws that are consistent with the federal counterparts. Nor is there any threatening conflict between federal and state antitrust provisions concerning conduct that the present investigation is designed to uncover; namely, price fixing, monopolization, divisions of markets, and restraint of trade. Hypothetical conflict between federal law and enforcement of California antitrust provisions within the scope of the investigation, even if assumed, is not ground for preemption since it may never arise in fact.

Energy & Utilities Law > Administrative Proceedings > Preemption

Immigration Law > Enforcement of Immigration Laws > State Enforcement

## [\*\*HN11\*\*](#) [blue] **Administrative Proceedings, Preemption**

A federal regulatory act does not preempt harmonious state regulation of matters that only peripherally affect federal concerns.

Energy & Utilities Law > Federal Oil & Gas Leases > Alaskan Interests & Leases > General Overview

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Administrative Law > Judicial Review > General Overview

Energy & Utilities Law > Administrative Proceedings > General Overview

Energy & Utilities Law > Administrative Proceedings > Judicial Review > General Overview

Energy & Utilities Law > Administrative Proceedings > Preemption

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > ... > US Federal Energy Regulatory Commission > Hearings & Orders > Judicial Review

Energy & Utilities Law > Natural Gas Industry > General Overview

Energy & Utilities Law > Natural Gas Industry > Marketing & Transportation > General Overview

Energy & Utilities Law > Pipelines & Transportation > Natural Gas Transportation

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

## [\*\*HN12\*\*](#) [blue] **Federal Oil & Gas Leases, Alaskan Interests & Leases**

The Alaska Natural Gas Transportation Act (ANGTA), [15 U.S.C.S. §§ 719-719o](#), facilitates selection, construction, and initial operation of a transportation system for delivery of Alaskan gas to the lower 48 states. The act provides for review and recommendation to the president by the federal power commission and other agencies a presidential decision and report to congress, and final approval by congressional joint resolution. The act limits judicial review by requiring challenges to be filed within limited periods in a particular court and by making the environmental impact statements conclusive. Those limits are reinforced by declarations of urgency and of intent to exercise fullest congressional power in limiting administrative and judicial procedures.

Energy & Utilities Law > Federal Oil & Gas Leases > Alaskan Interests & Leases > General Overview

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > Common Carriers

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Natural Gas Industry > General Overview

Energy & Utilities Law > Pipelines & Transportation > Natural Gas Transportation

Energy & Utilities Law > Pipelines & Transportation > Pipelines > General Overview

#### **HN13** [ ↴ ] **Federal Oil & Gas Leases, Alaskan Interests & Leases**

15 U.S.C.S. § 719 provides that nothing in the Alaska Natural Gas Transportation Act (Act), and no action taken hereunder, shall imply or effect an amendment to, or exemption from, any provision of the antitrust laws. Moreover, 15 U.S.C. § 719 directed the United States attorney general to conduct a thorough study of the antitrust issues and problems relating to the production and transportation of Alaska natural gas and to report findings and recommendations to congress within six months of the Act's enactment.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > General Overview

#### **HN14** [ ↴ ] **Estoppel, Collateral Estoppel**

A federal judgment has the same effect in the courts of this state as it would have in a federal court. Moreover, the court has abandoned the mutuality requirement.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

#### **HN15** [ ↴ ] **Estoppel, Collateral Estoppel**

Before a party can invoke the collateral estoppel doctrine, the legal matter raised in the second proceeding must involve the same set of events or documents and the same bundle of legal principles that contributed to the rendering of the first judgment.

## **Headnotes/Summary**

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### **Summary**

#### **CALIFORNIA OFFICIAL REPORTS SUMMARY**

The trial court denied the state Attorney General's petitions for orders compelling compliance with subpoenas served on two companies to give evidence at an investigation into possible state and federal antitrust violations affecting California in the marketing of natural gas that originates in Alaska. The Attorney General deemed defendants' responses inadequate and commenced the present enforcement proceedings. The trial court denied the petitions to compel compliance on the ground that the investigation was preempted by federal law. A third company, which had also been served a subpoena by the Attorney General, did not respond to the subpoena, but instead obtained from the federal district court an injunction against enforcement which was presently on appeal. (Superior Court of Los Angeles County, Nos. C-170995 and C-184173, John L. Cole, Judge.)

The Supreme Court reversed the orders denying enforcement of the subpoenas. The court held that it was within the authority of the Attorney General to inquire not only into the existence of antitrust violations but also into questions of California's jurisdiction over them. The court also held that the Attorney General's investigation was preempted by neither the Natural Gas Act of 1938 ([15 U.S.C. §§ 717-717w](#)) nor the Alaska Natural Gas Transpostation Act of 1976 ([15 U.S.C. §§ 719-719o](#)). Finally, the court held that Attorney General was not estopped from enforcing the subpoena against defendants by the federal district court judgment the enjoined him from enforcing a similar subpoena against the third company not a party to the present proceeding. (Opinion by Newman, J., with Bird, C. J., Mosk, J., and White, J., \* concurring. Separate dissenting opinion by Manuel, J., with Clark and Richardson, JJ., concurring.)

### **Headnotes**

#### [CA\(1a\)](#) [ ] (1a) [CA\(1b\)](#) [ ] (1b)

##### **State of California § 9 — Attorney General — Duties — Investigatory Powers.**

--Since the state Attorney General's investigative power extends to matters relating to antitrust violations, it does not depend on any predetermination that violations actually or even probably have taken place. Thus, it was within the Attorney General's power to inquire not only into the existence of state or federal antitrust violations affecting California in the marketing of natural gas that originated in Alaska but also into questions of California's jurisdiction over them.

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

##### **Monopolies and Restraints of Trade § 6 — Under Cartwright Act — Effect of Federal Law.**

--There is an overlap between the coverages of the federal Sherman Act ([15 U.S.C. § 1 et seq.](#)) and state antitrust laws that prohibit substantially the same conduct, such as the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)), but neither the Sherman Act nor the federal prohibition of undue burdens on interstate commerce contained in U.S.

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\* Assigned by the Chairperson of the Judicial Council.

Const., art. I, § 8, cl. 3, prevents those state laws from reaching transactions that have interstate aspects but significantly affect state interests.

CA(3a) [ ] (3a) CA(3b) [ ] (3b) CA(3c) [ ] (3c) CA(3d) [ ] (3d)

**Oil and Gas § 3 — Regulation — Investigation Into Violation of State Antitrust Laws — Preemption by Federal Law.**

--An investigation by the state Attorney General into possible state and federal antitrust violations affecting California in the marketing of natural gas that originated in Alaska was not preempted by either the Natural Gas Act of 1938 ([15 U.S.C. §§ 717-717w](#)), protecting consumers against exploitation at the hands of natural gas companies, or the Alaska Natural Gas Transportation Act of 1976 ([15 U.S.C. §§ 719-719o](#)), providing the means for making a decision as to the selection of a transportation system for delivery of Alaska natural gas to the lower 48 contiguous states. Thus, the trial court committed reversible error in denying petitions sought by the Attorney General for orders compelling compliance with subpoenas served on two companies requiring them to give evidence at the investigation. (Disapproving [Standard Radio and Television Co. v. Chronicle Publishing Co. \(1960\) 182 Cal. App. 2d 293 \[6 Cal. Rptr. 246\]](#), insofar as it holds that a federal regulatory scheme which does not expressly restrict the states and allows enforcement of federal antitrust laws nonetheless may preclude state antitrust enforcement consistent with those laws.)

CA(4) [ ] (4)

**Oil and Gas § 3 — Regulation — Natural Gas Act of 1938 — Preemption of State Laws.**

--The Natural Gas Act of 1938 ([15 U.S.C. §§ 717-717w](#)), protecting consumers against exploitation at the hands of natural gas companies, preempts state laws that would interfere with its regulatory scheme by fixing rates that are under the jurisdiction of the Federal Power Commission by requiring an interstate pipeline to purchase ratably from all connected well-heads, or by ordering extension of an interstate pipeline to a local gas utility.

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

**Oil and Gas § 3 — Regulation — Natural Gas Act of 1938 — Federal Antitrust Laws.**

--The Natural Gas Act of 1938 ([15 U.S.C. §§ 717-717w](#)), protecting consumers against exploitation at the hands of natural gas companies, does not preclude application of federal antitrust laws to interstate gas transactions under regulation of the Federal Power Commission. The commission's power over rates does not preclude federal antitrust proceedings against anticompetitive conduct but affects the rate-making process. The commission fixes rates by approving or revising those initiated by the regulated companies. Proceedings to prevent or redress anticompetitive agreements or monopolizations that contaminate the private component of the rate-making process did not undercut or impair the regulatory function. Similarly, the commission's control of market allocation through its authority over pipeline interconnections, acquisitions, construction and abandonment does not preclude challenges to that allocation under federal antitrust law.

CA(6) [ ] (6)

**Monopolies and Restraints of Trade § 1 — Federal Antitrust Laws — Subsequent Repeal.**

--Generally, subsequent federal statutes repeal federal antitrust laws only when there is plain repugnancy, and then only to the extent necessary to make the new statutory scheme work.

**CA(7) [D] (7)****Monopolies and Restraints of Trade § 1 — Antitrust Violations — Federal Power Commission.**

--Although the Federal Power Commission must take antitrust considerations into account when it determines public interest and public convenience and necessity in its regulatory actions, it has no power to insulate utilities under its regulation from the operation of the antitrust acts, or to determine when an antitrust violation has taken place.

**CA(8) [D] (8)****Constitutional Law § 6 — Operation and Effect — Supremacy of Constitutional Provisions — Preemption of State's Police Power.**

--Ordinarily a state's exercise of its police power is not deemed superseded under the federal supremacy clause (U.S. Const., art. VI, cl. 2) unless that was the clear and manifest purpose of Congress, unless compliance with both federal and state regulations is a physical impossibility, or unless state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

**CA(9) [D] (9)****Conflict of Laws § 4 — Relationship Between Federal and State Law — Preemption.**

--A federal regulatory act does not preempt harmonious state regulations of matters that only peripherally affect federal concerns.

**CA(10a) [D] (10a) CA(10b) [D] (10b)****Judgments § 83 — Res Judicata — Collateral Estoppel — Identity of Issues — Judgment Involving Different Events and Transactions.**

--Collateral estoppel does not apply when the previous judgment governed only the scope of future regulation that involves different events and transactions. Thus, the Attorney General was not estopped from petitioning the superior court for orders compelling compliance with subpoenas served on two companies requiring them to give evidence at investigative hearings, despite the fact that a federal district court had entered a judgment enjoining the Attorney General from enforcing a similar subpoena against a third company which was not a party to the present proceedings. The federal judgment governed no past events but only restricted the scope of future regulation by enjoining enforcement of the subpoena against the third company. That subpoena called only for evidence under the control of the third company and involved different events and transactions from the present subpoenas.

**CA(11) [D] (11)****Judgments § 85 — Res Judicata — Collateral Estoppel — Character of Tribunal — Federal Judgment.**

--A federal judgment has the same effect in the state courts as it would have in a federal court. Accordingly, the fact that a federal judgment has been appealed does not prevent it from operating as a collateral estoppel in a state court.

[CA\(12\)](#) [  ] (12)**Judgments § 82 — Res Judicata — Collateral Estoppel — Mutuality.**

--Like the California Supreme Court, the United States Supreme Court has abandoned the mutuality requirement in the application of the doctrine of collateral estoppel.

[CA\(13\)](#) [  ] (13)**Judgments § 83 — Res Judicata — Collateral Estoppel — Identity of Issuesy — Identity of Facts.**

--If the very same facts and no others are involved in a second case, a prior judgment will be conclusive as to the same legal issues which appear, assuming no intervening doctrinal change. However, if the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case. Thus, the second proceeding may involve an instrument or transaction identical with, but in a form separable from, the one dealt with in the first proceeding. In that situation, a court is free in the second proceeding to make an independent examination of the legal matters at issue. It may then reach a different result, or if consistency and decision is considered just and desirable, reliance may be placed upon the ordinary rule of stare decisis. Before a party can invoke the collateral estoppel doctrine in these circumstances, the legal matter raised in the second proceeding must involve the same set of events or documents and the same bundle of legal principles that contribute to the rendering of the first judgment.

**Counsel:** Evelle J. Younger, Attorney General, Warren J. Abbott, Robert H. O'Brien, Assistant Attorneys General, and Linda L. Tedeschi, Deputy Attorney General, for Plaintiff and Appellant.

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Hughes, Hubbard & Reed, Norbert A. Schlei, Ronald C. Redcay, David A. Lombardero, Otis Pratt Pearsall, John A. Donovan, Philip H. Curtis, Ronald J. Tabak, Kenneth R. Dickerson, James R. Coffee, Donald A. Bright and Edward E. Vaill as Amici Curiae on behalf [\*\*\*\*2] of Defendants and Respondents.

**Judges:** Opinion by Newman, J., with Bird, C. J., Mosk, J., and White, J., \* concurring. Separate dissenting opinion by Manuel, J., with Clark and Richardson, JJ., concurring.

**Opinion by:** NEWMAN

## **Opinion**

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**[\*402] [\*\*816] [\*\*\*908]** The California Attorney General has appealed from orders that deny two petitions for enforcement of subpoenas to give evidence at an investigation into possible antitrust violations affecting California in the marketing of natural gas that originates at Prudhoe Bay, Alaska.

The principal issues are (1) the authorized scope of the state's investigation, and (2) whether federal law preempts the investigation. Also at issue is whether the Attorney General is collaterally estopped by a federal court injunction that on preemptive grounds forbids investigatory proceedings that appear similar.

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\* Assigned by the Chairperson of the Judicial Council.

Government Code section 11180 HN1[] empowers the Attorney General to investigate any subject under his department's jurisdiction.<sup>1</sup> His power may be delegated to deputies (§ 11182) and includes the right to subpoena witnesses and documentary evidence (§ 11181). [\*\*\*\*3] If a subpoena is disobeyed he may petition the superior court for enforcement. (§§ 11186, 11187.) After order to show cause and opportunity for hearing the court must require compliance "[if] it appears . . . that the subpoena was regularly issued . . ." (§ 11188.)

On January 19, 1976, the incumbent Attorney General delegated to certain deputies authority "to conduct an investigation into the ownership, production, sale and distribution of Prudhoe [\*\*\*\*4] 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 [\*403] restraint of trade, and to hold hearings, issue subpoenas inspect books and records, take testimony, hear complaints, and administer oaths in connection therewith . . ." Investigation was prompted by a request of the Public Utilities Commission (PUC) for the Attorney General's opinion on possible antitrust violations arising out of two funding agreements the PUC had approved between certain California utilities and certain producers of Prudhoe Bay gas. Under one agreement Pacific Lighting Gas Development Company (PLGD), an affiliate of Southern California Gas Company, agreed with Atlantic Richfield Company (ARCO) to assume loan payments in exchange for rights to 60 percent of ARCO's gas reserves at Prudhoe Bay. In the other agreement Pacific Gas and Electric Company (PG&E) agreed to assume similar payments in exchange for 30 percent of the Prudhoe Bay gas production of Exxon Corporation over a 20-year period. Both agreements contained [\*\*\*\*5] "most favored nation" clauses providing that gas should be purchased at prices not less than the highest price paid any producer by any buyer for Prudhoe Bay gas to be delivered in the lower 48 states. PUC's question was whether those clauses would give rise to antitrust violations.

Replying by letter on January 2, 1976, the Attorney General opined not only that the [\*\*817] most-favored-nation clauses might be contracts [\*\*\*909] in restraint of trade but also that known facts indicated the need for further investigation of other possible antitrust violations in connection with sales of Alaska gas in California -- including price-fixing agreements among producers, monopolization, and division of the California market. The letter urged the PUC to investigate and offered the Attorney General's cooperation.

On December 31, 1975, the Federal Power Commission (FPC)<sup>2</sup> withdrew its authorization to include in gas pipelines' rate bases advance payments made to gas producers. (See Public Serv. Com'n, State of N. Y. v. Federal Power Com. (D.C. Cir. 1975) 511 F.2d 338 (conditioning the continuation of rate-base treatment of advance payments on further investigation [\*\*\*\*6] of cost-effectiveness).) The two California funding agreements were then terminated by the parties, whereupon the PUC rescinded its approval of the PLGD-ARCO agreement on January 27, 1976, the PG&E-Exxon agreement on April 13, 1976.

[\*404] The Attorney General instituted his investigation in the spring of 1976 by serving subpoenas on the four parties to the agreements, requiring that documents be produced and that representatives testify. Responses were deemed inadequate, and accordingly he commenced the enforcement proceedings now before us (§§ 11186-

<sup>1</sup> All section references are to the Government Code unless otherwise indicated. Section 11180 provides: HN2[] "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."

The Attorney General is head of the Department of Justice (§ 12510; cf. § 15000), which includes the Office of the Attorney General (§ 15001).

<sup>2</sup> As of October 1, 1977, all functions of the FPC were transferred to the Secretary of Energy and the Federal Energy Regulatory Commission. (42 U.S.C. §§ 7151, 7172, 7341; Exec. Order No. 12009, 42 Fed. Reg. 46267 (Sept. 13, 1977), 42 U.S.C.A. § 7341, note.) For convenience here we use "FPC" to refer to the entity exercising those functions after as well as before the transfer.

11187) -- one against [\*\*\*\*7] Exxon, the other against PLGD and its secretary, John Jensen.<sup>3</sup> The matter was heard by the trial court, which on April 19, 1977 denied enforcement in both proceedings on the sole ground that the Attorney General's investigation was preempted by federal regulation of interstate distribution of natural gas, particularly under laws conferring jurisdiction on the FPC (see [15 U.S.C. § 717 et seq.](#)). The Attorney General's appeals present identical issues and thus were consolidated.

#### [\*\*\*\*8] Authorized Scope of Investigation

**CA(1a)[<sup>↑</sup>](1a)** The issue posed by the trial court's order is not the validity of hypothetical steps California might take to enforce its antitrust laws but rather the power of the state's chief law officer to investigate possible violation of law. Defendants were subpoenaed pursuant to his delegation of authority "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." That clearly was within his over-all authority to investigate "matters relating to . . . subjects under [his] jurisdiction" ([§ 11180](#); see footnote 1, *ante*, p. 402 and [Shively v. Stewart \(1966\) 65 Cal.2d 475, 479 \[55 Cal. Rptr. 217, 421 P.2d 65, 28 A.L.R.3d 1431\]](#)).

**HN3[<sup>↑</sup>]** Possible antitrust violations are, of course, subjects under his jurisdiction. (See, e.g., [Bus. & Prof. Code, §§ 16750, 16752- 16754.5, \[\\*\\*\\*\\*9\] 16760.](#))

**HN4[<sup>↑</sup>]** Because his investigative power extends to "matters relating to" antitrust violations it does not depend on any predetermination that violations actually or even probably have taken place. The breadth of the power was recognized in [Brovelli v. Superior Court \(1961\) 56 Cal.2d 524 \[<sup>1</sup>\\*405\] \[15 Cal. Rptr. 630, 364 P.2d 462\]](#), which upheld "an [\*\*818] investigation commenced by the attorney general [\*\*\*910] to determine whether the Cartwright Act or the Unfair Practices Act was being violated by the concrete block industry" (*id.*, at p. [526](#)). Noting that mere investigation requires neither the filing of charges nor any formal proceedings, this court stated: "As has been said by the United States Supreme Court, the power to make administrative inquiry is not derived from a judicial function but is more analogous to the power of a grand jury, which does not depend on a case or controversy in order to get evidence but can investigate 'merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.' (" [United States v. Morton Salt Co., 338 U.S. 632, 642-643 \[70 S. Ct. 357, 94 L. Ed. 401\].](#)" [\*\*\*\*10] ([56 Cal.2d at p. 529.](#)))

The investigation here could be undertaken to inquire not only into the existence of violations but also into questions of California's jurisdiction over them. (See [Okla. Press Pub. Co. v. Walling \(1946\) 327 U.S. 186, 215-217 \[90 L. Ed. 614, 633-634, 66 S. Ct. 494, 166 A.L.R. 531\].](#)) **CA(2)[<sup>↑</sup>](2)** **HN5[<sup>↑</sup>]** Obviously there is an overlap between coverages of the Sherman Act ([15 U.S.C. § 1 et seq.](#)) and state antitrust laws that prohibit substantially the same conduct, such as California's Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)).<sup>4</sup> Neither the Sherman Act nor the federal prohibition of undue burdens on interstate commerce (U.S. [Const. art. I, § 8, cl. 3](#)) prevents those state laws from reaching transactions that have interstate aspects but significantly affect state interests. ( [Speegle v. Board of Fire Underwriters \(1946\) 29 Cal.2d 34, 51 \[172 P.2d 867\]; R. E. Spriggs v. Adolph Coors Co. \(1974\) 37 Cal. App. 3d 653, 659 \[112 Cal. Rptr. 585\].](#))<sup>5</sup> Accordingly, the coordination of federal and state antitrust

<sup>3</sup> A proceeding against PG&E culminated in an order of the San Francisco Superior Court filed November 22, 1976, which enforced most of the terms of the subpoena and is now final. ARCO did not respond to its subpoena. Instead it obtained from the United States District Court, Central District of California, an injunction against enforcement that is still on appeal. See *post*, footnote 8. The ARCO proceeding is discussed below in connection with defendants' contention that the present proceedings are barred by collateral estoppel.

<sup>4</sup> Federal cases interpreting the Sherman Act generally apply to construction of the Cartwright Act. ( [Mailand v. Burckle \(1978\) 20 Cal.3d 367, 376 \[143 Cal. Rptr. 1, 572 P.2d 1142\]; Marin County Bd. of Realtors, Inc. v. Palsson \(1976\) 16 Cal.3d 920, 925 \[130 Cal. Rptr. 1, 549 P.2d 833\]; Corwin v. Los Angeles Newspaper Service Bureau, Inc. \(1971\) 4 Cal.3d 842, 852-853 \[94 Cal. Rptr. 785, 484 P.2d 953\].](#))

enforcement has become [\*\*\*\*11] a prime example of "cooperative federalism." (Rubin, *Rethinking State Antitrust Enforcement* (1974) 26 U.Fla.L. Rev. 653, 680; see too Mosk, *State Antitrust Enforcement and Coordination with Federal Enforcement* (1962) 21 A.B.A. Antitrust Section 358; Fellmeth & Papageorge, *A Treatise on State Antitrust Law* and Enforcement (1978) 7-18.)

[\*\*\*\*12] [\*406] [CA\(1b\)](#) (1b) The present investigation has both interstate and intra-California aspects. Though dealing with gas to be imported from another state, defendants' actions are being investigated for possibly illegal impact on the marketing of that gas in California. Thus while conducting the investigation the Attorney General properly may be concerned not only with the possibilities of prosecution in California courts but also with formulations of enforcement policy in cooperation with federal authorities and with recommendations for remedial administrative rulings and legislation.<sup>6</sup> (See 1 Davis, [\*\*819] [\*\*\*911] *Administrative Law Treatise* (2d ed. 1978) § 4:4.) [Section 11180](#) surely empowers the Attorney General to gather information that is "not plainly incompetent or irrelevant to" those purposes. (See [Endicott Johnson Corp. v. Perkins](#) (1943) 317 U.S. 501, 509 [87 L. Ed. 424, 429, 63 S. Ct. 339].)

[\*\*\*\*13] Natural Gas Act

[CA\(3a\)](#) (3a) Defendants contend the Attorney General's investigation is preempted by [HN6](#) the Natural Gas Act, which gives the FPC regulatory control over rates charged for interstate sale and transportation of natural gas and over the construction, connections, and abandonment of interstate gas pipelines. ([15 U.S.C. §§ 717-717w.](#)) [CA\(4\)](#) (4) The act preempts state laws that would interfere with its regulatory scheme by fixing rates that are under FPC jurisdiction ( [Natural Gas Co. v. Panoma Corp.](#) (1955) 349 U.S. 44 [99 L. Ed. 866, 75 S. Ct. 576] (producer's prices to interstate pipeline); [Public Utilities Comm'n v. Gas Co.](#) (1943) 317 U.S. 456 [87 L. Ed. 396, 63 S. Ct. 369] (interstate pipeline's prices to local distributor)), by requiring an interstate pipeline to purchase ratably from all connected wellheads ( [Northern Gas Co. v. Kansas Comm'n](#) (1963) 372 U.S. 84 [9 L. Ed. 2d 601, 83 S. Ct. 646]), or by ordering extension of an interstate pipeline to a local gas utility ( [Illinois Gas Co. v. Public Service Co.](#) (1942) 314 U.S. 498 [86 L. Ed. 371, 1\*407] 62 S. Ct. 384]; [\*\*\*\*14] cf. [Cabot Corporation v. Public Service Com'n of W. Va.](#) (S.D. W. Va. 1971) 332 F. Supp. 370 (denying state's authority to disapprove transfer of interstate pipeline facilities to entity holding FPC certificate)).

[CA\(5a\)](#) (5a) [HN7](#) The Natural Gas Act does not, however, preclude application of *federal* antitrust laws to interstate gas transactions under FPC regulation. [CA\(6\)](#) (6) Generally, subsequent federal statutes repeal federal antitrust laws only when there is plain repugnancy, and then only to the extent necessary to make the new statutory scheme work. ( [Gordon v. New York Stock Exchange](#) (1975) 422 U.S. 659, 682-683 [45 L. Ed. 2d 463, 478-480, 95 S. Ct. 2598]; see [Cantor v. Detroit Edison Co.](#) (1976) 428 U.S. 579, 596 fn. 34 [49 L. Ed. 2d 1141, 1152-1153, 96 S. Ct. 3110].) [CA\(5b\)](#) (5b) The FPC's power over rates does not preclude federal antitrust proceedings against anticompetitive conduct that affects the rate-making process. [HN8](#) The FPC fixes rates by approving or revising those initiated by the regulated companies. ([15 U.S.C. §§ 717c, 717d, 717f, United Gas Co. v. Mobile Gas Corp.](#) (1956) 350 U.S. 332 [100 L. Ed. 373, 76 S. Ct. 373]; [\*\*\*\*15] [Atlantic Rfg. Co. v. Pub. Serv.](#)

<sup>5</sup> Cases cited as examples of conflict between state and federal antitrust laws involve statutory differences not present here: [Connell Co. v. Plumbers & Steamfitters](#) (1975) 421 U.S. 616 [44 L. Ed. 2d 418, 95 S. Ct. 1830] (though federal *antitrust law* applies to contractor's collective bargaining agreement to subcontract only with firms recognizing union, Texas law does not apply because, unlike federal law, it conflicts with federal policies favoring employee organization); cf. [Shell Oil Co. v. Younger](#) (9th Cir. 1978) 587 F.2d 34 ( *Bus. & Prof. Code, § 21200*, prohibiting motor-fuel price discrimination, not preempted by Sherman or Robinson-Patman acts even though it provides a "meeting competition" defense that is narrower than [15 U.S.C. § 13\(b\)](#) (Robinson-Patman)).

<sup>6</sup> In questioning the relevance of those concerns to an investigation designed to uncover violations of state *antitrust law*, the dissenting opinion (post, at p. 419) appears to lose sight of (1) the overlap and consequent necessity for coordination of state and federal antitrust enforcement, and (2) the Attorney General's right, on discovering possible violations, not only to invoke existing remedies but also to recommend to legislators and administrators improvement of those remedies or creation of alternate remedies.

Comm'n (1959) 360 U.S. 378, 388-392 [3 L. Ed. 2d 1312, 1319-1321, 79 S. Ct. 1246].) Proceedings to prevent or redress anticompetitive agreements or monopolizations that contaminate the private component of the rate-making process do not undercut or impair the regulatory function. ( Georgia v. Pennsylvania R. Co. (1945) 324 U.S. 439, 455-460 [89 L. Ed. 1051, 1061-1064, 65 S. Ct. 716].) Similarly the FPC's control of market allocation through its authority over pipeline interconnections, acquisitions, construction, and abandonment (15 U.S.C. § 717f) does not preclude challenges to that allocation under federal antitrust law. ( California v. Fed. Power Comm'n (1962) 369 U.S. 482 [8 L. Ed. 2d 54, 82 S. Ct. 901] (FPC approval of pipeline merger must be stayed pending Justice Department's suit under Clayton Act); Otter Tail Power Co. v. United States (1973) 410 U.S. 366 [35 L. Ed. 2d 359, 93 S. Ct. 1022] (FPC authority to order electric utility interconnections (16 U.S.C. § 824a(c); cf. Natural Gas Act, 15 U.S.C. § 717f [\*\*\*\*16] (a)) does not preclude Justice Department's Sherman Act suit for monopolistic refusal to supply wholesale electric power).) CA(7)[↑] (7) HN9[↑] Though the FPC must take antitrust considerations into account when it determines "public interest" and "public convenience and necessity" (15 U.S.C. § 717f), it has "no power to insulate utilities under its regulation from the operation of the antitrust acts, or to determine when an antitrust violation has taken place. Otter Tail Power Co. v. United States, 410 U.S. 366, 93 S. Ct. 1022, 35 L.E.2d 359 (1973)." ( Monsanto Co. v. United Gas Pipe Line [\*4081 Company (D.D.C. 1973) 360 F. Supp. 1054, 1057, affd. [\*\*820] [\*\*912] (1974) 489 F.2d 1272 [160 App. D.C. 148]; accord, Northern Natural Gas Co. v. Federal Power Comm'n (1968) 399 F.2d 953, 959-961 [130 App. D.C. 220]; City of Pittsburgh v. Federal Power Commission (1956) 237 F.2d 741, 754 [99 App. D.C. 113].)

CA(3b)[↑] (3b) Despite the compatibility of the Natural Gas Act with federal antitrust enforcement, defendants here contend that the act precludes the Attorney [\*\*\*\*17] General's investigating possible violations of California antitrust law. CA(8)[↑] (8) Ordinarily a state's exercise of its police power is not deemed superseded under the supremacy clause (U.S. Const., art. VI, cl. 2) 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]), "compliance with both federal and state regulations is a physical impossibility" ( Florida Avocado Growers v. Paul (1963) 373 U.S. 132, 142-143 [10 L. Ed. 2d 248, 256-257, 83 S. Ct. 1210]), or state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." ( De Canas v. Bica (1976) 424 U.S. 351, 363 [47 L. Ed. 2d 43, 53, 96 S. Ct. 933], quoting Hines v. Davidowitz (1941) 312 U.S. 52, 67 [85 L. Ed. 581, 587, 61 S. Ct. 399]). ( Ray v. Atlantic Richfield Co. (1978) 435 U.S. 151, 157-158 [55 L. Ed. 2d 179, 188, 98 S. Ct. 988].) CA(3c)[↑] (3c) Defendants do not point out, nor have we found, HN10[↑] any words in the Natural Gas Act that expressly prohibit investigation or other [\*\*\*\*18] activity regarding state antitrust laws that are consistent with the federal counterparts. (Cf. 15 U.S.C. § 717s(a): "The [FPC] may transmit such evidence as may be available . . . concerning apparent violations of the Federal antitrust laws to the Attorney General . . . .") Nor does there appear any threatening conflict between federal and state antitrust provisions concerning conduct that the present investigation is designed to uncover; namely, " price fixing, monopolization, divisions of markets, and restraint of trade." Hypothetical conflict between federal law and enforcement of California antitrust provisions within the scope of the investigation, even if assumed, is not ground for preemption since it may never arise in fact. (See Exxon Corp. v. Governor of Maryland (1978) 437 U.S. 117, 130 [57 L. Ed. 2d 91, 102-103, 98 S. Ct. 2207]; Goldstein v. California (1973) 412 U.S. 546, 554-555 [37 L. Ed. 2d 163, 172-173, 93 S. Ct. 2303]; Rice v. Chicago Board of Trade (1947) 331 U.S. 247, 255-256 [91 L. Ed. 1468, 1473-1474, 67 S. Ct. 1160].)

Defendants argue that the sweeping and complex character [\*\*\*\*19] of Natural Gas Act regulation implies congressional intent to exclude state [\*409] antitrust enforcement or inquiry. Comprehensiveness and complexity, however, may simply reflect the intricate nature of the regulated subject matter; and no preemptive intent need be implied. ( New York Dept. of Social Services v. Dublino (1973) 413 U.S. 405, 414-415 [37 L. Ed. 2d 688, 695-696, 93 S. Ct. 2507].) CA(9)[↑] (9) HN11[↑] A federal regulatory act does not preempt harmonious state regulation of matters that only peripherally affect federal concerns. ( De Canas v. Bica, supra, 424 U.S. 351 (Immigration & Nationality Act (8 U.S.C. § 1101 et seq.), being centrally concerned with admission of aliens and treatment of aliens lawfully admitted, does not preempt state law prohibiting employment of illegal entrants); Farmer v. Carpenters (1977) 430 U.S. 290 [51 L. Ed. 2d 338, 97 S. Ct. 1056] (National Labor Relations Act, though prohibiting hiring hall discrimination, does not preclude state tort action for emotional distress caused by outrageous conduct accompanying such discrimination).) CA(3d)[↑] (3d) Since, as already [\*\*\*\*20] explained, federal antitrust enforcement seems peripheral rather than central to aims of the Natural Gas Act, no reason appears for deeming

the present inquiry into violations of California statutes that harmonize with the federal antitrust laws to be other than peripheral. Therefore there is no preemption.<sup>7</sup>

[\*\*\*\*21] [\*\*821] [\*\*\*913] Alaska Natural Gas Transportation Act (ANGTA)

Defendants also contend that the Attorney General's investigation is preempted by [HN12](#)<sup>↑</sup> the Alaska Natural Gas Transportation Act (ANGTA), [\*410] [15 U.S.C. sections 719-719e](#), enacted in October 1976 to facilitate selection, construction, and initial operation of a transportation system for delivery of Alaskan gas to the lower 48 states. The act provides for review and recommendation to the President by the FPC and other agencies ([15 U.S.C. §§ 719c-719d](#)), a presidential decision and report to Congress ([15 U.S.C. § 719e](#)), and final approval by congressional joint resolution ([15 U.S.C. § 719f](#)). That approval was given in November 1977. (Pub.L. No. 95-158, 91 Stat. 1268.) The act limits judicial review by requiring challenges to be filed within limited periods in a particular court and by making the environmental impact statements conclusive ([15 U.S.C. § 719h](#)); and those limits are reinforced by declarations of urgency and of intent to exercise fullest congressional power in limiting administrative [\*\*\*\*22] and judicial procedures ([15 U.S.C. §§ 719-719a](#)).

Section 14 of the act ([15 U.S.C. § 719j](#)) [HN13](#)<sup>↑</sup> provides, however: "Nothing in this Act, and no action taken hereunder, shall imply or effect an amendment to, or exemption from, any provision of the antitrust laws." Moreover, section 19 ([15 U.S.C. § 719](#) note) directed the United States Attorney General "to conduct a thorough study of the antitrust issues and problems relating to the production and transportation of Alaska natural gas" and to report findings and recommendations to Congress within six months of the act's enactment. That was done. The report recommended (1) the imposition of conditions on the license for the pipeline project, (2) legislation to clarify the pipeline's common carrier status ([15 U.S.C. § 719k\(a\)](#)), and (3) "collateral" actions by the FPC. Based on those recommendations, the President's decision, approved by Congress, requires the licensee to exclude gas producers from participation in ownership of the transportation system and requires parties to sales of gas through the pipeline to submit their sale agreements to the [\*\*\*\*23] FPC for approval.

We conclude that ANGTA presents no bases for preemption of the present investigation beyond those we have considered and rejected with respect to the Natural Gas Act. ANGTA expressly disclaims amendment of or exemption from federal antitrust laws. ([15 U.S.C. § 719l](#).) The pipeline-licensing conditions imposed as a consequence of the United States Attorney General's report do not differ in their relation to federal and state antitrust enforcement from comparable conditions that might be imposed on a pipeline project by the FPC under the Natural Gas Act.

[\*411] Collateral Estoppel Defense

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<sup>7</sup> Defendants rely on [Standard Radio & Television Co. v. Chronicle Pub. Co. \(1960\) 182 Cal. App. 2d 293 \[6 Cal. Rptr. 246\]](#), which barred a Cartwright Act suit that attacked "exclusivity" clauses through which contracts for film distribution to defendant television stations forbade marketing of the same films to other stations, including plaintiff's, within a 60-mile radius. The Court of Appeal concluded that the suit was foreclosed by the FCC's power over such arrangements in connection with its aims to optimize use of broadcast channels ([182 Cal. App. 2d at pp. 298-300](#); see [Nat. Broadcasting Co. v. U.S. \(1943\) 319 U.S. 190, 200-201, 214-220, 222-224 \[87 L. Ed. 1344, 1354-1355, 1361-1367, 63 S. Ct. 997\]](#)), even though such power would not foreclose a suit to enforce federal antitrust laws ([182 Cal. App. 2d at pp. 300-301](#)).

That case preceded decisions that limited the preemptive effect of the Federal Communications Act ([Head v. New Mexico Board of Examiners in Optometry \(1963\) 374 U.S. 424 \[10 L. Ed. 2d 983, 83 S. Ct. 1759\]](#); see O'Neil, *Television, Tort Law, and Federalism* (1965) 53 Cal. L. Rev. 421, 456-460) and that curtailed federal statutes' preemptive effect on state proceedings peripheral to these statutes' central concerns ([De Canas v. Bica, supra, 424 U.S. 351](#); [Farmer v. United Brotherhood of Carpenters, supra, 430 U.S. 290](#)). (See too Note, *Federal Preemption in Television Antitrust* (1961) 13 Stan.L. Rev. 629) (criticizing *Standard Radio* even under precedents then available.) *Standard Radio* is disapproved insofar as it holds that a federal regulatory scheme which does not expressly restrict the states and allows enforcement of federal antitrust laws nonetheless may preclude state antitrust enforcement consistent with those laws.

**CA(10a)** [↑] (10a) Defendants contend that the Attorney General is estopped from enforcing the subpoenas against them by the federal district court judgment that enjoins him from [\*\*822] [\*\*\*914] enforcing a similar subpoena against ARCO.<sup>8</sup> The judgment declares that his investigation and the ARCO subpoena are "unconstitutional." The court's memorandum of decision that explicates the judgment (see *Tygrett v. Washington* (1974) 543 F.2d 840, 844 [177 App. D.C. 355]) concludes that the investigation is preempted by the Natural Gas [\*\*\*24] Act and ANGTA on grounds we have considered and rejected in this opinion.

**CA(11)** [↑] (11) **HN14** [↑] A federal judgment "has the same effect in the courts of this state as it would have in a federal court." (*Levy v. Cohen* (1977) 19 Cal.3d 165, 173 [137 Cal. Rptr. 162, 561 P.2d 252].) Accordingly, the fact that the Attorney General has appealed from the ARCO judgment does not prevent it from operating as a collateral estoppel. (*Calhoun v. Franchise Tax Bd.* (1978) 20 Cal.3d 881, 887 [143 Cal. Rptr. 692, 574 P.2d 763]. *Martin v. Martin* (1970) 2 Cal.3d 752, 761 [87 Cal. Rptr. 526, 470 P.2d 662].) [\*\*\*25] **CA(12)** [↑] (12) Moreover, like this court the United States Supreme Court has abandoned the mutuality requirement. (*Parklane Hosiery Co., Inc. v. Shore* (1979) 439 U.S. 322 [58 L. Ed. 2d 552, 99 S. Ct. 645]; *Blonder-Tongue v. University Foundation* (1971) 402 U.S. 313 [28 L. Ed. 2d 788, 91 S. Ct. 1434]; *Bernhard v. Bank of America* (1942) 19 Cal.2d 807 [122 P.2d 892].) The fact that defendants here are not parties to the federal judgment therefore does not preclude its collaterally estopping the Attorney General, who is a party.

**CA(10b)** [↑] (10b) Nonetheless the federal judgment does not bar enforcement of the subpoenas against defendants because *FPC v. Amerada Petroleum Corp.* (1965) 379 U.S. 687 [13 L. Ed. 2d 605, 85 S. Ct. 632] is controlling. The Eighth Circuit had held that the FPC had no jurisdiction over intrastate sales of gas commingled in a pipeline with other gas being transported interstate. One ground for the decision was that the FPC was collaterally estopped by the denial of its jurisdiction in an earlier case involving the same parties but different, though legally indistinguishable, sales and pipeline [\*\*\*26] transmission arrangements. Reversing the [\*412] Eighth Circuit, the Supreme Court said: "The Court of Appeals thought that its decision in *North Dakota v. Federal Power Comm'n*, 247 F.2d 173, brought collateral estoppel into play in the present case. 334 F.2d 404, 411-412. But that rule has no place here for *no judgment governing past events is in jeopardy, only the scope of future regulation that involves different events and transactions*. See *Commissioner v. Sunnen*, 333 U.S. 591, 601-602." (379 U.S. at p. 690 [13 L. Ed. 2d at p. 607], italics added.)

Those italicized words apply here.<sup>9</sup> The judgment governs no "past events" but [\*\*823] [\*\*\*915] only restricts "the scope of future regulation" by enjoining enforcement of the ARCO subpoena. That subpoena calls only for evidence under the control of ARCO and thus "involves different events and transactions" from the present subpoenas which demand evidence under defendants' control. The high court's citation of *Commissioner v. Sunnen* establishes the existence of that difference notwithstanding the subpoenas' common origin in a single investigation. [\*\*\*27] **CA(13)** [↑] (13) On the pages cited *Sonnen* says: "[If] the very same facts and no others

<sup>8</sup> See footnote 3, *ante*. ARCO was granted a temporary restraining order on June 14, 1976, a preliminary injunction on September 29, 1977, and a summary judgment incorporating a permanent injunction on June 26, 1978. (*Lewis and Atlantic Richfield Co. v. Younger et al.*, (C.D. Cal.) Dock. No. CV 76-1890-FW.) Appeal is pending in the Ninth Circuit.

<sup>9</sup> The factual distinction discussed in the dissenting opinion (*post*, at pp. 419-420) does not undercut the applicability here of the quoted words. Though asserted by the FPC the distinction was rejected by the court of appeals, which said: "In our former opinion we fully adjudicated and decided the same issue recurring now under equivalent circumstances that the Commission lacks jurisdiction to regulate gas produced, sold, and consumed intrastate, which is transported in a pipeline commingled with interstate gas and that decision as between these parties bars resurrection of the issue again." (334 F.2d at p. 412.)

When reversing, the Supreme Court majority gave no weight to the asserted distinction and indicated no disagreement with the court of appeals' conclusion that its former opinion "decided the same issue recurring now under equivalent circumstances." The concurring opinion footnote (*379 U.S. at p. 691 [13 L. Ed. 2d at p. 608]*), quoted in the dissent here (*post*., p. 420, fn. 8), declared that the factual changes "*standing alone*, makes inapplicable any doctrine of collateral estoppel" (italics added) but did not disagree with the majority's broader statement, quoted in our text above, that the doctrine "has no place here" (*379 U.S. at p. 690*).

are involved in the second case, a case relating to a different tax year, the prior judgment will be conclusive as to the same legal issues which appear, assuming no intervening doctrinal change. But if the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case. Thus the second proceeding may involve an instrument or transaction identical with, but in a form separable from, the one dealt with in the first proceeding. In that situation, a court is free in the second proceeding to make an independent examination of the legal matters at issue. It may then reach a different result or, if consistency [\*413] in decision is considered just and desirable, reliance may be placed upon the ordinary rule of *stare decisis*. [HN15](#)<sup>↑</sup> Before a party can invoke the collateral estoppel doctrine in these circumstances, the legal matter raised in the second proceeding must involve the same set of events or documents and the same bundle of legal principles that contributed to the rendering [\*\*\*\*28] of the first judgment. [Citations.]" (Fn. omitted.)

[\*\*\*\*29] The orders denying enforcement of the subpoenas are reversed.

**Dissent by:** MANUEL

## Dissent

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**MANUEL, J.** I dissent. It is my view that a sound application of the principles of res judicata, supported by significant considerations of comity between courts of concurrent jurisdiction, precludes the Attorney General from maintaining that the investigation he here seeks to pursue -- given the objects which he presently seeks to further through it -- is not preempted by federal law. I would affirm the orders appealed from.

I

As the majority opinion indicates, in January 1976, the Attorney General, purporting to act under the provisions of [section 11180 et seq. of the Government Code](#), 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 testimony, hear complaints [\*\*\*\*30] and administer oaths in connection therewith, as [the delegates] deem necessary." The following April subpoenas to attend and testify and to produce certain described documents were served on respondents Pacific Lighting Gas Development Company (PLGD) and Exxon Corporation (Exxon).<sup>1</sup> Similar subpoenas were also served on Pacific Gas and Electric Company (P.G. & E.) and Atlantic Richfield Company (ARCO), who are not parties to the instant action.<sup>2</sup>

[\*414] Of the four companies above named Exxon and PLGD, and apparently P.G. & E., responded to the subpoenas served upon each of them, but when each failed to comply therewith in a manner and extent satisfactory to the Attorney General the latter commenced separate enforcement proceedings [\*\*824] [\*\*\*\*31] [\*\*\*916] ([Gov. Code, § 11187](#)) against them -- in San Francisco Superior Court with respect to P.G. & E., and in Los Angeles Superior Court with respect to Exxon and PLGD (the instant proceeding). ARCO, however, did not respond to the subpoena served upon it; instead, on the day before the return date set forth therein, it filed an action in the United States District Court for the Central District of California (*Lewis v. Younger*, No. CV 76-1890-FW) seeking declaratory and injunctive relief.

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<sup>1</sup>The Exxon subpoena was actually served on Exxon Company, U.S.A., one of Exxon's operating divisions, but Exxon itself responded.

<sup>2</sup>It does not appear from the record whether other parties as well were served with subpoenas in connection with the investigation.

In each of the above four proceedings the substantive issue presented and litigated was the same: Whether the Attorney General's investigation, in light of its purpose and objective, was unconstitutional under the supremacy clause (U.S. Const., art. VI, *cl. 2*), because it was preempted under the Alaska Natural Gas Transportation Act of 1976 ([15 U.S.C. § 719 et seq.](#)), and the Natural Gas Act of 1938 ([15 U.S.C. § 717 et seq.](#)).

The first action to proceed to judgment was that involving P.G. & E. (In the Matter of the Investigation of: Ownership, Production, Sale & Distribution of Prudhoe Bay, Alaska Natural Gas, Super. [\*\*\*\*32] Ct. No. 710-531). On November 22, 1976, the San Francisco Superior Court filed an order substantially enforcing the subpoena against P.G. & E. and rejecting all constitutional challenges, including that of preemption. No further review was sought by P.G. & E., and that order is now final.

The instant proceedings against Exxon and PLGD were filed in the Los Angeles Superior Court approximately one month after the order had issued in the San Francisco (P.G. & E.) case. The two petitions were heard jointly, and on April 19, 1977, were denied, the court ruling that the Attorney General's investigation was preempted. The Attorney General's appeals from these orders of denial are the subject of the instant matter.

On June 26, 1978, judgment issued in the federal proceeding which had been brought by ARCO (*Lewis v. Younger, supra*, No. CV 76-1890-FW), plaintiffs having moved for summary judgment on all claims urged by them. The United States District Court (Whelan, district [\*415] judge), declared the Attorney General's investigation unconstitutional and permanently enjoined him from conducting it and from enforcing the subpoena directed to ARCO which had been issued pursuant [\*\*\*\*33] to it.<sup>3</sup>

[\*\*\*\*34] The Attorney General has appealed from this judgment; his appeal is presently pending before the United States Court of Appeals for the Ninth Circuit (*Lewis v. Younger*, No. 773834), oral argument having been heard on June 5, 1979.

## II

The doctrine of res judicata -- of which we are here concerned with that aspect known as collateral estoppel<sup>4</sup> or, more modernly, [\*\*825] [\*\*\*917] issue preclusion (compare Rest., Judgments, §§ 68-73 with Rest.2d Judgments (Tent. Draft No. 4) §§ 68, 68.1) -- "precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction. Any issue necessarily decided in such litigation is conclusively determined as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action. [Citations.] The rule is based upon the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue [\*416] from again drawing it into controversy. [Citations.]" ([Bernhard v. Bank of](#)

<sup>3</sup> The operative provisions of the federal judgment, of which we may take judicial notice ([Evid. Code, §§ 452, subd. \(d\); 459](#)), are as follows: "It Is Ordered, Adjudged and Decreed that Defendants' Investigation of Ownership, Production, Sale and Distribution of Prudhoe Bay, Alaska Natural Gas and Defendants' Subpoena directed to Plaintiffs to Attend, Testify and to Produce Books, Records, Papers and Documents are unconstitutional. [para. ] It Is Further Ordered, Adjudged and Decreed that Defendants, and each of them, and all persons acting under them or in concert with them, be, and hereby are, *permanently enjoined and restrained* from conducting an Investigation of Plaintiff Company's Ownership, Production, Sale and Distribution of Prudhoe Bay, Alaska Natural Gas and enforcing the Subpoena to Attend, Testify and to Produce Books, Records, Papers and Documents directed to Plaintiffs Howard H. Lewis and Atlantic Richfield Company." (Italics added.)

In its memorandum of decision, filed concurrently with the judgment, the court indicated that its injunction was to be made permanent "[because] of the potential for serious harm such an investigation would have on the federal regulatory scheme." It also stated: "Generally [federal] courts will not enjoin the enforcement of state criminal statutes. 'But this is not an absolute policy and in some circumstances injunctive relief may be appropriate.' [Wooley v. Maynard, 430 U.S. 705, 712 \(1977\)](#). Such a situation exists in this case; the rule applies to civil cases."

<sup>4</sup> In the words of an influential commentary on the subject, "[collateral] estoppel is that aspect of res judicata concerned with the effect of a final judgment on subsequent litigation of a different cause of action involving some of the same issues determined in the initial action." (Note, *Developments in the Law: Res Judicata* (1952) 65 Harv. L. Rev. 818, 840, fn. omitted.)

America (1942) 19 Cal.2d 807, 810-811 [122 P.2d 892].) In light of this underlying policy, we went [\*\*\*\*35] on to point out in the *Bernhard* case, the criteria to be applied in determining who may assert a plea of res judicata differ fundamentally from those to be applied in determining against whom such a plea may be asserted. Thus, whereas the requirements of due process of law forbid the assertion of such a plea against a party who was not bound (as a party or a privy to a party) by the earlier litigation, such considerations have no application in determining whether a party to the second proceeding may assert the plea. (19 Cal.2d at pp. 811-813.) The focus, in short, is on the prior adjudication and the status of the party against whom the plea is asserted. The pertinent questions, we concluded, are these: "[1] Was the issue decided in the prior adjudication identical with the one presented in the action in question? [2] Was there a final judgment on the merits? [and 3] Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?" (19 Cal.2d at p. 813.)

[\*\*\*\*36] I believe that each of these questions must be answered in the affirmative with respect to the assertion of the plea herein against the Attorney General. He, of course, was a party defendant in the case of *Lewis v. Younger*, where he had a full opportunity to present his position on the merits. The judgment in that case was on the merits, having been rendered following a motion for summary judgment, and it is final for purposes of res judicata. ( Martin v. Martin (1970) 2 Cal.3d 752, 761-762 [87 Cal. Rptr. 526, 470 P.2d 662]; <sup>5</sup> see also Calhoun v. Franchise Tax Bd. (1978) 20 Cal.3d 881, 887 [143 Cal. Rptr. 692, 574 P.2d 763]; Levy v. Cohen (1977) 19 Cal.3d 165, 172-173 [137 Cal. Rptr. 162, 561 P.2d 252].) We are therefore left with the question whether the issue decided in *Lewis v. Younger* was identical with that presented in the instant case.

[\*\*\*\*37] Although the judgment of the federal district court in *Lewis* speaks only in terms of its ultimate conclusion - - i.e., that the Attorney General's investigation and subpoena "are unconstitutional" -- we are not limited to that document in determining the scope and content of the issues there presented and determined. It is well established that [\*417] materials extrinsic to the judgment roll, including the memorandum opinion of the trial court, may be used to establish the nature of the issues presented and decided in a former adjudication. ( Carroll v. Puritan Leasing Co. (1978) 77 Cal. App. 3d 481, 491 [143 Cal. Rptr. 772]; Crain v. Crain (1960) 187 Cal. App. 2d 825, 831-833 [9 Cal. Rptr. 850]; Tevis v. Beigel (1957) 156 Cal. App. 2d 8, 13-15 [319 P.2d 98]; see generally, 4 Witkin, Cal. Procedure (2d ed. 1971) pp. 3338-3339.) The trial court's memorandum of decision in *Lewis* clearly indicates the nature of the contention and issue before it. "Defendants," the court stated, "concede [\*\*826] [\*\*\*918] the Natural Gas Act . . . preempts state regulation of price and transportation of the Alaska natural [\*\*\*\*38] gas. However, they contend California could still regulate agreements or combinations to fix prices, market divisions and contracts in restraint of trade." (Italics added.) Any such regulation, the court concluded, and "an investigation to consider [its] necessity" was preempted by federal law -- namely the Alaska Natural Gas Transportation Act of 1976 (15 U.S.C. § 719 et seq.), and the Natural Gas Act of 1938 (15 U.S.C. § 717 et seq.) -- because the envisioned regulation (a) "would have the direct effect of regulating price which they [defendants] concede to be preempted" and (b) would "affect [] the interstate commerce of Prudhoe Bay natural gas and the federal regulatory scheme," which is administered by the Federal Energy Regulatory Commission. In this respect the federal district court, quoting from Northern Gas Co. v. Kansas Comm'n (1963) 372 U.S. 84, at page 91 [9 L. Ed. 2d 601, at page 607, 83 S. Ct. 646], noted: "'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 [\*\*\*\*39] achieve the same result.'" (Italics added.) Finally, the court decided that the subject investigation must be permanently enjoined "[because] of the potential for serious harm such an investigation would have on the federal regulatory scheme, . . ."

Looking to the instant proceeding we find that the issues presented are identical to those presented in the federal proceeding. Each of the petitions seeking an order compelling compliance with the subpoenas served on defendants provides in essentially identical language: "1. Petitioner is and at all times mentioned herein has been the duly constituted head of the Department of Justice of the State of California. [para.] 2. Petitioner is authorized to take such action as may be necessary to enforce the California antitrust laws contained in §§ 16700-16758

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<sup>5</sup> "A federal court judgment has the same effect in the courts of this state as it would in a federal court. [Citations.] The federal rule is that a judgment or order, once rendered, is final for purposes of res judicata until reversed on appeal or modified or set aside in the court of rendition. ( *Stoll v. Gottlieb, supra*, 305 U.S. 165, 170 . . .)." ( Martin v. Martin, supra, 2 Cal.3d 752, 761-762, fn. omitted.)

inclusive of the Business and Professions Code of [**\*418**] California. [Para.] 3. Pursuant to the provisions of Government Code §§ 11180 et seq., in January 1976, petitioner instituted an investigation into the ownership, production, sale and distribution of Prudhoe Bay, Alaska Natural Gas insofar as it affects [\*\*\*\*40] the State of California to determine whether any of the provisions of the California antitrust laws were being violated. [para.] 4. Pursuant to the provisions of section 11182 of the Government Code, petitioner authorized [named delegates] of the Department of Justice to conduct the investigation described in paragraph 3 herein . . . [para.] 5. On [date] a subpoena duces tecum was regularly issued . . . commanding [named officer of defendant] to appear before [named delegates] . . . to testify and produce books, records, papers and documents, which are required in the investigation described in paragraph 3 herein, and will aid said petitioner in determining whether there has been a violation of the California antitrust laws." (Italics added.) The contentions set forth in appellant's opening brief, which must be considered to further reflect the issues he here seeks to raise, are (1) that "the California natural gas investigation is authorized by California statutes that confer broad investigatory powers on the Attorney General to investigate possible antitrust violations, to execute the vital public interest of protecting Californians [\*\*\*\*41] from unlawful restraints of trade" and (2) that "the Natural Gas Act does not preempt the Cartwright Act or an investigation thereunder." <sup>6</sup> (Italics added.) Although this brief goes on to discuss in general terms the breadth of the Attorney General's powers to conduct an investigation under Government Code section 11180 et seq., it is at no point suggested that the instant investigation has any other present purpose than that of developing the informational basis for possible regulation of [\*\*827] [\*\*\*919] defendants and others similarly situated under the California antitrust laws.<sup>7</sup>

[\*\*\*\*42] [\*419] I am convinced that the majority has ignored the fundamental identity of issues between this case and the prior federal proceeding. It may well be that "the Attorney General properly may be concerned not only with the possibilities of prosecution in California courts but also with formulations of enforcement policy in cooperation with federal authorities and with recommendations for remedial administrative rulings and legislation." (Majority opn., *ante*, at p. 406.) What I fail to understand, however, is the relevance of that consideration to the instant proceeding, where the Attorney General has explicitly indicated that the purpose of his investigation is to uncover any possible violation of state antitrust laws.

Nor am I persuaded by the majority's reliance on the case of FPC v. Amerada Petroleum Corp. (1965) 379 U.S. 687 [13 L. Ed. 2d 605, 85 S. Ct. 632], a case cited by none of the parties which in my view is utterly without relevance to the matter before us. There the Federal Power Commission had in 1956 disclaimed jurisdiction over sales of natural gas under certain "firm gas" contracts between a utility company and two affiliated [\*\*\*\*43] gas producers -- holding that such gas, which was produced, wholesaled, transported, and sold intrastate, did not lose its intrastate character, and thus become a proper subject for federal regulation, simply because a part of its transportation occurred in a commingled state with other "dump gas" admittedly being transported in interstate commerce pursuant to other contracts between the same parties. This order had been affirmed. (*State of North Dakota v.*

<sup>6</sup> The reply brief urges in addition that the Alaska Natural Gas Transportation Act does not preempt the subject investigation and that the investigation involves no violation of the commerce clause, the due process clause, or Fourth Amendment search and seizure protections.

<sup>7</sup> As indicated above, the Attorney General's delegation of authority to investigate pursuant to Government Code section 11182 authorizes the delegates "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 testimony, hear complaints, and administer oaths in connection therewith, as [the delegates] deem necessary." The Attorney General has at no time suggested that the instant investigation is directed toward the development of an informational basis for possible future action by him under the federal antitrust laws. (See generally, Hawaii v. Standard Oil Co. (1972) 405 U.S. 251, 257-260 [31 L. Ed. 2d 184, 189-191, 92 S. Ct. 885]; In re Multidistrict Vehicle Air Pollution M.D.L. No. 31 (9th Cir. 1973) 481 F.2d 122, 131.) Nor has he suggested, aside from a passing reference in his opening brief, that other less specific purposes, such as making a report to some appropriate legislative body, such as the United States Congress, was contemplated. As I indicate in more detail below, an investigation having such broad purposes as these would raise questions which, in light of the Attorney General's posture in these proceedings, are not now before us.

*Federal Power Commission* (8th Cir. 1957) [247 F.2d 173](#).) In 1960, the two producers entered into new contracts with the same utility company; again these contracts involved intrastate "firm gas," on the one hand, and interstate "dump gas" on the other. This time, however, the gas sold under the "firm gas" contracts was transported intrastate not only with the two producers' interstate "dump gas" but with interstate gas from *another* two producers as well. The commission asserted jurisdiction, holding that commingling the gas sold under the "firm gas" contracts not only with interstate gas of the subject producers but with interstate gas of the two other producers as well justified a different result. The [\*\*\*\*44] court of appeals, however, set aside the order asserting [\*420] jurisdiction, holding that the commission was collaterally estopped from so asserting by its earlier decision and the affirmance thereof. (*Amerada Petroleum Corp. v. Federal Power Com'n* (8th Cir. 1964) [334 F.2d 404](#).)

The Supreme Court reversed, holding insofar as here relevant that collateral estoppel did not preclude assertion of jurisdiction by the commission over the second set of contracts. It was in this context, then, that the court stated that collateral estoppel "has no place here for no judgment governing past events is in jeopardy, only the scope of future regulation that involves *different* [\*\*828] [\*\*\*920] events and transactions." ([379 U.S. at p. 690 \[13 L. Ed. 2d at p. 607\]](#), italics added.)<sup>8</sup>

[\*\*\*\*45] It is clear in my view that the *Amerada* case has no application to the matter before us. We do not deal here with "different events and transactions." We deal with a single investigation and a single legal question: whether that investigation, given its scope and purpose as defined by the Attorney General, is preempted by federal law. The federal district court has determined, in a decision which is final for purposes of res judicata, that it is so preempted. That determination, in my view, precludes the Attorney General from seeking to raise the matter before this court.

### III

The Attorney General goes on to argue, however, that even if the basic requisites for upholding the plea of collateral estoppel here appear, we should nevertheless reject the plea and reach the merits of the issues sought to be presented. First, invoking the doctrine of *Younger v. Harris* (1971) [401 U.S. 37 \[27 L. Ed. 2d 669, 91 S. Ct. 746\]](#), he contends that the district court "lacked jurisdiction" to enjoin the subject investigation and therefore that its judgment should not be accorded res [\*421] judicata effect. What this contention fails to recognize, however, is that the [\*\*\*\*46] doctrine of the cited *Younger* case is not concerned with the lack of subject matter jurisdiction as such but rather with the circumstances in which federal courts, in the interest of federalism, will abstain from asserting their existing equitable jurisdiction to enjoin pending state proceedings, especially of a criminal nature. (See generally, Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 Sup. Ct. Rev. 193.) In any event the high court has recently stated that the *Younger* doctrine does not state "an absolute policy and in some circumstances injunctive relief may be appropriate. 'To justify such interference there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights.' *Spielman Motor Co.* [(1935) 295 U.S.] at 95 . . ." ([Wooley v. Maynard](#) (1977) [430 U.S. 705, 712 \[51 L. Ed. 2d 752, 761, 97 S. Ct. 1428\]](#).) The federal district court in the *Lewis* case, as I have indicated above (fn. 3, *ante*), specifically applied this standard and, in light of what it considered "the potential for serious [\*\*\*\*47] harm [the subject] investigation would have on the federal regulatory scheme," made its injunction permanent. Even if we disagreed with this assessment, I do not believe that a "lack of jurisdiction" in the former adjudication would thereby appear, necessitating the rejection of PLGD's plea. It should also be noted in this respect that the federal district court undeniably had jurisdiction to grant declaratory relief, which it did grant along with injunctive relief. Thus, even if it appeared that the court somehow lacked "jurisdiction" to grant the latter form

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<sup>8</sup> The controlling effect of the clear factual differences between the two sets of contracts was made even clearer in a concurring opinion representing the views of three justices. It was there stated: "Some years prior to this action Amerada-Signal claimed no more than its proportionate share, and under those circumstances the FPC disclaimed jurisdiction. See *North Dakota v. FPC*, [247 F.2d 173 \(C.A. 8th Cir. 1957\)](#). The fact that the amount claimed by respondents at the time of this action exceeds Amerada-Signal's proportionate share is due to *the addition of new sources of supply to the commingled stream*. This change, standing alone, makes inapplicable any doctrine of collateral estoppel based on the FPC's disclaimer or the Court of Appeals' affirmation in *North Dakota v. FPC, supra*." ([379 U.S. at p. 691](#), fn. \* [[13 L. Ed. 2d at p. 608, fn. 1](#); italics added.])

of relief, I think it clear that its determination of the issues here in question for declaratory purposes would provide an adequate jurisdictional basis for assertion of the plea of former adjudication.

The Attorney General's final contention is that even if the *Bernhard* requirements for the successful assertion of a plea of res judicata are here met, we should in the exercise of our discretion refuse to uphold the plea because injustice and anomaly would otherwise result. It is pointed out [\*\*829] [\*\*\*921] that in circumstances involving multiple enforcement actions against different defendants in which a [\*\*\*\*48] common question of law is presented, the doctrine of res judicata is normally unavailable to a subsequent defendant following an initial adjudication of that question in favor of a former defendant. (See [Woodford v. Municipal Court \(1974\) 37 Cal. App. 3d 874, 877-878 \[112 Cal. Rptr. 773\]](#); [People v. Seltzer \(1972\) 25 Cal. App. 3d Supp. 52, 54-57 \[101 Cal. Rptr. 260\]](#).) This is so, it has been said, because application of the doctrine in such situations "would produce anomalous results, would not serve the objective of preventing [\*422] a defendant from being harassed or twice vexed by litigation, and would not accord sufficient consideration to the public interest in the enforcement of [the] laws . . . ." ( [People v. Seltzer, supra, 25 Cal. App. 3d Supp. at p. 57](#).) By the same token, the Attorney General argues, to allow PLGD to here raise the plea on the basis of the *Lewis v. Younger* decision -- without itself being bound by the prior P.G. & E. decision (as to which it was neither a party nor in privity with a party) -- would result in an anomalous situation without serving any of the objectives of the doctrine. [\*\*\*49] On the contrary, the Attorney General urges, such a result would fly in the face of "the public interest in enforcement of the antitrust laws and the public interest in the state court determination of the validity of the . . . subpoenas."

It is quite true that, as we stated in [Chern v. Bank of America \(1976\) 15 Cal.3d 866, 872 \[127 Cal. Rptr. 110, 544 P.2d 1310\]](#), "[in] general it may be said that rulings of law, divorced from the specific facts to which they were applied, are not binding under principles of res judicata." The drafters of the Restatement state the same precept as follows: "Where a question of law essential to the judgment is actually litigated and determined by a valid and final personal judgment, the determination is not conclusive between the parties in a subsequent action on a different cause of action, except where both causes of action arose out of the same subject matter or transaction; and in any event it is not conclusive if injustice would result." (*Rest., Judgments*, § 70.) It is also quite true that in some cases concerning matters of important public interest the courts will decline to apply the bar of former adjudication even [\*\*\*50] if all of the formal elements for its application are present. (See [Chern v. Bank of America, supra, 15 Cal.3d 866, 872-873](#); [Louis Stores, Inc. v. Department of Alcoholic Beverage Control \(1962\) 57 Cal.2d 749, 757-759 \[22 Cal. Rptr. 14, 371 P.2d 758\]](#); [Kelly v. Trans Globe Travel Bureau, Inc. \(1976\) 60 Cal. App. 3d 195, 202-203 \[131 Cal. Rptr. 488\]](#); [Bleek v. State Board of Optometry \(1971\) 18 Cal. App. 3d 415, 430-431 \[95 Cal. Rptr. 860\]](#).)

In applying these precepts, however, the courts must be alert to the existence of countervailing considerations which, in the circumstances of the particular case, render the upholding of the plea consistent with "sound principles of judicial administration looking to equal justice for all." ( [Nevarov v. Caldwell \(1958\) 161 Cal. App. 2d 762, 775 \[327 P.2d 111\]](#).) In my view such considerations exist in the instant case.

As above indicated, I do not understand the Attorney General to assert that the defendants in the instant case should be bound by the [\*423] now-final determination of the San Francisco Superior Court in the P.G. & [\*\*\*51] E. case (In the Matter of the Investigation of: Ownership, Production, Sale & Distribution of Prudhoe Bay, Alaska Natural Gas, Super. Ct. No. 710-531), rejecting the claim of preemption. It is clear that such a claim would fail not only on grounds of due process (see [Bernhard, supra, 19 Cal.2d at p. 811](#)), but also because it would involve an offensive assertion of the plea. (See [Nevarov v. Caldwell, supra, 161 Cal. App. 2d 762](#); Currie: *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine* (1957) 9 Stan.L. Rev. 281.) Rather, it is the contention of the Attorney General that, in the words of the Restatement, "injustice would result" if he, being precluded from such an offensive assertion of the plea, were now to be held bound by a defensive assertion based on the contrary decision of [\*\*830] [\*\*\*922] the federal district court in the ARCO case, *Lewis v. Younger*. I cannot agree. Surely this case bears small resemblance to those such as [Woodford v. Municipal Court, supra, 37 Cal. App. 3d 874](#) and [People v. Seltzer, supra, 25 Cal. App. 3d Supp. 52](#), wherein a criminal acquittal [\*\*\*52] based upon a finding of non-obscenity was sought to be raised as a bar to prosecution by a different criminal defendant in another county. (See also [Zeitlin v. Arnebergh \(1963\) 59 Cal.2d 901, 907 \[31 Cal. Rptr. 800, 383 P.2d 152, 10 A.L.R.3d 707\]](#).) The issue here in question is a purely legal one which does not depend for its resolution upon the views of the factfinder to whom it is presented -- as is peculiarly the case in obscenity prosecutions. More significantly, whereas a

particular finding on the issue of obscenity may depend to a great extent upon the skill and preparation with which a particular prosecutor presents it, here there is no question but that the issue of preemption was argued before the federal district court with all of the skill and vigor which the Attorney General has at his command. In these circumstances, then, I do not believe that the reasoning of the *Woodford* and *Seltzer* cases has any application here.

It is quite true, as the Attorney General so forcefully asserts, that there exists a significant public interest in this state in the full and vigorous enforcement of our antitrust laws, as well as in the pursuance of investigations [\*\*\*\*53] to that end under Government Code section 11180 et seq. I do not believe, however, that this is a case in which the presence of these considerations should lead us to reject the plea of former adjudication in favor of ourselves addressing the merits of the issues presented. As indicated above (see text accompanying fn. 7, *ante*), the Attorney General does not here seek to test the limits of his investigatory power in areas which the decided cases have not heretofore treated. [\*424] Thus he does not assert that his investigation has any purpose other than that of developing an informational basis for regulating the activities of defendants under the *California* antitrust laws, a purpose whose legitimacy is clearly established as within the scope of his investigative power under the California law. (*Brovelli v. Superior Court (1961) 56 Cal.2d 524 [15 Cal. Rptr. 630, 364 P.2d 462].*) No suggestion is made, for instance, that even if an investigation for the indicated purpose should be held to be preempted by federal law, other purposes -- such as for instance the development of an informational basis for action under the federal [\*\*\*\*54] antitrust laws or the presentation of a report to Congress -- would remain as legitimate objects of his investigatory powers. While we might, if such contentions were presented, properly take the view that our role as the highest court of this state requires us to reject the plea of res judicata in the interest of delineating further the scope of permissible investigatory powers under Government Code section 11180 et seq., the Attorney General's position herein, in my view, precludes us from doing so in the circumstances of this case.

I would affirm the orders.

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## Partee v. San Diego Chargers Football Co.

Supreme Court of California

August 29, 1983

L.A. No. 31560

### **Reporter**

34 Cal. 3d 378 \*; 668 P.2d 674 \*\*; 194 Cal. Rptr. 367 \*\*\*; 1983 Cal. LEXIS 223 \*\*\*\*; 1983-2 Trade Cas. (CCH) P65,588

DENNIS PARTEE, Plaintiff and Respondent, v. SAN DIEGO CHARGERS FOOTBALL COMPANY, Defendant and Appellant

**Subsequent History:** [\*\*\*\*1] Respondent's Petition for a Rehearing was Denied September 28, 1983, and the Judgment was Modified to Read as Printed Above.

**Prior History:** Superior Court of San Diego County, No. 391152, Franklin B. Orfield, Judge.

**Disposition:** The judgment is reversed insofar as it awards damages on the basis of violation of the Cartwright Act. Each party shall bear its own costs on appeal.

### **Core Terms**

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interstate commerce, baseball, antitrust, regulation, Cartwright Act, state regulation, commerce clause, anti trust law, professional football, state **antitrust law**, practices, league, exemption, football, Sherman Act, interstate, teams, players, cases, interstate activity, federal law, preclusion, state law, professional baseball, trial court, preempt, national uniformity, present case, intrastate, preemption

### **LexisNexis® Headnotes**

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

Governments > State & Territorial Governments > Legislatures

Governments > Legislation > Effect & Operation > Prospective Operation

### **HN1 [?] Regulated Practices, Trade Practices & Unfair Competition**

The federal and California antitrust laws, having identical objectives, are harmonious with each other.

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

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

34 Cal. 3d 378, \*378 668 P.2d 674, \*\*674 194 Cal. Rptr. 367, \*\*\*367 1983 Cal. LEXIS 223, \*\*\*\*1

Transportation Law > Interstate Commerce > Federal Powers

Governments > Federal Government > US Congress

## **HN2** Regulated Practices, Trade Practices & Unfair Competition

The Commerce Clause is a limitation upon the power of the states without implementing legislation by Congress.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

Governments > State & Territorial Governments > Legislatures

Transportation Law > Interstate Commerce > Balancing Tests

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

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

## **HN3** Interstate Commerce, State Powers

Not every exercise of state power with some impact on interstate commerce is invalid. A state statute must be upheld if it regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

Civil Procedure > Trials > Bench Trials

Governments > Legislation > Effect & Operation > Prospective Operation

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

## **HN4** Interstate Commerce, State Powers

The burden on interstate commerce will ordinarily be found unreasonable where a state regulation substantially impedes the free flow of commerce from state to state or governs those phases of national commerce which, because of the need of national uniformity, demand their regulation, if any, be prescribed by a single authority.

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

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Governments > State & Territorial Governments > Legislatures

## **HN5** Regulated Practices, Trade Practices & Unfair Competition

The Commerce Clause permits only incidental regulation of interstate commerce by the states; direct regulation is prohibited.

Antitrust & Trade Law > Regulated Industries > Sports > Football

Governments > State & Territorial Governments > Legislatures

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

## **[HN6](#) [down] Sports, Football**

It is settled that the National Football League is engaged in interstate commerce and that federal antitrust laws are applicable.

Antitrust & Trade Law > Regulated Industries > Sports > Baseball

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Civil Procedure > Trials > Bench Trials

Governments > State & Territorial Governments > Legislatures

## **[HN7](#) [down] Sports, Baseball**

Where the nature of an enterprise is such that differing state regulation, although not conflicting, requires the enterprise to comply with the strictest standard of several states in order to continue an interstate business extending over many states, the extraterritorial effect which the application of a particular state law would exact constitutes, absent a strong state interest, an impermissible burden on interstate commerce.

## **Headnotes/Summary**

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### **Summary**

#### **CALIFORNIA OFFICIAL REPORTS SUMMARY**

A professional football player who played for a team member of the National Football League (NFL) and who was subject to certain nationwide NFL operating rules, such as the draft, option clause, Rozelle rule, tampering rule, and one-man rule, brought an antitrust action against the team for violation of the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)). The trial court found all but the option clause to violate state antitrust laws and awarded the player treble damages based on the difference between his \$ 38,500 salary and a \$ 50,000 offer from a team in another league. (Superior Court of San Diego County, No. 391152, Franklin B. Orfield, Judge.)

The Supreme Court reversed insofar as the judgment awarded damages on the basis of a violation of the Cartwright Act, holding that application of state **antitrust law** to the interstate activities of professional football would impermissibly burden interstate commerce. Stating that professional football is a nationwide business

structured essentially the same as baseball, to which state antitrust laws are inapplicable, and that there was need for a nationwide league structure and a nationally uniform set of rules, the court held that the national uniformity required in the regulation of baseball and its reserve system was likewise required in the player-team-league relationships at issue. Fragmentation of the league structure on the basis of state lines would adversely affect the success of the competitive business enterprise, and differing state antitrust decisions would likely compel all members to comply with the laws of the strictest state. (Opinion by Broussard, J., with Bird, C. J., Mosk, Richardson, Kaus, JJ., and Byrne, J., \* concurring. Separate concurring opinion by Mosk, J. Separate dissenting opinion by Reynoso, J.)

## **Headnotes**

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

#### **Monopolies and Restraints of Trade § 6—Under Cartwright Act—Applicability to Interstate Activities of Professional Football.**

--A professional football player who played for a team that was a member of the National Football League (NFL) and who was subject to certain nationwide NFL operating rules, such as the draft, option clause, Rozelle rule, tampering rule, and one-man rule, did not have an antitrust claim against the team for violation of the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*), and was improperly awarded treble damages based on the difference between his \$ 38,500 salary and a \$ 50,000 offer from a team in another league, since application of the Cartwright Act to the interstate activities of professional football would impermissibly burden interstate commerce. Professional football is a nationwide business structured essentially the same as baseball, to which state antitrust laws are inapplicable, in which there is need for a nationwide league structure and a nationally uniform set of rules. Fragmentation of the league structure on the basis of state lines would adversely affect the success of the competitive business enterprise, and differing state antitrust decisions would likely compel all member teams to comply with the laws of the strictest state. Thus, the national uniformity required in the regulation of baseball and its reserve system was likewise required in the player-team-league relationships at issue.

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

#### **Monopolies and Restraints of Trade § 6—Under Cartwright Act—Consistency Between State and Federal Law.**

--The federal and state antitrust laws (*Bus. & Prof. Code, § 16700 et seq.*), having identical objectives, are harmonious with each other.

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

#### **Commerce § 3—State Regulation and Taxation of Interstate Commerce.**

--The commerce clause is a limitation on the power of the states without implementing legislation by Congress and does not render invalid every exercise of state power with some impact on interstate commerce. However, the commerce clause permits only incidental regulation of interstate commerce by the states; direct regulation is prohibited. Accordingly, a state statute must be upheld if it regulates evenhandedly to effectuate a legitimate local public interest and its effects on interstate commerce are only incidental, unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. The burden on interstate commerce will ordinarily be found unreasonable when the state regulation substantially impedes the free flow of commerce from

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\* Assigned by the Chairperson of the Judicial Council.

state to state or governs those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.

**CA(4) [4]**

#### **Monopolies and Restraints of Trade § 4—Sherman Act—Applicability to Professional Football.**

--The National Football League is engaged in interstate commerce and is subject to federal antitrust laws.

**Counsel:** Terry Christensen, Andrew M. White, Michael E. Viebrock and Wyman, Bautzer, Rothman, Kuchel & Silbert for Defendant and Appellant.

Hamilton Carothers, Keith A. Teel and Covington & Burling as Amici Curiae on behalf of Defendant and Appellant.

Louis E. Goebel, Brian D. Monaghan, James E. Rubnitz and Goebel & Monaghan for Plaintiff and Respondent.

**Judges:** Opinion by Broussard, J., with Bird, C. J., Mosk, Richardson, Kaus, JJ., and Byrne, J., \* concurring. Separate concurring opinion by Mosk, J. Separate dissenting opinion by Reynoso, J.

**Opinion by:** BROUSSARD

## **Opinion**

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**[\*380] [\*\*675] [\*\*\*368]** The San Diego Chargers Football Company, a California limited partnership, appeals a judgment awarding damages for violation **[\*\*\*369]** of the California antitrust law. **[\*\*\*\*2]** (*Bus. & Prof. Code, § 16700 et seq.*, hereinafter the **[\*\*676]** Cartwright Act.)<sup>1</sup> In accordance with other decisions considering the applicability of state antitrust laws to national professional sports leagues, we conclude that the Cartwright Act is not applicable to the interstate activities of professional football.

From 1968 to 1976, Dennis Partee, a California resident, played professional football as a punter and placekicker for the Chargers, a member of the National Football League (NFL). In 1974, the World Football League came into existence, and one of its teams offered Partee \$ 50,000 to play for **[\*381]** it for a season. He subsequently entered into a contract with the Chargers for three years with a salary of \$ 38,500 in 1974, \$ 44,000 in 1975, and \$ 49,500 in 1976. The **[\*\*\*\*3]** agreement was subject to the terms and conditions of the standard NFL players contract. The trial court fixed damages for violation of the Cartwright Act based on the difference between the \$ 50,000 offer and the 1974 salary, awarded for the three years of the contract and trebled for a total award of \$ 103,500.

In 1975, the last full year Partee played for the Chargers, the NFL had 26 teams located in 16 states and the District of Columbia. The league structure is characterized by a basic division into two conferences each having divisions composed of certain teams within the conference, and by play according to an ordered schedule between teams within the various divisions and the two conferences. The Chargers play nearly half their games outside of California, and most of their games are against teams located in other states. NFL games are regularly broadcast coast to coast over network television, and professional football has gained nationwide appeal.

To promote athletic competition by providing a means of keeping the teams on a par with each other and to foster the business success of the member teams, the NFL has certain operating rules, many of which are embodied in

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\* Assigned by the Chairperson of the Judicial Council.

<sup>1</sup> The judgment also awarded damages for breach of contract. On appeal, the Chargers did not challenge the part of the judgment awarding contract damages, and we dismissed the appeal insofar as it relates to that award.

the [\*\*\*\*4] NFL constitution and bylaws. Partee's antitrust action concerns five of these operating rules as they existed in 1974: the draft, option clause, Rozelle rule, tampering rule and one-man rule.<sup>2</sup> These rules are applied nationwide to all of the teams in the league. The court found all but the option clause to violate California antitrust laws.

[\*\*\*\*5] Since 1968, all NFL players have been represented by the NFL Players Association (NFLPA). In 1970, the NFLPA and NFL management entered [\*382] a second collective bargaining agreement covering the 1970 and 1973 seasons. No new agreement was reached until March 1977, but this agreement was made retroactive to the expiration date of the prior agreement. This new agreement, which was effective into [\*\*\*370] 1982, contains each of the rules or practices challenged by Partee.<sup>3</sup>

[\*\*\*\*6] [CA\(1a\)](#) (1a) The [\*\*677] Chargers contend that professional football is a unique activity of interstate commerce which requires nationally uniform governance, that only federal antitrust laws apply, that interstate commerce would be unreasonably burdened if state antitrust laws were applied to professional football's interstate activities, and that application of the Cartwright Act was a violation of the commerce and supremacy clauses of the Constitution.

[CA\(2\)](#) (2) The Chargers do not claim federal antitrust laws, the Sherman and Clayton Acts, "occupy" the field of antitrust regulation, or that the federal and state antitrust laws so conflict as to require preemption of the state scheme. [HN1](#) The federal and California antitrust laws, having identical objectives, are harmonious with each other. (See [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) [HN2](#) The commerce clause is a limitation upon the power of the states without implementing legislation by Congress. ([A.&P. Tea Co., Inc. v. Cottrell \(1976\) 424 U.S. 366, 370-371 \[47 L.Ed.2d 55, 60, 96 S.Ct. 923\].](#)) [HN3](#) "Not every exercise of state power with some impact on interstate [\*\*\*\*7] commerce is invalid. A state statute must be upheld if it 'regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental . . . unless the burden imposed on such-commerce is clearly excessive in relation to the putative local benefits.'" ([Edgar v. Mite Corp. \(1982\) 457 U.S. 624, 640 \[73 L.Ed.2d 269, 282, 102 S.Ct. 2629, 2640\]; Minnesota v. Clover Leaf Creamery Co. \(1981\) 449 U.S. 456, 471 \[66 L.Ed.2d 659, 673, 101 S.Ct. 715\]; Pike v. Bruce Church, Inc. \(1970\) 397 U.S. 137, 142 \[25 L.Ed.2d 174, 178, 90 S.Ct. 844\].](#)) [HN4](#) The burden on interstate commerce will ordinarily be found unreasonable where the state regulation

<sup>2</sup>The draft is a selection system whereby the respective NFL teams are awarded the initial rights to negotiate exclusively with football players graduating from college.

The option clause is a provision of the NFL Standard Player Contract which grants the team the right to renew a player's contract for one additional year if the team and player cannot agree to a new contract. After the option year expires, the player becomes a "free agent" and may negotiate and contract with teams of another league or with other NFL teams subject to the Rozelle rule.

The Rozelle rule is named after the NFL commissioner, Pete Rozelle. This rule provides if a free agent contracts with another NFL team, the new team must compensate the player's former team with draft choice(s) or other player contracts. If the new and former teams cannot agree as to the compensation, the commissioner arbitrates the matter and determines the compensation.

The tampering rule prohibits an NFL team from negotiating with a player currently under contract with another NFL team. Also, if one team has the exclusive right to negotiate with a player, no other team may tamper with that player.

The one-man rule refers to the commissioner's authority to compel a player to adhere to terms of an operative collective bargaining agreement between the players and the NFL teams.

<sup>3</sup>This second collective bargaining agreement was negotiated during the pendency of antitrust suits brought by players against the NFL. The most significant case, *Alexander v. National Football League* (D.Minn. 1977) 1977-2 Trade Cases (CCH) para. 61,730, was a class action. The agreement and *Alexander* incorporate a settlement which includes the practices and rules Partee challenges. The settlement also contains a covenant not to sue (in antitrust) by the class members. However, Partee, who filed this suit before the specified cutoff date, chose not to be a class member. This agreement terminated in mid-1982.

substantially impedes the free flow of commerce from state to state or governs "those phases of the national commerce which, because of the need of national uniformity, demand their [\*383] regulation, if any, be prescribed by a single authority." ( *Southern Pacific Co. v. Arizona* (1945) 325 U.S. 761, 767 [89 L.Ed. 1915, 1923, 65 S.Ct. 1515].) **HN5**<sup>4</sup> The commerce clause permits only incidental regulation of interstate commerce by the states; direct regulation is prohibited. [\*\*\*\*8] ( *Edgar v. Mite Corp.*, *supra*, 457 U.S. 624, 641-643 [73 L.Ed.2d 269, 282-283, 102 S.Ct. 2629, 2640-2641].)

**CA(4)**<sup>4</sup> (4) **HN6**<sup>4</sup> It is settled that the NFL is engaged in interstate commerce and that federal antitrust laws are applicable. ( *Radovich v. Nat. Football League* (1957) 352 U.S. 445, 452 [1 L.Ed.2d 456, 462, 77 S.Ct. 390].)

**CA(1b)**<sup>4</sup> (1b) A number of cases have considered the applicability of state antitrust laws to national professional sports leagues. The leading case is *Flood v. Kuhn* (S.D.N.Y. 1970) 316 F.Supp. 271, affirmed (2d Cir. 1971) 443 F.2d 264, affirmed 407 U.S. 258 [32 L.Ed.2d 728, 92 S.Ct. 2099]. Considering baseball's reserve system, the trial court found state antitrust laws inapplicable on alternative grounds: preemption and unreasonable burden on interstate commerce.<sup>4</sup>

[\*\*\*9] [\*\*\*371] Treating the applicability of state antitrust laws to professional baseball as a question of first impression, the Second Circuit affirmed. ( *Flood v. Kuhn*, *supra*, 443 F.2d 264, 267-268.) [\*\*678] The court stated: **HN7**<sup>4</sup> "[Where] the nature of an enterprise is such that differing state regulation, although not conflicting, requires the enterprise to comply with the strictest standard of several states in order to continue an interstate business extending over many states, the extra-territorial effect which the application of a particular state law would exact constitutes, absent a strong state interest, an impermissible burden on interstate commerce." ( *Id.*, at p. 267.)

Analyzing the organization of professional baseball and the effect of state antitrust regulation balanced against its need, the court of appeals reasoned: "Professional baseball clubs, although existing as separate legal entities, are organized into so-called leagues for competitive play and are dependent on the league playing schedule to further the ends of their sports competition. Therefore, it is the league structure at which any state antitrust regulation must be aimed if organized professional [\*\*\*10] baseball is not to be severely fragmented. On the one hand, it is apparent that each league extends over [\*384] many states, and that, if state regulation were permissible, the internal structure of the leagues would require compliance with the strictest state antitrust standard. The consequent extra-territorial effect of necessary compliance would be considerably more far-reaching than that in *Southern Pacific Co. v. Arizona*, *supra*. On the other hand, we do not find that a state's interest in antitrust regulation, when compared with its interest in health and safety regulation, is of particular urgency. Hence, as the burden on interstate commerce outweighs the states' interests in regulating baseball's reserve system, the Commerce Clause precludes the application here of state **antitrust law**." (443 F.2d at pp. 267-268; fn. omitted.)

Affirming the circuit court, the United States Supreme Court stated: "The petitioner's argument as to the application of state antitrust laws deserves a word. Judge Cooper rejected the state law claims because state antitrust regulation would conflict with federal policy and because national 'uniformity [is required] in any regulation of [\*\*\*11] baseball and its reserve system.' 316 F.Supp., at 280. The Court of Appeals, in affirming, stated, '[As] the burden on interstate commerce outweighs the states' interests in regulating baseball's reserve system, the Commerce Clause precludes the application here of state **antitrust law**.' 443 F.2d, at 268. As applied to organized baseball, and in the light of this Court's observations and holdings in *Federal Baseball*, in *Toolson*, in *Shubert*, in *International Boxing*, and in *Radovich*, and despite baseball's allegedly inconsistent position taken in the past with respect to the application of state law, these statements adequately dispose of the state law claims." (407 U.S. at

<sup>4</sup> As considered by the trial court in *Flood v. Kuhn*, baseball's reserve system had many of the attributes of the NFL rules and practices of which Partee complains. Baseball's reserve system involved an agreement by all of the teams to be involved in a draft creating exclusive bargaining rights in the club as to the draftee; a uniform player's contract empowering the signing club unilaterally to renew a player's contract from year to year; denial of any right in a player, once signed, to negotiate with any other team; a prescribed number of players per team; and the unilateral right of a team to assign the contract to another team. (See *Flood v. Kuhn*, *supra*, 316 F.Supp. 271, 273-275.)

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[pp. 284-285 \[32 L.Ed.2d at p. 745\]](#), fn. omitted; see [State of Wisconsin v. Milwaukee Braves, Inc. \(1966\) 31 Wis.2d 699 \[144 N.W.2d 1, 17-18\]](#); cert. den. 385 U.S. 990 [17 L.Ed.2d 451, 87 S.Ct. 598]; rehg. den. 385 U.S. 1044 [17 L.Ed.2d 689, 87 S.Ct. 770].)

Following *Flood v. Kuhn*, state antitrust regulation has been held inapplicable to professional basketball ([Robertson v. National Basketball Association \(S.D.N.Y. 1975\) 389 F.Supp. 867, 881](#); [HMC Management \[\\*\\*\\*\\*12\] v. New Orleans Basketball Club \(La.App. 1979\) 375 So.2d 700, 706-707](#)) and professional football ([Matuszak v. Houston Oilers, Inc. \(Tex.Civ.App. 1974\) 515 S.W.2d 725, 728-729](#)). No case has been found applying state antitrust laws to the interstate activities of professional sports.

Professional football is a nationwide business structured essentially the same as baseball. Professional football's teams are dependent upon the league playing schedule for competitive play, just as in baseball. The necessity of a nationwide league structure for the benefit of both teams and players for effective competition is evident as is the need for a nationally uniform set of rules governing the league structure. Fragmentation of the [\*385] league structure on the basis of state lines would adversely affect the success of the competitive business [\*\*\*372] enterprise, and differing state antitrust decisions if applied to the enterprise would likely compel all member teams to comply with the laws of the strictest state. [\*\*679] (*Flood v. Kuhn, supra*, 443 F.2d at pp. 267-268.)

We are satisfied that national uniformity required in regulation of baseball and its reserve [\*\*\*13] system is likewise required in the player-team-league relationships challenged by Partee and that the burden on interstate commerce outweighs the state interests in applying state antitrust laws to those relationships.

Partee seeks to distinguish *Flood v. Kuhn*, on the ground that professional baseball enjoys a unique exemption from federal **antitrust law** (*Flood v. Kuhn, supra*, 407 U.S. 258, 269-284 [32 L.Ed.2d 728, 736-745]; [Toolson v. New York Yankees \(1953\) 346 U.S. 356 \[98 L.Ed. 64, 74 S.Ct. 78\]](#); [Federal Baseball Club v. National League \(1922\) 259 U.S. 200 \[66 L.Ed. 898, 42 S.Ct. 465, 26 A.L.R. 357\]](#)), and that the United States Supreme Court in upholding baseball's exemption from state law relied on the cases establishing baseball's federal exemption and stated that its holding applied to baseball. However, the high court specifically relied upon the court of appeals' statement: "[As] the burden on interstate commerce outweighs the states' interests in regulating baseball's system, the Commerce Clause precludes the application of state **antitrust law**." The high court also relied upon the district court judge's statement that "national 'uniformity [\*\*\*\*14] [is required] in a regulation of baseball and its reserve system.'" ([407 U.S. at p. 284 \[32 L.Ed.2d at p. 745\]](#).) There is no justification to conclude that the United States Supreme Court did not fully consider the brief statements from the lower court opinions it chose to quote, approve, and rely upon. The statements are clear and unequivocal, and we are not free to disregard them. Because in all relevant respects the burden on interstate commerce and the state interest resulting from the player-team-league relationship in professional football attacked by Partee is substantially the equivalent of that resulting from the reserve clause in professional baseball, the statements are applicable to professional football.

Our conclusion that application of the Cartwright Act in the instant case would be in conflict with the commerce clause makes it unnecessary to consider the claim that application of the Cartwright Act would also be in conflict with federal labor law policy.<sup>5</sup>

[\*\*\*15] [\*386] The judgment is reversed insofar as it awards damages on the basis of violation of the Cartwright Act. Each party shall bear its own costs on appeal.

**Concur by:** MOSK

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<sup>5</sup> The dissent asserts that today's holding strikes a significant blow to the vitality of the Cartwright Act and that by this opinion "we would necessarily have to exempt all businesses engaged in multistate activities." (Dis. opn. at pp. 389, 408.) This opinion has a limited scope. The Cartwright Act remains vital. We do not mean to suggest that multistate activities of other businesses may not be subject to state regulation upon due consideration of the commerce clause. Our holding is limited to the issue directly before us, the inapplicability of the Cartwright Act to professional football.

## Concur

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**MOSK, J.**, Concurring. I have signed the majority opinion, under compulsion of [\*Flood v. Kuhn \(1972\) 407 U.S. 258 \[32 L.Ed.2d 728, 92 S.Ct. 2099\]\*](#).

Though keenly aware of the need to vigilantly enforce the Cartwright Act, I cannot accept the unique theory of the dissent that professional baseball and professional football are governed by different law. Though the playing fields are of different configuration, the balls of a different shape, the equipment and uniforms of a varying appearance and the method of scoring inconsistent, both baseball and football are for all practical purposes identical coast to coast sporting ventures seeking a combination of glory and financial reward.

While I might not rhapsodize as effusively about baseball lore as did Justice Blackmun [\*\*\*373] in *Flood* (*supra*, pp. 260-264 [32 L.Ed.2d pp. 732-734]), I am bound by the decision in that case and believe despite some dictum (*id.*, p. 283 [32 L.Ed.2d at p. 744]) that [\*\*680] it must be applied [\*\*\*\*16] equally to professional football. If a great outfielder like Curt Flood is barred by the United States Supreme Court from state antitrust protection, an outstanding gridiron performer like Dennis Partee must suffer the same fate.

**Dissent by:** REYNOSO

## Dissent

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**REYNOSO, J.**, Dissenting. Is the application of our state antitrust law ([\*Bus. & Prof. Code, § 16700 et seq.\*](#); the Cartwright Act) to professional football precluded by the presence of interstate commerce and concurrent Sherman Act jurisdiction? I think not.

The Cartwright Act parallels and is in harmony with the Sherman Antitrust Act. A conflict would arise only if compliance with both federal and state regulations were impossible ([\*Florida Avocado Growers v. Paul \(1963\) 373 U.S. 132, 142-143 \[10 L.Ed.2d 248, 256-257, 83 S.Ct. 1210\]\*](#)) or if state regulation stood as an obstacle to achievement of congressional objectives ([\*Hines v. Davidowitz \(1941\) 312 U.S. 52, 67 \[85 L.Ed. 581, 587, 61 S.Ct. 399\]\*](#)). Nothing in the case before us even remotely suggests that application of the Cartwright Act conflicts with or is hostile to federal [\*387] antitrust enforcement. To the contrary, federal courts have held the [\*\*\*\*17] same National Football League (NFL) rules and practices challenged by Partee to be violative of the Sherman Act. Nor is there any interference with any congressionally declared, paramount national interest, notwithstanding the majority's implication that the league structure of professional sports entitles the individual team businesses to a state antitrust exemption not enjoyed by any other business engaged in interstate commerce.

As the majority correctly note, the doctrine of federal preemption under the supremacy clause <sup>1</sup> is not involved in this case, i.e., Congress has not occupied the field of antitrust regulation to the exclusion of the states. Our focus then is on the narrow issue of federal preclusion under the commerce clause. <sup>2</sup> [\*\*\*\*19] The majority summarily conclude, without discussion, that application of the Cartwright Act to the NFL practices would virtually destroy "the

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<sup>1</sup> (U.S. Const., art. VI, [\*cl. 2.\*](#))

<sup>2</sup> "The Congress shall have Power . . . To regulate Commerce . . . among the several States . . ." (U.S. [\*Const., art. I, § 8, cl. 3.\*](#)) The Supreme Court has explained: "The Commerce Clause reaches, in the main, three categories of problems. First, the use of channels of interstate or foreign commerce which Congress deems are being misused, as, for example, the shipment of stolen goods . . . or of persons who have been kidnapped . . . Second, protection of the instrumentalities of interstate commerce, as, for example, the destruction of an aircraft . . . or persons or things in commerce, as, for example, thefts from interstate shipments . . . Third, those activities affecting commerce." ( [\*Perez v. United States \(1971\) 402 U.S. 146, 150 \[28 L.Ed.2d 686, 690, 91 S.Ct. 1357\]\*](#).) We are here concerned with the third element of interstate commerce jurisdiction.

player-team-league relationships challenged by Partee and that the burden on interstate commerce outweighs the state interests in applying state antitrust laws to those relationships." (*Ante*, at p. 385.) But we are not told why this is so when the trial court has done nothing more than remove restraints [\*\*\*\*18] on free trade which have already been held violative of the federal act.<sup>3</sup> I respectfully suggest that the majority fail to explain why there is a potential for lack of uniformity and a consequent burden on interstate commerce, because, in the present case, there can be no showing whatsoever that the application of the Cartwright Act to the challenged NFL practices will have *any* adverse effects on the free flow of commerce across state lines. In holding otherwise -- contrary to the record before us -- the majority ignore the unique and limited [\*\*\*374] factual circumstances in which this case arises. The trial judge found that this case is one of only four cases remaining from a 1977 settlement of a class action [\*\*681] antitrust suit brought by NFL players against the league. Pursuant to the settlement agreement, the players covenanted not to sue; thus only players opting out of the settlement -- e.g., Partee -- can challenge the practices here in issue.

[\*388] Thus, in the circumstances of this case, I cannot agree that application of state **antitrust law** will impose on interstate commerce an undue -- indeed, any -- burden which "is clearly excessive in relation to the putative local benefits." (*Ante*, at p. 385.) This action, involving a California resident and a California corporation, arises under an employment contract expressly providing for the application of California law. The trial court, recognizing that antitrust regulation is an area of overlapping state and federal concern, correctly concluded the process is one of accommodation and that, in the present circumstances, application of state law is proper and preferable. Indeed, the state antitrust [\*\*\*\*20] action was the only one available to Partee. A majority of this court have now left him with no remedy though the challenged practices manifestly violate state and federal antitrust laws.

The majority reverse the judgment in this case on the ground that "we are not free to disregard" the Supreme Court's holding in Flood v. Kuhn (1972) 407 U.S. 258 [32 L.Ed.2d 728, 92 S.Ct. 2099]. Finding *Flood* controlling, the majority think it unnecessary to decide whether state regulation of professional football actually conflicts with federal law or policy. As I shall explain, the *Flood* case, while binding on us, is in my view clearly distinguishable. I question the wisdom of deferring to a case which the high court candidly admits is an aberration in the law and a perpetuation of earlier, erroneously decided cases applicable only to professional baseball. More importantly, in *Flood*, state antitrust regulation would have inevitably resulted in conflict with federal law as baseball has historically been granted an exemption from federal antitrust regulation. In other contexts, the Supreme Court has consistently held that the mere potential of conflict with federal law [\*\*\*\*21] is insufficient to preempt state regulation. Most recently, the high court has held that California's statutory provisions for the storage and disposal of nuclear waste are not preempted by, and do not conflict with federal law, notwithstanding Congress' passage of the Nuclear Waste Policy Act of 1982. ( Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission (1983) U.S. [75 L.Ed.2d 752, 103 S.Ct. 1713].) I find it ironic that this court today holds that professional football -- for which Congress has *not* declared a national uniform policy -- is immune from state regulation.

The majority thus embrace the same dubious conclusion reached by the Court of Appeal below. Although we granted hearing to address this difficult federal preemption question -- the resolution of which requires a delicate balancing of state and federal interests in this area of mutual concern -- the majority simply conclude that we are presented with a nonissue as the result in this case is assertedly preordained by the Supreme Court's decision in *Flood*. My conclusion that this case is not controlled by *Flood* necessarily requires a more detailed [\*\*\*\*22] analysis (and rejection) of the San Diego Chargers [\*389] federal preclusion claim than that of the majority decision, which -- I respectfully suggest -- is rendered without apparent recognition of the significant blow dealt to the vitality of the Cartwright Act.

As I shall explain, the majority's holding represents a dramatic and abrupt departure from this court's previous teachings and uniform application of the Cartwright Act to activities affecting interstate commerce. I would not turn

<sup>3</sup> "Consequently, it would be difficult to prove that a policy which removes privately instituted interferences, delays, interruptions, and inconveniences with interstate commerce, is itself a delay, interference, interruption, and inconvenience to interstate commerce when enforced at the local level by the States." (Flynn, *Federalism and State Antitrust Regulation* (1964) at p. 84.)

my back on sound precedent unless there is something unique about professional football which compels a marked deviation from the normal course of our consistent holdings in this area. In my view, professional sports enterprises, despite our society's fascination with them, are no different, in any legally significant way, than any other business engaged in [\*\*\*375] interstate commerce. Accordingly, I fear that today's decision comes dangerously close to eliminating concurrent state-federal [\*\*682] antitrust enforcement as it may be read as relegating state jurisdiction to solely intrastate conduct and activities, a realm of competence already severely restricted by the vast expansion [\*\*\*23] of federal interstate authority.

In short, the majority fail to reconcile principles of federalism with the reality of a national economy dominated by interstate commercial activity. My review of the case law in this area convinces me that our state's interest in regulating anticompetitive practices is paramount if the subject matter is not one which requires exclusive federal regulation in order to achieve uniformity vital to national interests. An extended discussion of the relevant decisional authority is necessary to show that the majority today fashion the unprecedented rule that a wholly speculative conflict between state and federal law, founded on mere supposition and inference unsupported by the factual record before us, is sufficient to compel a finding of federal preemption. This approach is completely at odds with, and seriously misapprehends the commerce clause preclusion doctrine carefully delineated in legion Supreme Court decisions. I would not follow this misguided path at the expense of our state's Cartwright Act. Instead, I would hold that, consistent with the commerce clause, the Cartwright Act may apply to activities which affect interstate commerce if, as [\*\*\*24] in the present case, there is neither a conflict with federal law or policy nor imposition of a burden on interstate commerce. I therefore dissent.

*This case arises in a limited factual setting.*

Partee filed this action alleging, inter alia, breach of contract in that the San Diego Chargers (Chargers) failed to pay his 1976 salary, and violation of the Cartwright Act in that the Chargers' adherence to various NFL rules and practices damaged his business and property interests. The antitrust action concerns five operating rules (contained in the NFL constitution and [\*390] bylaws and incorporated by reference in the standard player contract) which, Partee alleged, imposed an unreasonable restraint on player transfer. Partee challenged these rules (the draft, option clause, Rozelle rule, tampering rule and one-man rule) as they existed in 1974.

These operating rules and practices have since been modified due in large part to several other actions against the NFL brought by players under federal antitrust laws. Three individual plaintiffs have prevailed on the merits of their challenge to these same rules. ( *Smith v. Pro-Football (D.D.C. 1976)* 420 F.Supp. 738, [\*\*\*25] revd. in part, affd. in part (D.C. Cir. 1976) 593 F.2d 1173; *Kapp v. National Football League* (N.D.Cal. 1974) 390 F.Supp. 73 (9th Cir. 1978) 586 F.2d 644, cert. den. 441 U.S. 907 [60 L.Ed.2d 375, 99 S.Ct. 1996]; *Mackey v. National Football League (D.Minn. 1975)* 407 F.Supp. 1000, affd. in part, revd. in part (8th Cir. 1976) 543 F.2d 606, petn. for cert. withdrawn (1977) 434 U.S. 801 [54 L.Ed.2d 59, 98 S.Ct. 28].) In *Kapp*, the district court granted summary judgment in favor of plaintiff, finding the draft, Rozelle rule, tampering rule and one man rule violative of the Sherman Act. The *Smith* court found the draft a "per se" restraint on trade; the circuit court affirmed on the "rule of reason" theory, but remanded for recomputation of damages. In *Mackey*, the circuit court affirmed a judgment that the Rozelle rule violated the Sherman Act; thereafter, the NFL's petition for writ of certiorari in the Supreme Court was withdrawn pursuant to the terms of a settlement agreement in *Alexander v. NFL* (D.Minn. 1977) 1977-2 Trade Cases (CCH) para. 61,730.

*Alexander* was a class action brought on behalf of all NFL players, during the same period that [\*\*\*26] NFL management was attempting to negotiate a collective bargaining agreement with the NFL Players Association (NFLPA). In March 1977, the NFL and NFLPA agreed to a comprehensive settlement which included the adoption of a new collective bargaining agreement which was made retroactive to the expiration date of the prior agreement in 1974. (This [\*\*\*376] agreement expired in 1982.) The 1977 collective bargaining agreement sought to stimulate player mobility and remedy the [\*\*683] lack of competitive bidding by, for example, modifying the Rozelle rule, providing a team with a "right of first refusal" when a free agent negotiates with another team for his services, and requiring that compensation take the form of draft choices. (See, e.g., Comment, *Sport in Court: The Legality of Professional Football's System of Reserve and Compensation* (1980) 28 UCLA L.Rev. 252.) Thus, the 1977 agreement substantially modified the rules and practices challenged by Partee and may have obviated most of the

problems with unreasonable trade practices. (Of course, we are here concerned only with the NFL's rules and practices in effect in 1974 and need not consider whether the terms of the [\*\*\*\*27] 1977, or for that matter the 1982, collective bargaining agreement are still so restrictive as to violate antitrust laws, state or federal.)

[\*391] The *Alexander* settlement also contained a covenant not to sue in antitrust by the class members. Partee, however, is not bound by the settlement agreement as he filed this action before the specified cut-off date and chose not to be a class member.<sup>4</sup> Thus, as earlier noted, he is one of a handful of players who is not precluded from challenging the NFL rules in force in 1974.

[\*\*\*28] The present action proceeded to trial in 1979. After a nonjury trial, the court found in favor of Partee on the antitrust and breach of contract causes of action.<sup>5</sup> As to the antitrust cause of action, the trial court found that "[the] facts of this case present no undue burden upon interstate commerce, nor is there any preemption of the field by the Sherman Act or other federal statutes or the Constitution . . . ." Based on the evidence and, alternatively, on the doctrine of collateral estoppel (in reliance on *Smith, Kapp, and Mackey*), the court found that all of the challenged rules, with the exception of the option clause, constituted an unreasonable restraint of trade in violation of the Cartwright Act. The court assessed actual damages under the antitrust cause of action in the amount of \$ 34,500 (based on the difference between the World Football League offer and Partee's 1974 salary from the Chargers computed through 1976) and trebled that amount under the Cartwright Act for a total amount of \$ 103,500. Damages under the breach of contract cause of action were assessed in the amount of \$ 30,550.

[\*\*\*29] The Chargers do not appeal from the breach of contract judgment as they assert claims of error only as to the antitrust judgment. The Chargers contend that the trial court lacked jurisdiction to apply the Cartwright Act to the interstate activities of professional football.

*The narrow issue before us involves federal preclusion under the commerce clause.*

As the majority observe, the Chargers *do not* base their argument against state antitrust regulation of their business activities on the traditional [\*392] preemption doctrine.<sup>6</sup> [\*684] [\*\*\*377] The Chargers do not claim a violation of the supremacy clause. Nor can they do so. The contention that the Sherman Act ([15 U.S.C. § 1 et seq.](#)) occupies the field of antitrust (so that state regulation of the field is preempted as conflicting with the declared or presumed intent of Congress) was persuasively rejected in the well-reasoned Court of Appeal opinion [\*R. E. Spriggs Co. v. Adolph Coors Co. \(1974\) 37 Cal.App.3d 653 \[112 Cal.Rptr. 585\]\*](#).

<sup>4</sup> Pursuant to federal rules of procedure for class actions, a notice was sent to all class members, including Partee, concerning the potential settlement. The settlement notice contained the following statement: "Neither the covenant not to sue, nor the dismissal with prejudice of this action shall prevent any member of the plaintiff class who duly commenced an individual action . . . in any Federal or State Court, prior to March 4, 1977, from pursuing such action to its lawful conclusion through trial and appeal." (Italics added.)

<sup>5</sup> The court found in favor of the Chargers on fraud and unpaid wages causes of action.

<sup>6</sup> The traditional preemption doctrine focuses on congressional intent. Thus, state regulation is preempted if Congress expresses a clear intent to reserve a field exclusively within its jurisdiction (see, e.g., [\*Pennsylvania v. Nelson \(1956\) 350 U.S. 497 \[100 L.Ed. 640, 76 S.Ct. 477\]\*](#); [\*Charleston & W.C. Railway v. Varnville Furniture Co. \(1915\) 237 U.S. 597 \[59 L.Ed. 1137, 35 S.Ct. 715\]\*](#)) or if such an intent can be inferred in a field dominated by pervasive federal regulation (see, e.g., [\*Garner v. Teamsters Union \(1953\) 346 U.S. 485 \[98 L.Ed. 228, 74 S.Ct. 161\]\*](#); [\*Hines v. Davidowitz, supra, 312 U.S. 52\*](#)). Conversely, in the absence of congressional occupation of a field, a state may regulate the interstate aspects of an activity, even though the regulation has some effect on interstate commerce. (See, e.g., [\*Head v. New Mexico Board \(1936\) 374 U.S. 424 \[10 L.Ed.2d 983, 83 S.Ct. 1759\]\*](#); [\*Huron Cement Co. v. Detroit \(1960\) 362 U.S. 440 \[4 L.Ed.2d 852, 80 S.Ct. 813, 78 A.L.R.2d 1294\]\*](#).) However, even in this latter area, state laws which conflict with federal law may be preempted. (E.g., [\*California v. Zook \(1949\) 336 U.S. 725 \[93 L.Ed. 1005, 69 S.Ct. 841\]\*](#); but see [\*Exxon Corp. v. Governor of Maryland \(1978\) 437 U.S. 117 \[57 L.Ed.2d 91, 98 S.Ct. 2207\]\*](#); [\*Parker v. Brown \(1943\) 317 U.S. 341 \[87 L.Ed. 315, 63 S.Ct. 307\]\*](#).)

[\*\*\*\*30] The court in *Coors* noted that the legislative history of the Sherman Act unequivocably evidences a congressional intent to supplement, not preempt, state antitrust enforcement.<sup>7</sup> [\*\*\*\*32] Moreover, because the Cartwright Act was patterned after the Sherman Act, both laws have identical objectives and are harmonious with each other (*Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 315 [70 Cal.Rptr. 849, 444 P.2d 481]); thus, decisions under the latter act are applicable in construing the former (*Mailand v. Burckle* (1978) 20 Cal.3d 367 [143 Cal.Rptr. 1, 572 [\*393] P.2d 1142]). The adoption and incorporation of federal precedent effectively precludes the possibility of conflicts.<sup>8</sup> In light of Supreme Court holdings that "mere coincidence" of state and federal regulation is not enough to preempt state law (see, e.g., *California v. Zook, supra*, 336 U.S. at pp. 731-733 [93 L.Ed. at pp. 1010-1011]), it cannot be seriously disputed, therefore, that state and federal laws may operate concurrently in the area of antitrust regulation. (See *Younger v. Jenson* (1980) 26 Cal.3d 397, 405 [161 Cal.Rptr. 905, 605 P.2d 813] ["Obviously [\*\*\*\*31] there is an overlap between coverages of the Sherman Act . . . and state antitrust laws that prohibit substantially the same conduct, . . ."].) Federal preemption, then, is applicable in this case, if at all, because of the operation of commerce clause limitations on this concurrent state jurisdiction.<sup>9</sup>

[\*\*\*378] The Chargers make clear that their position is grounded on commerce clause principles. Particularly, they contend that state regulation [\*\*\*\*33] through the Cartwright Act is [\*\*685] precluded by the commerce clause because the structure of professional football is (1) "exclusively interstate commerce," and (2) "uniquely interstate commerce." The distinction set forth by the Chargers is not without significance. The former characterization -- exclusivity -- goes to the *impact* of the activity on the state: does it have a sufficient local consequence or nexus with the state? The latter -- uniqueness -- relates more properly to the *nature* of the activity: is it an activity requiring national uniformity, the regulation of which imposes a burden on interstate commerce?

*The challenged activities in this case are not exclusively in interstate commerce.*

It is axiomatic that where an activity is exclusively in interstate commerce without intrastate aspects, the commerce clause precludes state regulation or interference with that activity. (*R. E. Spriggs Co. v. Coors Co., supra*, 37 Cal.App.3d at p. 657.) Of course, as a practical matter, all interstate commerce has intrastate effects, as it begins in one state and ends in another. [\*394] We are here concerned, however, with "exclusive" federal

<sup>7</sup> "The history of the Sherman Antitrust Act makes it clear that the Congress did not intend that the federal legislation preempt parallel state efforts to control unfair competitive practices. Before the enactment of the Sherman Act, some 21 states had legislation proscribing 'combinations in restraint of trade.' Thus, it was not by accident that Congress did not use language in its act that would expressly preclude state regulation though the activity possessed interstate qualities. Senator Sherman, in urging enactment of his bill, stated: 'This bill . . . has for its . . . object to invoke the aid of the courts of the United States to deal with the combinations . . . when they affect injuriously our foreign and interstate commerce . . . and in this way to supplement the enforcement of the established rules of the common and statute laws by the several states in dealing with combinations that affect injuriously the industrial liberty of the citizens of those states. It is to arm the federal courts within the limit of their constitutional power *that they may cooperate with the state courts* in checking, curbing and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States . . .' (21 Cong. Rec. 2457 (1890).)" (*R. E. Spriggs Co. v. Coors, supra*, 37 Cal.App.3d at p. 660, original italics, fn. omitted.) Thus, the fact that federal antitrust enforcement has historically become the dominant force in the field does not in itself mean that state *antitrust law* is displaced or preempted by the Sherman Act which, as noted, was passed for the purpose of supplementing state antitrust enforcement by providing for more efficient regulation of anticompetitive interstate activities.

<sup>8</sup> Also relevant in this regard is the shared common law heritage of state and federal antitrust laws. (See Flynn, *Federalism and State Antitrust Regulation, supra*, at p. 90.) As this court stated in *Speegle v. Board of Fire Underwriters* (1946) 29 Cal.2d 34, 44 [172 P.2d 867]: "The Cartwright Act merely articulates in greater detail a public policy against restraint of trade that has long been recognized at common law . . . ." This policy is wholly in conformity with the purposes sought to be furthered by the Sherman Act. (See, e.g., *Northern Pac. R. Co. v. United States* (1958) 356 U.S. 1 [2 L.Ed.2d 545, 78 S.Ct. 514]; *Apex Hosiery Co. v. Leader* (1940) 310 U.S. 469 [84 L.Ed. 1311, 60 S.Ct. 982, 128 A.L.R. 1044].)

<sup>9</sup> Although some courts have employed supremacy clause preemption and commerce clause preclusion terminology interchangeably, it is apparent that preclusion has been treated as a species of preemption.

jurisdiction [\*\*\*\*34] in the constitutional sense, i.e., the preclusion of state regulation of essentially interstate activity. The question, then, is whether the interstate activity has the requisite impact upon intrastate commerce to sanction state interference. It has been held that states may apply antitrust laws to interstate commerce only "when such commerce has significant local consequences."<sup>10</sup> ([Baker v. Walter Reade Theatres, Inc. \(1962\) 37 Misc.2d 172, 173 \[237 N.Y.S.2d 795\]](#).)

[\*\*\*\*35] The Chargers assert that the employment practices challenged by Partee are solely interstate in character. It is emphasized that the challenged rules and practices were applied uniformly by all the teams in the NFL. Thus, the Chargers argue, Partee's antitrust injury was the product of nationwide conduct by all NFL teams. Yet, we are not here concerned with the uniform adherence to the challenged rules and practices by NFL teams in general; rather, we are concerned with the anticompetitive practices of one team, a California partnership, which caused injury to a California resident. Moreover, the rules which were found to be a restraint on trade were incorporated in a service contract which, by its terms, expressly provides for the application of California law. Manifestly, the activity in the present case has both interstate and intrastate aspects.

I therefore conclude that the Chargers' conduct in this case does not present too remote or insubstantial a nexus with intrastate commerce so as to preclude state antitrust jurisdiction. (See [State v. Allied Chemical & Dye Corporation \(1960\) 9 Wis.2d 290 \[101 N.W.2d 133\]](#).)<sup>11</sup> I am not persuaded that this case involves [\*\*\*\*36] exclusively interstate commerce and that this state has no legitimate local interest in its adjudication. Because the Cartwright Act is "within the tradition of 'the usual police' powers of the state," the state retains the right to protect its residents from trade restraints. ([Alfred M. Lewis Inc. v. Warehousemen etc. Local No. 542 \(1958\) 163 Cal.App.2d 771, 790 \[\\*\\*\\*379\] \[330 P.2d 53\]](#).) But may it do so when such restraints arise primarily from interstate activity? In other words, may state [\*\*686] regulation affect [\*395] all interstate activity which has a significant local impact? Although there is a dearth of authority in the area of antitrust, in other contexts the Supreme Court has consistently held, "[ever] since *Willson v. Black-Bird Creek Marsh Co.*, 2 Pet. 245, and [Cooley v. Board of Wardens, 12 How. 299](#)" that the commerce clause "does not exclude all state power of regulation" and that "there is a residuum of power in the state to make laws governing matters of local concern which nevertheless . . . affect interstate commerce or even . . . regulate it." ([Southern Pacific Co. v. Arizona \(1944\) 325 U.S. 761, 766-767 \[89 L.Ed. 1915, 1923\]](#).)

*The Cartwright Act is applicable to interstate activities.*

The anticompetitive activity in the present case -- being both interstate and intrastate in character -- is in the penumbral zone of the antitrust jurisdictional continuum, i.e., subject to overlapping state and federal authority. As I have explained, there is no supremacy clause bar to concurrent state jurisdiction in this area. The inquiry, then, is whether, given the requisite local nexus, the state is precluded by the commerce clause from affecting interstate commerce in its regulation of restraints on trade. The Chargers contend that no California case has upheld state regulation of [\*\*\*\*38] interstate conduct comparable to the national practices here at issue, and that Cartwright Act enforcement has been limited to activities wholly within California. They further argue that prior cases deal only with supremacy clause preemption and not commerce clause preclusion.<sup>12</sup> The Chargers mischaracterize our case

<sup>10</sup> Conversely, the reach of federal antitrust jurisdiction into intrastate activity, while generally expansive, is also limited by the requirement that the impact of the local conduct on interstate commerce be more than incidental. (See, e.g., [Sun Valley Disposal Co. v. Silver State Disposal Co. \(9th Cir. 1969\) 420 F.2d 341](#) [garbage collection]; [Kallen v. Nexus Corp. \(N.D.Ill. 1973\) 353 F.Supp. 33](#) [bar review courses].) The boundaries in this area, however, are elusive. The courts have disagreed as to what type of activities are "essentially local" and thus not subject to federal intervention. (Compare [United States v. Yellow Cab Co. \(1947\) 332 U.S. 218, 230 \[91 L.Ed. 2010, 2020, 67 S.Ct. 1560\]](#) with [Times-Picayune v. United States \(1953\) 345 U.S. 594, 602, fn. 11 \[97 L.Ed. 1277, 1286, 73 S.Ct. 872\]](#).)

<sup>11</sup> In [Allied Chemical, supra, 101 N.W.2d 133](#), three out-of-state corporate defendants were charged with a price-fixing conspiracy under the Wisconsin antitrust law. Defendants had neither offices nor employees in the state; and prices were set nationwide. Nonetheless, the court found them within the purview of the Wisconsin law.

law. California cases have held, despite the lack of an unambiguous Supreme Court directive, that the state may, consistent with the commerce clause, regulate restraints on trade which affect interstate commerce.

[\*\*\*\*39] This court has recently stated that "[neither] the Sherman Act nor the federal prohibition of undue burdens on interstate commerce . . . prevents [the Cartwright Act] from reaching transactions that have interstate aspects, [\*396] but significantly affect state interests." ( *Younger v. Jensen, supra, 26 Cal.3d 397, 405*; citing *Speegle v. Board of Fire Underwriters, supra, 29 Cal.2d 34; R. E. Spriggs v. Coors Co., supra, 37 Cal.App.3d 653*.) Although the issue in *Younger* concerned the authority of the Attorney General to investigate into the existence of antitrust violations, this court's statement regarding preclusion reaffirmed prior cases which have held that our state may regulate anticompetitive activities that affect interstate commerce. *Speegle* and *Coors* inescapably support the conclusion that Cartwright Act enforcement is not limited to wholly intrastate activities.

*Coors* involved a Cartwright Act action alleging antitrust violations in the California beer distribution system of an out-of-state brewer. Although the Court of Appeal was primarily confronted with a preemption challenge, it explicitly recognized that any holding [\*\*\*\*40] against federal exclusivity [\*\*\*380] would affect interstate commerce; accordingly, it proceeded to discuss commerce clause preclusion. While acknowledging [\*\*687] that only Coors' California distribution scheme was being challenged, the court correctly noted that as this state's regulation of the distribution scheme "would clearly affect Coors' overall methods of distribution which are in interstate commerce, interstate commerce is both involved and affected." (*37 Cal.App.3d at p. 658, fn. 4*) It had earlier observed that "[there] is no question but that at all times relevant to this case, Coors was engaged in interstate commerce." ( *Id., at p. 656*.) After concluding that neither the supremacy clause nor the Sherman Act preempted the Cartwright Act, the court "[turned] to the question of whether the nature of the regulated subject requires federal preeminence." ( *Id., at p. 660*, original italics.) The court answered this question in the negative by employing the balancing approach enunciated in *California v. Zook, supra, 336 U.S. 725*. "The approach has been to reconcile the relevant state and federal interests and to find that the states have a valid [\*\*\*\*41] interest in regulating unfair competitive practices within their jurisdictions, and that this power is not lost merely because the activity affects interstate commerce." (*Id., at p. 663*, italics added.) Earlier, the *Coors* opinion had observed that there was no undue burden on interstate commerce "in that the Cartwright Act, . . . is complementary to the relevant provisions of the federal statutes and may be justified as a reasonable means of protecting a significant state interest, i.e., prevention of unfair competition." (*Id., at p. 659*.)

Of significance is the *Coors* court's recognition that finding state preclusion whenever interstate commerce is involved would effectively destroy most state antitrust enforcement since, in light of the vastly increased domain of federal commerce clause authority, states would be relegated to a severely restricted realm of intrastate commerce. With the demise of the mechanical "dual sovereignty" theory and the development of expansive [\*397] federal power over activities merely "affecting" interstate commerce (see, e.g., *Manderille Farms v. Sugar Co. (1948) 334 U.S. 219 [92 L.Ed. 1328, 68 S.Ct. 996]; United States [\*\*\*\*421] v. Frankfort Distilleries (1945) 324 U.S. 293, 298 [89 L.Ed. 951, 956, 65 S.Ct. 661]* ["Congress in passing the Sherman Act, left no area of its constitutional power unoccupied"]), the regulatory power of the national government has become so broad that, if fully exercised, virtually all intrastate activity might be regulated to the complete exclusion of state authority (see, e.g., *Perez v. United States (1971) 402 U.S. 146 [28 L.Ed.2d 686, 91 S.Ct. 1357]* [loan sharking]; *Atlanta Motel v. United States (1964) 379 U.S. 241 [13 L.Ed.2d 258, 85 S.Ct. 348]* [public accommodations]). Recognizing the potential for

<sup>12</sup> As previously noted, some cases do appear to discuss preclusion and preemption interchangeably. One example is *Alfred M. Lewis, Inc. v. Warehousemen etc. Local No. 542, supra, 163 Cal.App.2d 771*, which involved an agreement to restrict competition. The trial court had determined that the agreement "would have been in violation of the Cartwright Act if it involved 'local businesses not engaged in interstate commerce,' but that because appellant [Lewis] was engaged in interstate commerce, the laws of the United States apply." ( *Id., at p. 783*.) Lewis was "engaged in interstate business, operating grocery stores in many states." ( *Id., at p. 775*.) Thus, the issue of commerce clause preclusion was squarely raised. The Court of Appeal reversed, holding that the Sherman Act does not preempt the Cartwright Act since there is no conflict between the acts. The court also discussed commerce clause preclusion: it stated that, even assuming "that the activities in question are within the sphere of the commerce clause [,] . . . [the] fact that Congress has acted to prevent restraints on trade in commerce, of itself, does not invalidate legislation by a state effecting the substantially same result." ( *Id., at p. 788*.)

"nullification of much state effort in the antitrust field[.]" the Court of Appeal aptly observed: "If state regulations were to lose effectiveness as soon as interstate commerce is affected, a large policing area would be excluded, and the states would become helpless to protect [their] citizens, though no national benefit would accrue. (*Commonwealth v. McHugh*, 326 Mass. 249 [93 N.E.2d 751, 761-764].) Exclusion would necessarily result whenever the subject activity 'substantially affects' interstate commerce." <sup>13</sup> (*37 Cal.App.3d* [\*\*\*\*43] at p. 660; [\*\*\*381] citing *Burke v. Ford* (1967) 389 U.S. 320 [19 L.Ed.2d 554, 88 S.Ct. 443].) Similarly, a federal court has recently [\*\*688] noted that "[despite] the broad reach of the federal commerce power, state antitrust laws retain vitality in dealing with matters which, while having interstate aspects, significantly affect local interests." (*Salveson v. Western States Bankcard Ass'n.* (N.D.Cal. 1981) 525 F.Supp. 556, 573-574).

[\*\*\*\*44] An earlier decision by this court, *Speegle v. Board of Fire Underwriters*, *supra*, 29 Cal.2d 34, further supports the view that the state is not precluded from regulating interstate activity once a local nexus is established. The issue before this court was whether the application of the Cartwright Act to the insurance business was precluded in light of a then-recent Supreme Court decision holding that insurance transactions were interstate commerce. (*U.S. v. Underwriters Assn.* (1944) 322 U.S. 533 [88 L.Ed. 1440, 64 S.Ct. 1142].) For three-quarters of a century prior to *South-Eastern*, insurance had been regulated by the states, as this business had been held [\*398] not to constitute interstate commerce. (*Paul v. Virginia* (1869) 75 U.S. (8 Wall.) 168 [19 L.Ed. 357].) However, the Supreme Court strongly suggested that the redefinition of insurance as interstate activity did not necessarily deprive state courts of jurisdiction to regulate this business,<sup>14</sup> and, accordingly, the court set forth a balancing test to decide the preclusion question: ". . . [The] primary test applied by the Court is not the mechanical one of whether the particular activity [\*\*\*\*45] affected by the state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the state and national interests involved can be accommodated. And the fact that particular phases of an interstate business or activity have long been regulated or taxed by states has been recognized as a strong reason why, in the continued absence of conflicting Congressional action, the state regulatory and tax laws should be declared valid . . ." (*South-Eastern*, *supra*, at pp. 548-549 [88 L.Ed. at pp. 1454-1455].)

[\*\*\*\*46] Relying on the above-quoted language, this court held in *Speegle* that since there is no conflict between the Cartwright Act and the Sherman Act, state law applies "even if interstate commerce is involved." (*29 Cal.2d* at p. 51.) *Speegle* stated: "State laws are not invalid under the Commerce Clause unless they actually discriminate against interstate commerce or conflict with a regulation enacted by Congress." (*Id.*, at p. 50.) (The *Speegle* court, however, omitted mention of the additional limitation -- enunciated in Supreme Court cases dealing with state regulations outside the antitrust context -- that the state may not impose an undue burden on interstate commerce -- see, e.g., *Pike v. Bruce Church Inc.* (1970) 397 U.S. 137, 142 [25 L.Ed.2d 174, 178-179, 90 S.Ct. 844]; *Bibb v. Navajo Freight Lines* (1959) 359 U.S. 520 [3 L.Ed.2d 1003, 79 S.Ct. 962].)

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<sup>13</sup> *McHugh*, the Massachusetts case cited by the Court of Appeal, makes the following pertinent observations in arguing against a restricted role for state antitrust regulation: "Monopolies and restraints of trade are of infinite form and variety . . . . Some expend their efforts almost wholly upon intrastate commerce and are of only local interest and some almost wholly upon interstate commerce and so become matters of national concern, and there are all gradations in between. In many cases it would be very difficult to draw the line. If State laws have no force as soon as interstate commerce begins to be affected, a very large area will be fenced off in which the States will be practically helpless to protect their citizens without, so far as we can perceive, any corresponding contribution to the national welfare . . . . Especially is this true in view of the immense broadening in the conception of interstate commerce in recent years." (*326 Mass.* at p. 265.)

<sup>14</sup> The final paragraph of the opinion states: "The argument that the Sherman Act necessarily invalidates many state laws regulating insurance we regard as [greatly] exaggerated." (*322 U.S.* at p. 562 [88 L.Ed. at p. 1462].) In response to *South-Eastern*, Congress enacted the McCarran-Ferguson Act which provides that federal law is only "applicable to the business of insurance to the extent that such business is not regulated by state law." ((1945) 59 Stat. 33, *15 U.S.C. §§ 1011, 1012*.)

The foregoing demonstrates that the courts of this state have held, consistent with Supreme Court authority,<sup>15</sup> [\*\*\*\*48] that the [\*\*689] [\*\*\*382] state may regulate interstate [\*399] anticompetitive activity subject to certain limitations. These limitations may be summarized as a three-part test [\*\*\*\*47] of commerce clause preclusion: states may regulate interstate activity unless (1) the activity is exclusively in interstate commerce without intrastate aspects or a local nexus (*Coors, supra, 37 Cal.App.3d 653*); or (2) regulation of the activity imposes an undue burden upon or discriminates against interstate commerce (*Bruce Church, supra, 397 U.S. 137; Bibb, supra, 359 U.S. 520*); or (3) regulation of the activity conflicts with federal law or policy (*Speegle, supra, 29 Cal.2d 34; South-Eastern, supra, 322 U.S. 533*).<sup>16</sup>

I have thus far concluded that the anticompetitive conduct before us has significant intrastate aspects and is not exclusively in interstate commerce, and that the state may, consistent with the commerce clause, regulate restraints on trade which affect interstate conduct. The remaining inquiries focus on the second and third part of the test, and specifically, on the central issue before us in this case: whether state regulation of professional football burdens interstate commerce or conflicts with federal law or policy. We must [\*\*\*\*49] "undertake[] a balancing approach in resolving these issues." (*Pike v. Bruce Church, Inc. (1970) 397 U.S. 137, 142 [25 L.Ed.2d 174, 178]*; see also *Huron Cement Co. v. Detroit, supra, 362 U.S. 440; Southern Pacific Co. v. Arizona, supra, 325 U.S. 761*.) The majority, however, do not engage in the impartial balancing of conflicting interests mandated in a host of Supreme Court decisions; instead they accept the Chargers' contention that Supreme Court authority compels this court to hold that state regulation of all professional sports is prohibited by the commerce clause.

[\*400] *Flood v. Kuhn* does not control this case.

The Chargers, relying on *Flood v. Kuhn (S.D.N.Y. 1970) 316 F.Supp. 271*, affirmed (2d Cir. 1971) *443 F.2d 264*, affirmed (*1972* *407 U.S. 258 [32 L.Ed.2d 728, 92 S.Ct. 2099]*) -- a baseball case -- contend that because professional sports require national uniformity in their regulation, they can only be regulated, if at all, under the Sherman Act. The majority agree with the Chargers that we are precluded from applying the balancing test because, assertedly, we are bound by the Supreme Court's decision in *Flood*. As [\*\*\*\*50] earlier noted, I conclude that the Supreme Court's cursory holding in *Flood* with respect to state antitrust preclusion is limited to baseball -- "a derelict in the stream of the law." (*Flood, supra, 407 U.S. at p. 286 [32 L.Ed.2d at p. 746]* [Douglas, J., dis.].)

<sup>15</sup> While *Speegle* relied on an antitrust case (*South-Eastern, supra*), *Coors* necessarily relied on commerce clause decisions outside the field of antitrust because the Supreme Court, to my knowledge, has never specifically addressed itself to the question of the outer limit of state antitrust regulation of interstate commerce. Nevertheless, in every case I have found that raised the question factually, the high court has expressed a willingness to defer to state regulation. (See *Waters-Pierce Oil Co. v. Texas* (No. 1) (*1909* *212 U.S. 86 [53 L.Ed. 417, 29 S.Ct. 220]*); *Standard Oil Co. v. Tennessee* (*1910* *217 U.S. 413 [54 L.Ed. 817, 30 S.Ct. 543]*); *Straus v. Am. Publishers' Ass'n.* (*1913* *231 U.S. 222 [58 L.Ed. 192, 34 S.Ct. 84]*); cf. *Gibbs v. Buick* (*1939* *307 U.S. 66, 83 [83 L.Ed. 1111, 1121, 59 S.Ct. 725]* [Black, J., dis.]; see also *U.S. v. Underwriters Assn., supra* *322 U.S. 533*.) The early cases are of limited precedential value, however, since they only implicitly approved the application of state antitrust law, and also because these decisions were rendered in the era of strict adherence to the mechanical intrastate-interstate view of the commerce clause. It appears that in these early cases the court perceived the activity in question as purely intrastate in nature. As an example, see *Standard Oil's* rejection of a contention that the Tennessee antitrust law constituted "an unreasonable constitutional interference with commerce among the States." (*217 U.S. at p. 419 [54 L.Ed. at p. 820]*.) Justice Holmes responded: "The mere fact that [the Tennessee act] may happen to remove an interference with commerce among the States as well with the rest does not invalidate it. It hardly would be an answer to an indictment for forgery that the instrument forged was a foreign bill of lading, or for assault and battery that the person assaulted was engaged in peddling goods from another State. How far Congress could deal with such cases we need not consider, but certainly *there is nothing in the present state of the law at least that excludes the States from a familiar exercise of their power.*" (*Id. at p. 422 [54 L.Ed. at p. 821]*, italics added.)

<sup>16</sup> I note that commentators are "overwhelmingly supportive of the extension of state antitrust regulation to include conduct and practices that, while possessing a local nexus, nonetheless 'affect' or are 'in' interstate commerce." (Rubin, *Rethinking State Antitrust Enforcement* (1974) *26 U.Fla.L.Rev.* 653, 670; see also Flynn, *Federalism and State Antitrust Regulation, supra*, at pp. 56-108; Mosk, *State Antitrust Enforcement* (1962) *21 A.B.A., Antitrust Section 358*; Note, *The Commerce Clause and State Antitrust Enforcement* (1961) *61 Colum.L.Rev.* 1469.)

While a few lower courts, state and federal, have considered this difficult question, there is to my knowledge no Supreme Court opinion which sets forth guidelines as to the exact parameters of state antitrust regulation [\*\*\*383] of interstate commerce. (See fn. 15, *ante*.) Finding no certain precedent to guide us, I would employ the balancing test [\*\*690] enunciated in cases involving the interface of commerce clause requirements within other areas of state regulation.

In *Flood*, a baseball player challenged professional baseball's reserve system as violative of the Sherman Act and New York's **antitrust law**. The *Flood* litigation, however, was principally an assault on baseball's long-standing exemption from antitrust laws. In 1922, Justice Holmes, speaking for a unanimous court, ruled that baseball exhibitions were purely state affairs (to which the interstate transportation of players was merely [\*\*\*\*51] incidental) and were not "trade or commerce in the commonly accepted use of those words" and hence "were not interference with commerce among the States." (*Federal Baseball Club v. National League* (1922) 259 U.S. 200, 209 [66 L.Ed. 898, 900, 42 S.Ct. 465, 26 A.L.R. 357].) Over the years, baseball was able to withstand intermittent antitrust attacks on the authority of *Federal Baseball*. The baseball exemption question again reached the Supreme Court in 1953, at a time when that court's decisions had greatly expanded federal commerce clause authority. In *Toolson v. New York Yankees* (1953) 346 U.S. 356 [98 L.Ed. 64, 74 S.Ct. 78], the court, with two justices dissenting, declined to reconsider *Federal Baseball* despite the considerable change during the intervening thirty years in the definition of "interstate commerce." The court referred to four reasons for its holding: (1) Congressional awareness of and inaction with respect to *Federal Baseball*; (2) baseball's development on the understanding that it was not subject to existing federal antitrust laws; (3) a reluctance to overrule *Federal Baseball* with a consequent retroactive effect; and (4) a professed [\*\*\*\*52] desire that any remedy be supplied by Congress rather than by court decision. (*346 U.S. at p. 357 [98 L.Ed. at p. 68]*.)

[\*401] Four years after *Toolson*, the Supreme Court limited the exemption to the sport of baseball, and held that antitrust laws were applicable to professional football and its practices. (*Radovich v. National Football League* (1957) 352 U.S. 445 [1 L.Ed.2d 456, 77 S.Ct. 390].) Other decisions made it clear that *Toolson* applied only to baseball and that no other sport enjoyed exemption from the antitrust laws.<sup>17</sup> (See, e.g., *U.S. v. International Boxing Club* (1955) 348 U.S. 236 [99 L.Ed. 290, 75 S.Ct. 259]; *Haywood v. National Basketball Assn.* (1971) 401 U.S. 1204 [28 L.Ed.2d 206, 91 S.Ct. 672].)

[\*\*\*\*53] Faced with this history, it is not surprising that *Flood* was not to prevail in his federal antitrust claim. The district court considered itself bound by the rule of stare decisis, stating that "decisions of the Supreme Court are not lightly overruled, . . ." (*Flood, supra, 316 F.Supp. at p. 277*.) Further, the court held that in light of baseball's exemption from federal antitrust laws, state antitrust regulation would violate the supremacy and commerce clauses. The circuit court affirmed. However, it considered the state law claim a "question of first impression, . . . whether application of state **antitrust law** to professional baseball is barred by a federal pre-emption of the field under the Commerce Clause." (*Flood, supra, 443 F.2d at p. 267*.) Citing *Southern Pacific Co. v. Arizona, supra, 325 U.S. 761, 774-775 [89 L.Ed. 1915, 1927-1928]*, the court of appeals said: "[Where] the nature of an enterprise is such that differing state regulation, although not conflicting, requires the enterprise to comply with the strictest standard of several states in order to continue an interstate [\*\*\*384] business extending over many states, the extraterritorial effect [\*\*\*\*54] which the application of a particular state law would exact [\*\*691] constitutes, absent a strong state interest, an impermissible burden on interstate commerce." (*Ibid.*) It thus held that the commerce clause precluded state regulation of baseball.

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<sup>17</sup> The lower courts accepted this inconsistent result, but they did so reluctantly. One circuit court stated: "We freely acknowledge our belief that *Federal Baseball* was not one of Justice Holmes' happiest days, that the rationale of *Toolson* is extremely dubious and that, to use the Supreme Court's own adjectives, the distinction between baseball and other professional sports is 'unrealistic,' 'inconsistent' and 'illogical.' [Citation.] . . . However, . . . we continue to believe that the Supreme Court should retain the exclusive privilege of overruling its own decisions . . ." (*Salerno v. American League of Prof. Baseball Clubs* (2d Cir. 1970) 429 F.2d 1003, quoting *Radovich v. National Football League, supra, 352 U.S. at p. 452 [1 L.Ed.2d at p. 461]*.)

On petition for certiorari, the Supreme Court principally considered the baseball exemption question. Justice Blackmun's opinion conceded that the baseball exemption was aberrant in view of the court's failure to similarly exempt other sports: "[Baseball] is, in a very distinct sense, an exception and an anomaly. *Federal Baseball* and *Toolson* have become an aberration confined to baseball. Even though others might regard this as 'unrealistic, [\*\*402] inconsistent, or illogical,' see *Radovich*, *supra*, the aberration is an established one, and . . . is an aberration that has been with us now for half a century, . . . If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court." ([407 U.S. at pp. 282-284 \[32 L.Ed.2d at pp. 743-744\]](#).) The court therefore concluded that Congress, "by its positive inaction," [\*\*\*55] had sanctioned this anomaly and had "clearly evinced a desire" to keep baseball unregulated by federal antitrust laws. ([Id., at pp. 283-284 \[32 L.Ed.2d at p. 744\]](#).)

The court then disposed of the state antitrust issue in a terse concluding paragraph: "The petitioner's argument as to the application of state antitrust laws deserves a word. Judge Cooper rejected the state law claims because state antitrust regulation would conflict with federal policy and because national 'uniformity [is required] in any regulation of baseball and its reserve system' [316 F.Supp., at 280](#). The Court of Appeals, in affirming, stated, '[As] the burden on interstate commerce outweighs the states' interests in regulating baseball's reserve system, the Commerce Clause precludes the application here of state antitrust law [443 F. 2d, at p. 268](#). As applied to organized baseball, and in the light of this Court's observation and holdings in *Federal Baseball* and *Toolson*, in [*United States v. Shubert* I(1955) [348 U.S. 222 \(99 L.Ed. 279, 75 S.Ct. 277\)](#)], in *International Boxing*, and in *Radovich*, and despite baseball's allegedly inconsistent position taken in the past with [\*\*\*56] respect to the application of state law, these statements adequately dispose of the state law claims." ([407 U.S. at pp. 284-285 \[32 L.Ed.2d at p. 745\]](#), fn. omitted, italics added.)

While it is unfortunate that the court did not find it necessary to explain its reasons for affirming, the brief paragraph is nonetheless a constitutional holding rejecting Flood's alternate contention. Accordingly, we are bound by it. The court makes clear, however, that it agreed with the judgment below "[as] applied to . . . baseball . . ." As the New Mexico Supreme Court recently noted in rejecting a contention that *Flood* mandates preclusion of state antitrust laws: "In affirming the lower courts' decisions, the Supreme Court did not adopt any broad or rigid limitations on the applicability of state antitrust laws to transactions involving interstate commerce. The Court upheld those holdings '[as] applied to organized baseball, and in light of this Court's holdings in *Federal Baseball* [and] *Toolson* . . .'" ([United Nuclear Corp. v. General Atomic Co. \(1980\) 96 N.M. 155 \[629 P.2d 231, 273\]](#), quoting [Flood, supra, 407 U.S. at p. 284 \[32 L.Ed.2d at p. 744\]](#).)

The [\*\*\*57] Chargers argue that we can infer from the citation to *Radovich*, a football case, that the court intended its holding to apply to football as well. [\*403] *Radovich*, however, held only that *Toolson* is specifically limited to baseball and that "the volume of interstate business involved in organized professional football places it within the provisions of the [Clayton] Act." ([352 U.S. at p. 452](#).) As I have explained, the mere fact that a defendant is engaged in interstate activities does not preclude application of state antitrust laws. More likely, the court cited *Radovich* and the other sports cases to emphasize the unique and anomalous treatment afforded baseball. While I agree with the majority that the organizational structure of football is factually indistinguishable from that of [\*\*\*385] baseball, the long-standing, aberrant exemption provided baseball makes this case readily distinguishable from *Flood*.

[\*\*692] The unique character of the baseball exemption provides a clear explanation for the Supreme Court's affirmation of the district court's supremacy rationale for preempting state regulation of baseball. Having concluded that the "positive [\*\*\*58] inaction" of Congress serves to exempt baseball from federal antitrust regulation ([407 U.S. at p. 283 \[32 L.Ed.2d at p. 744\]](#)), the court found it necessary to imply federal preemption of state antitrust enforcement as well. (See [Bay Guardian Company v. Chronicle Publishing Company \(N.D.Cal. 1972\) 344 F.Supp. 1155, 1160](#) [statutory exemption for joint operating agreements preempts state antitrust law].) Indeed, "the time honored, though unusual, exemption from federal antitrust laws which professional baseball enjoys would be meaningless if state antitrust laws were not also inapplicable." ([United Nuclear Corp., 629 P.2d at p. 273](#).) Thus, in *Flood* there was a clear conflict since the application of state antitrust laws would produce a result inconsistent with the congressional intent that baseball be unregulated.

The Supreme Court's alternate holding<sup>18</sup> in *Flood* -- affirming the circuit court's burden-on-commerce holding -- also appears to be grounded on baseball's unique exemption, again, as suggested by the citation to *Federal Baseball* and *Toolson*. The high court specifically approved the view of the circuit court that "the burden on interstate commerce [\*\*\*\*59] outweighs the states' interests in regulating baseball's reserve system, . . ." ([407 U.S. at p. 284 \[32 L.Ed.2d at p. 745\]](#); quoting [443 F.2d at p. 268](#).) The circuit court, [\*404] relying on [Southern Pacific Co. v. Arizona, supra, 325 U.S. 761](#), had reasoned that "if state regulation were permissible, the internal structure of the [baseball] leagues would require compliance with the strictest state antitrust standard." ([443 F.2d at p. 268](#).)

[\*\*\*\*60] The Chargers place heavy reliance on *Southern Pacific*, a case in which the Supreme Court precluded application of an Arizona law requiring a change in the length of trains at the state line. The trial court had found that "the Arizona Law had no reasonable relation to safety, . . ." (325 U.S. at p. 775 [25 L.Ed.2d at p. 1928].) Balanced against this, the court held that the "Arizona Train Limit Law imposes a serious burden on interstate commerce, . . . [as] [it] materially impedes the movement of appellant's interstate trains through that state and interposes substantial obstruction to the *national policy proclaimed by Congress*, to promote adequate, economical and efficient railway transportation service. Interstate Commerce Act, preceding [§ 1](#), 54 Stat. 899." ( *Id.*, at p. 773 [25 L.Ed.2d 1927], italics added.)

It seems evident that the circuit court in *Flood* quite properly relied on *Southern Pacific* because, as in the case of train regulation, there is, according to the Supreme Court, a "national policy" as to baseball. With respect to railroads and other interstate transportation, the needs of the subject matter clearly call for national uniformity.

[\*\*\*\*61] (See [Railroad Trainmen v. Terminal Co. \(1969\) 394 U.S. 369 \[22 L.Ed.2d 344, 89 S.Ct. 1109\]](#); [Bibb v. Navajo Freight Lines, supra, 359 U.S. 520](#).) Similarly, professional baseball is entitled to uniform treatment as Congress has "clearly evinced a desire" for a policy of self-regulation and complete antitrust exemption for this particular sport. ([Flood, supra, 407 U.S. at p. 284 \[32 L.Ed.2d at p. 744\]](#).) State regulation of baseball [\*\*\*386] would result in inherent conflict because states, unguided by federal antitrust precedent, [\*\*693] would subject baseball to antitrust laws of varying strictness in violation of the commerce clause.

While the impact of diverse state regulation is unquestionable as to baseball, professional football, by marked contrast, can claim only a potential conflict in the absence of a corresponding "national policy" precluding federal antitrust regulation. Unlike baseball, football cannot claim a national policy supporting self-regulation. Nor is football "a subject demanding exclusive federal regulation in order to achieve uniformity vital to national interests."

<sup>19</sup> [\*\*\*\*63] ( [Florida Avocado Growers v. Paul, supra, 373 U.S. \[\\*\\*\\*\\*62\] 132, 144 \[\\*405\] \[10 L.Ed.2d 248, 257\]](#); see and compare [Southern Pacific, supra, 325 U.S. 761](#), and [Navajo Freight Lines, supra, 359 U.S. 520](#) with [Pacific Gas & Elect., supra, U.S. ,](#) and [United Nuclear, supra, 629 P.2d 231, 272](#) [uranium industry not "vital to military posture of United States" and subject to state antitrust laws].) Nor has Congress manifested the intent, express or implied, to exempt football from federal antitrust regulation so as to preclude divergent state-enforcement.<sup>20</sup> To the

<sup>18</sup> I note that the preemption holding alone is sufficient to dispose of the *Flood* case. If state antitrust regulation is completely preempted by the supremacy clause there is no need to weigh the state's interest in regulating the activity against the burden imposed upon interstate commerce. Under a commerce clause analysis, state interference is presumed valid unless it unduly burdens commerce; therefore, such analysis must be preceded by a judicial determination (or litigant's concession) that state law is *not* preempted by the supremacy clause. In *Flood*, the circuit court did not discuss supremacy clause preemption; nor did it comment on the district court's preemption holding. It might be argued, therefore, that the high court's affirmation of the district court rendered the circuit court's commerce-clause-preclusion holding dictum, or that the court's affirmation of the circuit court is itself dictum.

<sup>19</sup> The Supreme Court has sustained preemption challenges against state law in most cases where the "national interest" implicated is in the area of national security or labor policy, neither of which is in issue here. (See, e.g., [Hines v. Davidowitz, supra, 312 U.S. 52](#); [Pennsylvania v. Nelson \(1956\) 350 U.S. 497 \[100 L.Ed. 640, 76 S.Ct. 477\]](#); [Garner v. Teamsters Union \(1955\) 346 U.S. 485 \[98 L.Ed. 228, 74 S.Ct. 161\]](#); [Hill v. Florida \(1945\) 325 U.S. 538 \[89 L.Ed. 1782, 65 S.Ct. 1373\]](#).)

<sup>20</sup> Chief Justice Stone's statement in [Parker v. Brown, supra, 317 U.S. at page 351 \[87 L.Ed. at p. 326\]](#), is particularly apt in this regard: "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may

contrary, the fact that football is subject to federal antitrust laws greatly reduces the potential for diverse treatment by states, like California, which have patterned their antitrust laws after the Sherman Act and have adopted federal precedent as their own. In fact, as I shall explain, the trial court judgment in the present case is consistent with federal authority holding the same rules and practices challenged here violative of the Sherman Act.

In sum, *Flood* and *Southern Pacific* are inapposite. The Chargers would have us assume a conflict between state and federal antitrust policies without assessing and weighing the perceived detrimental impact of state regulation on professional football against this state's strong interest in enforcing its antitrust laws. Although the mere potential of conflicting state regulation was held sufficient to impermissibly burden baseball by forcing it to conform to "the strictest state antitrust standard" (*Flood, supra*, 443 F.2d at p. 268), I interpret the *Flood* cases as limited to professional baseball because of their focus on the unique historic development of [\*\*\*\*64] that sport.<sup>21</sup> [\*406]

[\*\*694] [\*\*\*387] Baseball is, to use the Supreme Court's own adjectives, "an exception and an anomaly." (*Flood, supra*, 407 U.S. at p. 282 [32 L.Ed.2d at p. 743].) I am not persuaded that this "aberration" (*ibid.*) should be extended to another professional sport. As in *Radovich*, the Chargers and amicus NFL seek refuge under a protective umbrella provided only to baseball. However, because football enjoys no congressional or judicially created exemption from antitrust laws, its asserted need for uniformity must be based, not on a national policy precluding state regulation, but, rather, only on the nature of its interstate operations. I would therefore balance this asserted need for uniformity against this state's interest in enforcing its antitrust laws in order to determine whether,

constitutionally subtract from their authority, an unexpressed purpose to nullify a state's [regulatory scheme] is not lightly to be attributed to Congress."

<sup>21</sup> I recognize of course that state and federal lower courts have held state antitrust laws inapplicable to various professional sports. (See *State v. Milwaukee Braves, Inc. (1966)* 31 Wis.2d 699, 719-732 [144 N.W.2d 1], cert. den. (1966) 385 U.S. 990 [17 L.Ed.2d 451, 87 S.Ct. 598]; *Matuszak v. Houston Oilers (Tex.Civ.App. 1974)* 515 S.W.2d 725; *Robertson v. National Basketball Association (S.D.N.Y. 1975)* 389 F.Supp. 867, 880-881; *HMC Management v. New Orleans Basketball Club (La.App. 1979)* 375 So.2d 700, 706, cert. den. (La. 1980) 379 So.2d 11.) These authorities, however, are not controlling.

In *Milwaukee Braves*, a pre-*Flood* case, Wisconsin brought an action against 10 baseball teams alleging that the league's decision to move the Braves' franchise to Atlanta violated its state antitrust law. In holding state law inapplicable, the majority opinion obliquely stated that "some members" of the court believed state law was preempted under the supremacy clause while "other members" preferred a commerce clause rationale. In either event, the court makes clear that its decision was grounded on baseball's unique "history of judicial action and legislative inaction" and the resulting "conflict between state and federal policy." (31 Wis.2d at p. 721.) Moreover, "transfer of a team franchise is certainly distinguishable (particularly with regard to the likelihood of state discrimination in favor of its own economic interests) from restraints imposed . . . upon players' freedom to negotiate, . . ." (*Flood, supra*, 316 F.Supp. 271, 279.)

Similarly, *HMC Management* involved an attempt to keep the "Jazz" basketball team from moving from New Orleans. Relying on *Flood*, the court held on preemption grounds that "most of the violations that are alleged cannot be subject to Louisiana Anti-Trust Laws." (375 So.2d at p. 706.) The court held, however, that the alleged violation of a lease, if proven to be the result of anticompetitive conspiracy, would be subject to the state law. ( *Id.*, at p. 707.) As I have explained, though, this court cannot, absent an unambiguous Supreme Court directive to the contrary, limit our state antitrust law to purely intrastate activities.

In *Matuszak*, a football case, the Texas court simply quoted the circuit court's opinion in *Flood* and concluded, on "federal pre-emption" grounds and without analysis, that the circuit court's "holding is applicable to the instant case . . . [therefore], the question of whether Matuszak's contract violates federal law is a question for the Federal Courts." (515 S.W.2d at pp. 728-729.)

Finally, in *Robertson* a federal district court found "the opinion of the Court of Appeals [in *Flood*] unquestionably applicable and controlling." (389 F.Supp. at p. 880.) The court held state antitrust regulation inapplicable to professional basketball because that sport is in the "same business" as baseball, involving "substantial volumes of interstate . . . commerce." ( *Id.*, at p. 881.).

To the extent that *HMC Management*, *Matuszak* and *Robertson* held (either without analysis or in reliance on the virtually identical league structures and interstate nature of professional sports) that state antitrust law is preempted or precluded, we should decline to follow these cases. In my view we should not decide the instant case on the basis of the organizational similarities between professional football and baseball; rather, we should focus on the aberrant treatment historically accorded the latter sport.

"under the circumstances of [this] particular case, [state] law 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 \[85 L.Ed. 581, 587\].](#))

*Under the facts of this case, state antitrust regulation of football neither burdens interstate [\*\*\*\*65] commerce nor conflicts with federal law or policy.*

[\*\*\*\*66] In cases where there is no express or implied national policy with respect to a particular business enterprise, the Supreme Court has phrased the "general rule" for determining the validity of state regulation affecting interstate commerce as follows: "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. [Citation.] If a legitimate local purpose is found, then the question becomes [\*407] one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues [citation], but more frequently it has spoken in terms of 'direct' and 'indirect' effects and burdens. [Citation.]" ( [Pike v. Bruce Church, Inc., supra, 397 U.S. 137, 142 \[25 L.Ed.2d 174, 178\]](#); see also [Hughes v. Oklahoma \(1979\) 441 \[\\*\\*\\*\\*67\] U.S. 322, 336 \[60 L.Ed.2d 250, 262, 99 S.Ct. 1727\]](#).) In applying this mode of analysis, I bear in mind that federal antitrust laws are applicable to professional football ( [Radovich, supra, 352 U.S. at p. 452 \[1 L.Ed.2d at p. 461\]](#)), and that federal decisions under the Sherman Act are applicable in state antitrust [\*\*\*388] cases brought under the Cartwright Act ( [Mailand v. Burkle, supra, 20 Cal.3d 367, 373.](#))

[\*\*695] With respect to the requirement that the state law regulate "even-handedly," it is the rule that the burden to show discrimination rests on the party challenging the state regulation. ( [Hughes v. Oklahoma, supra, at p. 336 \[60 L.Ed.2d at p. 262\]](#).) This question needs no extended discussion as the Chargers do not contend the Cartwright Act discriminates between interstate and intrastate commerce. Clearly, this state's **antitrust law** is nondiscriminating. Because the Cartwright Act applies both to interstate and intrastate commerce, "the controlling question is whether the incidental burden imposed on interstate commerce by [the state] is 'clearly excessive in relation to the putative local benefits.'" ( [Minnesota v. Clover Leaf Creamery \[\\*\\*\\*\\*68\] Co. \(1981\) 449 U.S. 456, 472 \[66 L.Ed.2d 659, 674, 101 S.Ct. 715\]](#), quoting from [Pike v. Bruce Church, Inc., supra, 397 U.S. 137, 142 \[25 L.Ed.2d 174, 178\]](#).) Though this is the central question before us, the majority do not balance California's interest in preventing unfair trade practices within its borders against the asserted burden on professional football's interstate operations and its need for nationally uniform antitrust regulation.

It is not open to dispute that California has a legitimate interest in protecting its citizens against unfair trade practices. Regulations which effectuate a legitimate public interest -- here antitrust regulation under the Cartwright Act -- are within the state's inherent police powers. ( [Alfred M. Lewis, Inc. v. Warehousemen etc. Local No. 542, supra, 163 Cal.App.2d 771, 790.](#)) It has been consistently held that "the prevention of anti-competitive, monopolistic and predatory trade practices . . . is a legitimate exercise of the state's inherent police powers." ( [United Nuclear, supra, 629 P.2d at p. 270;](#) citing [Giboney v. Empire Storage Co. \(1949\) 336 U.S. 490 \[93 L.Ed. 834, 69 S.Ct. 684\].](#))

The Chargers contend, [\*\*\*\*69] though, that the state interest is outweighed because professional football is a unique activity of interstate commerce which [\*408] requires nationally uniform governance. The Chargers argue that the nationwide character of the NFL league structure and operating practices prohibits the application of state antitrust laws.

The Supreme Court has rejected a similar argument, advanced by oil companies, that the nationwide character of the industry prohibited state regulation. The court stated: "[We] cannot adopt appellants' novel suggestion that because the economic market for petroleum products is nationwide, no State has the power to regulate the retail marketing of gas. Appellants point out that . . . the cumulative effect of this sort of legislation may have serious implications for their national marketing operations. While this concern is a significant one, we do not find that the Commerce Clause, by its own force, pre-empts the field of retail gas marketing . . . . [This] Court has only rarely

held that the Commerce Clause itself pre-empts an entire field from state regulation, and then only when a lack of national uniformity would impede the flow of interstate goods [\*\*\*\*70] . . . . In the absence of a relevant congressional declaration of policy, or a showing of a specific discrimination against, or burdening of, interstate commerce, we cannot conclude that the States are without power to regulate in this area." ( [Exxon Corp. v. Governor of Maryland, supra, 437 U.S. 117, 128-129 \[57 L.Ed.2d 91, 101-102\].](#))

The *Exxon* analysis applies with equal force here. If we were to insulate football from this state's antitrust laws on the basis of its "national character," we would necessarily have to exempt all businesses engaged in multistate activities. The Chargers' arguments, carried to their logical extension, would severely restrict the applicability of the Cartwright Act since a large segment of this nation's businesses would be immunized from state antitrust regulation as soon as their activities became "national" in scope. Thus, "a very large area will be fenced off in which the states will be practically helpless to protect their citizens . . ." [\*\*389] ( [Commonwealth v. McHugh, supra, 326 Mass. 249, 265.](#))

The majority apparently accept the Chargers' argument that professional football [\*\*696] is unique in that the league [\*\*\*\*71] structure imposes a "necessary interdependence" among the teams, each of which is required to function pursuant to a uniform set of national rules. Thus, the Chargers argue, subjecting California teams to differing standards would adversely affect, and possibly result in the fragmentation of, the league structure of the NFL. This argument would be quite persuasive if these were the facts before us, but, because they are not, we cannot properly express any opinion as to the resolution of a hypothetical conflict. There is no showing whatsoever in the present case that the Chargers have been subjected to more stringent or inconsistent requirements under state law. (Cf. [Ray v. Atlantic Richfield Co. \[\\*409\] \(1978\) 435 U.S. 151, 165 \[55 L.Ed.2d 179, 193, 98 S.Ct. 988\]](#) (preemption of state statute which undermined uniform federal standards by setting more stringent oil tanker design requirements).) To the contrary, the judgment below is entirely consistent with federal court decisions finding the same practices violative of the Sherman Act. As earlier noted, the trial court was aware of, and in fact relied in part on the federal decisions in *Smith v. Pro-Football, Inc.*, [supra, 593 F.2d 1173, Kapp v. National Football League, supra, 390 F.Supp. 73, and Mackey v. National Football League, supra, 543 F.2d 606.](#) Thus, there is uniformity of treatment under both state and federal law. It certainly cannot be argued that state antitrust enforcement has in this case frustrated the purpose of the Sherman Act when the trial court, in complete harmony with its federal counterparts, has simply condemned anticompetitive practices that have already been condemned under federal law. Because both jurisdictions have sought to achieve the same result -- elimination of trade restraints -- there is no "showing of a specific . . . burdening of . . . interstate commerce." ( [Exxon, supra, at pp. 128-129 \[57 L.Ed.2d at p. 102\].](#)) While professional football may indeed be entitled to uniform treatment, it has been provided it by the trial court.<sup>22</sup>

[\*\*\*\*73] The Chargers fall back on one final argument: they contend that they need not show specific, actual conflict but only that *potential* conflict may arise after an initial state and then subsequent states impose their own differing regulations on the activity. I disagree. Numerous Supreme Court decisions have deferred to concurrent state and federal regulation where the record "contains nothing to suggest the existence of any . . . competing or conflicting local regulations" ( [Huron Cement, supra, 362 U.S. 440, at p. 448 \[4 L.Ed.2d 852 at p. 859\]](#) or where the "record demonstrates no inevitable collision between the two schemes of regulation, despite the dissimilarity of standards." ( [Florida Avocado, supra, 373 U.S. 132, at p. 143 \[10 L.Ed.2d 248 at p. 257\].](#)) Moreover, the limited scope of the present case militates against finding even a potential conflict. As noted earlier, the NFL rules and practices challenged by Partee have been substantially modified pursuant to the settlement in *Alexander*. There was evidence before the trial court that Partee was one of only four players who opted-out of the *Alexander* class and refused to covenant not to sue. Thus, there [\*\*\*\*74] is potential for conflict *only* if a court in one of the remaining cases rules *in favor* of the NFL, and contrary to the present case and *Smith, Kapp, and Mackey*.

"Only if the burden on interstate commerce clearly outweighs the State's legitimate purposes does [state] regulation violate the Commerce Clause." [\*410] ( [Minnesota v. Clover Leaf Creamery Co. \(1981\) 449 U.S. 456, 474 \[66](#)

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<sup>22</sup>I do not mean to suggest that under different factual circumstances state antitrust regulation may not unreasonably burden interstate commerce. Such a case, however, is not before us.

L.Ed.2d 659, 675, 101 S.Ct. 715.) On the record before us, I conclude there is no specific burdening of interstate commerce; nor is there a showing of actual or potential conflict in an area where uniformity [\*\*\*390] of regulation is required pursuant to a congressional declaration of policy. "[Where] the effect of the application of [\*\*697] the Cartwright Act upon interstate commerce is to facilitate competition and not to place a restraint upon it, it is one which conforms with like policies of the federal government . . ." ( Coors, supra, 37 Cal.App.3d at p. 666.)

In sum, the present case illustrates a successful accommodation of state and federal policies. I am simply unable to find that the stringent federal preclusion standard has been met in this case. [\*\*\*\*75] <sup>23</sup> Yet, this court today relies on the Chargers' unwarranted and unproven speculations as to a purported irreconcilable undermining of federal law without requiring them to meet their burden of clearly demonstrating that the application of the Cartwright Act in this case inexorably conflicts with the purposes underlying the federal act. The reasoning process which leads the majority to conclude that a citizen of this state is without power to enforce our state's antitrust laws because of the mere existence of concurrent federal regulation of professional football is both legally and factually defective. Though it may be correctly said that the national operations of professional football require uniform antitrust regulation, this alone does not justify ignoring the "thoroughly established" principle that where Congress has not expressly prohibited regulation of a given field, state law "is superseded *only* where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'" ( Kelly v. Washington (1937) 302 U.S. 1, 10 [82 L.Ed. 3, 10-11, 58 S.Ct. 87], italics added.) Our primary inquiry, then, should be [\*\*\*\*76] whether state antitrust enforcement in this case is so repugnant that it inevitably undermines the purpose of the Sherman Act. As I have explained, we simply have no basis for concluding that state regulation frustrates federal law or policy as nothing in the present record shows that this state has or will impose more stringent antitrust requirements.

Although, "[in] the final analysis, there can be no crystal clear distinctly marked formula" ( Hines v. Davidowitz, supra, 312 U.S. at p. 67 [85 L.Ed. at p. 587]), my review of the case law compels me to conclude -- notwithstanding the aberrant *Flood* decision -- that there is a [\*\*\*\*77] heavy presumption against preemption where state regulation seeks to protect the vital interests [\*411] of state citizens. By reversing the normal presumption against finding federal preemption, the majority ignore the fact that state enforcement here promotes the very policy goals underlying the enactment of the Sherman Act. Accordingly, under the factual circumstances before us, I cannot agree that the commerce clause precludes state antitrust regulation. I would hold that the trial court had jurisdiction to apply the Cartwright Act to professional football.

For the foregoing reasons I would affirm the judgment.

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<sup>23</sup> "The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." ( Florida Avocado Growers v. Paul, supra, 373 U.S. at p. 142 [10 L.Ed.2d at p. 257].)

## Union Carbide Corp. v. Superior Court

Supreme Court of California

April 20, 1984 ; April 20, 1984

S.F. No. 24462

**Reporter**

36 Cal. 3d 15 \*; 679 P.2d 14 \*\*; 201 Cal. Rptr. 580 \*\*\*; 1984 Cal. LEXIS 173 \*\*\*\*; 1984-1 Trade Cas. (CCH) P65,983

UNION CARBIDE CORPORATION et al., Petitioners, v. THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Respondent; VILLMAR DENTAL LABS, INC., et al., Real Parties in Interest

**Disposition:** [\*\*\*\*1] The petition for a peremptory writ of mandate is denied, and the alternative writ is discharged.

### **Core Terms**

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purchasers, overcharges, joinder, indirect, parties, damages, multiple liabilities, antitrust, chain of distribution, Cartwright Act, duplicative, federal action, industrial, joined, substantial risk, indirectly, fraudulent concealment, intermediate, conspiracy, consumers, potential plaintiff, treble damages, common fund, claimants, suits, statute of limitations, anti trust law, petitioners', alleges, chain

### **LexisNexis® Headnotes**

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

Torts > Business Torts > General Overview

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

#### **HN1[] Private Actions, Purchasers**

Before amendment in 1978, [Cal. Bus. & Prof. Code § 16750 \(a\)](#) provided that any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter (the Cartwright Act, [Cal. Bus. & Prof. Code § 16720](#)) may bring an action for treble damages. The 1978 amendment provided that such action may be brought by any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter, regardless of whether such injured person dealt directly or indirectly with the defendant.

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

#### **HN2[] Compulsory Joinder, Necessary Parties**

Cal. Civ. Proc. Code § 389 (a)(2)(ii) specifies that, in requiring joinder, the risk of multiple liability in an action brought under the Cartwright Act, Cal. Bus. & Prof. Code § 16720, must be "substantial." A "substantial risk" means more than a theoretical possibility of the absent party's asserting a claim that would result in multiple liability. The risk must be substantial as a practical matter.

## Headnotes/Summary

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### Summary

#### CALIFORNIA OFFICIAL REPORTS SUMMARY

The defendants in an antitrust action brought by indirect purchasers of industrial gas petitioned the Supreme Court for a writ of mandate requiring the trial court to order the joinder of all persons in plaintiffs' chain of distribution and to strike allegations in the complaint that defendants fraudulently concealed the conspiracy. The Supreme Court denied the petition. The court held that defendants were not entitled, at the pleading stage, to joinder of persons in the chain of distribution, since they failed to demonstrate a substantial risk of multiple liability (Code Civ. Proc., § 389, subd. (a)(2)(ii)), with respect to either direct or intermediate purchasers. However, the court held defendants were not precluded from attempting to make such showing at a later stage of the litigation. It also held that plaintiffs were not required to plead fraudulent concealment of the cause of action as an excuse for late filing, since the complaint, which alleged that the offenses began at a time unknown and continued up to the date the complaint was filed, did not reveal on its face that it was time barred. Accordingly, the fraudulent concealment allegation that defendants sought to have stricken was mere surplusage. (Opinion by Reynoso, J., with Bird, C. J., Mosk, Kaus, Broussard and Grodin, JJ., concurring. Separate dissenting opinion by Richardson, J. \*)

### Headnotes

#### CA(1) [blue download icon] (1)

##### **Monopolies and Restraints of Trade § 10—Under Cartwright Act—Remedies of Individuals—Indirect Purchasers.**

--Bus. & Prof. Code, § 16750, subd. (a) (Cartwright Act), as amended in 1978, adopts the view that indirect purchasers are persons "injured" by illegal overcharges passed on to them in the chain of distribution, and permits actions for treble damages by such persons.

#### CA(2) [blue download icon] (2)

##### **Parties § 7—Joinder—Substantial Risk of Multiple Liability.**

--Under Code Civ. Proc., § 389, subd. (a)(2)(ii), requiring joinder of a party when his absence will create a substantial risk of multiple liability for an existing party, a "substantial risk" means more than a theoretical possibility of the absent party's asserting a claim that would result in multiple liability. The risk must be substantial as a practical matter.

#### CA(3) [blue download icon] (3)

##### **Monopolies and Restraints of Trade § 10—Under Cartwright Act—Remedies of Individuals—Indirect Purchasers—Joinder of Parties.**

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\* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.

--Care must be taken in Cartwright Act actions by indirect purchasers ([Bus. & Prof. Code, § 16750, subd. \(a\)](#), as amended in 1978) to avoid applying the mandatory joinder provisions of [Code Civ. Proc., § 389](#), so as to thwart the legislative intent expressed in the 1978 amendment to [§ 16750, subd. \(a\)](#) to retain the availability of indirect-purchaser suits as a viable and effective means of enforcing California's **antitrust law**. The 1978 amendment implies a mandate to avoid unnecessary procedural barriers to the prosecution of California antitrust suits by indirect purchasers.

#### [CA\(4\)](#) [ ] (4)

##### **Parties § 7—Joinder—Time for Making Determination.**

--In an antitrust action by indirect purchasers of industrial gas ([Bus. & Prof. Code, § 16750, subd. \(a\)](#)) in which defendants sought to compel joinder of all persons in the chain of distribution in order to protect themselves against an asserted risk of multiple liability, the fact that defendants raised their objections to nonjoinder by demurrer, coupled with a motion to dismiss under [Code Civ. Proc., § 389](#) (joinder of parties), did not necessarily require the trial court to make an immediate determination of what parties, if any, must ultimately be joined. A joinder question should be decided with reasonable promptness, but decision may properly be deferred if adequate information is not available. Thus, deferral is appropriate if the relationship of an absent person to the action, and the practical effects of an adjudication on him and others, is not sufficiently revealed at the pleading stage. A motion to dismiss on grounds that a person has not been joined and that justice requires that the action not proceed in his absence may be made as late as the trial on the merits.

#### [CA\(5\)](#) [ ] (5)

##### **Monopolies and Restraints of Trade § 10—Under Cartwright Act—Remedies of Individuals—Indirect Purchasers—Joinder of Parties—Substantial Risk of Multiple Liability.**

--In an antitrust action by indirect purchasers of industrial gas ([Bus. & Prof. Code, § 16750, subd. \(a\)](#)), defendants were not entitled, at the pleading stage, to joinder of all persons in plaintiffs' chain of distribution, where they failed to demonstrate a substantial risk of multiple liability ([Code Civ. Proc., § 389, subd. \(a\)\(2\)\(ii\)](#)). The pendency of a federal action by direct purchasers did not compel their joinder, since questions of whether overcharges were passed on, essential to plaintiffs' claims as indirect purchasers, were irrelevant to, and thus not subject to inconsistent determination in, the direct purchasers' federal suit. The joinder of intermediate purchasers was not required either, where the complaint did not state that there were in fact any intermediate purchasers in plaintiffs' chain of distribution and where, even assuming such fact, there was no showing of any actual assertion of a state antitrust claim on their behalf. However, defendants were not precluded from attempting to make the requisite showing of substantial risk of multiple liability at a later stage of the litigation.

#### [CA\(6a\)](#) [ ] (6a) [CA\(6b\)](#) [ ] (6b)

##### **Limitation of Actions § 78—Pleading—Avoidance of Statute—Fraudulent Concealment of Cause of Action.**

--An antitrust complaint by indirect purchasers of industrial gas ([Bus. & Prof. Code, § 16750, subd. \(a\)](#)), alleging that the offenses began at a time unknown and continued up to the date the complaint was filed, did not reveal on its face that the action was barred by the applicable four-year statute of limitations ([Bus. & Prof. Code, § 16750.1](#)). At most plaintiffs would be limited to recovering damages for actions occurring within the four years preceding the complaint. Thus, plaintiffs were not required to plead fraudulent concealment of the cause of action as an excuse for late filing. A fraudulent concealment allegation that was nevertheless included in the complaint was mere surplusage, and the trial court properly denied a motion to strike such allegation on grounds of uncertainty.

**CA(7) [D] (7)****Limitation of Actions § 78—Pleading—Avoidance of Statute—Fraudulent Concealment of Cause of Action.**

--When a plaintiff seeks to avoid a statute of limitations by showing fraudulent concealment of the cause of action, the plaintiff must plead with particularity the facts showing fraudulent concealment.

**CA(8) [D] (8)****Limitation of Actions § 78—Pleading—Avoidance of Statute.**

--If on the face of a complaint an action appears barred by the statute of limitations, the plaintiff has an obligation to anticipate the defense and plead facts to negative the bar.

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No appearance for Respondent.

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George Deukmejian, Attorney General, Sanford N. Gruskin, Assistant Attorney General, Michael I. Spiegel, Peter K. Shack, Owen Lee Kwong, Michael R. Granen and Charles M. Kagay, Deputy Attorneys General, [\*\*\*\*2] as Amici Curiae on behalf of Real Parties in Interest.

**Judges:** Opinion by Reynoso, J., with Bird, C. J., Mosk, Kaus, Broussard and Grodin, JJ., concurring. Separate dissenting opinion by Richardson, J.\*

**Opinion by:** REYNOSO

## **Opinion**

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[\*18] [\*16] [\*\*\*582] Petitioners are named as defendants in a complaint seeking treble damages under the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) for an alleged price-fixing conspiracy, resulting in injury to plaintiffs as indirect purchasers. Petitioners request a writ of mandate that would require the respondent superior court to (1) order real parties in interest (hereafter plaintiffs) to join all persons in the chain of distribution between plaintiffs and petitioners as additional parties, on pain of a dismissal of the complaint, and (2) strike allegations of petitioners' fraudulent concealment of the conspiracy that, if proved, might enable plaintiffs to recover damages [\*19] for injuries incurred more than four years before commencement of the action but that are not necessary to recovery for injury incurred [\*\*\*3] within the four-year period. We deny the writ.

I

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\* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.

The complaint was filed January 23, 1981. It alleges: The three named plaintiffs are users of industrial gas which they purchased indirectly from petitioners through California distributors. Petitioners and others conspired to fix prices of the gas, causing plaintiffs to pay more for it than they would have paid in the absence of the conspiracy. The action is brought on behalf of a class composed of all California end-users who similarly purchased the gas indirectly from petitioners, and no plaintiff's individual damages exceed \$ 10,000. Plaintiffs were unaware of the conspiracy and could not have uncovered it earlier by the exercise of due diligence because it was actively concealed by petitioners.

Petitioners demurred to the complaint, claiming a defect of parties ([Code Civ. Proc., § 430.10, subd. \(d\)](#); see [§ 430.30, subd. \(a\)](#))<sup>1</sup> and moved to dismiss under [section 389](#) for absence of indispensable parties. They also moved to strike the allegations of fraudulent concealment for uncertainty. The demurrer was overruled and the motions denied.<sup>2</sup> At petitioners' request, an alternative writ was issued for the purpose of reviewing [\*\*\*\*4] those rulings.

The complaint was filed pursuant to [section 16750](#), as amended in 1978. Before that amendment, [HN1](#)<sup>↑</sup> subdivision (a) of the section provided that “[any] person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter [the Cartwright Act]” may bring an action for treble damages. (For Cartwright Act provisions forbidding price-fixing, see [Bus. & Prof. Code, § 16720](#).) The 1978 amendment provided: “Such action may be brought by any person who is injured in his business or property by reason of anything forbidden or declared unlawful [\*\*\*\*5] by this chapter, regardless of whether such injured person dealt directly or indirectly with the defendant.” The statute enacting the amendment declared that it “does not constitute a change in, but is declaratory of, the existing law.” (Stats. 1978, ch. 536, § 2, p. 1696.)

The amendment was enacted in response to the holding in [Illinois Brick Co. v. Illinois \(1977\) 431 U.S. 720 \[52 L.Ed.2d 707, 97 S.Ct. 2061\]](#), that [\*20] under section 4 of the Clayton Act ([15 U.S.C. § 15](#)) only direct purchasers may sue to recover treble damages for overcharges resulting from price-fixing prohibited by [section 1](#) of the Sherman Act ([15 U.S.C. § 1](#)), and that indirect purchasers may not recover even if they show that the overcharges were passed on by the intervening distributors. [CA\(1\)](#)<sup>↑</sup> (1) California's 1978 amendment to [section 16750](#) in effect incorporates into the Cartwright Act the view of the dissenting opinion in [Illinois Brick](#) ([431 U.S. at p. 748 \[52 L.Ed.2d at p. 726\]](#)) that indirect purchasers are persons [\*\*17] [\*\*\*583] “injured” by illegal overcharges passed on to them in the chain of distribution. (See Smith, *The California Legislature Steers the Antitrust Cart Right* [\*\*\*\*6] *Off the Illinois Brick Road* (1979) 11 Pacific L.J. 121. For responses by other states to the *Illinois Brick* decision, see Gisser, *Indirect Purchaser Suits Under State Antitrust Laws: A Detour Around the Illinois Brick Wall* (1981) 34 Stan.L.Rev. 203.)

## II

Petitioners contend that [section 389](#) requires the joinder as parties (subd. (a)), or the naming in the complaint with reasons for nonjoinder (subd. (b)), of all persons in the chain of distribution of industrial gas from petitioners to plaintiffs, because the absence of such persons from the action would subject petitioners “to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations” ([§ 389, subd. \(a\)\(2\)\(ii\)](#)). Of the persons whose joinder is sought, petitioners distinguish between those who (1) purchased the gas directly from petitioners and (2) purchased it indirectly from petitioners, regardless of whether the ensuing resales to plaintiffs were direct or indirect. For convenience, we refer to those two categories as “direct purchasers” and “intermediate purchasers.”

As to direct purchasers, petitioners call our attention to a class action in the United States District Court for the Northern [\*\*\*\*7] District of Illinois (In re Industrial Gas Antitrust Litigation, No. 80 C 3479), brought by residents of states other than California, who allege that they purchased industrial gas directly from petitioners and were injured

<sup>1</sup> All section references are to the Code of Civil Procedure unless otherwise indicated, except that citations of [section 16750](#) refer to the Business and Professions Code.

<sup>2</sup> Certain allegations of the complaint not relevant to this writ proceeding were stricken on petitioners' motion, and plaintiffs filed an amended complaint that, for present purposes, may be treated as no different from the original complaint.

by essentially the same price-fixing activities as those alleged in the complaint now before us. On October 24, 1983, the federal court authorized the suit to proceed as a class action on behalf of essentially all those in the United States who purchased gas (directly) from petitioners between July 1, 1974, and June 30, 1980. Petitioners argue that the federal suit exposes them to a substantial risk of multiple liability, i.e., liability to direct purchasers under the Sherman and Clayton Acts for damages based on the same alleged overcharges for which plaintiffs in the present action seek damages under the Cartwright Act as indirect purchasers and consumers.

As to intermediate purchasers who bought indirectly from petitioners and resold directly or indirectly to plaintiffs, petitioners contend that their absence [\*21] from the present suit would create a substantial risk of multiple liability because the intermediate purchasers might independently sue petitioners [\*\*\*8] under the Cartwright Act, contending that they absorbed, rather than passing on to the present plaintiffs, all or part of the overcharges for which plaintiffs now seek damages.

**CA(2)[<sup>↑</sup>]** (2) There are reasons to be cautious in requiring joinder, **HN2[<sup>↑</sup>]** under [subdivision \(a\)\(2\)\(ii\) of section 389](#), at the very outset of this Cartwright Act action. The subdivision specifies that the risk of multiple liability must be "substantial." Courts construing identical language in [rule 19 of the Federal Rules of Civil Procedure](#) (28 U.S.C.), from which the present version of [section 389](#) was derived in 1971 (see [Conrad v. Unemployment Ins. Appeals Bd. \(1975\) 47 Cal.App.3d 237, 241 \[120 Cal.Rptr. 803\]](#)), correctly point out that a "substantial risk" means more than a theoretical possibility of the absent party's asserting a claim that would result in multiple liability. The risk must be substantial as a practical matter. ( [A. J. Kellog Const. Co., Inc. v. Balboa Ins. Co. \(S.D.Ga. 1980\) 495 F.Supp. 408, 414](#); [Virginia Electric and Power Co. v. Bunker Ramo Corp. \(E.D.Va. 1973\) 61 F.R.D. 366, 368-369](#); [F. T. C. v. Manager, Retail Credit Co., Miami Branch Office \(D.D.C. 1973\) 357 F.Supp. \[\\*\\*\\*9\] 347, 354](#), revd. on other grounds (D.C. Cir. 1975) [515 F.2d 988](#).)

**CA(3)[<sup>↑</sup>]** (3) Moreover, in the context of an indirect-purchaser suit under the Cartwright Act, we must take care to avoid an application of [section 389](#) that would thwart the legislative intent, expressed in the 1978 amendment to [section 16750, subdivision \(a\)](#), to retain the availability of indirect-purchaser suits as a viable and effective means of enforcing California's anti-trust [\*18] [\*\*\*584] laws. In precluding such suits under the Clayton Act, the United States Supreme Court expressed apprehension that "allowing indirect purchasers to recover using pass-on theories, even under the optimistic assumption that joinder of potential plaintiffs will deal satisfactorily with problems of multiple litigation and liability, would transform treble-damages actions into massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant." ( [Illinois Brick Co. v. Illinois, supra, 431 U.S. 720, 740 \[52 L.Ed.2d 707, 721\]](#).) The dissenting opinion, however, concluded that "the hypothetical possibility that a few defendants might be subjected to the [\*\*\*10] danger of multiple liability does not, . . . justify erecting a bar against all recoveries by indirect purchasers without regard to whether the particular case presents a significant danger of double recovery." ( *Id.*, at p. 761 [52 L.Ed.2d at p. 734].) The dissent declared that the majority's decision "regrettably weakens the effectiveness of the private treble-damages action as a deterrent to antitrust violations by, in most cases, precluding consumers from recovering for antitrust injuries." ( *Id.*, at p. 764 [52 L.Ed.2d at p. 736].) The 1978 [\*22] amendment to [section 16750, subdivision \(a\)](#), implies legislative endorsement of those dissenting views, as applied to the Cartwright Act, and a mandate to avoid unnecessary procedural barriers to indirect purchasers' prosecution of California antitrust suits.

**CA(4)[<sup>↑</sup>]** (4) The fact that petitioners have raised their objections to nonjoinder of parties by demurrer ([§§ 430.10, subd. \(d\), 430.30, subd. \(a\)](#)) coupled with a motion to dismiss ([§ 389](#)) does not necessarily require that the trial court make an immediate determination of what parties, if any, must ultimately be joined. The California Law Revision Commission comment to [section \[\\*\\*\\*11\] 389](#) quotes these pertinent observations from the Advisory Committee's note on federal [rule 19](#): "A person may be added as a party at any stage of the action on motion or on the court's initiative . . .; and a motion to dismiss, on the ground that a person has not been joined and justice requires that the action should not proceed in his absence, may be made as late as the trial on the merits . . . . However, when the moving party is seeking dismissal in order to protect himself against a later suit by the absent person (subd. (a)(2)(ii)), and is not seeking vicariously to protect the absent person against a prejudicial judgment (subd. (a)(2)(i)), his undue delay in making the motion can properly be counted against him as a reason for denying the motion. A joinder question should be decided with reasonable promptness, but decision may properly be

deferred if adequate information is not available at the time. Thus the relationship of an absent person to the action, and the practical effects of an adjudication upon him and others, may not be sufficiently revealed at the pleading stage; in such a case it would be appropriate to defer decision until the action was further advanced . . [\*\*\*\*12] . .”

**CA(5)↑ (5)** By their demurrer and motion to dismiss, petitioners raise their joinder claim “at the pleading stage,” basing it wholly upon plaintiffs' complaint, the complaint in the Illinois federal case, and the proceedings in that case regarding certification of the plaintiff class. As we now explain, those papers do not demonstrate a substantial risk of multiple liability sufficient to require that additional parties be joined in the complaint (or named therein with sufficient reasons for nonjoinder) as a prerequisite to petitioners' being required to answer the complaint in order to avoid default.

We consider first petitioners' contention that joinder of direct purchasers who were in the chain of distribution to plaintiffs is required by the pendency of the Illinois federal class action, in which recovery is sought for damages based on overcharges paid by those direct purchasers regardless of whether the overcharges were passed on. Petitioners are not entitled to joinder of additional parties on account of a substantial risk of multiple liability ([§ 389, subdivision \(a\)\(2\)\(ii\)](#)) simply because [\*\*19] [\*\*\*585] petitioners may be held [\*23] liable in a federal suit under a federal [\*\*\*\*13] statute to a person or class wholly different from the person or class to whom they are sought to be held liable in a California action under a California statute for the same tortious conduct. Federal law, interpreted in [Illinois Brick, supra, 431 U.S. 720](#), precludes recovery by indirect purchasers and allows recovery by the direct purchaser regardless of whether the overcharge was passed on, whereas the terms of [section 16750, subdivision \(a\)](#), allow recovery by the indirect purchaser regardless of whether the direct purchaser in the plaintiff's chain of distribution has asserted a federal claim for damages from the overcharge. Questions of whether overcharges were passed on, essential to the indirect purchaser's California claim, are irrelevant to, and thus not subject to inconsistent determination in, a suit on the direct purchaser's federal claim. Thus, federal actions such as the one in Illinois do not give rise to a “substantial risk” of multiple liability under [section 389, subdivision \(a\)\(2\)\(ii\)](#).

Petitioners also seek joinder of intermediate purchasers who purchased the gas *indirectly* from petitioners and sold it directly or indirectly to plaintiffs as end users, [\*\*\*\*14] or consumers. Petitioners argue (1) that an intermediate purchaser could sue separately under the Cartwright Act for all or part of the overcharges claimed by the present plaintiffs, asserting that those overcharges were absorbed rather than being passed on, and (2) that the separate suit could result in petitioners' being held liable to both the intermediate purchaser and the plaintiff end users under the same statute for the same overcharges. On the record before us, however, the risk of any such exposure to multiple liability is not “substantial” as required by [section 389, subdivision \(a\)\(2\)\(ii\)](#).

In the first place, the complaint does not state that there were in fact any intermediate purchasers in plaintiffs' chain of distribution; it is neither alleged nor denied that the distributors who bought the gas directly from petitioners sold indirectly, rather than directly, to plaintiffs. The complaint alleges that plaintiffs were “indirect-purchaser, end-user/consumers of substantial amounts of industrial gas manufactured by one or more of the defendants [petitioners]” ([para. ] 8), that “[purchasers] of industrial gas from defendants [petitioners] include independent [\*\*\*\*15] distributors, who in turn re-sell industrial gas to users” ([para. ] 24), and that “defendants [petitioners] sold substantial quantities of industrial gas to distributors in the State of California who then re-sold such industrial gas to end-user/consumers such as the plaintiffs” ([para. ] 25). Thus, on the face of the complaint, the only persons in the chain of distribution between plaintiffs and petitioners may have been direct purchasers who are members of the plaintiff class in the Illinois federal action and need not now be joined for the reasons already stated.

Moreover, the fact of purchasers intermediate between plaintiffs and direct purchasers in the chain of distribution, even if assumed, would not [\*24] establish a substantial risk of multiple liability. There is no showing of any actual assertion of a Cartwright Act claim on behalf of any such intermediate purchaser. We turn again to the views expressed by the *Illinois Brick* dissenting opinion that seem to have met with the California Legislature's approval when it amended [section 16750, subdivision \(a\)](#), in 1978. After pointing out the possibility of coordinating and consolidating pending federal court [\*\*\*\*16] actions brought by different purchasers, the opinion observes: “True,

there is a greater hypothetical danger of multiple recovery where suits are independently instituted after an earlier suit based on the same violation has proceeded to judgment. But even here the likelihood that defendants will be subjected to multiple liability is, as a practical matter, remote. The extended nature of antitrust actions, often involving years of discovery, combines with the short four-year statute of limitations to make it impractical for potential plaintiffs to sit on their rights until after entry of judgment in the earlier suit." ([431 U.S. at pp. 763-764, \\*\\*\\*586](#)] [\*\*20] fn. omitted [[52 L.Ed.2d at p. 736](#).])

We do not foreclose the possibility that through discovery or other means petitioners may be able later to make a showing of substantial risk of multiple liability that would entitle them to a joinder order. Nor do we have occasion now to consider questions of whether or how potential plaintiffs should be represented if the present suit goes forward as a class action. (See [§ 389, subd. \(d\)](#) ["Nothing in this section affects the law applicable to class actions"].) We simply reject [\*\*\*\*17] petitioners' contention that on the present record they are entitled to joinder under [section 389, subdivision \(a\)\(2\)\(ii\)](#).<sup>3</sup>

### III

**CA(6a)[↑] (6a)** Finally, petitioners contend that the trial court should have granted its motion to strike the following allegations of the complaint for uncertainty: "Concealment [para. ] 22. At all times relevant hereto, plaintiffs and the members of the class had no knowledge of the combination and conspiracy alleged herein, or of any facts which might have led to the discovery thereof. Plaintiffs and the members of the class they represent could not have uncovered the conspiracy at an earlier date by the exercise of due diligence, inasmuch as the unlawful conspiracy was actively concealed by the defendants through the adoption of elaborate schemes, including [\*\*\*\*18] their resort to secrecy to avoid detection."

We have concluded that petitioners' contention should be rejected for the reasons stated in the following portion of the opinion prepared in this case by Justice Barry-Deal for the Court of Appeal:

[\*25] "[Business and Professions Code section 16750.1](#) provides that any civil action to enforce state antitrust laws 'shall be commenced within four years after the cause of action accrued.' In an apparent attempt to recover maximum damages, [plaintiffs] have alleged in their complaint that the offenses began at a 'date unknown' and that fraudulent concealment prevented plaintiffs from learning about the unlawful conduct. Petitioners object that the fraudulent concealment allegations quoted earlier in this opinion are not specific and factual.

"Petitioners argue that [plaintiffs] are required to plead: (1) when the facts giving rise to their claims were discovered; (2) what facts were discovered that led to the initiation of the claim and under what circumstances such facts were discovered; (3) that neither plaintiffs nor any of the putative class members had actual or presumptive knowledge of facts sufficient to put them under a duty [\*\*\*\*19] to inquire; (4) that plaintiffs and putative class members are not at fault for failing to discover the facts underlying their cause of action sooner; and (5) that the failure to discover such facts was attributable to affirmative acts of fraudulent concealment perpetrated by defendants.

**CA(7)[↑] (7)** "Petitioners cite [Kimball v. Pacific Gas & Electric Co. \(1934\) 220 Cal. 203, 215 \[30 P.2d 39\]](#), [Baker v. Beech Aircraft Corp. \(1974\) 39 Cal.App.3d 315, 321 \[114 Cal.Rptr. 171, 91 A.L.R.3d 981\]](#), and other authority for the proposition that when the plaintiff seeks to avoid the statute of limitations by showing fraudulent concealment of the cause of action, the plaintiff must plead with particularity the facts showing fraudulent concealment. Petitioners accurately interpret those authorities. However, we find them distinguishable.

**CA(8)[↑] (8)** "The principle applied by those authorities is the well-recognized proposition that if on the face of the complaint the action appears barred by the statute of limitations, plaintiff has an obligation to anticipate the defense and plead facts to negative the bar. (3 Witkin, Cal. Procedure (2d ed. 1971) Pleading, §§ 313, 779, pp. 1983, 2395.) **CA(6b)[↑] (6b)** Here, however, [\*\*\*\*20] nothing appearing on the face of the complaint suggests that the

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<sup>3</sup> The dissenting opinion implicates substantive questions yet to be resolved. Petitioners do not contend, in this proceeding, that the 1978 amendment poses impermissible conflict with federal law, and we express no opinion on that issue.

action is barred by the statute of limitations. The complaint alleges that the offenses [\*\*21] [\*\*\*587] began at a time unknown and continued up to the date of the filing of the complaint. Thus, the filing of the action was not barred by the statute of limitations. At most, plaintiffs will be limited to recovering damages for actions occurring within the four years preceding the complaint.

"Because the complaint does not reveal on its face that it is barred by the statute of limitations, real parties were not required to plead fraudulent concealment as an excuse for late filing. Thus, the fraudulent concealment [\*26] allegation is mere surplusage, and the trial court was not required to sustain a demurrer or motion to strike directed toward it." n6

The Court of Appeal's footnote 6 states:

"Petitioners contend that the requirement of particularized pleading in anticipation of the statute of limitations should be enforced here because otherwise real parties will be permitted to seek discovery concerning injuries 'stretching back through the endless corridors of time, . . .' However, it is only through [\*\*\*\*21] this discovery that [plaintiffs] can uncover the beginning of the alleged conspiracy which they assert has been concealed by petitioners. The situation differs markedly from one in which the complaint alleges an open or public injurious act and that there has been concealment from the plaintiff of the defendant's involvement or of the as-yet-unrealized injurious consequences of the act. By its nature, a conspiracy to fix prices in violation of antitrust law is a secret act whose effects are public. Only through discovery or chance disclosure can an antitrust plaintiff learn about the actions leading to the observable effects."

The petition for a peremptory writ of mandate is denied, and the alternative writ is discharged.

**Dissent by:** RICHARDSON

## Dissent

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**RICHARDSON, J.** I respectfully dissent, believing that a writ should issue. In my view, several rules enunciated by the United States Supreme Court in Hanover Shoe v. United Shoe Mach. (1968) 392 U.S. 481 [20 L.Ed.2d 1231, 88 S.Ct. 2224] and Illinois Brick Co. v. Illinois (1977) 431 U.S. 720 [52 L.Ed.2d 707, 97 S.Ct. 2061], considered in conjunction with the Legislature's 1978 amendment to section 16750 of the [\*\*\*\*22] Business and Professions Code, make appropriate a joinder of others within the chain of distribution, pursuant to Code of Civil Procedure section 389, subdivision (a).

In *Hanover Shoe* the high court interpreted section 4 of the Clayton Act (15 U.S.C. § 15) which provides that any person "who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . ." (Cf. Bus. & Prof. Code, § 16750, subd. (a).) The *Hanover Shoe* defendant asserted that it should be permitted to show that any illegal overcharge it may have imposed on its purchasers was, in turn, [\*27] "passed on" by the plaintiff purchaser to the latter's customers with no net loss to plaintiff. The high court rejected the "pass on" defense, reasoning: "We are not impressed with the argument that sound laws of economics require recognizing this defense. A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different [\*\*\*\*23] (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in a company's price will have on its total [\*\*22] sales. [\*\*\*588] Finally, costs per unit for a different volume of total sales are hard to estimate . . . Treble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories." (392 U.S. at pp. 492-493 [20 L.Ed.2d at p. 1241].)

Subsequently, in *Illinois Brick*, the Supreme Court examined the application of the “pass on” concept when used as a *plaintiff*’s device, rejecting the proposal that indirect purchasers could demonstrate that damages had been “passed on” to them. Referring to the Clayton Act, the high court said: “Permitting the use of pass-on theories under § 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge -- from direct purchasers [\*\*\*\*24] to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness.” ([431 U.S. at p. 737 \[52 L.Ed.2d at p. 719\]](#).)

In the year after *Illinois Brick* the Legislature amended the California antitrust law by the addition of a clause in section 16750, subdivision (a), of the Business and Professions Code to provide that antitrust actions “may be brought by any person who is injured in his business or property by reason of anything forbidden or declared unlawful in this chapter, *regardless of whether such injured person dealt directly or indirectly with the defendant.*” (Italics added.) Section 2 of the statute provides additionally that “The amendment of this section . . . does not constitute a change in, but is declaratory of, the existing law.” (Stats. 1978, ch. 536, § 2 at p. 1696.) Thus, while the federal rule, solidly and clearly established by the United States Supreme Court, restricts antitrust enforcement to the direct purchaser, the Legislature conferred an express remedy on those who are injured by antitrust [\*\*\*\*25] action whether *or not* they dealt directly with defendant. Plaintiffs sue under the authority of the state provision.

[\*28] Nonetheless, as we stressed in [Marin County Bd. of Realtors, Inc. v. Palsson \(1976\) 16 Cal.3d 920, 925 \[130 Cal.Rptr. 1, 549 P.2d 833\]](#), “A long line of California cases has concluded that the Cartwright Act is patterned after the Sherman Act 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. [Citations.]” (See also [Chicago Title Ins. Co. v. Great Western Financial Corp. \(1968\) 69 Cal.2d 305, 315 \[70 Cal.Rptr. 849, 444 P.2d 481\]](#).) The Legislature’s declaration in section 2 of the amendment demonstrates a general intent to preserve this approach.

There is little applicable precedent governing the interplay of federal and state law on the subject. Several congressional proposals to overrule *Illinois Brick* have been unsuccessful. Six other states by statute have adopted a rule permitting, as does California, actions by indirect purchasers under state antitrust provisions (Alabama, [Ala. Code, § 6-5-60\(a\)](#) [\*\*\*\*26] (1975); Hawaii, [Hawaii Rev. Stat., § 480-14\(c\)](#) (amended 1980); Illinois, Ill. Ann. Stat., ch. 38, § 60-7(2) (amended 1979); Mississippi, [Miss. Code Ann., § 75-21-9](#) (1973); New Mexico, [N.M. Stat. Ann., § 57-1-3\(A\)](#) (amended 1979); and Wisconsin, [Wis. Stat. Ann., § 133.18\(1\)](#) (amended 1980)). These have yet to be judicially construed.

A critical factor in resolving the issue before us is the fact that defendants here are also defendants in a United States District Court action presently pending in the Eastern Division of the Northern District of Illinois (In re Industrial Gas Antitrust Litigation, Master File No. 80 C 3479). Based upon plaintiffs’ demonstration in the district court action that a common method of proof of damages could be used for all class members on November 3, 1983, the district judge recertified the class of direct purchasers to include: “All persons, firms, and corporations in the United States that purchased industrial gas from any defendant [\*\*23] [\*\*\*589] [including their respective subsidiaries or affiliates] at any time during the period of July 1, 1974, to and including June 30, 1980, but excluding (a) any defendants, or other industrial gas [\*\*\*\*27] manufacturers and their subsidiaries and excluding (b) all on-site and pipeline purchasers.” All direct purchasers at the top of the chain of distribution are included in the class and, as such, if they prevail under federal law are entitled to treble damages for any overcharges by defendants.

In my view, in order to afford complete relief the direct and indirect purchasers in the chain of distribution to plaintiff must be joined as parties. Joinder is appropriate if there are persons not parties to the action in whose “absence complete relief cannot be accorded among those already parties,” or who claim an interest in the subject matter of the action and whose absence may impair their ability to protect that interest or subject any of [\*29] those already parties “to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations . . . .” ([Code Civ. Proc., § 389, subd. \(a\)](#).) The two bases for my conclusion are (1) the strong probability that unless joinder is effected defendants may be subject to duplicative recovery of damages by different classes of plaintiffs and (2) plaintiffs may encounter significant problems in allocating the available “common [\*\*\*\*28] fund” composed of

trebled overcharges in which other parties may claim an interest. While my colleagues consider the risk speculative at this time, I regard the danger as real and substantial.

The first problem is the potential for duplicative damages against defendants. Direct purchasers under *Illinois Brick* may recover treble damages for overcharges paid by them even though the overcharges were “passed on” to others and regardless of any proven injury. In addition, under the Legislature's amendment to *Business and Professions Code section 16750*, indirect and end-user purchasers may also sue in order to show that the overcharges were passed on to them to their actual detriment, claiming as damages treble the amount of the “passed-on” overcharges. Thus, both federal direct purchaser plaintiffs and state indirect purchaser plaintiffs may recover based on the same overcharge. This potential arithmetic expansion is further complicated by the possibility of further damage awards for others in the chain of distribution. Despite the rather cavalier approach of my colleagues, the risk here is neither speculative nor clearly permissible. In the present case if the direct purchasers [\*\*\*\*29] prevail in their federal action a plaintiff's recovery could impose upon defendants a recovery of six times the amount of any overcharge proved.

The *Illinois Brick* court expressly found such risk of duplicative recoveries wholly unacceptable. (*431 U.S. at pp. 730-731*, and fn. 11 [*52 L.Ed.2d at pp. 715-716*.) The high court, stating “we are unwilling to ‘open the door to duplicative recoveries’ under § 4” (p. 731 [*52 L.Ed.2d at p. 716*]), was entirely consistent with its earlier decision in *Hawaii v. Standard Oil Co. (1972) 405 U.S. 251 [31 L.Ed.2d 184, 92 S.Ct. 885]*, in which it held that section 4 of the Clayton Act did not authorize a state to sue as *parens patriae* for harm done to its economy allegedly caused by an antitrust violation. The court reasoned that, “A large and ultimately indeterminable part of the injury to the ‘general economy’ . . . is no more than a reflection of injuries to the ‘business or property’ of consumers, for which they may recover themselves under § 4. Even the most lengthy and expensive trial could not . . . cope with the problems of double recovery inherent in allowing damages for harm both to the economic interests of [\*\*\*\*30] individuals and for the quasi-sovereign interests of the State.” ( *Id. at p. 264 [31 L.Ed.2d at p. 193]*; see Comment, *Parents Patriae Actions on Behalf of [\*\*30] Indirect Purchasers: Do They Survive Illinois Brick?* (1982) *34 Hastings L.J. 179* [arguing that they do].)

The holdings of lower federal and state courts following *Illinois Brick* have demonstrated the problem. Thus, in *Alton Box Bd. Co. v. Esprit de Corp. (9th Cir. 1982) 682 F.2d 1267*, the Ninth Circuit sustained [\*\*24] [\*\*\*590] the refusal by the district court, on procedural grounds, to enjoin a state court action by indirect purchasers. Finding no independent basis for federal jurisdiction the *Alton* court held that an injunction would be procedurally inappropriate. (See Anti-Injunction Act, *28 U.S.C. § 2283*.) In dicta, however, the court viewed with favor the defendant manufacturer's argument that the Cartwright Act proceeding and an ongoing federal action involved claims to the same “common fund” which therefore might result in “duplicative recoveries” condemned by the Supreme Court.” ( *Id. at p. 1272*.) One New York court denied recovery to indirect purchasers in a state [\*\*\*\*31] action reasoning that “If the direct purchasers class in the Federal Court recover, allowing the putative class proposal by the plaintiffs here, to also sue would subject defendants for a second time to liability for damages.” ( *Russo & Dubin v. Allied Maint. (1978) 95 Misc.2d 344, 348 [407 N.Y.Supp.2d 617]*.) Finally, another federal court in construing South Carolina's *antitrust law* limited the application of the state statute to intrastate commerce, and dismissed the indirect purchaser plaintiff's claims on the ground that they were interstate in character. It reasoned that, “Failure to apply *Illinois Brick* in this action would create the same problems the Supreme Court sought to avoid when it rendered that decision . . . [including] the ‘serious risk of multiple liability for defendants’ . . . .” ( *In re Wiring Device Antitrust Litigation (E.D.N.Y. 1980) 498 F.Supp. 79, 87*.) Thus, all the courts previously considering this problem have indicated that they believe risks such as the one involved here are not acceptable.

In attempting to accommodate the federal rule limiting treble damages to one action, some commentators have argued that the rule is not binding [\*\*\*\*32] on state legislatures which may adopt a policy of compensation in preference to deterrence. (See Note, *State Indirect Purchaser Statutes: The Preemptive Power of Illinois Brick* (1982) *62 B.U.L.Rev. 1241, 1266-1268, 1270-1271*; Note, *Indirect Purchaser Suits Under State Antitrust Laws: A Detour Around the Illinois Brick Wall* (1981) 34 Stan. L.Rev. 203, 208-211, 218-220 [recommending a legislative solution to the unacceptable problems of potential duplicative liability].) However, we are not asked, either by pleading or argument, to determine at this time whether the effect of *Illinois Brick* is to preempt those state laws

which may result in duplicative liability. Nonetheless, the Legislature has expressly said that the *substantial risk* of such multiple liability is a basis for joinder. ( [Code Civ. Proc., § 389, subd. \(a\)](#).) While deference should be afforded to state antitrust statutes (see [Exxon \[\\*31\] Corp. v. Governor of Maryland \(1978\) 437 U.S. 117, 128, 130-132 \[57 L.Ed.2d 91, 101, 102-104, 98 S.Ct. 2207\]](#); Note, [State Indirect Purchaser Statutes: The Preemptive Power of Illinois Brick, supra, 62 B.U.L.Rev. at pp. 1252-1253](#), and fn. 76), I cannot [\*\*\*\*33] accept plaintiffs' argument that there is no substantial potential for duplicative liability or the majority's conclusion made without citation or analysis that in any event such duplication would be permissible.

In fact, plaintiffs rather than claiming a right to duplicative recovery, instead attempt to suggest methods by which the problems of such recovery could be ameliorated. Each of the remedies suggested by plaintiffs raises substantial difficulties. It may be difficult for defendants to interplead or otherwise gain access to damages that may be awarded to direct purchasers in the federal action. ( [Code Civ. Proc., § 386](#).) Under *Illinois Brick* only direct purchasers are entitled to any such award, and attempts by state courts or defendants in state court actions to force federal plaintiffs to disgorge any part of the recovery to which they are expressly and solely entitled under federal law may well directly conflict with the federal decisions and the rationale behind them. Arguably, a direct purchaser will be less likely to sue if he knows that, after he obtains recovery, he may be required to "pass-on" that recovery to state court plaintiffs. "Simple" procedural devices [\*\*\*\*34] normally available under [\*\*25] [\*\*\*591] state law thus may be inapplicable where the federal and state systems interact.

Next, plaintiffs assert that the risk to defendants of multiple liability becomes substantial only after plaintiffs have won. However, joinder is an appropriate protective remedy *before* any duplicate relief to plaintiff is assured. In the case before us, for example, a parallel federal action is proceeding in which direct purchasers from defendants are an integral part of the plaintiff class at the top of plaintiffs' distribution chain.

Apart from the danger of improper duplicative awards, another related consideration persuades me that a joinder of plaintiffs is required. If the present federal action involving direct purchasers across the United States results in a jury verdict for defendants it is arguable that such a verdict will have either a res judicata or collateral estoppel effect on the present case. The majority completely ignores this problem, commenting only that questions of pass-on are irrelevant and therefore not subject to an inconsistent result in the federal action. (See *ante*, p. 23.) Plaintiffs in the case before us can [\*\*\*\*35] recover only if they can establish an overcharge by defendants to direct purchasers which overcharge has been passed down the distribution chain to them as indirect purchasers. If there is a judgment for defendants in the federal action on the ground that there was no antitrust violation causing an overcharge to direct purchasers, that judgment arguably would [\*32] estop plaintiffs in this state action. (See Degnan, *Federalized Res Judicata* (1976) 85 Yale L.J. 741, 767-773; cf. [Ford Motor Co. v. Superior Court \(1973\) 35 Cal.App.3d 676, 679 \[110 Cal.Rptr. 59\]](#) [after dismissal of federal antitrust action plaintiff barred from bringing Cartwright Act suit based on same acts alleged in federal complaint: "The two actions . . . rested on but a single invasion of one primary right . . ."]; [Federated Department Stores, Inc. v. Moitie \(1981\) 452 U.S. 394 \[69 L.Ed.2d 103, 101 S.Ct. 2424\]](#) [antitrust plaintiffs who brought state action instead of appealing after losing in federal antitrust action were barred on res judicata grounds from proceeding after removal of the new action to federal court despite the fact that plaintiffs in related suits had successfully [\*\*\*\*36] appealed].) If on the other hand, the direct purchaser plaintiffs prevail in the federal action all of the above problems of duplicative recovery would be squarely raised.

Thus, in my view, joinder is appropriate because of the substantial possibility of multiple recovery. Moreover, even if plaintiffs before us are correct that, upon proof of "pass on," they are entitled to relief through apportionment of any recovery received by plaintiffs in the federal action, and thus problems of duplicative recovery will not occur, a determination will still have to be made regarding the competing rights of various sets of plaintiffs to any treble damages recovery.

In [Bank of California v. Superior Court \(1940\) 16 Cal.2d 516, 521 \[106 P.2d 879\]](#), we described situations relating to a "common fund" which require all interested parties to be joined: "There may be some persons whose interests, rights, or duties will inevitably be affected by any decree which can be rendered in the action. Typical are the situations where a number of persons have undetermined interests in the same property, or in a particular trust fund, and one of them seeks, in an action, to recover the whole, to fix [\*\*\*\*37] his share, or to recover a portion claimed by him. The other persons with similar interests are indispensable parties. The reason is that a judgment

in favor of one claimant for part of the property or fund would necessarily determine the amount or extent which remains available to the others."

Contrary to the majority, but consistent with *Illinois Brick*, I view the damages flowing from an overcharge antitrust violation, if multiple recoveries are barred, as constituting a common fund. The Supreme Court had this precisely in mind when it observed: "potential plaintiffs at each level in the distribution chain are in a position to assert conflicting claims to a common fund -- the amount of the alleged overcharge -- [\*\*\*592] [\*\*26] by contending that the entire overcharge was absorbed at that particular level in the chain." (*Illinois Brick*, 431 U.S. at p. 737 [52 L.Ed.2d at p. 720], fn. omitted; see [\*33] *Atlantic Richfield Co. v. Superior Court* (1975) 51 Cal.App.3d 168 [124 Cal.Rptr. 63].)

I find unpersuasive the majority's contention that there is no logical inconsistency in simultaneous federal and state antitrust awards. It is no answer to the [\*\*\*38] problem before us to note that in "common fund" situations the prospective claimants may recover pro rata shares of the fund while here the plaintiffs may be in an adversarial position. Whenever there are competing claims, the competitors with interest in the funds are adversaries. The real problem remains -- if indeed the right to recover for an overcharge creates a common fund -- what will be the effect on the excluded claimants in a related state action of a federal court decision awarding all interests in the common fund to one of several potential claimants? To me the competing claims here involved make invocation of the joinder statute entirely proper.

In summary, because of the significant unresolved issues affecting the rights of parties to this action as well as persons not parties but with interests affected by this suit, I find compelling the high court's assessment of joinder in *Illinois Brick*: "A treble-damages action brought by one of these potential plaintiffs [persons at each level of the distribution chain] (or one class of potential plaintiffs) to recover the overcharge implicates all three of the interests that have traditionally been thought to support [\*\*\*39] compulsory joinder of absent and potentially adverse claimants: the interest of the defendant in avoiding multiple liability for the fund; the interest of the absent potential plaintiffs in protecting their right to recover for the portion of the fund allocable to them; and the social interest in the efficient administration of justice and the avoidance of multiple litigation. [Citations.]" (*431 U.S. at pp. 737-738 [52 L.Ed.2d at p. 720]*.)

Additional guidance favoring joinder may be found in the Law Revision Commission comment to the 1971 amendment to *Code of Civil Procedure section 389* which noted that the section was "revised to substitute practically in its entirety *Rule 19 of the Federal Rules of Civil Procedure* . . . ." Accordingly, "[it] is therefore appropriate to use federal precedents as a guide to application of the statute." (*Conrad v. Unemployment Ins. Appeals Bd.* (1975) 47 Cal.App.3d 237, 241, [120 Cal.Rptr. 803]; see *Van Atta v. Scott* (1980) 27 Cal.3d 424, 451 and fn. 30 [*166 Cal.Rptr. 149, 613 P.2d 210*].) As the high court expressly declared in *Illinois Brick*: "if the defendant, for any of a variety of reasons does not choose to interplead [\*\*\*40] the absent potential claimants, there would be a strong argument for joining them as 'persons needed for just adjudication' under *Fed. Rule Civ. Proc. 19(a)* . . . . These absent potential claimants would seem to fit the classic definition of 'necessary parties,' for purposes of compulsory joinder . . . ." [\*34] (*431 U.S. at pp. 738-739*, fns. omitted [*52 L.Ed.2d at pp. 720-721*].) Under both state and federal authority, joinder is appropriate.

A secondary issue, raised by plaintiffs for the first time in their petition for hearing with us, involves the party upon whom falls the burden of naming those to be joined in the litigation. It seems to me that the plaintiffs have more accurate knowledge of, or at least access to, identification of those persons or entities along the chain of distribution. In the federal action the number of direct purchasers from defendants is so numerous that plaintiffs are proceeding as a class action. Defendants would have a difficult task if they were required to trace the sales to plaintiffs here through all their direct purchasers, the majority of whom may well have no relationship to this action.

Furthermore, *Code of Civil Procedure section 411* 389, subdivision (c), provides that "A complaint or cross-complaint shall state the names, if known to the pleader, of any persons as described in paragraph (1) or (2) of subdivision (a) who are not joined and [\*\*27] [\*\*\*593] the reasons why they are not joined." (See *Illinois Brick*, 431 U.S. at p. 739 [52 L.Ed.2d at p. 721] ["The plaintiff bringing the treble damages action would be required under *Fed. Rule Civ. Proc. 19(c)*, to 'state the names, if known,' of these absent claimants"].) I believe that it is incumbent

upon plaintiffs to name the required parties or to suffer the risk of dismissal if they fail to do so or fail to explain the basis for their omission.

Finally, on the burden point, it may be observed that plaintiffs had apparently named as defendants in their action three direct purchasers whom they have subsequently dismissed because of the federal court's recertification of the class. It thus appears to me that plaintiffs do indeed have knowledge of the persons through whom they must prove their case and the added obligation to plaintiffs becomes no burden at all. Plaintiffs will be required to discover the persons or entities in the chain of distribution [\*\*\*\*42] between their purchase and defendants' initial sale in order to prove that any overcharge was passed on to them. Nor are we here faced with a claim by defendants that plaintiffs must now join any users to whom plaintiffs might have sold their product thus making identification more difficult. As to such an assertion, *Illinois Brick* suggested that one possible procedural solution in such a situation was appointment of a class representative of such consumers. ([431 U.S. at p. 739 \[52 L.Ed.2d at p. 720\]](#).) Alternatively, another approach is to allow courts to inquire whether users further down the distribution chain are too remote or speculative to permit standing. (See Harris & Sullivan, *Passing On The Monopoly Overcharge: A Comprehensive Policy Analysis* (1979) 128 U.Pa.L.Rev. 269, 347, and fns. 149, 150.) In any event, plaintiffs, who will be required to identify the others in the line of [\*35] distribution leading to them in order to prevail, are best situated to identify the necessary parties.

From the foregoing, I conclude that joinder is appropriate for purchasers in the distribution chain leading to plaintiffs. I would issue a writ of prohibition directing the [\*\*\*\*43] superior court to vacate its order denying defendants' motion to dismiss and ordering it to effect joinder of other purchasers within the line of distribution leading from defendants to plaintiffs. If it appears that any of such parties are not amenable to the court's jurisdiction, then the trial court should exercise its balancing function carefully applying those factors described by the Legislature in [Code of Civil Procedure section 389, subdivision \(b\).](#)

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End of Document

## Fisher v. City of Berkeley

Supreme Court of California

December 27, 1984

S.F. No. 24675

**Reporter**

37 Cal. 3d 644 \*; 693 P.2d 261 \*\*; 209 Cal. Rptr. 682 \*\*\*; 1984 Cal. LEXIS 141 \*\*\*\*; 1985-1 Trade Cas. (CCH) P66,473

ALEXANDRA FISHER et al., Plaintiffs and Appellants, v. CITY OF BERKELEY et al., Defendants and Respondents

**Prior History:** [\*\*\*\*1] Superior Court of Alameda County, No. 536602-6, Donald P. McCullum, Judge.

**Disposition:** The judgment is affirmed. The 1982 amendment to section 14, purporting to create a presumption affecting the burden of proof, is invalid. This provision is clearly severable. (§ 16.) All other provisions of the ordinance are valid and enforceable. Each party shall bear its own costs.

### **Core Terms**

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ordinance, landlords, rent, municipal, antitrust, regulation, tenant, anti trust law, withholding, defendants', rent control, invalid, exemption, eviction, subdivision, police power, price fixing, cases, private business, anticompetitive, plaintiffs', fair return, Sherman Act, per se rule, provisions, courts, burden of proof, effects, prices, conflicts

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Governments > Local Governments > Ordinances & Regulations

#### **HN1 [down arrow] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Although price fixing by private business enterprises is clearly illegal per se, the per se rule of illegality does not apply to all municipal price-fixing ordinances. Nor can such a municipal regulation be reviewed pursuant to the traditional rule of reason, under which validity would be judged solely by the regulation's effect on competition. Instead, when the validity of an ordinance is challenged under the federal antitrust laws, courts must adapt traditional antitrust rules in order to accommodate municipal governments' legitimate interest in enacting economic and social regulations concerning local health, safety and welfare.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Local Governments > Claims By & Against

37 Cal. 3d 644, \*644 693 P.2d 261, \*\*261 209 Cal. Rptr. 682, \*\*\*682 1984 Cal. LEXIS 141, \*\*\*\*1

Governments > Local Governments > Police Power

## [\*\*HN2\*\*](#) [] **Antitrust & Trade Law, Sherman Act**

If a municipal regulation has a proper local purpose, is rationally related to the municipality's legitimate exercise of its police power, and operates in an evenhanded manner, it must be upheld against a claim that it conflicts with [15 U.S.C.S. § 1](#) or [15 U.S.C.S. § 2](#) unless opposition to the regulation demonstrates that the city's purposes could be achieved as effectively by means that would have a less intrusive impact on federal antitrust policies.

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

Real Property Law > Landlord & Tenant > Rent Regulation > Rent Control Statutes

Real Property Law > Landlord & Tenant > Rent Regulation > General Overview

## [\*\*HN3\*\*](#) [] **Fundamental Rights, Procedural Due Process**

A rent control ordinance is valid if it guarantees each landlord a fair return on his investment; it need not guarantee a fair return on the value of property.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > General Overview

## [\*\*HN4\*\*](#) [] **Appeals, Reviewability of Lower Court Decisions**

It is well settled that a court will consider on appeal a new point of law decided while the appeal is pending.

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

Civil Procedure > Appeals > Standards of Review > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

## [\*\*HN5\*\*](#) [] **Labor, Statutory Exemptions**

It is established that on appeal from judgments granting or denying an injunction, the court applies the law that is current at the time of the decision. Further, parties may advance new theories on appeal when the issue posed is purely a question of law based on undisputed facts, and involves important questions of public policy.

Governments > Local Governments > Ordinances & Regulations

Real Property Law > Landlord & Tenant > Rent Regulation > General Overview

Governments > Local Governments > Police Power

## [\*\*HN6\*\*](#) [] **Local Governments, Ordinances & Regulations**

*Cal. Const. art. XI, § 7* confers on all cities and counties the power to make and enforce within their limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws. A city's police power under

this provision can be applied only within its own territory and is subject to displacement by general state law but otherwise is as broad as the police power exercisable by the legislature itself.

Constitutional Law > Supremacy Clause > General Overview

Governments > Local Governments > Ordinances & Regulations

Governments > Local Governments > Police Power

Governments > Police Powers

## **HN7** Constitutional Law, Supremacy Clause

Although the California constitution grants cities police power equal to that of the state, we are duty-bound under the supremacy clause of the U.S. [Const. art. VI, § 2](#) to invalidate a municipal regulation that on its face violates paramount federal law.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Constitutional Law > Supremacy Clause > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Transportation Law > Interstate Commerce > Federal Preemption

## **HN8** Antitrust & Trade Law, Exemptions & Immunities

[15 U.S.C.S. § 1](#) declares all contracts, combinations or conspiracies in restraint of interstate commerce to be illegal. [15 U.S.C.S. § 2](#) declares that the act of monopolizing, or attempting to monopolize any part of interstate commerce is illegal. Quite obviously, if an ordinance conflicts with the Sherman Act, and further, if it is not exempt from antitrust scrutiny, the [supremacy clause of the federal constitution](#) requires that a court declare the ordinance invalid.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Federal Government > US Congress

37 Cal. 3d 644, \*644 693 P.2d 261, \*\*261 209 Cal. Rptr. 682, \*\*\*682 1984 Cal. LEXIS 141, \*\*\*\*1

### [\*\*HN9\*\*](#) [blue download icon] **Antitrust & Trade Law, Sherman Act**

In a dual system of government in which, under the U.S. Constitution, the states are sovereign, save only as congress may constitutionally 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. The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Constitutional Law > Congressional Duties & Powers > General Overview

Governments > Public Improvements > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Governments > Local Governments > Duties & Powers

### [\*\*HN10\*\*](#) [blue download icon] **Exemptions & Immunities, Parker State Action Doctrine**

Cities are not themselves sovereign; they do not receive all the federal deference of the states that create them.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Governments > Local Governments > Home Rule

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Governments > Local Governments > Ordinances & Regulations

### [\*\*HN11\*\*](#) [blue download icon] **Exemptions & Immunities, Parker State Action Doctrine**

A city's ordinance cannot be exempt from antitrust scrutiny unless it constitutes the action of the state itself in its sovereign capacity, or unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy.

Antitrust & Trade Law > Sherman Act > General Overview

### [\*\*HN12\*\*](#) [blue download icon] **Antitrust & Trade Law, Sherman Act**

See [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Sherman Act > General Overview

### [\*\*HN13\*\*](#) [blue download icon] **Antitrust & Trade Law, Sherman Act**

The Sherman Act applies to a municipality's noncommercial activities.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > General Overview

#### [\*\*HN14\*\*](#) [ ] **Sherman Act, Claims**

To prove a facial conflict with [15 U.S.C.S. § 1](#), a plaintiff must establish as a matter of law (a) that two or more persons acted in concert, (b) that the activities complained of affect interstate commerce, and (c) that the action constitutes an unreasonable restraint on commerce. A court may invalidate an ordinance in the abstract only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Governments > Local Governments > Police Power

#### [\*\*HN15\*\*](#) [ ] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Anticompetitive conduct by a municipality in exercise of its legitimate police power is indeed of a different complexion than similar conduct engaged in by private business enterprises and, therefore, courts must adapt or modify the application of traditional antitrust rules when reviewing the acts of municipal defendants.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

#### [\*\*HN16\*\*](#) [ ] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Under what has become termed the rule of reason, many restraints are analyzed in light of their economic effects on market conditions, and may be upheld if reasonable, i.e., if the restraint merely regulates and perhaps thereby promotes competition instead of suppressing or destroying competition.

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Energy & Utilities Law > Antitrust Issues > Pricing Conduct

Antitrust & Trade Law > Sherman Act > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

#### [\*\*HN17\*\*](#) [ ] **Sherman Act, Scope**

Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity is illegal per se. The machinery employed is immaterial. Any combination, which tampers with price structures, is engaged in an unlawful activity.

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Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

#### **HN18** Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The per se rule reflects an irrebuttable presumption that, if the court were to subject the conduct in question to a full-blown inquiry, a violation would be found under the traditional rule of reason.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

#### **HN19** Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

It is improper to dispose of an antitrust case by invoking a per se rule unless the challenged practice really fits the policy and rationale of the rule.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Governments > Local Governments > Ordinances & Regulations

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

#### **HN20** Actual Monopolization, Anticompetitive & Predatory Practices

Neither the presumption that price fixing is invariably anticompetitive, nor the fear of facilitating predatory practices, both concerns that have been expressed by the United States Supreme Court in the context of analyzing the conduct of private business defendants, justifies application of the per se rule to municipalities acting in their legitimate governmental capacities.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

#### **HN21** Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Resort to the per se rule for the purpose of administrative convenience can be justified only if the costs of formulating the rule, and of the overinclusiveness that inevitably accompanies it, are less than the attendant savings in administrative costs.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

#### **HN22** Regulated Industries, Higher Education & Professional Associations

Contrary to its name, the rule of reason does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions. Under the rule of reason, inquiry is limited to whether the challenged conduct promotes or suppresses competition. The parties will not be heard to argue, and a court may not consider, whether a policy favoring competition is in the public interest.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Governments > Local Governments > Police Power

### **HN23** [+] **Antitrust & Trade Law, Exemptions & Immunities**

To prevent unwarranted interference with a municipal government's legitimate exercise of its police power, and to accommodate the motives that underlie local government regulation, courts must develop tests that recognize a public welfare defense to alleged violation of the antitrust laws by municipalities.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Transportation Law > Interstate Commerce > Balancing Tests

### **HN24** [+] **Interstate Commerce, State Powers**

State or local regulation will be upheld against commerce clause attack if the regulation (1) does not discriminate against interstate commerce and (2) bears a rational relationship to a legitimate local purpose. In addition, the extent to which the court will permit burdens on interstate commerce depends on (3) the nature of the local interest, and whether it could be promoted with a lesser impact on interstate activities. Once these elements are satisfied, the court applies a balancing test: a regulation will be upheld unless its incidental burdens on interstate commerce are clearly excessive in relation to the putative local benefits.

Governments > Local Governments > Claims By & Against

Real Property Law > Landlord & Tenant > Rent Regulation > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Local Governments > Ordinances & Regulations

Governments > Local Governments > Police Power

### **HN25** [+] **Local Governments, Claims By & Against**

If a municipal regulation has a proper local purpose, is rationally related to the municipality's legitimate exercise of its police power, and operates in an even handed manner, it must be upheld against a claim that it conflicts with [15 U.S.C.S. § 1](#) unless the plaintiff demonstrates that the city's purposes could be achieved as effectively by means that would have a less intrusive impact on federal antitrust policies.

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Antitrust & Trade Law > Sherman Act > General Overview

Governments > Local Governments > Ordinances & Regulations

#### **HN26** [L] Antitrust & Trade Law, Sherman Act

Although a court may not invalidate local legislation by balancing the propriety of or need for a legitimate local purpose against federal antitrust policies, a court may invalidate a municipality's means of achieving a local policy if the local goal is sought to be advanced through discriminatory or irrational means, or if it could be achieved as effectively by means that can be demonstrated to likely intrude less on federal antitrust policies.

Governments > Local Governments > Police Power

#### **HN27** [L] Local Governments, Police Power

It has long been settled that municipal police power extends to objectives in furtherance of the public peace, safety, morals, health and welfare and is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life.

Antitrust & Trade Law > Sherman Act > General Overview

#### **HN28** [L] Antitrust & Trade Law, Sherman Act

See [15 U.S.C.S. § 2](#).

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

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

#### **HN29** [L] Monopolies & Monopolization, Actual Monopolization

In the context of reviewing the legality of private business conduct, the United States Supreme Court has established that the offense of monopolization consists of two elements: (1) possession of monopoly power in the relevant market, and (2) willful acquisition of that power. Monopoly power has been defined as the power to control prices or exclude competition. The existence of such power may be inferred from a defendant's predominant share of the relevant market.

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > Judgments > Pretrial Judgments > General Overview

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

#### **HN30** [L] Declaratory Judgments, State Declaratory Judgments

It is well established that a motion for judgment on the pleadings may be used in an action for declaratory relief to obtain a declaratory judgment on the merits in favor of the defendant rather than a dismissal of the plaintiff's suit.

Governments > Legislation > Interpretation

### **HN31**[ **Legislation, Interpretation**

A court will declare a regulation invalid on its face when its terms will not permit those who administer it to avoid confiscatory results in its application to the complaining parties.

Real Property Law > Landlord & Tenant > Rent Regulation > Methods

Real Property Law > Landlord & Tenant > Rent Regulation > General Overview

Real Property Law > Landlord & Tenant > Rent Regulation > Rent Control Statutes

### **HN32**[ **Rent Regulation, Methods**

Rent control agencies are not obliged by either the California constitution or the U.S. Constitution to fix rents by application of any particular method or formula.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Governments > Local Governments > Police Power

Real Property Law > Inverse Condemnation > Regulatory Takings

### **HN33**[ **Regulated Practices, Price Fixing & Restraints of Trade**

Any price-setting regulation, like most other police power regulations of property rights, has the inevitable effect of reducing the value of regulated properties. But it has long been held that such reduction in property value does not by itself render a regulation unconstitutional. Police power legislation results in a confiscatory taking only when the owner has been deprived of substantially all reasonable use of the property. Even a significant diminution in value is insufficient to establish a confiscatory taking. The fixing of prices, like other applications of the police power, may reduce the value of the property, which is being regulated. But the fact that the value is reduced does not mean that the regulation is invalid.

Real Property Law > Landlord & Tenant > Rent Regulation > General Overview

### **HN34**[ **Landlord & Tenant, Rent Regulation**

When rent ceilings of an indefinite duration are established, a mechanism must be provided for granting those increases necessary to permit landlords a just and reasonable return. The mechanism is sufficient for the required purpose only if it is capable of providing adjustments in maximum rents without a substantially greater incidence and degree of delay than is practically necessary.

Real Property Law > Landlord & Tenant > Rent Regulation > General Overview

### **HN35** [L] **Landlord & Tenant, Rent Regulation**

Some delays are inherent in any rent control scheme. But, only those delays which are longer than practically necessary to achieve the legitimate purposes of the legislation are constitutionally proscribed.

Real Property Law > Landlord & Tenant > Rent Regulation > General Overview

Real Property Law > Estates > Future Interests > Invalid Restraints & Rule Against Perpetuities

### **HN36** [L] **Landlord & Tenant, Rent Regulation**

See [Cal. Civ. Code § 711](#).

Governments > Local Governments > Ordinances & Regulations

Real Property Law > Landlord & Tenant > Rent Regulation > General Overview

Real Property Law > Estates > Future Interests > General Overview

Real Property Law > Estates > Future Interests > Invalid Restraints & Rule Against Perpetuities

### **HN37** [L] **Local Governments, Ordinances & Regulations**

[Cal. Civ. Code § 711](#) does not, and was never intended to, apply to municipal ordinances. Our review of that statute and the many cases that apply it reveals that it addresses only private restraints on alienation, and not government regulations.

Civil Procedure > ... > Pretrial Judgments > Nonsuits > General Overview

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

Evidence > Inferences & Presumptions > General Overview

### **HN38** [L] **Pretrial Judgments, Nonsuits**

The burden of producing evidence refers to a party's obligation to introduce evidence sufficient to establish a *prima facie* case, or, in other words, sufficient to avoid nonsuit. [Cal. Evid. Code §110](#). A presumption affecting the burden of producing evidence is a presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied. [Cal. Evid. Code § 603](#). The code makes clear that the purpose of such a rebuttable presumption relates solely to judicial efficiency, and does not rest on any public policy extrinsic to the action in which it is invoked. A presumption affecting the burden of producing evidence is based on an underlying logical inference that the presumed fact very likely follows from the proved fact; the presumption is designed to avoid unnecessary proof of facts likely to be true if not disputed.

Evidence > Burdens of Proof > General Overview

Evidence > Inferences & Presumptions > General Overview

#### **HN39** [ ] Evidence, Burdens of Proof

The burden of proof refers to a party's obligation to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact. [Cal. Evid. Code, §115](#). Unlike presumptions affecting the burden of producing evidence, which exist merely to expedite resolution of disputes, a presumption affecting the burden of proof is a presumption established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied, such as the policy in favor of establishment of a parent and child relationship, the validity of marriage, or the stability of titles to property. [Cal. Evid. Code § 605](#).

Governments > Local Governments > Ordinances & Regulations

Real Property Law > ... > Landlord's Remedies & Rights > Eviction Actions > General Overview

Governments > State & Territorial Governments > Relations With Governments

#### **HN40** [ ] Local Governments, Ordinances & Regulations

Although municipalities have power to enact ordinances creating substantive defenses to eviction, such legislation is invalid to the extent it conflicts with general state law.

Business & Corporate Compliance > ... > Enforcement > Duties & Liabilities of Parties > Fictitious Payees & Imposters

Evidence > Inferences & Presumptions > General Overview

#### **HN41** [ ] Duties & Liabilities of Parties, Fictitious Payees & Imposters

See [Cal. Evid. Code § 500](#).

Evidence > Inferences & Presumptions > General Overview

#### **HN42** [ ] Evidence, Inferences & Presumptions

The term "law," as used in [Cal. Evid. Code § 500](#), is defined as including constitutional, statutory, and decisional law. [Cal. Evid. Code § 160](#).

Governments > Local Governments > Ordinances & Regulations

#### **HN43** [ ] Local Governments, Ordinances & Regulations

Long before enactment of [Cal. Evid. Code §§ 500](#) and [160](#), the California Supreme Court suggested that municipal governments have no authority to depart from the common law of evidence.

37 Cal. 3d 644, \*644 693 P.2d 261, \*\*261 209 Cal. Rptr. 682, \*\*\*682 1984 Cal. LEXIS 141, \*\*\*\*1

Constitutional Law > ... > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness of Legislation

Governments > Legislation > Overbreadth

Governments > Legislation > Vagueness

#### **HN44** [blue icon] **Judicial & Legislative Restraints, Overbreadth & Vagueness of Legislation**

A court will uphold an ordinance against a vagueness challenge if it (1) gives fair notice of the practice to be avoided and (2) provides reasonably adequate standards to guide enforcement.

Governments > Local Governments > Ordinances & Regulations

Real Property Law > Landlord & Tenant > Rent Regulation > General Overview

Governments > Local Governments > Police Power

#### **HN45** [blue icon] **Local Governments, Ordinances & Regulations**

Every California city possesses the general power to make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws. *Cal. Const. art. XI, § 7*. In addition, charter cities have even greater authority: they have exclusive power to legislate over municipal affairs. [Cal. Const. art. XI, § 5\(a\)](#).

Governments > Local Governments > Charters

Governments > Local Governments > Police Power

#### **HN46** [blue icon] **Local Governments, Charters**

See [Cal. Const. art. XI, § 5\(a\)](#).

Real Property Law > Landlord & Tenant > General Overview

#### **HN47** [blue icon] **Real Property Law, Landlord & Tenant**

[Cal. Civ. Code § 1947](#) provides for the timing of the payment of rent if there is no usage or contract to the contrary.

Real Property Law > ... > Landlord's Remedies & Rights > Eviction Actions > Forcible Entry & Detainer

Real Property Law > Landlord & Tenant > General Overview

Real Property Law > Title Quality > Adverse Claim Actions > Unlawful Detainer

#### **HN48** [blue icon] **Eviction Actions, Forcible Entry & Detainer**

[Cal. Civ. Proc. § 1161](#) describes the circumstances under which a tenant is guilty of unlawful detainer.

Real Property Law > Landlord & Tenant > General Overview

**HN49** [  ] **Real Property Law, Landlord & Tenant**

Cal. Civ. Code § 1942 identifies circumstances under which a tenant may withhold rent and utilize those funds to repair deficiencies rendering the premises untenantable.

Real Property Law > Landlord & Tenant > General Overview

**HN50** [  ] **Real Property Law, Landlord & Tenant**

See Cal. Civ. Code § 1947.

Real Property Law > ... > Landlord's Remedies & Rights > Eviction Actions > Forcible Entry & Detainer

Real Property Law > Landlord & Tenant > General Overview

Real Property Law > Title Quality > Adverse Claim Actions > Unlawful Detainer

**HN51** [  ] **Eviction Actions, Forcible Entry & Detainer**

See Cal. Civ. Proc. § 1161.

Contracts Law > Types of Contracts > Lease Agreements > Oral Leases

Real Property Law > Landlord & Tenant > General Overview

**HN52** [  ] **Lease Agreements, Oral Leases**

See Cal. Civ. Code § 1942.

Real Property Law > ... > Landlord's Remedies & Rights > Eviction Actions > Forcible Entry & Detainer

Real Property Law > Landlord & Tenant > Rent Regulation > General Overview

Real Property Law > Landlord & Tenant > Rent Regulation > Rent Control Statutes

Real Property Law > Title Quality > Adverse Claim Actions > Unlawful Detainer

**HN53** [  ] **Eviction Actions, Forcible Entry & Detainer**

Although there is extensive state legislation governing many aspects of landlord-tenant relationships, some of which pertain specifically to the determination or payment of rent neither the quantity nor the content of these statutes establishes or implies any legislative intent to exclude municipal regulation of the amount of rent based on local conditions.

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Real Property Law > ... > Landlord's Remedies & Rights > Eviction Actions > Forcible Entry & Detainer

Real Property Law > ... > Landlord's Remedies & Rights > Eviction Actions > General Overview

Real Property Law > Landlord & Tenant > Lease Agreements > Standing

Real Property Law > Title Quality > Adverse Claim Actions > Unlawful Detainer

#### **HN54** [ ] **Eviction Actions, Forcible Entry & Detainer**

*Cal. Civ. Proc. Code § 1161(1)* makes the continuation of a tenant's possession after expiration of the term a form of unlawful detainer for which the landlord may recover possession in summary proceedings under [Cal. Civ. Proc. Code §§ 1164 et seq.](#)

Governments > Local Governments > Police Power

Real Property Law > Title Quality > Adverse Claim Actions > Unlawful Detainer

Governments > Legislation > Statutory Remedies & Rights

Governments > Police Powers

Real Property Law > ... > Landlord's Remedies & Rights > Eviction Actions > Forcible Entry & Detainer

Real Property Law > Landlord & Tenant > Rent Regulation > General Overview

Real Property Law > Landlord & Tenant > Rent Regulation > Rent Control Statutes

#### **HN55** [ ] **Local Governments, Police Power**

The statutory remedies for recovery of possession and of unpaid rent do not preclude a defense based on municipal rent control legislation enacted pursuant to the police power imposing rent ceilings and limiting the grounds for eviction for the purpose of enforcing those rent ceilings.

Constitutional Law > Supremacy Clause > General Overview

Governments > State & Territorial Governments > Relations With Governments

#### **HN56** [ ] **Constitutional Law, Supremacy Clause**

A field cannot properly consist of statutes unified by a single common noun. A potentially preemptive field of state regulation is an area of legislation, which includes the subject of the local legislation, and is sufficiently logically related so that a court, or a local legislative body, can detect a patterned approach to the subject.

Constitutional Law > Supremacy Clause > General Overview

Governments > Local Governments > Police Power

Governments > Legislation > Types of Statutes

Governments > State & Territorial Governments > Relations With Governments

### [HN57](#) [down] Constitutional Law, Supremacy Clause

A court may infer an intent to preempt municipal legislation only if (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; or (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.

## Headnotes/Summary

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### Summary

#### CALIFORNIA OFFICIAL REPORTS SUMMARY

In an injunctive and declaratory relief action, in which landlords challenged the validity of a city's rent control ordinance, the trial court granted the city's motion for judgment on the pleadings, declaring the ordinance constitutional on its face. The court granted the landlords leave to amend to allege facts showing that the ordinance was unconstitutional as applied, but the landlords subsequently dismissed this aspect of the complaint. (Superior Court of Alameda County, No. 536602-6, Donald P. McCullum, Judge.)

The Supreme Court affirmed. However, it held that a provision in the ordinance that an eviction within six months of a tenant's assertion of rights under the ordinance would be presumed to be a retaliatory eviction by the landlord, and that a court must "find the existence of the fact presumed unless and until its nonexistence is proven by a preponderance of the evidence," created a presumption affecting the burden of proof in conflict with [Evid. Code, § 500](#), and was thus invalid. This provision, however, was severable, and the court held that all other provisions of the ordinance were valid and enforceable. The court upheld the ordinance as against the landlords' claims that it violated [sections 1 and 2](#) of the Sherman Antitrust Act ([15 U.S.C. §§ 1, 2](#)); that the establishment by the ordinance of a fair return on investment standard, rather than a fair return on value standard, necessarily caused confiscatory results; that the ordinance precluded consideration of the effect of inflation on a landlord's investment; that the provision in the ordinance which allowed a tenant to withhold rent if his or her landlord charged excessive rents or failed to register the rental unit with the city rent stabilization board denied landlords substantive and procedural due process; and that the rent withholding provision was directly or by implication preempted by state law. (Opinion by Mosk, J., with Reynoso and Grodin, JJ., Cooperman and Mills, JJ., \* concurring. Separate concurring opinion by Bird, C. J. Separate dissenting opinion by Lucas, J.)

### Headnotes

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

##### Appellate Review § 127—Scope and Extent—New Points of Law.

--A court will consider on appeal a new point of law decided while the appeal is pending.

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

##### Injunctions [§ 1](#)—Appeals—Applicable Law.

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\* Assigned by the Chairperson of the Judicial Council.

--On appeal from judgments granting or denying an injunction, the court applies the law that is current at the time of the decision.

**CA(3)[] (3)**

**Appellate Review § 81—Record—Contents as Affecting Scope of Review—New Theories.**

--Parties may advance new theories on appeal when the issue posed is purely a question of law based on undisputed facts and involves important questions of public policy.

**CA(4)[] (4)**

**Monopolies and Restraints of Trade § 5—Actions—Jurisdiction of State Courts to Construe Federal Antitrust Statutes.**

--In an action challenging the validity of a city's rent control ordinance, the Supreme Court had jurisdiction to decide whether the ordinance conflicted with federal antitrust law. Plaintiffs did not seek a private remedy against the city; instead, they sought to enjoin enforcement of a local regulation alleged to be facially unconstitutional under the supremacy clause of the federal Constitution (U.S. Const., art. VI, cl. 2). State courts may both construe and "enforce" the federal antitrust statutes for the purpose of ruling on such facial attacks.

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

**Landlord and Tenant § 200—Rent Control Laws—Validity—Challenge Under Federal Antitrust Laws.**

--A city rent control ordinance did not, on its face, violate either section 1 of the Sherman Antitrust Act (15 U.S.C. § 1), which prohibits contracts, combinations, and conspiracies in restraint of interstate trade or commerce, or section 2 of the act (15 U.S.C. § 2), which provides that, "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 . . . shall be deemed guilty of a felony . . ." There was no conflict of interest or illegal collusion in enacting or drafting the ordinance. Rent control was rationally related to the municipality's legitimate exercise of its police power. The regulation operated in an evenhanded manner. Further, those challenging the ordinance suggested no alternative, equally effective approach to achieving the city's legitimate local purposes by means that would have a less intrusive impact on federal antitrust policies.

**CA(6)[] (6)**

**Monopolies and Restraints of Trade § 1—Invalidation of Ordinance on Its Face.**

--A court may invalidate an ordinance in the abstract, by reason of conflict with federal antitrust laws, only if the ordinance mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the ordinance.

**CA(7a)[] (7a) CA(7b)[] (7b)**

**Monopolies and Restraints of Trade § 4—Sherman Act—City Rent Control—Test for Legality.**

--In an action by landlords challenging a city rent control ordinance as in conflict with the Sherman Antitrust Act ([15 U.S.C. § 1 et seq.](#)), neither the rule that price fixing is illegal per se nor the rule of reason, which limited inquiry to whether the challenged conduct promotes or suppresses competition, was applicable. The appropriate rule was: if a municipal regulation has a proper local purpose, is rationally related to the municipality's legitimate exercise of its police power, and operates in an evenhanded manner, it must be upheld against a claim that it conflicts with [section 1](#) of the Sherman Act unless the plaintiff demonstrates that the municipality's purposes could be achieved as effectively by means that would have a less intrusive impact on federal antitrust policies.

#### [CA\(8\)](#) [ ] (8)

##### **Municipalities § 54—Ordinances, Bylaws, and Resolutions—Validity—Conflict With Constitution—Commerce Clause.**

--State or local regulation will be upheld against commerce clause attack if the regulation does not discriminate against interstate commerce and bears a rational relationship to a legitimate local purpose. In addition, the extent to which the court will permit burdens on interstate commerce depends on the nature of the local interest, and whether it could be promoted with a lesser impact on interstate activities. Once these elements are satisfied, the court applies a balancing test: a regulation will be upheld unless its incidental burdens on interstate commerce are clearly excessive in relation to the putative local benefits.

#### [CA\(9\)](#) [ ] (9)

##### **Municipalities § 26—Police Power—Scope.**

--Municipal police power extends to objectives in furtherance of the public peace, safety, morals, health, and welfare, and is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life.

#### [CA\(10\)](#) [ ] (10)

##### **Judgments § 8—On the Pleadings—Admission of Facts Alleged.**

--In an action challenging the validity of a city's rent control ordinance, the fact that the trial court's grant to the city of judgment on the pleadings denied plaintiffs the opportunity to present evidence as to their claims of confiscation, denial of equal protection, and unlawful restraint on alienation did not render the trial court's decision improper. On a defense motion for judgment on the pleadings, all facts alleged in the complaint are deemed admitted. Thus, there was no need for plaintiffs to present any evidence.

#### [CA\(11\)](#) [ ] (11)

##### **Declaratory Relief § 10—Judgment on the Pleadings.**

--A motion for judgment on the pleadings may be used in an action for declaratory relief to obtain a declaratory judgment on the merits in favor of the defendant rather than a dismissal of the plaintiff's suit.

#### [CA\(12a\)](#) [ ] (12a) [CA\(12b\)](#) [ ] (12b) [CA\(12c\)](#) [ ] (12c) [CA\(12d\)](#) [ ] (12d)

##### **Landlord and Tenant § 200—Rent Control Laws—Validity—Fair Return on Investment Standard.**

--A city rent control ordinance which provided that a landlord was to receive a fair return on his or her investment rather than on the value of his or her property was constitutional on its face. The fair return on investment standard afforded the city rent stabilization board sufficient flexibility to avoid confiscatory results. The ordinance did not preclude consideration of the effect of inflation on a landlord's investment. Moreover, the board was not precluded, in appropriate cases, from considering as "investment," a landlord's personal labor in improving his or her property, imputing a transferor's "investment" to landlords who obtained property by gift or inheritance, mortgage payments toward principal, or cash invested in later improvements in the property. Further, the investment standard did not deny equal protection by causing different possible rent ceilings for comparably valued rental units. It was reasonable to conclude that the investment standard, more effectively than a value-based standard, insured noninflated, reasonable rents. [Disapproving [Gregory v. City of San Juan Capistrano \(1983\) 142 Cal.App.3d 72 \[191 Cal.Rptr. 47\]](#), to the extent that it is contrary to this determination.]

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

**Landlord and Tenant § 200—Rent Control Laws—Validity—Confiscatory Results.**

--A rent control regulation is invalid on its face when its terms will not permit those who administer it to avoid confiscatory results in its application to the complaining parties.

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

**Landlord and Tenant § 199—Rent Control Laws—Methods for Fixing Rents.**

--Rent control agencies are not obliged by either the state or federal Constitution to fix rents by application of any particular method or formula.

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

**Landlord and Tenant § 201—Rent Control Laws—Construction and Application.**

--It is to be presumed that a city rent stabilization board will exercise its powers in conformity with the requirements of the Constitution, and if it does act unfairly, the fault lies with the board and not the law creating the board.

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

**Constitutional Law § 48—Police Power—Subjects of Regulation—Property and Its Uses.**

--Police power legislation results in a confiscatory "taking" only when the owner has been deprived of substantially all reasonable use of the property. Even a significant diminution in value is insufficient to establish a confiscatory taking.

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

**Landlord and Tenant § 199—Rent Control Laws—Rent Ceilings—Duration—Delay in Providing Adjustments.**

--When rent ceilings of an indefinite duration are established, a mechanism must be provided for granting, without delay longer than practically necessary to achieve the legitimate purposes of the rent control legislation, those increases necessary to permit landlords a just and reasonable return.

**CA(18)** [  ] (18)**Landlord and Tenant § 200—Rent Control Laws—Validity—Avoidance of Confiscatory Results.**

--The test for reviewing the facial validity of rent adjustment procedures under a city rent control ordinance was whether the ordinance on its face permitted the city rent stabilization board to avoid confiscatory results. The ordinance established a comprehensive scheme that provided for an annual, general adjustment based on "cost" factors, and thus avoided confiscatory delays inherent in a former ordinance's unit-by-unit adjustment procedure. Further, its individual adjustment procedures were designed to assure reasonably prompt consideration of landlords' claims. Since by its own terms the ordinance permitted the board to avoid confiscatory results, the ordinance, on its face, guaranteed landlords due process.

**CA(19)** [  ] (19)**Landlord and Tenant § 201—Rent Control Laws—Construction and Application—Rent Control Ordinance as Unreasonable Restraint on Alienation.**

--A city rent control ordinance did not constitute an unreasonable restraint on alienation in violation of [Civ. Code, § 711](#), by prohibiting individual rent increases based on increased interest or other expenses resulting from sale or refinancing of rental property if the landlord could reasonably have foreseen that such increased expenses could not be covered by the existing rent schedule. The ordinance also provided that no provision therein could be applied so as to prohibit the city rent stabilization board from granting an individual rent adjustment as demonstrated to be necessary to provide a fair return on investment. Moreover, [Civ. Code, § 711](#), does not apply to municipal ordinances.

**CA(20)** [  ] (20)**Perpetuities and Restraints on Alienation [§ 1](#)—Prohibition Against Unreasonable Restraint on Alienation—Applicability to Municipal Ordinances.**

--[Civ. Code, § 711](#), prohibiting unreasonable restraints on alienation, does not apply to municipal ordinances. It addresses only private restraints on alienation, and not government regulations.

**CA(21a)** [  ] (21a) **CA(21b)** [  ] (21b)**Landlord and Tenant § 200—Rent Control Laws—Validity—Presumption of Retaliatory Eviction.**

--A provision in a city rent control ordinance that an eviction within six months of a tenant's assertion of rights under the ordinance would be presumed to be a retaliatory eviction by the landlord, and that a court must "find the existence of the fact presumed unless and until its nonexistence is proven by a preponderance of the evidence," created a presumption affecting the burden of proof. Since [Evid. Code, § 500](#), allocates the burden of proof of a fact to the party whose claim for relief or defense relies on the existence or nonexistence of the fact, and since the Legislature deliberately excluded ordinances from those sources of law that may, under the terms of [Evid. Code, § 500](#), change the traditional allocation of the burden of proof, the provision was thus in direct conflict with [Evid. Code, § 500](#), and therefore invalid.

**CA(22)** [  ] (22)

**Municipalities § 55—Ordinances, Bylaws, and Resolutions—Validity—Conflict With Statutes or Charter—Defenses to Eviction.**

--Although municipalities have power to enact ordinances creating substantive defenses to eviction, such legislation is invalid to the extent that it conflicts with general state law.

**CA(23) [ ] (23)**

**Landlord and Tenant § 200—Rent Control Laws—Validity—Rent Withholding—Due Process.**

--The provision in a city rent control ordinance which allowed a tenant to withhold rent if a landlord charged excessive rents or failed to register the rental unit with the city rent stabilization board, did not deny landlords substantive due process. The remedy of rent withholding was rationally related to the legitimate purpose of achieving compliance with the ordinance. The provision gave fair notice to landlords of that conduct which was proscribed. The determination of a tenant's good faith in invoking the remedy would be a question of law; thus, the provision posed little threat of arbitrary application. Nor did the ordinance deny landlords procedural due process; its sole effect was to create a substantive defense to eviction for nonpayment of rent if the tenant's withholding was found to have been made pursuant to a good faith belief that the landlord had not complied with the ordinance. Further, it did not deprive the landlord of rent due, since back rent could be recovered once compliance with the ordinance was established.

**CA(24a) [ ] (24a) CA(24b) [ ] (24b)**

**Landlord and Tenant § 200—Rent Control Laws—Validity—Tenant Withholding of Rent—Preemption by State Law.**

--The provision in a city rent control ordinance which allowed a tenant to withhold rent when a landlord charged excessive rents or failed to register the rental unit with the city rent stabilization board was not directly or by implication preempted by either *Code Civ. Proc.*, § 1161, which describes the circumstances under which a tenant is guilty of unlawful detainer, [Civ. Code, § 1942](#), the "repair and deduct statute," or [Civ. Code, § 1947](#), which provides for the timing of the payment of rent if there is no usage or contract to the contrary. Although the ordinance provided a defense which eliminated one ground for eviction, this exercise of the municipality's police power did not bring the provision into conflict with state law. The statutory remedy for recovery of possession did not preclude limitations on grounds for eviction for the purpose of enforcing a local rent control regulation. Further, neither [Civ. Code, § 1942](#), nor [Civ. Code, § 1947](#), involves the field of defenses to eviction or enforcement of local rent control ordinances.

**CA(25) [ ] (25)**

**Municipalities § 56—Ordinances, Bylaws, and Resolutions—Validity—Conflict With Statutes or Charter—Test for Preemption—Preemptive "Field."**

--A potentially preemptive "field" of state regulation is an area of legislation which includes the subject of the local legislation, and is sufficiently logically related so that a court, or a local legislative body, can detect a patterned approach to the subject.

**CA(26) [ ] (26)**

**Municipalities § 56—Ordinances, Bylaws, and Resolutions—Validity—Conflict With Statutes or Charter—Test for Preemption.**

--A court may infer an intent to preempt local legislation only if the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern, or the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.

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**Judges:** Opinion by Mosk, J., with Reynoso and Grodin, JJ., Cooperman and Mills, JJ., \* concurring. Separate concurring opinion by Bird, C. J. Separate dissenting opinion by Lucas, J.

**Opinion by:** MOSK

## Opinion

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[\*651] [\*\*269] [\*\*\*690] Plaintiffs, a group of landlords who own property in the City of Berkeley, appeal from a judgment of the Alameda County Superior Court holding defendants' rent control ordinance unconstitutional on its face. We substantially affirm the judgment.

Plaintiffs claim that defendants' ordinance conflicts with, and hence is preempted by, federal antitrust law because it is a combination that unreasonably restrains interstate commerce in violation of section 1 of the Sherman Antitrust Act (Act or Sherman Act). (15 U.S.C.) They also claim that it constitutes monopolization, or attempted monopolization, in violation [\*\*\*\*3] of section 2 of the Act. (*Ibid.*) HN1↑ Although price fixing by private business enterprises is clearly illegal per se, we hold that the per se rule of illegality does not apply to the municipal defendants' price-fixing ordinance in this case. Nor can such a municipal regulation be reviewed pursuant to the traditional rule of reason, under which validity would be judged solely by the regulation's effect on competition. Instead, we have determined that when [\*652] the validity of an ordinance is challenged under the federal antitrust laws, courts must adapt traditional antitrust rules in order to accommodate municipal governments' legitimate interest in enacting economic and social regulations concerning local health, safety and welfare. We conclude that HN2↑ if a municipal regulation has a proper local purpose, is rationally related to the municipality's legitimate exercise of its police power, and operates in an evenhanded manner, it must be upheld against a claim that it conflicts with section 1 or 2 of the Sherman Act unless the plaintiff demonstrates that the city's purposes could be achieved as effectively by means that would have a less intrusive impact on federal antitrust [\*\*\*\*4] policies. No such means have been proposed. Under the foregoing test the ordinance in question has not been shown to conflict with federal antitrust laws.

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\* Assigned by the Chairperson of the Judicial Council.

We also conclude that defendants' ordinance is facially constitutional under both the federal and state due process clauses: HN3[<sup>↑</sup>] a rent control ordinance is valid if it guarantees each landlord a fair return on his investment; it need not guarantee a fair return on the value of property. Furthermore, the ordinance on its face provides for reasonably prompt access to adjustment procedures for those landlords seeking to increase rents. Additionally, we conclude that the rent withholding provisions of the ordinance do not violate landlords' due process rights, nor are such provisions preempted by general state law. Finally, however, we have determined that the ordinance is invalid to the extent it purports to create an evidentiary presumption affecting the burden of proof in regard to retaliatory evictions, but that such a provision is severable, and does not affect the validity of the remainder of the ordinance.

#### *Background and Procedure*

In June 1980 the Berkeley electorate enacted initiative "Measure D," the "Rent Stabilization [\*\*\*\*5] and Eviction for Good Cause Ordinance," (hereafter ordinance). The ordinance affects approximately 23,000 rental units.

Section 3 sets out the purpose of the ordinance: It is intended "to regulate residential rent increases in the City of Berkeley [\*\*270] and to protect tenants from unwarranted [\*\*\*691] rent increases and arbitrary, discriminatory, or retaliatory evictions, in order to help maintain the diversity of the Berkeley community and to ensure compliance with legal obligations relating to the rental of housing. This legislation is designed to address the City of Berkeley's housing crisis, preserve the public peace, health and safety, and advance the housing policies of this City with regard to low and fixed income persons, minorities, students, handicapped, and the aged."

Section 5 exempts from the ordinance government-owned units, transient units, cooperatives, hospitals, certain small owner-occupied buildings, and [\*653] all newly constructed buildings. Section 6 establishes a rent stabilization board (Board) of nine commissioners, and sets out its powers, duties, rules and procedures, as well as a means of ending rent control if the city's vacancy rate [\*\*\*\*6] surpasses 5 percent. Section 8 requires landlords to register with the Board, furnish specified information, and pay a registration fee for each unit.

Section 10 establishes base rent ceilings <sup>1</sup> that landlords may not exceed except as permitted by the Board under sections 11 and 12. Section 11 provides for annual general adjustment of rent ceilings to cover increases or decreases relating to utilities and taxes. In making such general adjustment, the Board is given authority to adopt a general formula based on available data relating to such expenses. If a landlord is not satisfied with this general increase, he may petition the Board for an individual adjustment under section 12. In ruling on this petition the Board must consider many nonexclusive factors, including a landlord's individual costs, but in no event may it deny a rent increase needed to allow a landlord a "fair return on investment."

[\*\*\*\*7] Section 13 prohibits evictions except for enumerated factors constituting "good cause." Section 14 prohibits retaliatory evictions, and states that any eviction action taken against a tenant within six months of the tenant's assertion of rights under the ordinance shall be "presumed" to be retaliatory.

Section 15 sets out remedies, including rent withholding, both for a landlord's violation of rent ceilings and failure to register. Section 16 is a severability clause. Section 17 declares that the provisions of the ordinance may not be waived. Section 18 provides for judicial review of any act of the Board.

Plaintiffs filed suit in August 1980 seeking injunctive and declaratory relief against enforcement of the ordinance. They alleged the ordinance is unconstitutional on its face and as applied. The trial court granted defendants' motion for judgment on the pleadings, declaring the ordinance constitutional on its face. The court granted plaintiffs leave to amend to allege facts showing that the ordinance is unconstitutional as applied, but plaintiffs subsequently dismissed this aspect of the complaint. Plaintiffs appeal from the trial court's order granting defendants

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<sup>1</sup> The base rent ceiling is the rent as of May 31, 1980. Regarding rental units for which there was no periodic rent in effect on that date, or during the six months preceding that date, the base rent ceiling is a "good faith estimate" of the median rent in effect for comparable units in the City of Berkeley on May 31, 1980.

judgment [\*\*\*\*8] on the pleadings. The [\*654] sole question before us, therefore, is whether the ordinance is invalid on its face.<sup>2</sup>

After the case was fully briefed on the merits in the Court of Appeal, but before that court rendered its decision, the United States Supreme Court decided *Community* [\*\*271] [Communications Co. v. City of Boulder \(1982\) 455 U.S. 40 \[70 L.Ed.2d 810, 102 S.Ct. 1692\] 835](#), holding a home rule municipality subject to federal antitrust scrutiny. We granted hearing, and soon thereafter the issue of the effect of *Boulder*, and antitrust law generally, was raised for the first time by amicus curiae. Both parties and additional amici curiae for both parties were granted leave to file, and have filed, supplemental briefs addressing inter alia antitrust issues generally, and the *Boulder* issue specifically.

Therefore, although plaintiffs claim the ordinance is facially invalid in whole or in part on due process and statutory grounds, they also assert that an alleged conflict between the ordinance and federal antitrust law presents a threshold issue dispositive of this appeal. [CA\(1\)\[↑\] \(1\)](#) [CA\(2\)\[↑\] \(2\)](#) [CA\(3\)\[↑\] \(3\)](#) (See fn. 3.) Defendants likewise request that we address and resolve plaintiffs' antitrust contentions.<sup>3</sup> Because of the extreme importance of the issues presented, we proceed to analyze plaintiffs' antitrust claims.

#### [\*\*\*\*10] [\*655] I. Antitrust Issues

In [Birkenfeld v. City of Berkeley \(1976\) 17 Cal.3d 129 \[130 Cal.Rptr. 465, 550 P.2d 1001\]](#), we held Berkeley's former rent control ordinance facially unconstitutional because its procedures for rent adjustment were "inexcusably cumbersome" and would have deprived landlords of due process if permitted to take effect. ([Id. at p. 173](#).) Before reaching that conclusion, however, we addressed the threshold question of the city's power to provide for rent

<sup>2</sup> While the case was pending on appeal the Berkeley electorate enacted the "Tenants' Rights Amendments Act of 1982," revising certain sections of the ordinance, including two sections relevant to our inquiry in this case: section 11, quoted *post* at pages 687-689, footnote 44, and section 14, quoted *post* at page 693, footnote 54. Although the amendment was not before the trial court at the time it held the ordinance facially constitutional, any issues that may arise as a result of the amendments are questions of law and thus may be properly resolved by this court in determining facial validity. Therefore we will review the regulation as amended.

<sup>3</sup> [HN4\[↑\]](#) It is well settled that a court will consider on appeal a new point of law decided while the appeal is pending. ([Claremont Imp. Club v. Buckingham \(1948\) 89 Cal.App.2d 32, 33 \[200 P.2d 47\]](#).) Although prior to *Boulder* there existed a plausible basis for alleging a municipal regulation to be in conflict with antitrust laws pursuant to [City of Lafayette v. Louisiana Power & Light Co. \(1978\) 435 U.S. 389 \[55 L.Ed.2d 364, 98 S.Ct. 1123\]](#) (discussed *post*, pp. 658-659), that case involved proprietary, rather than regulatory conduct, and hence such a claim could not reasonably have been expected to survive demurrer. In a real sense, therefore, the spectre of antitrust scrutiny of municipal regulatory conduct first arose in *Boulder*.

[HN5\[↑\]](#) It is also established that on appeal from judgments granting or denying an injunction, the court applies the law that is current at the time of the decision. ([Cal-Dak Co. v. Sav-On Drugs, Inc. \(1953\) 40 Cal.2d 492, 496-497 \[254 P.2d 497\]](#) [congressional amendment of antitrust laws while appeal pending given effect to exempt a manufacturer from Sherman Act § 1 charges]; see also [M Restaurants, Inc. v. San Francisco Local Joint Exec. Bd. Culinary etc. Union \(1981\) 124 Cal.App.3d 666, 673 \[177 Cal.Rptr. 690\]](#).) Further, we have held that parties may advance new theories on appeal when the issue posed is purely a question of law based on undisputed facts, and involves important questions of public policy. ([Frink v. Prod \(1982\) 31 Cal.3d 166, 170 \[181 Cal.Rptr. 893, 643 P.2d 476\]](#) (plurality decision); [Carman v. Alvord \(1982\) 31 Cal.3d 318, 324 \[182 Cal.Rptr. 506, 644 P.2d 192\]](#); [UFITEC, S.A. v. Carter \(1977\) 20 Cal.3d 238, 249, fn. 2](#) [142 Cal.Rptr. 279, 571 P.2d 990]; [Wong v. Di Grazia \(1963\) 60 Cal.2d 525, 532, fn. 9 \[35 Cal.Rptr. 241, 386 P.2d 817\]](#); [Tyre v. Aetna Life Ins. Co. \(1960\) 54 Cal.2d 399, 405 \[6 Cal.Rptr. 13, 353 P.2d 725\]](#); [Burdette v. Rollefson Construction Co. \(1959\) 52 Cal.2d 720, 725-726 \[344 P.2d 307\]](#).) In [Di Grazia, supra](#), we rejected defendants' contention that because an issue regarding the rule against perpetuities had not been raised at trial, it would be improper for this court to address the question on appeal. Justice Tobriner, writing for the court, suggested that defendants' contention was meritless, and that "in any event, the issue as to the rule against perpetuities [is of] considerable public interest; it has been fully argued before this court; we, accordingly, dispose of the issue on its merits." ([60 Cal.2d 525, 532, fn. 9](#).) We believe that the validity of municipal rent controls under antitrust law raises extremely significant issues of public policy and public interest. (See, e.g., Goodrich, *The Limits of Municipal Power* (Mar. 1984) 4 Cal.Law. 26; Spiegel, *Local Governments and the Terror of Antitrust* (1983) 69 A.B.A.J. 163.)

control. We observed that [HN6](#) our Constitution confers on all cities and counties the power to "make and enforce within [their] limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws" (*Cal. Const., art. XI, § 7*) and noted that "[a] city's police power under this provision can be applied only within its own territory and is subject to displacement by general state law but otherwise is as broad as the police power exercisable by the Legislature itself." ([17 Cal.3d at p. 140](#).) Although there is [\\*\\*272](#) extensive regulation governing various aspects of landlord-tenant relations, "California has no state rent control statute." (*Id.* [I\\*\\*\\*693](#) [\\*\\*\\*\\*11](#) [at p. 141](#).) We therefore concluded that the Berkeley ordinance was within the city's police power: there was "no legislative indication of 'a paramount state concern [which] will not tolerate further or additional local action.'" (*Id. at p. 142*, quoting [In re Hubbard \(1964\) 62 Cal.2d 119, 128 \[41 Cal.Rptr. 393, 396 P.2d 809\]](#).)

Conceding that local rent control is not preempted by state law, plaintiffs champion federal **antitrust law** in order to attack *Birkenfeld*'s premise that the police power of a city is as broad as that power exercisable by the Legislature.

Plaintiffs observe that [HN7](#) although our state Constitution grants cities police power equal to that of the state, we are duty-bound under the supremacy clause of the federal Constitution (art. VI, [cl. 2](#)) to invalidate a municipal regulation that on its face violates paramount federal law. ([Sail'er Inn, Inc. v. Kirby \(1971\) 5 Cal.3d 1, 10-11 \[95 Cal.Rptr. 329, 485 P.2d 529, 46 \]\\*6561 A.L.R.3d 351](#).) They argue that (1) the city's ordinance, on its face, conflicts with federal **antitrust law**; that (2) under *Boulder*, the ordinance is not exempt from antitrust scrutiny, and hence (3) defendants have [\\*\\*\\*\\*12](#) no authority to enforce the regulation in question. [CA\(4\)](#) [\(4\)](#) We clearly have jurisdiction to decide such claims. ([Rice v. Norman Williams Co. \(1982\) 458 U.S. 654, 659-661 \[73 L.Ed.2d 1042, 1049-1051, 102 S.Ct. 3294\]](#); see [Rice v. Alcoholic Bev. etc. Appeals Bd. \(1978\) 21 Cal.3d 431, 439-446 \[146 Cal.Rptr. 585, 579 P.2d 476, 96 A.L.R.3d 613\]](#) [state retail price maintenance scheme for distilled liquor invalidated under [§ 1](#) of the Sherman Act]; [Midcal Aluminum, Inc. v. Rice \(1979\) 90 Cal.App.3d 979, 982-984 \[153 Cal.Rptr. 757\]](#) [enjoining enforcement of state wholesale price maintenance scheme for wine as invalid under [§ 1](#) of the Act], affd. *sub nom.* [California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc. \(1980\) 445 U.S. 97 \[63 L.Ed.2d 233, 100 S.Ct. 937\]](#); [Capiscean Corp. v. Alcoholic Bev. etc. Appeals Bd. \(1979\) 87 Cal.App.3d 996, 999-1000 \[151 Cal.Rptr. 492\]](#) [invalidating state retail price maintenance scheme under [Rice v. Alcoholic Bev. etc. Appeals Bd.](#), *supra*, 21 Cal.3d 431].) <sup>4</sup>

#### [\\*\\*\\*\\*13\] A. State Action, Municipal Action, and Federal Antitrust Law](#)

In order to prohibit private businesses from practicing various anticompetitive activities in interstate commerce, nearly a century ago the United States Congress exercised its broad authority under the commerce clause (U.S. Const., art. I, § 8, cl. 3) to enact the Sherman Act. (Pub.L. No. 51-190, 26 Stat. 209 (1890) codified as amended at [15 U.S.C. §§ 1-7](#); see [Parker v. Brown \(1943\) 317 U.S. 341, 351 \[87 L.Ed. 315, 326, 63 S.Ct. 307\]](#), citing Remarks of Sen. Sherman, 21 Cong. Rec. 2457, 2562 (1890).) Two sections of the Act are relevant to the present case. [HN8](#) [Section 1](#) declares all contracts, combinations or conspiracies in restraint of interstate commerce to be illegal. [Section 2](#) declares that the act of monopolizing, or attempting to monopolize any part of interstate commerce is illegal. Quite obviously, if defendants' ordinance conflicts with the Act, and further, if it is not exempt from antitrust scrutiny, the supremacy clause of the federal [\\*\\*2731 Constitution](#) requires that we declare the ordinance invalid.

<sup>4</sup>We are aware that some decisions broadly declare that "state courts have no jurisdiction to construe or enforce the federal antitrust laws." ([Classen v. Weller \(1983\) 145 Cal.App.3d 27, 34, fn. 2 \[192 Cal.Rptr. 914\]](#) [concession by counsel]; [Union Oil v. Chandler \(1970\) 4 Cal.App.3d 716, 726 \[84 Cal.Rptr. 756\]](#).) Plaintiffs in this case, however, do not seek a private remedy against defendants; instead, they seek to enjoin enforcement of a local regulation alleged to be facially unconstitutional under the supremacy clause. It is clear that state courts may both construe and "enforce" the federal antitrust statutes for the purpose of ruling on such facial attacks. ([Rice v. Norman Williams Co. \(1982\) 458 U.S. 654, 658, fn. 4 \[73 L.Ed.2d 1042, 1049, 102 S.Ct. 3294\]](#) revg. on other grounds [Norman Williams Co. v. Rice \(1980\) 108 Cal.App.3d 348, 354, fn. 2 \[166 Cal.Rptr. 563\]](#).) We do not construe *Classen* or *Union Oil* to suggest that state courts lack jurisdiction to review facial attacks premised on alleged conflict with federal antitrust laws.

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[\*657] [\*\*\*694] Over 40 years ago, the Supreme Court in *Parker, supra*, held [\*\*\*\*14] this state's raisin marketing program, which restricted competition and maintained prices in order to protect the local raisin market, was not subject to federal antitrust scrutiny. The court found "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. [HN9](#) In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally 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. [para.] The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state . . . . [para.] There is no suggestion of a purpose to restrain state action in the Act's legislative history." ([317 U.S. at pp. 350-351 \[87 L.Ed. at p. 326\]](#).) The *Parker* court concluded that "[the] state in adopting and enforcing the . . . program . . . as a sovereign, imposed the restraint as an act of government which the Sherman Act [\*\*\*15] did not undertake to prohibit." ([Id. at p. 352 \[87 L.Ed. at p. 327\]](#).)

In a series of cases over the last decade the United States Supreme Court has considered the extent to which private, or nongovernmental, business enterprises may come under the protection conferred in *Parker*.<sup>5</sup> And in two [\*658] recent decisions, the [\*\*274] court has addressed the conditions under which local governments may gain *Parker* [\*\*\*695] protection. The first case, [City of Lafayette v. Louisiana Power & Light Co. \(1978\) 435 U.S. 389 \[55 L.Ed.2d 364, 98 S.Ct. 1123\]](#), involved two Louisiana municipalities that owned and operated their own electric

<sup>5</sup> In [Goldfarb v. Virginia State Bar \(1975\) 421 U.S. 773 \[44 L.Ed.2d 572, 95 S.Ct. 2004\]](#), the court held minimum fee schedules for lawyers enforced by the state bar subject to scrutiny under the Act. The state bar's status as an agent of the state supreme court did not make its fee schedule "state action" because such anticompetitive conduct was not "compelled by direction of the State acting as a sovereign." ([Id. at p. 791 \[44 L.Ed.2d at p. 587\]](#).) The court again denied protection from antitrust scrutiny in [Cantor v. Detroit Edison Co. \(1976\) 428 U.S. 579 \[49 L.Ed.2d 1141, 96 S.Ct. 3110\]](#). In that case the state public utility commission approved an anticompetitive tariff requiring the defendant to provide its customers "free" light bulbs. Rejecting the utility's argument that commission approval "compelled" it to operate the light bulb distribution program despite its anticompetitive effects, the court held that mere approval was insufficient to invoke state action protection because it signified only state neutrality toward the conduct in question. ([Id. at p. 585 \[49 L.Ed.2d at pp. 1146-1147\]](#).)

In the following year, the court recognized state action protection in [Bates v. State Bar of Arizona \(1977\) 433 U.S. 350 \[53 L.Ed.2d 810, 97 S.Ct. 2691\]](#). In *Bates* the state supreme court, acting as the state's ultimate authority over the practice of law, promulgated American Bar Association-sponsored disciplinary rules banning lawyer advertising. The United States Supreme Court held that "[although] the State Bar plays a part in the enforcement of the rules, its role is completely defined by the court; the [State Bar] acts as the agent of the court under its continuous supervision." ([Id. at p. 361 \[53 L.Ed.2d at p. 822\]](#).) The court concluded that the state's anticompetitive policy was "clearly and affirmatively expressed" ([id. at p. 362 \[53 L.Ed.2d at p. 822\]](#)), and that the state bar's conduct was sufficiently compelled by the state to warrant protection from antitrust scrutiny. ([Id. at p. 363 \[53 L.Ed.2d at pp. 822-823\]](#).)

In [New Motor Veh. Bd. of Cal. v. Orrin W. Fox, Co. \(1978\) 439 U.S. 96 \[58 L.Ed.2d 361, 99 S.Ct. 403\]](#), and [California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc. \(1980\) 445 U.S. 97 \[63 L.Ed.2d 233, 100 S.Ct. 937\]](#), the court again addressed the state action exemption as it applies to private business enterprises. In *Orrin Fox* the court held that a state-imposed scheme that restricted intrabrand competition in the sale of new automobiles was exempt from scrutiny under the antitrust laws because the program operated under "clearly articulated and affirmatively expressed" legislative guidelines. ([439 U.S. at p. 109 \[58 L.Ed.2d at p. 376\]](#).) In *Midcal*, on the other hand, the court held that a state-imposed maximum resale price maintenance system, affecting all wine producers and wholesalers in this state, was not exempt from antitrust laws. Although the scheme was "clearly articulated and affirmatively expressed as state policy," it was not "actively supervised" by the State itself. ([445 U.S. at p. 105 \[63 L.Ed.2d at p. 243\]](#), quoting [Lafayette, supra, 435 U.S. 389, 410 \[55 L.Ed.2d 364, 381\]](#) (plur. opn.).)

Most recently, in [Hoover v. Ronwin \(1984\) 466 U.S. 558 \[80 L.Ed.2d 590, 104 S.Ct. 1989\]](#), the court, on a four-to-three vote, found Arizona state bar examiners exempt from antitrust scrutiny. The majority held the examiners' actions constituted action of the sovereign itself, and hence exempt from antitrust scrutiny under *Parker* (*id.* at p. -- [[80 L.Ed.2d at p. 599, 104 S.Ct. at p. 1995](#)]). Therefore, the majority found it unnecessary to consider whether the alleged anticompetitive policy was "clearly articulated" or "actively supervised." (*Id.* at p. -- [[80 L.Ed.2d at pp. 599-600, 104 S.Ct. at pp. 1995-1996](#)].)

utility systems. Louisiana Power alleged that the municipalities had engaged in illegal tying arrangements with their customers.

[\*\*\*\*16] The majority rejected the municipalities' contention that antitrust laws were intended to protect only against abuses by private businesses and are not applicable to municipalities that "exist to serve the public weal." (*Id. at p. 403 [55 L.Ed.2d at p. 376]*.) The court observed that the defendants were not motivated solely by desire to benefit the public. Instead, like "[every] business enterprise" (*ibid.*), their decisions may be motivated by the goal of "realizing maximum benefits to [themselves] without regard to extraterritorial impact and regional efficiency." (*Id. at p. 404 [55 L.Ed.2d at p. 377]*.) A majority therefore rejected the argument that the two municipalities -- both of which "[acted] as owners and providers of services" (*id. at p. 408 [55 L.Ed.2d at p. 379]*), were immune from antitrust scrutiny.

A plurality opinion by Justice Brennan then rejected the contention that municipalities, simply by reason of their status as such, are exempt from antitrust laws. "Parker's limitation of the exemption . . . to 'official action directed by [the] state,' arises from the basis for the 'state action' doctrine -- that given our 'dual system of [\*\*\*\*17] government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority,' 317 U.S., at 351, a congressional purpose to subject to antitrust control the States' acts of government will not lightly be inferred. To extend that doctrine to municipalities would be inconsistent with that limitation. HN10<sup>↑</sup> Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them." (435 U.S. at pp. 411-412 [55 L.Ed.2d at p. 382].) Still, the plurality suggested, a municipality [\*659] could come under the *Parker* exemption if it acts pursuant to state policy to displace competition with regulation or monopoly public service. Deviating slightly from the court's requirement in the private business enterprise cases that the state must have "compelled" the conduct in order for the activity to come within the *Parker* exemption (*ante*, pp. 657-658, fn. 5), the plurality stated that state direction or authorization of the anticompetitive conduct would be sufficient to trigger the exemption for municipalities. (*Id. at p. 417 [55 L.Ed.2d at pp. 385-386]*).<sup>6</sup>

[\*\*\*\*18] In a concurrence, Chief Justice Burger emphasized his view that the municipalities' ownership and operation of utility companies constituted business activities pursuant to their proprietary functions (*id. at p. 422-425 [55 L.Ed.2d at pp. 388-391]*), and hence any question of exemption should meet the more stringent "compulsion" standard applicable to private parties seeking the protection of *Parker*. The Chief Justice appeared to suggest that municipalities' nonproprietary activities should be exempt from antitrust scrutiny.

Four years later the United States Supreme Court decided Community Communications Co. v. City of Boulder, supra, 455 U.S. 40. The city, apparently acting in its regulatory capacity, placed a moratorium on expansion of plaintiff's cable television service for three months in order to allow competing companies to make bids to enter a new geographic market under a proposed model ordinance.<sup>7</sup> Plaintiff sued to enjoin the [\*275] moratorium, claiming inter alia that it constituted [\*\*\*\*696] a conspiracy between the city and a potential competitor, and that it restrained trade in violation of section 1 of the Sherman Act. The district court [\*\*\*\*19] granted an injunction, rejecting the city's argument that its actions were protected as a valid exercise of its police power, or that it was exempt from antitrust scrutiny under *Parker*. A divided Tenth Circuit Court of Appeals reversed, distinguishing *Lafayette* on the ground that, in contrast to the activity in that case, "no proprietary interest of the City is here involved." (630 F.2d 704, 708.) The United States Supreme Court in turn reversed, holding over the dissent of Justice Rehnquist that HN11<sup>↑</sup> the city's ordinance "cannot be exempt from antitrust scrutiny unless it constitutes the action of the State . . . itself in its sovereign capacity, see *Parker*, or unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy, see *City of Lafayette* . . .

<sup>6</sup> Four justices dissenting, led by Justice Stewart, maintained that exemption applied because "petitioners are governmental bodies, not private persons, and their actions are 'acts' of government' which *Parker v. Brown* held are not subject to the Sherman Act." (435 U.S. at p. 426 [55 L.Ed.2d at p. 391].)

<sup>7</sup> Plaintiff was assignee of a 20-year, revocable, nonexclusive permit to conduct a cable television business within the city limits. (455 U.S. at p. 44 [70 L.Ed.2d at p. 814].)

. ." ( *Boulder, supra, 455 U.S. 40, 52 [70 L.Ed.2d 810, 819]*.) The court rejected the city's argument that merely because the state, under its home rule amendment, had vested the city with ""every power theretofore possessed by the legislature . . . in local and municipal affairs"" ( *id. at p. 52 [70 L.Ed.2d at p. 819]*, italics [\*\*\*\*20] in original), regulation of cable television was therefore an "act of government" performed by the city *acting as the state* in local matters . . . ." ( *Id. at p. 53 [70 L.Ed.2d at p. 820]*, italics in original.) Granting of home-rule power, the court reasoned, merely indicates neutrality respecting the challenged actions, and does not satisfy the "clear articulation and affirmative expression" of state policy requirement. ( *Id. at p. 55 [70 L.Ed.2d at p. 821]*.) The court reiterated the *Lafayette* plurality's view that the *Parker* exemption is premised on sovereignty, and that because municipalities are not sovereign, they fall outside the exemption. ( *Id. at pp. 50-51 [70 L.Ed.2d at p. 818]*.)

Accordingly, much of the parties' energy in the present case has been directed toward arguing their respective views [\*\*\*\*21] as to whether defendants' ordinance falls within or without the *Boulder* state action exemption.<sup>8</sup> Consideration of *Boulder*'s exemption standard at this stage in our analysis, however, is premature. Application of the state action exemption principle becomes necessary only after we determine that there is "truly a conflict between the Sherman Act and the challenged regulatory scheme." ( *First American Title Co. of South Dakota v. South Dakota Land Title Ass'n* (8th Cir. 1983) 714 F.2d 1439, 1452; see also *Rice v. Norman Williams Co., supra, 458 U.S. 654, 662, fn. 9 [73 L.Ed.2d 1042, 1052]*; *Midcal, supra, 445 U.S. 97, 102 [63 L.Ed.2d 233, 241]*; *Parker, supra, 317 U.S. 341, 350 [87 L.Ed. 315, 325-326]*; *Rice, supra, 21 Cal.3d 431, 439-446*; *Lewis-Westco & Co. v. Alcoholic Bev. etc. Appeals Bd.* (1982) 136 Cal.App.3d 829, 834-837 [186 Cal.Rptr. 552].)

#### [\*\*\*\*22] B. Facial Validity of the Ordinance Under Section 1 of the Sherman Act

**CA(5a)[↑] (5a)** Plaintiffs contend that the ordinance, on its face, conflicts with, and hence is preempted by, section 1 of the Sherman Act. (See *ante*, fn. 8.) [\*661] **HN12[↑]** That section states: "Every [\*\*276] contract, combination . . . [\*\*\*697] or conspiracy, in restraint of trade or commerce among the several States . . . is . . . declared to be illegal." ( 15 U.S.C. § 1.)

Defendants and amici broadly respond that no provision of the Act was intended to apply to city ordinances designed to protect or further local health, safety, or general welfare, and hence the ordinance in question cannot violate the antitrust laws. They suggest that only local legislation designed to achieve commercial or proprietary interests -- either from city ownership of property or through fees or taxes pursuant to franchise awards -- are properly subject to antitrust scrutiny.

Although defendants' view has rational appeal, we are bound by the United States Supreme Court's implicit rejection of that theory in *Lafayette* and *Boulder*. In both of those cases the court addressed the applicability of state action exemption to [\*\*\*\*23] municipal defendants. However, in order to reach the question of exemption from antitrust laws, in both decisions the court necessarily assumed that each case presented a violation of antitrust laws. (E.g., *First American Title Co., supra, 714 F.2d 1439, 1451-1452*.) While standing alone, *Lafayette* could be read to support defendants' view that only the commercial activities of municipalities are subject to antitrust scrutiny ( *Lafayette, 435 U.S. 389, 418-426 [55 L.Ed.2d 364, 386-391]*, Burger, C. J., conc.), we must conclude that *Boulder* forecloses any argument that **HN13[↑]** the Act does not apply to a municipality's "noncommercial" activities. The alleged anticompetitive activity in that case concerned merely the imposition of a three-month moratorium on

<sup>8</sup> Justice Rehnquist, writing for the dissent in *Boulder*, correctly noted that the *Parker* court cast its decision in the language of preemption. ( *Parker, supra, 317 U.S. 341, 351 [87 L.Ed. 315, 326]*.) *Parker*, which was a suit to enjoin enforcement of a state statute, has been characterized by *Boulder* and *Lafayette*, however, as establishing a state action exemption from antitrust laws. ( *455 U.S. 40, 43 [70 L.Ed.2d 810, 814]*; *435 U.S. 389, 394 [55 L.Ed.2d 364, 371]*.) Unlike *Parker*, both of these latter cases were private antitrust suits for damages, not invalidation of a regulation. In the court's most recent case in this area, *Rice v. Norman Williams Co.* (1982) *supra, 458 U.S. 654*, the plaintiffs sought to enjoin enforcement of one of this state's liquor statutes. Consistently with *Parker*, the court framed its analysis in terms of preemption. In view of these cases, we agree with plaintiffs and amici that the question in the present appeal is whether defendants' regulation conflicts with, and hence is preempted by, the Sherman Act.

expansion of petitioner's cable television franchise while the city studied the need for increased regulation. Whereas the facts of *Boulder* strongly suggest that the moratorium was imposed pursuant to the city's regulatory authority, still the court's resolution of the state action exemption issue necessarily assumed an antitrust violation; moreover, the court did not even mention the possibility of a broader, preliminary [\*\*\*\*24] exemption from antitrust scrutiny for "nonproprietary" municipal activity.<sup>9</sup>

Therefore, we must conclude that the United States Supreme Court necessarily and implicitly rejected defendants' view in *Boulder*. (McMahon, [\*\*\*25] [\*662] *Recent Significant Developments in "State Action" and Noerr-Pennington Exemptions: From Boulder to the "Sham" Exception* (1983) 14 Toledo L.Rev. 531, 540-541.) As we shall explain below, however, defendants are correct when they assert that the antitrust laws are aimed chiefly at commercial activities. And, as demonstrated below, this fact must influence the question of how, and to what extent, traditional antitrust rules apply to municipal defendants.

We turn now to plaintiffs' claim under [section 1](#) of the Sherman Act. [HN14](#)[<sup>↑</sup>] To prove a facial conflict with [section 1](#) in the present case, plaintiffs must establish as a matter of law (a) that two or more "persons" acted in concert, (b) that the activities complained of affect interstate commerce, and (c) that the action constitutes an unreasonable restraint on commerce.<sup>10</sup> [CA\(6\)](#)[<sup>↑</sup>] (6) A [\*\*277] [\*\*\*698] court may invalidate an ordinance in the abstract "only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute." ([Rice v. Norman Williams Co., \\*\\*\\*\\*261](#) *supra*, 458 U.S. 654, 661 [*73 L.Ed.2d 1042, 1051*].)

[\*\*\*27] [CA\(5b\)](#)[<sup>↑</sup>] (5b) Both parties vigorously contest whether in this case plaintiffs can or cannot prove the requisite concerted action and effect on interstate commerce. Although we do not agree with plaintiffs' suggestion that these "technical" requirements should be ignored in a facial attack seeking "mere invalidation" instead of damages (*ante*, fn. 10), we need not address these issues now<sup>11</sup> because we have determined that, in any event,

<sup>9</sup> In this regard, we must also reject defendants' attempt to distinguish *Boulder* on the ground that the city in that case stood to acquire revenues from its franchise awards. Again, it must be noted that the challenged activity in *Boulder* concerned not collection of franchise fees, but merely the city's imposition, under its regulatory powers, of a three-month moratorium on expansion of petitioner's franchise. Nowhere in the court's majority, concurring, or dissenting opinions is it even suggested that resolution of the case rested on defendants' "revenue generating" theory. If in fact the United States Supreme Court had found the city's apparent interest in collecting fees for its franchise awards to be determinative, we believe that court would have said so somewhere in its opinion.

<sup>10</sup> Plaintiffs and amici argue that a local enactment is preempted by federal law not only when its operation would bring it expressly within the federal statute, but also whenever its operation would frustrate the broad objectives that underlie federal legislation. (See [Hines v. Davidowitz \(1941\) 312 U.S. 52, 67](#) [*85 L.Ed. 581, 586-587, 61 S.Ct. 399*] (the test of preemption is whether the state law stands "as an obstacle to the accomplishment . . . of the full purposes and objectives of Congress").) See generally, Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws* (1974) 49 N.Y.U.L.Rev. 693, 698-703 (suggesting that the federal policy of free and open competition can be applied to prevent the operation of state law that clearly transgresses the "spirit of the Sherman Act," "even if the conflict is not within the express language of the federal statute"). We are not convinced that such a broad view is warranted or that the United States Supreme Court has embraced it. Indeed, the court has recently indicated that it will not follow plaintiffs' approach: the court stated that "[a] state statute is not preempted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect" ([Rice v. Norman Williams Co., supra, 458 U.S. 654, 659](#) [*73 L.Ed.2d 1042, 1049*]) and suggested that it will invalidate state legislation in the abstract "only if it mandates . . . a violation of the antitrust laws in all cases . . ." (*Id. at p. 661* [*73 L.Ed.2d at p. 1051*], italics added.) Because it is necessary to prove the requisite concerted action and interstate commerce elements in order to prove a violation of [section 1](#), the court's statement must reasonably be construed to require proof of those elements even in a facial attack such as this.

<sup>11</sup> It is therefore unnecessary to discuss either the "intraenterprise" or the *Noerr/Pennington* issues raised in the briefs.

plaintiffs cannot prove that the ordinance on its face mandates an unreasonable restraint [\*663] of trade and hence irreconcilably conflicts with [section 1](#) of the Sherman Act. ([458 U.S. at p. 661 \[73 L.Ed.2d at p. 1051\]](#).)<sup>12</sup>

## 1. Unreasonable Restraint

### a. Application of Traditional **Antitrust Law** to Municipal Defendants

We recognize [\*\*\*\*28] at the onset that this case forces us to wander off the map and travel cross country without the benefit of trail or compass. Although *Boulder* clearly held municipalities subject to antitrust laws, the court specifically declined to address the issue of the applicability of traditional antitrust rules or standards against which municipal defendants are to be judged. ([Boulder, supra, 455 U.S. 40, 56, fn. 20 \[70 L.Ed.2d 810, 822\]](#).) Significantly, however, the *Boulder* court strongly suggested that municipalities and private business enterprises may be subject to different standards: the court repeated *Lafayette*'s suggestion that "[it] may be that certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government." (*Ibid.*, citing [Lafayette, supra, 435 U.S. 389, 417, fn. 48 \[55 L.Ed.2d 364, 385\]](#).) Similarly, the *Boulder* dissent observed that under the majority's rule, the courts "must now adapt antitrust principles to adjudicate Sherman Act challenges to local regulation of the economy." ([455 U.S. at p. 65 \[70 L.Ed.2d at p. 828\]](#).) **HN15** Anticompetitive conduct by a municipality [\*\*\*\*29] in exercise of its legitimate police power is indeed of a "different complexion" than similar conduct engaged in by private business enterprises and therefore, as the *Boulder* court suggested, courts must adapt or modify the application of traditional antitrust rules when reviewing the acts of municipal defendants.

The United States Supreme Court has often noted that the purpose of **antitrust law** is the regulation of anticompetitive business practices. The Sherman Act relates to "business competition" ([Apex Hosiery Co. v. Leader \(1940\) 310 U.S. 469, 493, fn. 15](#) [\*\*278] [\[84 \\*\\*\\*699\] L.Ed. 1311, 1323, 60 S.Ct. 982, 128 A.L.R. 1044](#)) and is designed to regulate "combinations of business and capital organized to suppress commercial competition . . ." ([United States v. South-Eastern Underwriters Ass'n \(1944\) 322 U.S. 533, 553 \[88 L.Ed. 1440, 1458, 64 S.Ct. 1162\]](#); see also [Parker, supra, 317 U.S. 341, 351 \[87 L.Ed. 315, 326\]](#)); 1 Kintner, **Federal Antitrust Law** (1980) § 4.18 [summarizing an exhaustive analysis of the legislative history of the Act]; cf. Bork, ***Legislative Intent and the Policy of the Sherman Act*** (1966) 9 J.L. & Econ. 7.) One commentator [\*\*\*\*30] has observed that "[the] Court [\*664] has been reluctant to apply antitrust laws to the conduct of those who are not engaged in commercial activities." (Vanderstar, ***Liability of Municipalities Under the Antitrust Laws: Litigation Strategies*** (1983) [32 Cath.U.L.Rev. 395, 397-398](#).) Indeed, the court has said that the Act "is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives." ([Klor's, Inc. v. Broadway-Hale Stores, Inc. \(1959\) 359 U.S. 207, 213, fn. 7 \[3 L.Ed.2d 741, 745, 79 S.Ct. 705\]](#).) Similarly, the court noted in [Goldfarb, supra](#), that it would be "unrealistic" to "automatically . . . apply to the professions antitrust concepts which originated in other areas." ([421 U.S. 773, 788, fn. 17 \[44 L.Ed.2d 572, 585\]](#).)

Traditional antitrust rules have been fashioned over the years in the context of private business regulation. Many of the rules are premised implicitly, sometimes explicitly, on assumptions about how rational business competitors behave in their quest for greater profit. Municipal governments, on the other hand, most often [\*\*\*\*31] act on the basis of different motives. Unlike a private business, a municipal government's decision to displace competition is generally motivated by the purpose of furthering local health, safety or welfare. When acting in its regulatory capacity, a local government is both authorized to act in accordance with, and entrusted with the duty of serving, the public weal. Just as courts should proceed cautiously lest they might unnecessarily interfere with rights of local self-governance (Frug, ***The City as a Legal Concept*** (1980) 93 Harv.L.Rev. 1059; Cirace, ***An Economic Analysis of the "State-Municipal Action" Antitrust Cases*** (1982) 61 Tex.L.Rev. 481, 490, fn. 50, 514; 1 DeTocqueville, ***Democracy in America*** (Mayer ed., Lawrence trans. 1969) pp. 90-91 and *passim*), so too courts must be attentive and sensitive to the legitimate motives behind municipal regulations. Therefore, contrary to the urging of plaintiffs

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<sup>12</sup> Compare, Comment, ***Sherman Act "Jurisdiction" in Hospital Staff Exclusion Cases*** (1983) [132 U.Pa.L.Rev. 121, 142](#).

and amici, we will not mechanically apply to municipalities rules of law fashioned exclusively in the different context of private business regulation. Such standards will no doubt be helpful in formulating rules for the application of antitrust principles to municipalities, [\*\*\*\*32] but if unbending application of traditional standards would prove too inflexible to accommodate legitimate governmental objectives that motivate municipal regulation, we will not hesitate to cautiously depart from traditional rules. (Shenefield, *The Parker v. Brown State Action Doctrine and the New Federalism of Antitrust* (1982) 51 Antitrust L.J. 337, 346; Note, *The Application of Antitrust Laws to Municipal Activities* (1979) 79 Colum.L.Rev. 518, 539-543; Note, *Home Rule and the Sherman Act After Boulder: Cities Between a Rock and a Hard Place* (1983) [49 Brooklyn L.Rev. 259, 291-297](#) [hereinafter cited *Home Rule*]; *The Supreme Court, 1981 Term* (1982) [96 Harv.L.Rev. 268, 272-276](#)).<sup>13</sup>

[\*665] b. The Two Traditional Standards: The Rule of Reason, and the Rule of Per Se Illegality

Although the prohibition in section 1 of "[every] contract, combination . . . or conspiracy, in restraint of trade" was at first applied literally [\*\*\*\*33] to invalidate *all* such restraints (e.g., *United States v. Trans-Missouri Freight Ass'n (1897)* 166 U.S. 290, 328 [\[\\*279\]](#) [41 L.Ed. 1007, 1023, 17 S.Ct. 540]) ["the [\*\*\*700] plain and ordinary meaning of . . . section 1 is not limited to that kind of contract alone which is an unreasonable restraint of trade, but all contracts are included . . ." within the section's proscription]), the court soon retreated from this manichean view of the Act, holding it was not intended to strike down restraints merely ancillary or incidental to another legitimate purpose. ( *United States v. Addyston Pipe & Steel Co. (6th Cir. 1898)* 85 F. 271, 282, mod. and affd. *sub nom. Addyston Pipe & Steel Co. v. United States* (1899) 175 U.S. 211, 244 [44 L.Ed. 136, 148-149, 20 S.Ct. 96].) In *Standard Oil Co. v. United States* (1911) 221 U.S. 1 [55 L.Ed. 619, 31 S.Ct. 502], the court announced that the Act "evidenced the intent not to restrain the right to make and enforce contracts . . . which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods . . . which would constitute an interference, -- that [\*\*\*\*34] is, an undue restraint." ( *Id. at p. 60* [55 L.Ed. at p. 645]; see also *United States v. American Tobacco Co. (1911)* 221 U.S. 106, 179 [55 L.Ed. 663, 693-694, 31 S.Ct. 632] ["restraint of trade" covers only those acts that "injuriously restrain[] trade".]) Today, [HN16](#)↑ under what has become termed the "rule of reason," many restraints are analyzed in light of their economic effects on market conditions, and may be upheld if "reasonable," i.e., if the restraint "merely regulates and perhaps thereby promotes competition" instead of suppressing or destroying competition. ( *Chicago Bd. of Trade v. United States (1918)* 246 U.S. 231, 238 [62 L.Ed. 683, 687, 38 S.Ct. 242].)

Some types of restraints, however, were never given such accommodating review. Cartels -- agreements among producers to set prices above the competitive level by lowering production -- were early declared illegal "per se," and the courts refused to consider arguments that prices set by a cartel were "reasonable." (Note, *Fixing the Price Fixing Confusion: A Rule of Reason Approach* (1983) 92 Yale L.J. 706, 710-712 [hereinafter *Price Fixing Confusion*].) Whereas these cases focused on cartel [\*\*\*\*35] behavior (e.g., *United States v. Trenton Potteries Co. (1927)* 273 U.S. 392 [71 L.Ed. 700, 47 S.Ct. 377, 50 A.L.R. 989]; see *Price Fixing Confusion, supra*, at p. 712, fn. 38; Comment, *The Per Se Illegality of Price-Fixing -- Sans Power, Purpose, or Effect* (1952) 19 U.Chi.L.Rev. 837, 855) and refused to consider economic reasonableness on the assumption that cartels were themselves evils to be eradicated (e.g., Bork, supra, 9 J.L. & Econ. at p. 11), the United States Supreme Court in 1940 significantly expanded the universe of price-related [\*666] agreements subject to an irrebuttable presumption of illegality. In *United States v. Socony-Vacuum Oil Co. (1940)* 310 U.S. 150 [84 L.Ed. 1129, 60 S.Ct. 811], the court, through Justice Douglas, inferred the existence of a cartel from the defendants' agreement to buy surplus oil. Socony, however, focused on price fixing itself rather than the inferred cartel; the court stated that whether the parties actually could or did succeed in fixing prices was irrelevant, and broadly characterized the proscribed conduct of price fixing: "[HN17](#)↑ Under the Sherman Act a combination formed for the purpose and with the [\*\*\*\*36] effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity . . . is illegal *per se* . . ." ( *Id. at p. 223* [84 L.Ed. at p. 1168].) "[The] machinery employed . . . is immaterial." (*Ibid.*) "Any combination which tampers with price structures is engaged in an unlawful activity." ( *Id. at p. 221* [84 L.Ed. at p. 1167].)

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<sup>13</sup> See also authorities cited *post*, page 673, footnote 24.

The focus of attention since *Socony* has been on whether defendants have in any way agreed on a course of conduct affecting prices: if the label "price fixing" is found to fit the conduct in question,<sup>14</sup> the [\*\*280] [\*\*\*701] courts have mechanically declared such conduct illegal "even though no invidious purpose or harmful economic consequences have been established, and even though the economic results of the conduct may be of net benefit to consumers." (*Price Fixing Confusion*, *supra*, 92 Yale L.J. at p. 714; see *Arizona v. Maricopa County Medical Soc'y (1982) 457 U.S. 332 [73 L.Ed.2d 48, 102 S.Ct. 2466]* [member physicians' "foundations" to set maximum fees charged to insurance plan patients illegal per se price fixing].) **HN18**[<sup>15</sup>] The per se rule reflects an irrebuttable presumption that, if the court were [\*\*\*\*37] to subject the conduct in question to a full-blown inquiry, a violation would be found under the traditional rule of reason. (*Id. at p. 344 [73 L.Ed.2d at pp. 58-59]*; *Northern Pac. Ry. v. United States (1958) 356 U.S. 1, 5 [2 L.Ed.2d 545, 549, 78 S.Ct. 514]*.)

Although the price-fixing illegal per se rule has its adherents, and [\*\*\*\*38] is asserted to be economically reliable and administratively efficient,<sup>15</sup> [\*\*\*39] it has also [\*667] suffered steady and growing criticism as an often arbitrary, mechanical, and inconsistently applied rule that ignores the realities of market power and net economic effects.<sup>16</sup> [\*\*\*40] Of course, we are not here concerned with the wisdom or efficacy of the per se rule as it applies to price fixing in the typical case against private business defendants. Nevertheless, we question whether the rule should be extended to cover the municipal defendants in this case. Therefore, although plaintiffs urge us to declare the ordinance facially invalid because it represents blatant, albeit government-imposed, vertical and horizontal<sup>17</sup> fixing of maximum prices, we must first pause to consider whether these municipal defendants should be subject to the per se rule, the rule of reason, or a more accommodating standard.

#### c. Purpose and Applicability of the Per Se Rule Against Price Fixing

**CA(7a)[<sup>18</sup>] (7a)** Of course, "**HN19**[<sup>19</sup>] it is . . . improper to dispose of an antitrust case by invoking a per se rule unless the challenged practice really fits the policy and rationale of the rule." (Elman, "*Petrified Opinions*" and

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<sup>14</sup> The court has at times declined to treat as illegal per se, conduct seemingly within *Socony*'s broad price-fixing definition. (E.g., *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc. (1979) 441 U.S. 1, 20 [60 L.Ed.2d 1, 16, 99 S.Ct. 1551]* [blanket licenses not illegal per se even though music associations "fixed" license prices, because such licenses created a market efficiency, i.e., a product different from individually licensed compositions].) It has been suggested that "price fixing" is no more than a label given to arrangements that have been found unlawful per se." (Easterbrook, *Maximum Price Fixing* (1981) 48 U.Chi.L.Rev. 886, 887.)

<sup>15</sup> E.g., Kaysen & Turner, *Antitrust Policy: An Economic and Legal Analysis* (1959) page 142 (rule is relatively clear, self-enforcing, and administratively efficient); Scherer, *Industrial Market Structure and Economic Performance* (2d ed. 1980) page 510 (abandoning the rule would lead to uncertainty, complex litigation, and undue burdens on courts and administrative agencies); Redlich, *The Burger Court and the Per Se Rule* (1979) 44 Alb.L.Rev. 1 (rule protects competitors' right to make independent judgments regarding price); Rahl, *Price Competition and the Price Fixing Rule -- Preface and Perspective* (1962) 57 Nw.U.L.Rev. 137 (rule provides a clear guide for business conduct and a simplified approach to resolving cases); Adams, *The "Rule of Reason": Workable Competition or Workable Monopoly?* (1954) 63 Yale L.J. 348 (criticizing attacks on the rule); Note (1983) 57 Tulane L.Rev. 994 (*Maricopa* properly reaffirmed the per se illegality of price fixing agreements).

<sup>16</sup> E.g., Easterbrook, *Maximum Price Fixing* (1981) 48 U.Chi.L.Rev. 886 (maximum price fixing is almost always beneficial to consumers, and hence should not be subject to per se analysis); Elman, "*Petrified Opinions*" and *Competitive Realities* (1966) 66 Colum.L.Rev. 625 (per se rule should not be mechanically applied to vertical maximum resale price agreements); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division pt. II* (1965) 75 Yale L.J. 373 (use of per se rules outside context of horizontal price-fixing agreements destroys efficiency and misallocates resources); von Kalinowski, *The Per Se Doctrine -- An Emerging Philosophy of Antitrust Law* (1964) 11 UCLA L.Rev. 569 (cautioning against mechanical application and adoption of per se rules); Director & Levi, *Law and the Future: Trade Regulation* (1956) 51 Nw.U.L.Rev. 281 (suggesting that price fixing should not be condemned as illegal per se unless it affects the market); Jaffe & Tobriner, *The Legality of Price-Fixing Agreements* (1932) 45 Harv.L.Rev. 1164 (proposing abolition of the "arbitrary" per se rule against price fixing, in favor of the rule of reason); *Price Fixing Confusion*, *supra*, 92 Yale L.J. at p. 714, & *passim*.

<sup>17</sup> Plaintiffs assert that the ordinance creates a coercive vertical combination between the Board and individual landlords and furthermore that it creates a horizontal combination among all covered landlords.

*Competitive Realities* (1966) 66 Colum.L.Rev. 625, 627; cf., *Boulder, supra, 455 U.S. 40, 65 [\*\*281] [70 L.Ed.2d 810, 827]*, Rehnquist, J., dis. [questioning whether per **[\*\*\*702]** se rules of illegality will apply to municipal defendants in the same manner as they apply to private business defendants].) Because we determine below that the two principal justifications for the rule's application to private business enterprises -- economic reliability and ease of administration<sup>18</sup> -- are not implicated in the situation before us, we must conclude that the per se rule has no place in this case.

**[\*\*\*\*41] [\*668] (i) Economic Reliability**

The per se rule is thought to be economically reliable because, the courts assume, price fixing almost always has anticompetitive effects and almost never has procompetitive effects or "redeeming virtue." Although it is unquestionable that the United States Supreme Court has long viewed price fixing by private business enterprises as illegal per se (e.g., *Monsanto Co. v. Spray-Rite Service Corp. (1984) 465 U.S. 752, 761 [79 L.Ed.2d 775, 783, 104 S.Ct. 1464, 1469]*), we note that the court has never addressed the question whether the same rule applies to the same conduct by municipalities. Moreover, just as the Supreme Court in the past has declined to apply the per se rule in circumstances that pose previously unaddressed questions of economic effect (cf. *White Motor Co. v. United States (1963) 372 U.S. 253, 261 [9 L.Ed.2d 738, 745, 83 S.Ct. 696]* [refusing to apply a new per se rule]; but see, *Maricopa, supra, 457 U.S. 332, 349 [73 L.Ed.2d 48, 61]* [applying an established per se rule to a "new" industry]), we too are reluctant to announce at this early stage, and without the benefit of any evidence regarding the economic **[\*\*\*42]** consequences of locally imposed rent controls, that price fixing implemented by a local government necessarily produces negative net anticompetitive effects or that it lacks "any redeeming virtue." (*Continental T. V., Inc. v. GTE Sylvania Inc. (1977) 433 U.S. 36, 50 [53 L.Ed.2d 568, 580, 97 S.Ct. 2549]*; see post, pp. 670-671, fn. 20.)

The court's conclusion that price fixing by private business defendants is "invariably anticompetitive," is based on a fear that even if prices are reasonable when set, by sanctioning such behavior the courts would facilitate fixing of unreasonable prices in the future. (*Socony, supra, 310 U.S. 150, 221 [84 L.Ed. 1129, 1167]*; *Trenton Potteries, supra, 273 U.S. 392, 397 [71 L.Ed. 700, 705]*.) In the context of price fixing by a cartel, the *Trenton Potteries* court observed that "[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 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 **[\*\*\*43]** 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." (*273 U.S. 392, 397 [71 L.Ed. 700, 705]*.) The *Socony* court echoed this concern, noting that "[those] who controlled the prices would control or effectively dominate the market. And those who were in that strategic position would have it in their power to destroy or drastically impair the competitive system." (*310 U.S. 150, 221 [84 L.Ed. 1129, 1167]*.)

The court's fear of facilitating such "predatory" activity is grounded on assumptions about how unrestrained business competitors will act if given **[\*669]** the opportunity. These assumptions have no place in the present case, however. There is nothing to suggest that the named defendants are acting for their own selfish purposes with a view toward securing market control and hence price control in the future. Quite the contrary, defendants' sole and only legitimate purpose is to serve the public welfare as described in section 3 of **[\*\*282]** the ordinance. When that purpose no longer exists -- i.e., when annual average **[\*\*\*703]** citywide **[\*\*\*44]** rental vacancies exceed 5 percent over a six-month period -- the ordinance provides for lifting of rent controls until the vacancy rate again falls below 5 percent. (§ 6, subd. (q).) We therefore conclude that **HN20**  neither the presumption that price fixing is invariably anticompetitive, nor the fear of facilitating "predatory" practices -- both concerns that have been expressed by the United States Supreme Court in the context of analyzing the conduct of private business defendants -- justifies application of the per se rule to municipalities acting in their legitimate governmental capacities.

(ii) Ease of Administration

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<sup>18</sup> *Maricopa, supra, 457 U.S. at pages 343-354 [73 L.Ed.2d at pages 57-65]*.

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The per se rule is also said to be justified by its ease of judicial administration. Both the *Trenton Potteries* and the *Socony* courts further explained refusal to inquire into the reasonableness of set prices on the ground that such a review would necessitate constant detailed supervision and analysis by the government to assure that reasonable prices remain reasonable as economic conditions vary. ([273 U.S. 392, 397-398 \[71 L.Ed. 700, 705-706\]](#); [310 U.S. 150, 221 \[84 L.Ed. 1129, 1167\]](#).)<sup>19</sup> Recently, the *Maricopa* court stated that the high costs associated [\*\*\*\*45] with "elaborate inquiry into . . . reasonableness" was a major justification for analyzing maximum price fixing in the health care industry under the per se rule. ([457 U.S. 332, 343-344 \[73 L.Ed.2d 48, 57-58\]](#).)

Certainly, the judicial task is easier when the question is changed from "does the conduct unreasonably restrain competition" to "have defendants engaged in price fixing." [HN21\[↑\]](#) Resort to this rule of administrative convenience, however, can be justified only if the costs "of formulating the rule, and of the overinclusiveness that inevitably accompanies it -- are less than the attendant savings in administrative costs." (*Price Fixing Confusion*, *supra*, 92 Yale L.J. at p. 709; see also [United States v. Container Corp. \(1969\) 393 U.S. 333, 341 \[\\*\\*\\*\\*461 \[21 L.Ed.2d 526, 532, 89 S.Ct. 510\]](#) (Marshall, J., dis.); Ehrlich & Posner, *An Economic Analysis of Legal Rulemaking* (1974) 3 J. Legal Stud. 257, 264-273; Easterbrook, *Maximum Price Fixing*, *supra*, 48 U.Chi.L.Rev. 886, 909-910; Bohling, *A Simplified Rule of Reason for [\*670] Vertical Restraints: Integrating Social Goals, Economic Analysis, and Sylvania* (1979) 64 Iowa L.Rev. 461, 490-491.)

The potential for overinclusiveness in the present case is apparent. Whereas the United States Supreme Court in *Trenton Potteries* and *Socony* based its refusal to consider whether private business defendants had set reasonable prices largely on the absence of administrative supervision and on the impracticality of constant judicial review of such prices, the present case presents a different situation. By express provision of the ordinance, it is the Board's duty constantly to review and, if necessary, to adjust rents in order to assure each landlord a "fair return on his investment." On the face of the ordinance, rents would "be subject to continuous administrative supervision and readjustment in light of changed conditions" ( [Socony, supra, 310 U.S. 150, 221 \[84 L.Ed. 1167\]](#) without requiring any involvement by the courts unless a landlord chooses to exercise his right to appeal his individual adjustment. Moreover, costs of administering the program are borne by the local agency: the ordinance is designed to allow the Board efficiently to address and resolve adjustment disputes and to be financially self-supporting.

We therefore must conclude that application of the "ease of administration" justification for the per se rule would, in the present case, improperly remove from judicial scrutiny an elaborate government-enforced maximum price control and adjustment scheme not contemplated by the [\*\*283] court's previous cases dealing with private business defendants. (See Posner, *The [\*\*\*704] Proper Relationship Between State Regulation and the Federal Antitrust Laws* (1974) 49 N.Y.U. L.Rev. 693, 706.) We cannot say that probable economic harm, together with social costs resulting from absence of a per se rule, outweighs the risk of condemning, without any detailed inquiry, a local government's heretofore presumed legitimate exercise of its police powers. (Cf. Bohling, *supra*, 64 Iowa L.Rev. at p. 491.) In our view, maximum [\*\*\*\*48] rents price fixing, implemented by local government, is simply not of the same character as price fixing among private business defendants.<sup>20</sup>

<sup>19</sup> Likewise, it has long been recognized that courts are poorly suited to judge the reasonableness of prices set by businesses. ([United States v. Trans-Missouri Freight Ass'n \(1897\) 166 U.S. 290, 331-332 \[41 L.Ed. 1007, 1024-1025, 17 S.Ct. 540\]](#).)

<sup>20</sup> Surely, the ordinance at issue here is not a naked restraint of trade with no purpose except stifling of competition. (See Note, *Crawling Out From Under Boulder* (1984) 34 Case Western Res. L.Rev. 303, 332-333.) In this regard, the dissent recognizes that per se rules are inapplicable if the challenged restraint has "any redeeming virtue" (post, p. 715; [Continental T. V., Inc. v. GTE Sylvania Inc. \(1977\) 433 U.S. 36, 50 \[53 L.Ed.2d 568, 580, 97 S.Ct. 2549\]](#), quoting [Northern Pacific, supra, 356 U.S. at p. 5 \[2 L.Ed.2d at p. 549\]](#)), but proceeds to ignore this established test, in favor of its own subjective inquiry into whether the ordinance's anticompetitive effects "override" its redeeming virtue. This unprecedented modification of *Northern Pacific-Sylvania* renders the dissent's analysis internally contradictory: at the same time the dissent recognizes the impropriety of balancing local policy against antitrust policy (post, p. 717), it plunges head-on to do just that by balancing a local policy's redeeming virtue against its anticompetitive effects. (Post, p. 718.) Thus -- through the thinly veiled guise of its revised standard of review -- the dissent would engage in the same *Lochner*-type analysis that it purports to disclaim, in order to accomplish the desired result:

[\*\*\*\*49] [\*671] Because we find neither the economic reliability justification nor the ease of administration justification applicable to municipal defendants' alleged anticompetitive behavior, we decline to subject these defendants to analysis under the per se rule.<sup>21</sup> We turn, instead, to the rule of reason. If this were a typical case in which it was determined that a per se rule did not apply to a claim of facial conflict with the Sherman Act, our inquiry would end here and the parties would be left to litigate their antitrust claims at trial under the rule of reason. (*Rice v. Norman Williams Co., supra, 458 U.S. 654, 661 [73 L.Ed.2d 1042, 1050]*) We cannot take that course in this appeal, however, because, [\*\*284] as we conclude below, the rule of reason as presently formulated is inapplicable [\*\*\*705] to review of alleged conflict between a municipal regulation and the Sherman Act.

#### [\*\*\*\*50] d. Applicability of the Rule of Reason

In *National Soc. of Professional Engineers v. U.S. (1978) 435 U.S. 679 [55 L.Ed.2d 637, 98 S.Ct. 1355]* the court held a professional association's price maintenance scheme illegal per se. Before reaching that conclusion, however, the court reviewed the defendant's claim that its conduct was legal under the rule of reason because it was motivated by a desire to forestall [\*672] decreased quality, and hence public harm, that might result if there was unrestrained competitive bidding among engineers. The court rejected the defendant's public welfare argument: "[HN22] contrary] to its name, the Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions." (*Id. at p. 688 [55 L.Ed.2d at p. 648]; Chicago Bd. of Trade, supra, 246 U.S. 231, 238 [62 L.Ed. 683, 687]; Standard Oil, supra, 221 U.S. 1, 58 [55 L.Ed. 619, 644]*.) The court made clear that under the rule of reason, inquiry is limited to whether the challenged conduct promotes [\*\*\*\*51] or suppresses competition. (*435 U.S. at p. 691 [55 L.Ed.2d at p. 650]*.) The parties will not be heard to argue, and a court may not consider, whether a policy favoring competition is in the public interest. (*Id. at p. 692 [55 L.Ed.2d at p. 650]*.)

As stated above, however, we will not mechanically apply to municipal defendants rules of law developed exclusively in the context of determining private business antitrust liability. Whereas private business is motivated chiefly by the goal of increasing profits, the only legitimate purpose for municipal action is promotion of public health, safety and welfare. If courts were to judge municipal conduct under the rule of reason as it applies to private business enterprises, i.e., solely by the effect of the restraint on competition, most municipal actions would be found

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judicial veto of local economic regulation deemed to be unwise. (Indeed, one need look no further than the titles of the dissent's authorities to see that this is the ultimate objective.)

Furthermore, even if the dissent might somehow be read to avoid such balancing, its analysis would be plainly circular. In order to determine that the per se rule of illegality of price fixing -- itself a presumption -- applies here, the dissent would apparently create a foundational presumption that municipal price fixing lacks "any redeeming virtue"; in other words, according to the dissent, municipal price fixing is per se illegal because it is per se meritless. This effectively guts the *Northern Pacific-Sylvania* holdings that presence of "redeeming virtue" renders per se analysis inapplicable. Finally, the dissent's suggestion that failure to apply a per se rule would somehow violate federal policy is curious at best. The Sherman Act says nothing of per se rules. The per se rule is a procedural device created by the federal courts largely for their administrative convenience; it is not a substantive rule of law. (*Northern Pacific, supra, 356 U.S. at p. 5 [2 L.Ed.2d at p. 549]; Maricopa, supra, 457 U.S. at p. 344 [73 L.Ed.2d at p. 58]*.) A state court violates no federal policy by declining to extend per se analysis to an unprecedented attack on municipal regulation.

<sup>21</sup> A third possible justification for application of per se rules, closely related to the ease of administration justification, relates to predictability. This justification, in turn, assumes clearly defined judicial pronouncements on prohibited and permissible conduct -- an assumption that has no basis with respect to the novel question of potential federal antitrust conflict with a municipality's exercise of its police powers.

For yet another reason, the per se rule is not applicable in this case. The per se rule is itself dependent on the applicability of the rule of reason. (E.g., Note, *Antitrust Standing, Antitrust Inquiry, and the Per Se Standard* (1984) *93 Yale L.J. 1309, 1311*.) As noted above, the per se rule reflects an irrebuttable presumption that, if the court were to subject the conduct in question to a full-blown inquiry, a violation would be found under the traditional rule of reason. If, as we conclude below, the traditional rule of reason must be modified or rejected in order to accommodate municipal defendants, it follows that traditional per se analysis cannot be applied to those defendants. (*Home Rule, supra*, 49 Brooklyn L.Rev. at pp. 294-296.)

to violate the law: "[competition] simply does not and cannot further the interests that lie behind most social welfare legislation." ([Boulder, supra, 455 U.S. 40, 66 \[70 L.Ed.2d 810, 828\]](#), Rehnquist, J., dis.) At the least, such regulations would be declared void; at worst, local governments might be subject to treble damages.<sup>22</sup> [\*\*\*\*53] We cannot believe that [\*\*\*\*52] Congress intended such results to flow from a municipality's heretofore presumed legitimate exercise of its police power.<sup>23</sup> ([Id. at p. 67 \[70 L.Ed.2d at p. 829\]](#) ["If municipalities are permitted only to enact ordinances that are consistent with the procompetitive policies of the Sherman Act, a municipality's power to regulate the economy would be all but destroyed."]; Vanderstar, *supra*, 32 Cath.U.L.Rev. at pp. 397-400; Handler, *The Current Attack on the Parker v. Brown State Action Doctrine* (1976) 76 Colum.L.Rev. 1, 15; Hovenkamp, *Tying Arrangements in the Real Estate Market: Federal Antitrust Law and Local Land Development Policy* (1981) 33 Hastings L.J. 325, 335.)

[\*673] [HN23](#)<sup>↑</sup> To prevent unwarranted interference with a municipal government's legitimate exercise of its police power, and to accommodate the motives that underlie local government regulation (cf. e.g., Elzinga, *The Goals of Antitrust Law: Other Than [\*\*285] Competition and Efficiency, What Else Counts?* (1977) 125 U.Pa.L.Rev. 1191), courts must develop tests that recognize a public welfare "defense" to alleged violation [\*\*\*706] of the antitrust laws by municipalities. ([Boulder, supra, 455 U.S. at pp. 66-67 \[70 L.Ed.2d at pp. 828-829\]](#), Rehnquist, J., dis.; *Home Rule, supra*, 49 Brooklyn L.Rev. at pp. 294-295; Note, *The Application of Antitrust Laws to Municipal Activities* (1979) 79 Colum.L.Rev. 518, 539-543; *The Supreme Court, 1981 Term* (1982) [96 Harv.L.Rev. 62, 268, 275.](#))<sup>24</sup>

#### [\*\*\*\*54] e. Facial Validity of the Ordinance Under a Modified Standard

We do not mean to suggest that rejection of the traditional rule of reason test in this case harkens return to "the same wide-ranging, essentially standardless inquiry into the reasonableness of local regulation" reminiscent of *Lochner v. New York* (1905) 198 U.S. 45 [49 L.Ed. 937, 25 S.Ct. 539]. ([Boulder, supra, 455 U.S. at p. 67 \[70 L.Ed.2d at p. 829\]](#), Rehnquist, J., dis.) Whereas the primary evil of the *Lochner* approach was an overly strict emphasis on the ends-means nexus that in turn allowed judges wide latitude to impose their own standards of reasonableness on economic and social legislation, such jurisprudence has no place in our analysis of a municipal regulation's potential conflict with the antitrust laws.<sup>25</sup>

<sup>22</sup> See [Boulder, supra, 455 U.S. 40, 56](#), footnote 20 [[70 L.Ed.2d 810, 822](#)] ("we do not confront the issue of remedies appropriate against municipal officials") (but see Rehnquist, J., dis. at p. 65, fn. 2); [Lafayette, supra, 435 U.S. 389, 401-402 \[55 L.Ed.2d 364, 375-376\]](#) (same); Areeda, *Antitrust Law* (Supp. 1982) par. 212.2b; *Home Rule, supra*, 49 Brooklyn L.Rev. at pages 297-299; Comment, *Antitrust Treble Damages as Applied to Local Government Entities: Does the Punishment Fit the Defendant?* 1980 Ariz.St.L.J. 411.

<sup>23</sup> See [Birkenfeld, supra, 17 Cal.3d 129, 153-164](#).

<sup>24</sup> See also McMahon, *supra*, 14 Toledo L.Rev. at pages 544-545; James, *Municipal Defenses to Antitrust Liability* (1983) 6 U.Ark. Little Rock L.J. 273, 290-296; Klitzke, *Antitrust Liability of Municipal Corporations: The Per Se Rule vs. The Rule of Reason -- A Reasonable Compromise* 1980 Ariz. St. L.J. 253, 265-273; Freilich et al., *Antitrust Liability and Preemption of Authority: Trends and Developments in Urban, State and Local Government Law* (1983) 15 Urban Law. 705, 711-713; Brame & Feller, *The Immunity of Local Governments and Their Officials From Antitrust Claims After City of Boulder* (1982) 16 U. Rich. L.Rev. 705, 715-717; Comment, *Community Communications Co. v. City of Boulder: Denial of Parker Exemption to Home Rule Cities* 1983 Utah L.Rev. 139, 159-160; Comment, *Affiliated Capital Corp. v. City of Houston: Local Governments and Antitrust Immunity* (1983) 35 Baylor L.Rev. 791, 816-818; cf. Levin, *The Antitrust Challenge to Local Government Protection of the Central Business District* (1983) 55 U.Colo.L.Rev. 21, 64-79; Note, *Post Lafayette Municipal Liability for Refusing to Zone Outlying Development* (1981) 59 Wash.U.L.Q. 485, 509-510; Chu, *Antitrust Liability for Municipal Airport Operations: Will It Fly?* (1983) 49 J. Air L. & Commerce 245, 280-282; Marticorena, *Municipal Cable Television Regulation: Is There Life After Boulder?* (1982) 9 Western St.U.L.Rev. 113, 166-167.

<sup>25</sup> For the same reason we decline to analyze municipal conduct under a so-called "municipal rule of reason." (See, e.g., James, *supra*, 6 U.Ark. Little Rock L.J. at pp. 291-296 [proposing such an approach]; Comment, *supra*, 35 Baylor L.Rev. at pp. 816-818 [same].) Whereas the rule of reason as presently formulated focuses solely on the policy of promoting competition ([Professional](#)

[\*\*\*\*55] [\*674] In articulating an appropriate test by which to review municipal actions alleged to conflict with the federal antitrust laws, we seek on the one hand a test that is sufficiently flexible to accommodate the interest of local government in promoting public health, safety and welfare programs or regulations. At the same time, we favor a standard that is not toothless; mere incantation of a purpose to promote the public welfare should not insulate municipal regulations from invalidation under the supremacy clause. Local governments should not be judged under a standard that will guarantee validity even for improperly [\*\*286] motivated or implemented<sup>26</sup> anticompetitive [\*\*\*707] municipal regulations or commercial enterprises that plainly undermine the objectives of the federal antitrust laws.

[\*\*\*\*56] We turn for initial guidance to the United States Supreme Court's commerce clause cases. [CA\(8\) ↑ \(8\)](#)  
[HN24 ↑](#) State or local regulation will be upheld against commerce clause attack if the regulation (1) does not discriminate against interstate commerce and (2) bears a rational relationship to a legitimate local purpose. In addition, the extent to which the court will permit burdens on interstate commerce depends on (3) the nature of the local interest, and whether it could be promoted with a lesser impact on interstate activities. Once these elements are satisfied, the court applies a balancing test: a regulation will be upheld unless its incidental burdens on interstate commerce are clearly excessive in relation to the putative local benefits. (E.g., [Edgar v. MITE Corp. \(1982\) 457 U.S. 624, 643-646 \[73 L.Ed.2d 269, 283-285, 102 S.Ct. 2629\]](#) [striking down state business takeover act]; [Kassel v. Consolidated Freightways Corp. \(1981\) 450 U.S. 662, 671-679 \[67 L.Ed.2d 580, 587-592, 101 S.Ct. 1309\]](#) [striking down state truck length statute]; [Minnesota v. Clover Leaf Creamery Co. \(1981\) 449 U.S. 456, 471-474 \[66 L.Ed.2d 659, 673-675, 101 S.Ct. 715\]](#) [upholding state law [\*\*\*\*57] banning plastic and nonreturnable milk containers]; [Hughes v. Oklahoma \(1979\) 441 U.S. 322, 336-338 \[60 L.Ed.2d 250, 261-263, 99 S.Ct. 1727\]](#) [striking down state regulation of minnow trade]; [Pike v. Bruce Church, Inc. \(1970\) 397 U.S. 137, 142 \[\\*675\] \[25 L.Ed.2d 174, 178, 90 S.Ct. 844\]](#) [striking down state law on packaging of cantaloupes]; [Dean Milk Co. v. Madison \(1951\) 340 U.S. 349, 353-356 \[95 L.Ed. 329, 332-334, 71 S.Ct. 295\]](#) [striking down local milk regulation].)

With appropriate modifications, we believe that a test modeled after the court's commerce clause cases will provide a workable standard for judging alleged conflict between municipal ordinances and the federal antitrust laws. We will, however, depart from the United States Supreme Court's commerce clause test in one significant respect. We will not apply the wide-ranging, essentially standardless cost-benefit analysis employed in the court's recent "balancing" decisions. (See, e.g., [MITE Corp., supra, 457 U.S. 624 \[73 L.Ed.2d 269\]](#); [Kassel, supra, 450 U.S. 662 \[67 L.Ed.2d 580\]](#); [Clover Leaf Creamery, supra, 449 U.S. 456 \[66 L.Ed.2d 659\]](#); see generally, Eule, [\*\*\*\*58] *Laying the Dormant Commerce Clause to Rest* (1982) 91 Yale L.J. 425 [criticizing the court's balancing approach, and proposing an alternate standard]; Maltz, *How Much Regulation is too Much -- An Examination of Commerce Clause Jurisprudence* (1981) 50 Geo.Wash.L.Rev. 47 [same]; Tushnet, *Rethinking the Dormant Commerce Clause* 1979 Wis.L.Rev. 125 [same].) Balancing a municipality's need for particular local health, safety and welfare regulations or programs against often incommensurable alleged anticompetitive effects is a task for which courts are not well suited. On the other hand, a standard applicable to municipalities must be capable of considering those economic efficiency factors that underlie federal antitrust policy.

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[Engineers, supra](#)), recognition of a municipal public policy "defense" within the framework of the rule of reason would drastically alter the nature of a court's rule of reason inquiry: a court would apparently be called on to balance the "amount" of anticompetitive restraint against a municipality's interest in effectuating a desired local purpose. If the rule of reason were so modified, it would be no more than a means for judges to impose their own policy judgments on municipal actions. (See [Boulder, supra, 455 U.S. at pp. 67-68 \[70 L.Ed.2d at pp. 829-830\]](#), Rehnquist, J., dis.; Civiletti, *The Fallout from Community Communications Co. v. City of Boulder: Prospects for a Legislative Solution* (1983) [32 Cath.U.L.Rev. 379, 386-387](#); Comment, *Alternative Approaches to Municipal Antitrust Liability* (1982) 11 Fordham Urban L.J. 51, 81-82; cf. Marticorena, *supra*, 9 Western St.U.L.Rev. at pp. 166-167.) We therefore reject a modified rule of reason; instead, we adopt a test that prevents judicial second-guessing of local decisions to accomplish proper local purposes. (See *post*, pp. 675-676, fn. 28.)

<sup>26</sup>Certainly, official misconduct or conflict of interest should not be immune from condemnation under the antitrust laws. See Note, *supra*, 79 Colum.L.Rev. at page 538; compare, Cirace, *supra*, 61 Tex.L.Rev. at page 498 (arguing that municipalities should be exempt from antitrust scrutiny if (a) displacement of competition is no broader than the scope of the substantial market failure, imperfection, or instability at which it is directed, and (b) implementation involves no official misconduct, discrimination, or conflict of interest).

**CA(7b)** [7b] Adapting the court's commerce clause test to this facial [section 1](#) attack on a municipal rent control ordinance, we conclude that [HN25](#) if a municipal regulation has a proper local purpose, is rationally related to the municipality's legitimate exercise of its police power,<sup>27</sup> and operates in an even [\\*\\*287](#) [\\*\\*\\*708](#) handed manner, it must be upheld against a claim that it conflicts with [section 1](#) of the Sherman Act unless the plaintiff demonstrates [\\*\\*\\*\\*59](#) that the city's purposes could be achieved as effectively by means that would have a less intrusive impact on federal antitrust policies.<sup>28</sup>

[\*\*\*\*60] [\*676] **CA(5c)** (5c) Applying this test to the present case, we first observe that our decision in *Birkenfeld* forecloses any suggestion that the regulation is not supported by a legitimate purpose. There are no allegations of conflict of interest or illegal collusion in the enactment or drafting of the ordinance. [CA\(9\)](#) (9) Moreover, "[[HN27](#)] it] has long been settled that [municipal police] power extends to objectives in furtherance of the public peace, safety, morals, health and welfare and 'is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life.'" ([17 Cal.3d 129, 160.](#))

**CA(5d)** (5d) Nor can it be suggested at this late date that rent control is not rationally related to the municipality's legitimate exercise of its police power. We observed in *Birkenfeld* that, as in the present case, "[the] charter amendment includes in its stated purposes for imposing rent control the alleviation of the ill effects of the exploitation of a housing shortage by the charging of exorbitant rents to the detriment of the public health and welfare of the [\\*\\*\\*\\*61](#) city and particularly its underprivileged groups. [Citation.] The amendment thus states on its face the existence of conditions in the city under which residential rent controls are reasonably related to promotion of the public health and welfare and are therefore within the police power." (*Ibid.*) Furthermore, *Birkenfeld* very clearly establishes that, even absent a so-called "housing emergency," local regulation of rents for the purposes stated in section 3 of the present ordinance is a rational exercise of the municipality's police power. ([Id. at pp. 153-164; Carson Mobilehome Park Owners' Assn. v. City of Carson \(1983\) 35 Cal.3d 184, 189, fn. 4 \[197 Cal.Rptr. 284, 672 P.2d 1297\].](#))

Neither can plaintiffs demonstrate that the regulation fails to operate in an even handed manner. The only possible theory of discriminatory treatment of similarly situated landlords concerns [section 5, subdivision \(f\)](#), of the ordinance. When the regulation was passed, this provision exempted "[rental] units in a residential property which is divided into a maximum of four (4) units where one of such units is occupied by the landlord as his/her principal residence,"<sup>29</sup> but [\\*\\*\\*\\*62](#) limited the exemption to "rental units that [\\*677](#) would have been exempt under the provisions of this Ordinance had this Ordinance been in effect on December 31, 1979." Plaintiffs do not challenge

<sup>27</sup> This formulation would not rest determination of permissible anticompetitive municipal conduct on findings that the local government engaged in "traditional," or "integral" functions, nor would an ordinance's validity turn on the distinction between "governmental" as opposed to "proprietary" activities. Framing permissible conduct in terms of a municipality's exercise of its legitimate police powers, on the other hand, encompasses all local actions rationally related to promotion of local health, safety and welfare. (*Home Rule*, *supra*, 49 Brooklyn L.Rev. at p. 294, fn. 191.)

<sup>28</sup> We recognize that this standard calls on courts to make difficult determinations as to whether proposed alternative means of accomplishing a legitimate local purpose would do so (1) as effectively as the challenged means and (2) through means that intrude less on the policies of the federal antitrust laws. Regardless of the difficulty of these determinations, however, this standard is preferable to a so-called "municipal rule of reason," because it would not require a court to balance competing -- and often incommensurable -- policies. (See *ante*, pp. 673-674, fn. 25.) Instead, the standard we embrace today prevents judicial second-guessing of legitimate local purposes. However, [HN26](#) although a court may not invalidate local legislation by balancing the propriety of (or need for) a legitimate local purpose against federal antitrust policies, a court may invalidate a municipality's means of achieving a local policy if the local goal is sought to be advanced through discriminatory or irrational means, or if it could be achieved as effectively by means that can be demonstrated to likely intrude less on federal antitrust policies.

<sup>29</sup> This subdivision was amended in 1982 to limit the exemption to rental property divided into two units. See *ante*, page 654, footnote 2.

the exemption itself; instead, [\*\*288] they challenge subdivision (f), to the extent that it excludes from the exemption any property that became owner-occupied after December 31, 1979.

[\*\*\*709] As defendants point out, however, the challenged exclusion from the exemption bears a debatable rational relationship to the purposes of the ordinance. The Berkeley electorate could reasonably have determined that the exclusion was desirable to prevent some landlords from avoiding application of the ordinance by evicting tenants and moving into their rental property after the provisions of the proposed ordinance became known. (See Baar, *Guidelines for Drafting Rent Control* [\*\*\*63] Laws: *Lessons of a Decade* (1983) 35 Rutgers L.Rev. 723, 758 & fn. 128 [suggesting that in jurisdictions without the exemption limitation, such abuse is widespread].) <sup>30</sup> Because the disparate treatment afforded similarly situated landlords is supported by a debatable rational basis, this aspect of plaintiffs' challenge must also be rejected. ( [Clover Leaf Creamery, supra, 449 U.S. 456, 464 \[66 L.Ed.2d 659, 668\]](#); [New Orleans v. Dukes \(1976\) 427 U.S. 297, 303 \[49 L.Ed.2d 511, 516, 96 S.Ct. 2513\]](#); [Hale v. Morgan \(1978\) 22 Cal.3d 388, 395 \[149 Cal.Rptr. 375, 584 P.2d 512\]](#).)

[\*\*\*\*64] Finally, plaintiffs suggest no alternative, equally effective approach to achieving defendants' legitimate local purposes by means that would have a less intrusive impact on federal antitrust policies. Indeed, such a showing could be made only after extensive evidence has been taken in the trial court. We therefore hold that plaintiffs have failed to establish that the ordinance on its face conflicts with [section 1](#) of the Sherman Act.

#### C. Facial Validity of the Ordinance Under [Section 2](#) of the Sherman Act

Plaintiffs also assert that the ordinance on its face violates [section 2](#) of the Act. [HN28](#) That section provides inter alia that "[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 . . . shall be deemed guilty of a felony . . ." ([15 U.S.C. § 2](#).)

[HN29](#) In the context of reviewing the legality of private business conduct, the United States Supreme Court has established that the "offense" of monopolization [\*678] consists of two elements: (1) possession of "monopoly power" in the relevant market, and (2) willful acquisition of that power. [\*\*\*65] ( [United States v. Grinnell Corp. \(1966\) 384 U.S. 563, 570-571 \[16 L.Ed.2d 778, 785-786, 86 S.Ct. 1698\]](#)). "Monopoly power" has been defined as the "power to control prices or exclude competition." ( [United States v. du Pont Co. \(1956\) 351 U.S. 377, 391](#) & fn. 18 [[100 L.Ed. 1264, 1278-1279, 76 S.Ct. 994](#)]). The existence of such power may be inferred from a defendant's predominant share of the relevant market. ( [Grinnell, supra, 384 U.S. at p. 571 \[16 L.Ed.2d at p. 786\]](#) [87 percent of market is monopoly power]; [American Tobacco Co. v. United States \(1946\) 328 U.S. 781, 797 \[90 L.Ed. 1575, 1587, 66 S.Ct. 1125\]](#) [two-thirds to 80 percent of market is monopoly power].) Seizing on these principles, plaintiffs claim the ordinance is "obviously" invalid because it represents a willful acquisition of power to control prices of all covered rental units in Berkeley -- 23,000 of the 27,000 units in that city.

Although plaintiffs' claim would likely have merit if defendants were private business parties and if the restraint was proved to affect interstate commerce, for reasons discussed above we will not mechanically apply to municipal defendants, rules of [\*\*\*66] law fashioned exclusively in the context of private business regulation. Instead, and assuming, over defendants' vehement protestations, [\*\*289] that [section 2](#) of the Act applies to a party that is not itself a competitor in the relevant market that it is accused of monopolizing, we apply the test articulated *ante*, [\*\*\*710] at page 675.

As explained previously, the stated objectives of the ordinance indicate a legitimate local purpose. Plaintiffs do not contend that the ordinance was implemented through misconduct, conflict of interest, or in order to affect

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<sup>30</sup> Although plaintiffs argue that any landlords so disposed would already have taken such measures because rental property of four or fewer units was already exempt from rent control by the terms of a prior ordinance (the Temporary Rent Stabilization Ordinance, passed by the Berkeley City Council eff. Dec. 30, 1979), this response ignores the fact that the ordinance now in question is far more comprehensive than its recent predecessor.

discrimination -- all factors that would tend to rebut defendants' claim of a legitimate purpose. (See Cirace, *supra*, 61 Tex.L.Rev. at p. 498.) It is established that the means invoked by defendants' ordinance is a rational exercise of the municipality's police power. Plaintiffs have cited no evidence tending to show that the ordinance fails to regulate similarly situated competitors in a reasonably evenhanded manner. Finally, they suggest no equally effective alternative to accomplish these legitimate local purposes by means that would have a less intrusive impact on federal antitrust policies. We therefore [\*\*\*\*67] conclude that plaintiffs have failed to establish that the ordinance on its face conflicts with section 2 of the Sherman Act.

Because we determine that plaintiffs have not established a conflict with the Act, we do not address whether the ordinance may be exempt from antitrust scrutiny under *Boulder*. (*Rice v. Norman Williams Co., supra, 458 U.S. at p. 662, fn. 9* [73 L.Ed.2d at p. 1042].) We proceed to analyze plaintiffs' additional constitutional and statutory contentions.

[\*679] II. [CA\(10\)](#) [↑] (10) [CA\(11\)](#) [↑] (11) (See fn. 31.) Rent Control Issues<sup>31</sup>

#### [\*\*\*\*68] A. Facial Validity of the Ordinance's "Fair Return" Standard

[CA\(12a\)](#) [↑] (12a) The primary dispute in the trial court and one of the primary substantive questions posed on this appeal concerns whether a rent control ordinance is facially constitutional if it provides that a landlord is to receive a fair return on his investment rather than a fair return on the value of his property.<sup>32</sup> The parties, assisted by amici curiae on both sides of the issue, have vigorously briefed and argued their respective views. We must stress at the outset, however, the limited scope of our inquiry in facial challenges such as this. As we made clear in *Birkenfeld*, whether rental regulations are fair or confiscatory depends ultimately on the result reached. (*17 Cal.3d 129, 165*.) That determination, of course, can only be [\*\*290] made by analyzing a challenge to the regulation as applied. [CA\(13\)](#) [↑] (13) Nevertheless, [HN31](#) [↑] we will declare a regulation invalid on its face "when its terms will not permit those who [\*\*\*711] administer it to avoid confiscatory results in its application to the complaining parties." (*Id. at p. 165*; see also *Cotati Alliance for Better Housing v. City of Cotati* (1983 *148 Cal.App.3d [\*\*\*\*69] 280, 287, 291* [195 Cal.Rptr. 825]; *Hutton Park Gardens v. Town Council* (1975) *68 N.J. 543* [350 A.2d 1, 14-16].)

For more than a decade, rent control agencies throughout this state and the nation have employed a veritable smorgasbord of administrative standards [\*680] by which [\*\*\*\*70] to determine rent ceilings. (*Carson, supra, 35 Cal.3d 184, 188* ["just, fair and reasonable"]; *Cotati Alliance, supra*, 148 Cal.App.3d at p. 286 ["fair and reasonable

<sup>31</sup> As a preliminary matter, we reject plaintiffs' procedural claim that it was improper for the court to grant judgment on the pleadings because this denied them the opportunity to present evidence as to their claims of confiscation, denial of equal protection, and unlawful restraint on alienation. On a defense motion for judgment on the pleadings, all facts alleged in the complaint are deemed admitted. (*Sullivan v. County of Los Angeles* (1974) *12 Cal.3d 710, 714, fn. 3* [117 Cal.Rptr. 241, 527 P.2d 865]; *Colberg, Inc. v. State of California ex rel. Dept. Pub. Wks.* (1967) *67 Cal.2d 408, 411-412* [62 Cal.Rptr. 401].) There was no need for plaintiffs to present any evidence. Further, although they claim that judgment on the pleadings denied them a declaration as to facial invalidity, the judgment expressly declared the ordinance "valid on its face." [HN30](#) [↑] It is well established that a motion for judgment on the pleadings "may be used in an action for declaratory relief to obtain a *declaratory judgment on the merits in favor of the defendant* rather than a dismissal of the plaintiff's suit." (4 Witkin, *Cal. Procedure* (2d ed. 1971) *Proceedings Without Trial*, § 161, p. 2817, italics in original.) Finally, although plaintiffs claim they should have been granted leave to amend their complaint, any amendment to make further factual allegations would only be applicable to the claim that the ordinance was invalid as applied. They were granted leave to amend as to this claim, but later dismissed the amended complaint.

<sup>32</sup> In reality, defendants' ordinance employs two administrative standards for setting maximum rents. As discussed *post* at pages 687-689, section 11 provides for annual rent adjustment, but precludes the Board from granting such citywide rent adjustment except to offset certain increases in general costs. This is, in essence, a variation on the so-called "maintenance of net operating income," or "cost passthrough" approach. (See Baar, *supra*, 35 Rutgers L.Rev. at pp. 809-816.) Section 12, subdivision (c), on the other hand, provides for individual rent increases based on "all relevant factors, including (but not limited to): . . . (8) the landlord's rate of return on investment," as well as the landlord's costs.

return on investment"]; *Palos Verdes Shores Mobile Estates, Ltd. v. City of Los Angeles (1983) 142 Cal.App.3d 362, 371 [190 Cal.Rptr. 866]* ["just and reasonable return" based on the "maintenance of profit" approach]; *Gregory v. City of San Juan Capistrano (1983) 142 Cal.App.3d 72, 86 [191 Cal.Rptr. 47]* [interpreting "return on investment" as requiring a "just and reasonable return on the fair market value of [landlords'] property"]; see also Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade* (1983) 35 Rutgers L.Rev. 723, 781-817 [describing and analyzing the following standards: (1) cash flow/return on gross rent; (2) return on equity (investment); (3) return on value; (4) percentage net operating income; and (5) maintenance of net operating income]; Comment, *Rethinking Rent Control: An Analysis of "Fair Return"* (1981) 12 Rutgers L.J. 617, 640-648 [hereinafter cited *Fair Return*]; Comment, *Rent Control and Landlords' Property Rights: The Reasonable* [\*\*\*\*71] *Return Doctrine Revived* (1980) 33 Rutgers L.Rev. 165 [hereinafter cited *Reasonable Return Doctrine*.] CA(14)<sup>↑</sup> (14) As we recently stressed in *Carson*, "[HN32<sup>↑</sup>] rent] control agencies are not obliged by either the state or federal Constitution to fix rents by application of any particular method or formula." (35 Cal.3d at p. 191, citing *Power Comm'n v. Pipeline Co. (1942) 315 U.S. 575, 586 [86 L.Ed. 1037, 1049-1050, 62 S.Ct. 736]*; *Power Comm'n v. Hope Gas Co. (1944) 320 U.S. 591, 601-602 [88 L.Ed. 333, 344, 64 S.Ct. 281].*)

**CA(12b)<sup>↑</sup>** (12b) In view of this oft-quoted and oft-followed principle, we are not persuaded by plaintiffs' and amici's apparent contention that the much criticized return on value standard<sup>33</sup> [\*\*\*\*73] -- or any of its variations<sup>34</sup>

<sup>33</sup> Whereas the return on investment standard determines "just and reasonable return" by focusing on the landlord's investment, the return on value standard determines fair return by focusing on the market value of the landlord's property. The fair return on market value standard advocated by plaintiffs and amici was used by the United States Supreme Court in an early railroad rate case, *Smyth v. Ames (1898) 169 U.S. 466 [42 L.Ed. 819, 18 S.Ct. 418]*, decree mod., *171 U.S. 361 [43 L.Ed. 197, 18 S.Ct. 888]*, in which the court held that railroads were entitled to rates sufficient, after deducting reasonable operating expenses, to produce a fair return on the fair market value of their assets. (169 U.S. at p. 547 [42 L.Ed. at p. 849].) The Supreme Court later changed its position, and approved use of an approach designed to ensure a fair return on investment. ( *Hope Gas, supra, 320 U.S. at pp. 599-605 [88 L.Ed. at pp. 343-346]*; see Siegel, *Understanding the Lochner Era: Lessons From the Controversy Over Railroad and Utility Rate Regulation* (1984) 70 Va.L.Rev. 187, 215-259.) Rejecting the idea that rates set by the Federal Power Commission must be based on the present "fair value" of property, the *Hope Gas* court observed: "[the] heart of the matter is that rates cannot be made to depend upon 'fair value' when the value of the going enterprise depends on earnings under whatever rates may be anticipated." (*Id. at p. 601 [88 L.Ed. at p. 344]*.) Implicit in this statement is the suggestion that a return on fair value standard is circular and unworkable. "Value" is the current worth of future benefits that may be derived from an investment. The "value" of a utility company, for example, depends in part on the rates that the utility company may charge for its product. Thus, to set rates by reference to the company's "value" is a circular process. (Siegel, *supra*, 70 Va.L.Rev. at p. 246 & fn. 253.)

The same circularity problem exists when fair market value concepts are applied in the rent control context. (See *Helmsley v. Borough of Fort Lee (1978) 78 N.J. 200 [394 A.2d 65, 71-72]*; Baar, *supra*, 35 Rutgers L.Rev. at pp. 798-803; *Reasonable Return Doctrine, supra*, 33 Rutgers L.Rev.) "Value is an expression of a building's potential capacity to generate rental income and incidental or intangible benefits of ownership during its useful life." (*Fair Return, supra*, 12 Rutgers L.J. at p. 640.) The current "value" of a rental property thus depends in large part on the amount of rental income the property is expected to generate. As in the utility rate cases, the process of using value to determine what rental income shall be permitted becomes circular. (Accord, *Cotati Alliance, supra*, 148 Cal.App.3d 280, 287-289; *Palos Verdes Estates, supra, 142 Cal.App.3d 362, 370-371*.) The *Cotati Alliance* court thus rejected a landlord's claim that a return on value standard is mandated for an ordinance to be facially constitutional: "The fatal flaw in the return on value standard is that income property most commonly is valued through capitalization of its income. Thus, the process of making individual rent adjustments on the basis of a return on value standard is meaningless because it is inevitably circular: value is determined by rental income, the amount of which is in turn set according to value. Use of a return on value standard would thoroughly undermine rent control, since the use of uncontrolled income potential to determine value would result in the same rents as those which would be charged in the absence of regulation. Value (and hence rents) would increase in a never-ending spiral." (148 Cal.App.3d at p. 287; accord, *Helmsley, supra, 394 A.2d at pp. 71-72*; *Niles v. Boston Rent Control Administrator (1978) 6 Mass.App. 135 [374 N.E.2d 296, 300-303].*)

<sup>34</sup> Amicus for plaintiffs suggests adoption of the "public utility investment standard," which, it is urged, would result in a base rent commensurate with the value of the regulated property at the time rent controls were imposed. (Cf. *Southern Cal. Gas Co. v. Public Utilities Com. (1979) 23 Cal.3d 470, 474 [153 Cal.Rptr. 10, 591 P.2d 341]*.) Aside from the questionable propriety of applying public utility law to the very different area of local regulation of private economic transactions, it has been observed that

-- [\*681] [\*\*291] [\*\*\*712] is required to be employed by the Board in the present case. We reiterate that selection of an administrative standard by which to set rent ceilings is a task for local governments -- in this case the voters themselves -- and not the courts. Our only concern in this appeal is whether defendants' fair return on investment standard, on its face, will not permit those who administer it to avoid confiscatory [\*\*\*\*72] results.<sup>35</sup> (*Birkenfeld, supra, 17 Cal.3d at p. 165*; [\*682] *Power Comm'n v. Pipeline Co., supra, 315 U.S. at pp. 585-586 /86 L.Ed. at pp. 1049-1050*; *Hutton Park, supra, 350 A.2d at pp. 13-16.*) If we conclude that the fair return on investment standard affords the Board sufficient flexibility to avoid confiscatory results, we must uphold the ordinance. ( *Cotati Alliance, supra*, 148 Cal.App.3d at pp. 289-291.)

[\*\*\*\*74] Plaintiffs and amici posit a number of due process obstacles and practical difficulties that the Board may face in administering the return on investment standard, but none will prevent the Board from avoiding confiscatory results.

#### 1. Adjustment of Landlords' Frozen May 1980 Profit Amount, and Consideration of the Effect of Inflation

One of plaintiffs' primary complaints is that section 11 of the ordinance locks landlords [\*\*292] into the fixed dollar amount of profit [\*\*\*713] they earned in May 1980,<sup>36</sup> [\*\*\*75] and that in order for the Board to avoid confining those landlords who invested long ago with preinflation dollars to their May 1980 profit amount, it must be free under section 12 of the ordinance to take into consideration the effect of inflation on individual landlords' investments<sup>37</sup> and award fair returns based on "adjusted" investment figures.<sup>38</sup>

"if there was a housing shortage which caused rents to be artificially high, use of prerent control value as the measure [for calculating fair return] will perpetuate artificially inflated rents. Rent control utilizing this standard is no rent control at all." ( *Cotati Alliance, supra*, 148 Cal.App.3d 280, 287.)

<sup>35</sup> As is apparently conceded by both parties, it would be premature and problematic for us to attempt to articulate, in the context of this facial attack, the constitutional test against which specific applications of various administrative standards are to be judged. We will face that question when we review a challenge to rent control as applied to particular plaintiffs. It is sufficient in this case to measure defendants' fair return on investment standard against the general proposition that an administrative standard must be such that it will permit those who administer it to avoid confiscatory results.

On a similar point, we also wish to dispel suggestions based on dictum in *Birkenfeld* that we have previously established, as a constitutional test, a requirement that rent controls must provide landlords a "just and reasonable return on their property." (*17 Cal.3d at p. 165*) This statement was made in the context of a broader discussion of the legitimate exercise of local police power, and was most certainly not intended to articulate a constitutional standard. *Birkenfeld's* reference to the term "property" should therefore be viewed with caution; it would be inappropriate to suggest that the *Birkenfeld* statement can be used to predict the specific constitutional standard that we will articulate when we review a challenge to rent control as applied.

<sup>36</sup> Plaintiffs demonstrate this point by the following hypothetical: In May of 1980, a landlord's gross rental income is \$ 10,000; his operating expenses total \$ 9,000, as follows: mortgage payment of \$ 6,000; property taxes of \$ 1,000; utility bills of \$ 2,000. Thus his net return (profit) is \$ 1,000. In May of 1982 his expenses remain the same except that utility costs increase by \$ 500 to \$ 1,500, thereby reducing his net return to \$ 500. Under these circumstances the section 11 annual general adjustment mechanism allows the Board to provide for a 5 percent increase in rent, to \$ 10,500, so that the landlord's profit amount would be the same number of dollars (\$ 1,000) as it was two years earlier. However, no relief is or can be provided under section 11 for the erosionary effect of two years of inflation on the \$ 1,000 base income, the purchasing power of which has been diminished.

<sup>37</sup> The "effect of inflation" issue was apparently raised for the first time at oral argument in the Court of Appeal. On July 21, 1983, the appellate court vacated submission of the case in order to receive defendants' written concession of July 5, 1983, that the term "fair return on investment" in section 12, subdivisions (c) and (i), may reasonably be interpreted to permit the Board to consider and allow for any decrease in the purchasing power of the landlord's return caused by inflation. Both the court's order and defendants' letter, as well as plaintiffs' response thereto, are part of the record before us on appeal. The issue has been briefed and responses have been filed.

<sup>38</sup> Plaintiffs' point can best be explained by a hypothetical example. Assuming that the Board were to fix a "fair return on investment" at 10 percent for all landlords, the following might occur: Recent investor A has invested \$ 70,000 since 1979, and he earned a profit of \$ 6,000 in 1980. In 1984 he petitions the Board under section 12 for an increase in his return on

[\*\*\*\*76] [\*683] Clearly, if the fixed amount of a landlord's profit remains the same year after year his return will in time diminish in real value: it is obvious that a \$ 1,000 "profit" in 1990 will have a much lower value than the same dollar amount of profit in 1980. Furthermore, although a fixed profit amount may produce a reasonable or fair return on investment for low-risk investments such as bonds, we must agree with plaintiffs that investment in rental units contemplates a higher risk and hence, in times of high inflation and when viewed in the long term, demands more than mere maintenance of an existing profit amount. (*Cotati Alliance, supra*, 148 Cal.App.3d at p. 295; *Hutton Park Gardens v. Town Council, supra*, 350 A.2d 1, 15 [a just and reasonable return on investment is one that is generally commensurate with returns on investments in other enterprises having comparable risks].) Therefore, although defendants' ordinance may properly *restrict* landlords' profits on their rental investments, it may not indefinitely *freeze* the dollar amount of those profits without eventually causing confiscatory results. (*Cotati Alliance, supra*, at p. 293 ["If the [\*\*\*\*77] net operating profit of a landlord continues to be the identical number of dollars, there is in time a real diminution to the landlord which eventually becomes confiscatory."].)

In determining the facial validity of the ordinance against plaintiffs' claim that it must be interpreted to require the Board to [\*\*293] account for the effect of inflation on investment in determining a landlord's amount of [\*\*\*714] profit or return, we adhere to the rule earlier stressed, that whether a regulation produces a return that is confiscatory or fair depends ultimately on the result, and that we will invalidate an ordinance on its face only if its terms preclude avoidance of confiscatory results.

First, it is not apparent that the ordinance on its face precludes alternative means of adjusting landlords' frozen May 1980 profit amounts.<sup>39</sup> Moreover, even assuming arguendo that a confiscatory result might occur in a future individual case if the Board fails to invoke measures necessary to adjust the dollar amount of a landlord's May 1980 profit, this would still provide us no basis on which to invalidate the entire ordinance, or its administrative "fair return on investment" standard. Unlike [\*\*\*\*78] *Birkenfeld*, in which we determined [\*684] that inherent and unnecessary procedural defects inevitably deprived all landlords of due process "except perhaps for a lucky few" (*17 Cal.3d at p. 172*), in this case, by contrast, it is unknown what percentage of landlords might be able to prove unconstitutional confiscation if the Board fails to consider the effect of inflation on dollars invested in order to adjust a landlord's frozen profit amount. Nor do we have before us any evidence to suggest that when faced with such a prospect, the Board will decline to invoke measures within its powers to adjust individual profit amounts. *CA(15)[↑]* (15) In this regard we observe that "[it] is to be presumed that the board will exercise its powers in conformity with the requirements of the Constitution; and if it does act unfairly, the fault lies with the board and not the statute." (*Butterworth v. Boyd (1938) 12 Cal.2d 140, 149 [82 P.2d 434, 126 A.L.R. 838]*). *CA(12c)[↑]* (12c) Until we are required to review a specific challenge to the Board's application of the ordinance, we note simply that, as defendants themselves concede (*ante*, p. 682, fn. 37), the ordinance is not drawn so narrowly as to preclude [\*\*\*\*79] consideration of the effect of inflation on a landlord's investment in those cases in which the Board might deem it necessary to take that factor into account in order to avoid causing a confiscatory result.<sup>40</sup>

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investment. Under its 10 percent return on investment standard, the Board may grant A an increase of \$ 1,000, so that his 1984 amount of profit is \$ 7,000. Additional contributions to capital could, of course, also yield a 10 percent return.

In contrast, long-term investor B has invested \$ 40,000 since 1950, and he, too, earned a profit of \$ 6,000 in 1980. However, when in 1984 he petitions the Board under section 12 for an increase in his return on investment, he will be turned down if the Board mechanically multiplies his \$ 40,000 investment by a 10 percent return. Hence, B would be limited to his frozen May 1980 amount of return -- \$ 6,000. Only if (as plaintiffs suggest is mandatory) the Board takes into account the effect of inflation on his investment, and "adjusts" his investment figure accordingly, or if (as § 12, subd. (c)(8), seems to allow (see *post*, p. 683, fn. 39)) the Board assigns him a higher rate of return, may he secure an increase in the amount of profit he received in 1980.

<sup>39</sup> For example, nothing in the ordinance precludes the Board from adjusting the rate (percentage) of return on investment in order to increase a landlord's amount of profit. Indeed, the ordinance seems to contemplate ad hoc adjustment of individual landlord's rates of return in order to reach this result: section 12, subdivision (c)(8), provides that in making individual adjustments the Board shall consider "[the] landlord's *rate* of return on investment." (Italics added.) See section 12, subdivision (c), set out *post*, page 689, footnote 46.

<sup>40</sup> Nothing in the ordinance requires the Board to fix a landlord's return based only on his "actual" investment. Further, although section 12, subdivision (c), contains a list of "relevant factors" to be considered by the Board in determining the appropriate

## [\*\*\*\*80] 2. Irrational Discrimination

Plaintiffs also argue that the investment standard denies equal protection because it will result in different rent ceilings for comparably valued rental units. This issue was raised and properly decided in *Cotati Alliance*, in which the court observed that such disparate treatment bears a debatable rational relationship to a legitimate public purpose: the voters could have reasonably concluded that the investment standard, more effectively than a value-based standard, ensures noninflated, reasonable rents for citizens in times of high inflation. ( *Cotati Alliance, supra*, 148 Cal.App.3d 280, 292; [\*\*\*715] see [\*\*294] [Hale v. Morgan \(1978\) 22 Cal.3d 388, 395 \[149 Cal.Rptr. 375, 584 P.2d 512\]](#).)

## [\*685] 3. Ascertaining the Extent of a Landlord's "Investment"

Plaintiffs next predict problems applying the investment standard to landlords who, for various reasons, have made little or no cash investment. However, those who purchased with no down payment, improved property years ago with "preinflation dollars," or who obtained property through gift or inheritance, need not be deprived of a fair return simply because they made no [\*\*\*\*81] initial monetary investment. The ordinance does not confine "investment" to such a restrictive definition. The Board, therefore, is not precluded, in appropriate cases, from considering as "investment," a landlord's personal labor in improving his property. ( *Cotati Alliance, supra*, 148 Cal.App.3d at pp. 287, 289.) Nor is the Board precluded from imputing the transferor's "investment," adjusted as might be necessary, to landlords who obtained property by gift or inheritance. (*Ibid.*; *Fair Return, supra*, 12 Rutgers L.J. at p. 645.) Furthermore, the ordinance does not preclude the Board from considering "forms of investment such as mortgage payments toward principal, [or] cash invested in later improvements in the property" ( *Cotati Alliance*, 148 Cal.App.3d at p. 287), or, with certain exceptions,<sup>41</sup> the terms of a landlord's individual financing obligations. In fact, the ordinance directly provides for such flexible application of the investment standard. Subdivision (i) of section 12 provides that "[no] provision of this Ordinance shall be applied so as to prohibit the Board from granting an individual rent adjustment that is demonstrated necessary by the landlord [\*\*\*\*82] to provide the landlord with a fair return on investment."

## 4. Deprivation of Full Long-term Appreciation

Finally, amicus for plaintiffs appears to argue that the ordinance's investment standard is unconstitutional on its face because it unfairly deprives landlords of full long-term appreciation on the value of their regulated property. The thrust of this contention is apparently aimed at establishing that, as a matter of due process, rent control ordinances must guarantee all landlords a fair return on the full market value of their property. This issue was also raised in *Cotati Alliance*, in which the court observed that "[some] lessening of appreciation is a necessary consequence of any rent control, since future appreciation is to a significant extent a function of increased rental income. [Citation.] It is one of the very sources of long-term appreciation -- inflated rents -- that rent control measures are intended [\*\*\*\*83] to restrict." ([148 Cal.App.3d at p. 290](#)).<sup>42</sup>

[\*686] The fallacy of plaintiffs' contention is readily apparent. [HN33](#)<sup>↑</sup> Any price-setting regulation, like most other police power regulations of property rights, has the inevitable effect of reducing the value of regulated

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amount of a landlord's rents, these factors are expressly nonexclusive. And perhaps most significant, subsection (8) of subdivision (c), permits the Board to consider "all relevant factors" in determining the "landlord's rate of return on investment." See section 12, subdivision (c), set out *post* at page 689, footnote 46.

We read *Cotati Alliance* to be consistent with our determination today. That case merely suggests that a rent board "may" consider the effect of inflation if doing so is necessary to assure a landlord a fair return, and hence avoid a confiscatory result, in a specific case. ([148 Cal.App.3d at p. 289](#)).

<sup>41</sup> See section 12, subdivisions (d) and (e), set out *post*, page 692, footnote 53.

<sup>42</sup> The court further noted: "[landlords] also argue that the ordinance unfairly denies long-time landlords any appreciation from the time of acquisition to the date when rents were first controlled, but the ordinance did not reduce rents when it was enacted, and thus, did not affect preordinance appreciation." ( *Id. at pp. 290-291* (italics in original).)

properties. But it has long been held that such reduction in property value does not by itself render a regulation unconstitutional. [CA\(16\)](#)<sup>43</sup> (16) Police power legislation results in a confiscatory "taking" only when the owner has been deprived of substantially all reasonable use of the property. ( *Agins v. City of Tiburon* (1979) 24 Cal.3d 266, 277 [157 Cal.Rptr. 372, 598 P.2d 25], affd. [\*\*\*\*84] [\(1980\) 447 U.S. 255 \[65 L.Ed.2d 106, 100 S.Ct. 2138\]](#).) Even a significant diminution in value is insufficient to establish a confiscatory taking. ( [Euclid v. Ambler Realty Co. \(1926\) 272 U.S. 365 \[71 L.Ed. 303, 47 S.Ct. 114, 54 A.L.R. 1016\]](#) [75 percent reduction in value because of zoning law insufficient to establish a taking]; [Hadacheck v. Sebastian](#) [\*\*295] [\[\\*\\*\\*716\] \(1915\) 239 U.S. 394 \[60 L.Ed. 348, 36 S.Ct. 143\]](#) [nearly 90 percent reduction in value because of use restriction insufficient to establish a taking].) As the United States Supreme Court noted in [Hope Gas Co., supra, 320 U.S. at page 601 \[88 L.Ed. at page 344\]](#), "[t]he fixing of prices, like other applications of the police power, may reduce the value of the property which is being regulated. But the fact that the value is reduced does not mean that the regulation is invalid." (Accord, [Penn. Central Transp. Co. v. New York City \(1978\) 438 U.S. 104, 131 \[57 L.Ed.2d 631, 652, 98 S.Ct. 2646\]](#) [diminution in property value, standing alone, cannot establish a "taking"]; [Permian Basin Area Rate Cases \(1968\) 390 U.S. 747, 769 \[20 L.Ed.2d 312, 337, 88 S.Ct. 1344\]](#) ["No [\*\*\*\*85] constitutional objection arises from the imposition of maximum prices merely because . . . the value of regulated property is reduced as a consequence of regulation."].)

[CA\(12d\)](#)<sup>43</sup> (12d) Thus, although we need not articulate in this facial attack the precise constitutional standard that all administrative rent control standards must meet (*ante*, p. 681, fn. 35), we can state with certainty that a rent control ordinance need not provide for a fair return on the value of a landlord's property in order to survive a facial challenge. We conclude that defendants' fair return on investment standard will not preclude the Board from avoiding confiscatory results, and hence the administrative standard established in the ordinance is constitutionally valid on its face. ([Cal. Const. art. I, § 7](#); accord, [Oceanside Mobilehome Park Owners' Assn. v. City of Oceanside \(1984\) 157 Cal.App.3d 887, 897-900 \[204 Cal.Rptr. 239\]](#); *Cotati Alliance, supra*, 148 Cal.App.3d at pp. 288-289, and cases and authorities cited.)<sup>43</sup>

#### [\*\*\*\*86] [\*687] B. Facial Validity of the Ordinance's Rent Adjustment Procedures

[CA\(17\)](#)<sup>43</sup> (17) As we observed recently in *Carson*, "[HN34]" when] rent ceilings of an indefinite duration are established, a mechanism must be provided for granting those increases necessary to permit landlords a just and reasonable return. 'The mechanism is sufficient for the required purpose only if it is capable of providing adjustments in maximum rents without a substantially greater incidence and degree of delay than is practically necessary.'" ([35 Cal.3d at p. 191](#), quoting [Birkenfeld, supra, 17 Cal.3d at p. 169](#).) As plaintiffs observe, "[property] may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmation of them . . . ." ([Smith v. Illinois Bell Tel. Co. \(1926\) 270 U.S. 587, 591 \[70 L.Ed. 747, 749, 46 S.Ct. 408\]](#).)

Of course, [HN35](#) some delays are inherent in any rent control scheme. But, "only those delays which are longer than practically necessary to achieve the legitimate purposes of the legislation are constitutionally proscribed." (*Carson, supra, 35 Cal.3d at p. 192; Birkenfeld, supra, 17 Cal.3d at pp. 169, 173.*) [\*\*\*\*87]

[CA\(18\)](#)<sup>43</sup> (18) The test used to review the facial validity of defendants' adjustment procedures is the same one used above to review the ordinances' administrative standard for individual maximum rent adjustments under section 12. We will declare the adjustment procedures invalid only if the ordinance on its face will not permit the Board to avoid confiscatory results. Although in *Birkenfeld* we found Berkeley's former ordinance facially unconstitutional on this basis because, by its terms, it precluded reasonably prompt action in most cases, the ordinance before us now contains none of the problems found in the former regulation.

The prior ordinance had no provision for "general rental adjustments for all or any" [\[\\*\\*296\]](#) class of rental units based on generally [\[\\*\\*\\*717\]](#) applicable factors such as property taxes." ([Birkenfeld, 17 Cal.3d at p. 171](#).) Although

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<sup>43</sup> To the extent it is contrary to this determination, [Gregory v. City of San Juan Capistrano \(1983\) 142 Cal.App.3d 72, 85-86 \[191 Cal.Rptr. 47\]](#) is disapproved.

we recently recognized in *Carson* that a rent control ordinance need not have a general adjustment provision to pass constitutional muster ([35 Cal.3d at p. 194](#)), such a mechanism will be required when the "magnitude of the job to be done" ([Birkenfeld, at p. 169](#)) so demands. Since we decided *Birkenfeld* the number of [\*\*\*\*88] rental units in Berkeley subject to rent control has increased to 23,000. However, the exact mechanism found wanting in 1976 is present in the ordinance before us now in section 11 <sup>44</sup> [\*\*\*\*89] -- a comprehensive [\[\\*\\*297\]](#) [\[\\*\\*\\*718\]](#) scheme [\[\\*688\]](#) that provides for annual <sup>45</sup> across the board adjustment based on "cost" factors.

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<sup>44</sup> Section 11, as amended in 1982 (see *ante*, p. 654, fn. 2), provides in full (deletions are stricken with a horizontal line; additions are in italics):

"a. Once each year, the Board shall consider setting and adjusting the rent ceiling for all rental units covered by this Ordinance in general and/or particular categories of rental units covered by this Ordinance deemed appropriate by the Board. The Board shall hold at least two public hearings prior to making any annual general adjustment of the rent ceilings. *The Board shall publish and publicize notices of the date, time, and place of the public hearings at least thirty (30) days prior to the hearing date. The two required public hearings shall be conducted and the annual general adjustment shall be set between September 1 and October 31, of each year. The annual adjustment shall become effective the following January 1.*

"b. In making annual general adjustments of the rent ceiling, the Board shall:

"(1) Adjust the rent ceiling upward by granting those landlords who pay for utilities a utility adjustment for increases in the City of Berkeley for utilities.

"(2) Adjust the rent ceiling upward by granting landlords a property tax, maintenance and operating expense increase adjustment (exclusive of utilities) for increases in the City of Berkeley for property taxes and maintenance and operating expenses.

"(3) Adjust the rent ceiling downward by requiring landlords to decrease rents for any decreases in the City of Berkeley for property taxes.

"(4) *Adjust the rent ceiling downward by requiring landlords who pay for utilities to decrease rents for any decreases in the City of Berkeley for utilities.*

"In adjusting rents *ceilings* under this subsection, the Board shall adopt a formula or formulas of general application. This formula will be based upon *the annual rent registration forms, surveys, information and testimonies presented at public hearings, and other available data indicating increases or decreases in the expenses relating to the rental housing market in the City of Berkeley set forth in this subsection. For maintenance and operating expense adjustments, the Board may also use survey data from surrounding communities where appropriate. The Board shall make no more than one annual adjustment of rent ceilings per rental units per year.*

*"Adoption of a formula greater than forty-five percent (45%) of the increase in the Consumer Price Index for the twelve months ending the previous June 30 shall require the affirmative vote of six (6) Commissioners, other provisions notwithstanding. Adoption of such a formula shall be a specific and special exception to the requirement of only five (5) affirmative votes to make a decision. For the purposes of this subsection, the Consumer Price Index shall mean the Consumer Price Index for all urban consumers in San Francisco -- Oakland, all items (1967 equals 100), as reported by the Bureau of Labor Statistics of the U.S. Department of Labor, as it pertains to the City of Berkeley.*

"c. An upward general adjustment in rent ceilings does not automatically provide for a rent increase. Allowable rent increases pursuant to a general upward adjustment shall become effective only after the landlord gives the tenant at least a thirty (30) days written notice of such rent increase and the notice period expires.

"d. If the Board makes a downward general adjustment in the rent ceilings, landlords of rental units to which this adjustment applies shall give tenants of such rental units written notice of the rent decrease to which they are entitled. Such rent decreases shall take effect not later than thirty (30) days after the effective date set by the Board for the downward general adjustment.

"e. If the maximum allowable rent specified under this Ordinance for a rental unit is greater than the rent specified for such unit in the rental agreement, the lower rent specified in the rental agreement shall be the maximum allowable rent until the rental agreement expires. If the maximum allowable rent specified under this Ordinance for a rental unit is less than the rent specified for such unit in the rental agreement, the lower rent specified under this Ordinance shall be the maximum allowable rent.

"f. No rent increase pursuant to an upward general adjustment of a rent ceiling shall be effective if the landlord:

The adjustment for all landlords under section 11 is designed to allow landlords to retain the generally same dollar amount of profit in subsequent years that they received in May 1980. In order to acquire rent increases that [\*689] reflect cost increases not imposed on other landlords generally, or in order to seek an increase in dollar amount of return (i.e., the dollar amount of profit), a landlord must secure an individual adjustment pursuant to section 12, subdivision c.<sup>46</sup> And, as observed *ante* at pages 682-684, unless landlords [\*690] have reasonable access to such individual adjustments, the ordinance has the potential for producing unconstitutional results.

[\*\*\*\*90] In comparison to the procedures for individual adjustment in Berkeley's former regulation -- which, we said, "put the Board in a procedural strait jacket" ( *Birkenfeld, supra, 17 Cal.3d at p. 171* ) -- the ordinance before us

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"(1) Has continued to fail to comply, after order of the Board, with any provisions of this Ordinance and/or orders or regulations issued thereunder, or

"(2) Has failed to bring the rental unit into compliance with the implied warranty of habitability, or

"(3) Has failed to make repairs as ordered by the Housing Inspection Services of the City of Berkeley, or

"(4) Has failed to completely register by September 1, except as provided in Subsection 11.g. below.

"g. The amount of an upward general adjustment for which a landlord shall be eligible shall decrease by ten (10) percent per month for each month beyond December 1 for which the landlord fails to register.

"h. A landlord who is ineligible to raise rents under an upward general adjustment for an entire calendar year shall not be eligible to raise rents under that particular general adjustment in future years."

<sup>45</sup> We are informed by amicus that general adjustments under section 11 in the past four years have been as follows: 1981, 5 percent (6.21 if the landlord provided space heating); 1982, 9 percent; 1983, 5 percent; 1984, no increase (apparently because of the low inflation rate for 1983). See Baar, *supra*, 35 Rutgers L.Rev. at pages 779-780.

<sup>46</sup> Section 12, subdivision c, provides in full: "In making individual adjustments of the rent ceiling, the Board or the hearing examiner shall consider the purposes of this Ordinance and shall specifically consider all relevant factors, including (but not limited to):

"(1) Increases or decreases in property taxes;

"(2) Unavoidable increases or any decreases in maintenance and operating expenses;

"(3) The cost of planned or completed capital improvements to the rental unit (as distinguished from ordinary repair, replacement and maintenance) where such capital improvements are necessary to bring the property into compliance or maintain compliance with applicable local code requirements affecting health and safety, and where such capital improvement costs are properly amortized over the life of the improvement;

"(4) Increases or decreases in the number of tenants occupying the rental unit, living space, furniture, furnishings, equipment, or other housing services provided, or occupancy rules;

"(5) Substantial deterioration of the controlled rental unit other than as a result of normal wear and tear;

"(6) Failure on the part of the landlord to provide adequate housing services, or to comply substantially with applicable state rental housing laws, local housing, health and safety codes, or the rental agreement;

"(7) The pattern of recent rent increases or decreases;

"(8) The landlord's rate of return on investment. In determining such return, all relevant factors, including but not limited to the following shall be considered: the landlord's actual cash down payment, method of financing the property, and any federal or state tax benefits accruing to landlord as a result of ownership of the property;

"(9) Whether or not the property was acquired or is held as a long-term or short-term investment; and

"(10) Whether or not the landlord has received rent in violation of the terms of this Ordinance or has otherwise failed to comply with the Ordinance.

"It is the intent of this Ordinance that individual upward adjustments in the rent ceilings on units be made only when the landlord demonstrates that such adjustments are necessary to provide the landlord with a fair return on investment."

now is solicitous of due process. The initiative drafters apparently studied *Birkenfeld*, and took it to heart: every major procedural failing that we noted in the former ordinance has been addressed, and additional procedural protections not previously mentioned have been included.

[\*\*298] The previous Berkeley ordinance found invalid in *Birkenfeld* (1) did not allow a landlord to file a petition for rent [\*\*\*719] adjustment unless it was accompanied by a certificate of building code compliance from the city's building code department; (2) gave the Board no power to consolidate petitions for units in the same building, unless the tenants consented; and (3) gave the Board (five members each paid a maximum of \$ 2,400 per year) no power to delegate the holding of hearings to hearing officers, or even to members or panels of the Board. ([17 Cal.3d at pp. 170-171](#).) As defendants point out, none of these "defects" appear in the new ordinance: (1) there [\*\*\*91] is no requirement that a landlord's petition be accompanied by a certificate from the building department, or from anyone else;<sup>47</sup> [\*\*\*92] (2) the Board is expressly given the power to consolidate a landlord's petitions for units in the same building -- whether or not the tenants consent;<sup>48</sup> and (3) the ordinance expressly gives the Board the power to appoint hearing officers to hold hearings,<sup>49</sup> and the hearing officers are authorized to issue decisions that are [\*691] final unless appealed to the Board.<sup>50</sup> [\*\*\*93] Additionally, the new ordinance imposes a time limit of 120 days on all decisions on landlord petitions.<sup>51</sup>

Defendants' new ordinance clearly avoids the confiscatory delays inherent in the former regulation's unit-by-unit procedure. It provides for general citywide increases to cover common costs, and its individual adjustment procedures are designed to assure reasonably prompt consideration of landlords' claims.<sup>52</sup> These procedures

<sup>47</sup> Section 12, subdivision a provides in full: "Petitions. Upon receipt of a petition by a landlord and/or tenant, the rent ceiling of individual controlled rental units may be adjusted upward or downward in accordance with the procedures set forth elsewhere in this Section. The petition shall be on the form provided by the Board. The Board may set a reasonable per unit fee based upon the expenses of processing the petition to be paid by the petitioner at the time of filing. No petition shall be filed before September 1, 1980. Notwithstanding any other provision of this Section, the Board or hearing examiner may refuse to hold a hearing and/or grant an individual rent ceiling adjustment for a rental unit if an individual hearing has been held and decision made with regard to the rent ceiling for such unit within the previous six months."

<sup>48</sup> Section 12, subdivision b(9) provides in full: "Consolidation. All landlord petitions pertaining to tenants in the same building shall be consolidated for hearing, and all petitions filed by tenants occupying the same building shall be consolidated for hearing unless there is a showing of good cause not to consolidate such petitions."

<sup>49</sup> Section 12, subdivision b(1) provides in full: "Hearing Examiner. A hearing examiner appointed by the Board shall conduct a hearing to act upon the petition for individual adjustments of rent ceilings and shall have the power to administer oaths and affirmations."

<sup>50</sup> Section 12, subdivision b(11) provides in full: "Finality of Decision. The decision of the hearing examiner shall be the final decision of the Board in the event of no appeal to the Board. The decision of the hearing examiner shall not be stayed pending appeal; however, in the event that the Board or panel reverses or modifies the decision of the hearing examiner, the Board shall order the appropriate party to make retroactive payments to restore the parties to the position they would have occupied had the hearing examiner's decision been the same as that of the Board's."

<sup>51</sup> Section 12, subdivision b(12) provides in full: "Time for Decision. The rules and regulations adopted by the Board shall provide for final Board action on any individual rent adjustment petition within one hundred and twenty (120) days following the date of filing of the individual rent ceiling adjustment petition, unless the conduct of the petitioner or other good cause is responsible for the delay." As defendants point out, it is clear that the 120-day rule also applies to petition determinations that are appealed to the Board.

<sup>52</sup> Like the 105-day provision that we recently reviewed in *Carson*, we do not believe that the time allowed for review under section 12 is excessive. Within the 120-day time limit, "the Board must (1) review all information provided by the applicants, including complex financial and tax data, (2) review comments received from tenants, and (3) hold a hearing at which the interested parties are permitted to testify. [para.] Careful review of the information provided to the Board is important. The financial and tax data submitted by the applicant reveals whether the owner's profits have increased or decreased, whether the property taxes or operating costs associated with the [property] have increased or decreased, and whether any capital improvements have been made. Review of the information supplied by the tenants helps the Board determine whether there has been any increase or decrease in the services provided by the [landlord]."[\(35 Cal.3d at pp. 193-194.\)](#)

[\*\*299] [\*\*\*720] are reasonably related to achievement of the ordinance's stated purpose of, *inter alia*, preventing excessive rents. By its own terms, the ordinance will permit the Board to avoid confiscatory results; we therefore [\*\*\*94] conclude that the ordinance, on its face, guarantees plaintiffs due process. (*Cal. Const., art. I, § 7; Birkenfeld, supra, 17 Cal.3d at pp. 165, 173.*)

#### [\*\*\*95] C. Unreasonable Restraint on Alienation

At the same time that mechanical application of the fair return on investment standard may have the potential to produce confiscatory results in some individual cases (*ante*, pp. 682-684) it is also recognized that the standard has the potential for awarding windfall returns to recent investors whose purchase prices and interest rates are high. If this latter aspect were unregulated, use of the investment standard might defeat the purpose of rent [\*692] price regulation. To prevent this result, defendants' ordinance, like others in the state (see *Baar, supra*, 35 Rutgers L.Rev. at p. 788, fn. 249), contains two "antispeculation" clauses that prohibit the Board from considering certain increases in mortgage interest payments when those increases occur after adoption of the ordinance. ( *Id. at pp. 788, 792.*) Thus, except when refinancing is necessary to make capital improvements or in cases of individual hardship to buyers, section 12, subdivisions d and e,<sup>53</sup> preclude the Board from authorizing an individual rent increase because of increased interest or other expenses resulting from sale or refinancing of rental property, [\*\*\*96] if the landlord could reasonably have foreseen that such increased expenses could not be covered by the "existing" rent schedule.

[\*\*\*97] **CA(19)** (19) Plaintiffs do not challenge the constitutional reasonableness of the classification created by these restrictions; instead, they claim these provisions constitute unreasonable restraints on alienation in that they will inhibit sales of rental property at a fair market value in violation of *Civil Code section 711*. **HN36** That section states simply, "[conditions] restraining alienation, when repugnant to the interest created, are void." Plaintiffs' contention, however, ignores ordinance section 12, subdivision i, which cautions, "[no] provision of this Ordinance shall be applied so as to prohibit the Board from granting an individual rent adjustment that is demonstrated necessary by the landlord to provide the landlord with a fair return on investment." This safety valve overrides all other provisions of the ordinance and averts any danger that subdivisions d and e might prevent a purchaser from realizing a fair return, and [\*300] thus prevents any unreasonable restraint on alienation. (See generally *Wellenkamp v. Bank of America (1978) 21 Cal.3d 943, 948 [148 Cal.Rptr. 379, 582 P.2d 970].*)

[\*\*\*721] Furthermore, even if the two subdivisions were assumed to create an [\*\*\*98] unreasonable restraint, we are persuaded by defendants' contention that **HN37** *Civil [\*693] Code section 711* does not, and was never intended to, apply to municipal ordinances. **CA(20)** (20) Our review of that statute and the many cases that apply it reveals that it addresses only private restraints on alienation, and not government regulations. (Cf. 3 Witkin, Summary of Cal. Law (8th ed. 1973) Real Property, § 314, p. 2024 [the rule against restraints on alienation "is

We stress that only the facial validity of the ordinance is currently before the court. Whether individual landlords might prove a denial of due process because of delays exceeding the 120-day time limit is a question of great concern, but it is not before us at this time.

<sup>53</sup> These subdivisions provide in full: "d. No individual upward adjustment of a rent ceiling shall be authorized by the Board by reason of increased interest or other expenses resulting from the landlord's refinancing the rental unit if, at the time the landlord refinanced, the landlord could reasonably have foreseen that such increased expenses could not be covered by the rent schedule then in existence, except where such refinancing is necessary for the landlord to make capital improvements which meet the criteria set forth in Section 12.c.(3). This paragraph shall only apply to that portion of the increased expenses resulting from the refinancing that were reasonably foreseeable at the time of the refinancing of the rental unit and shall only apply to rental units refinanced after the date of adoption of this Ordinance. [para.] e. Except for cases of individual hardship as set forth in Subsection 12.i. of this Ordinance, no individual upward adjustment of a rent ceiling shall be authorized by the Board because of the landlord's increased interest or other expenses resulting from the sale of the property, if at the time the landlord acquired the property, the landlord could have reasonably foreseen that such increased expenses would not be covered by the rent schedule then in effect. This Subsection (12.e.) shall only apply to rental units acquired after the date of adoption of this Ordinance."

directed against the provisions in contracts or conveyances. It has no application to disabling restraints established by express statute."); Rest., Property, pp. 2377, 2381.) None of the cases cited by plaintiffs or amici supports a contrary view.

#### *D. Retaliatory Eviction Presumption*

Typically, rent control schemes include eviction controls that require "good cause" in order for a landlord to bring an eviction action. Without such controls, "the security of tenure objectives of rent control laws could be undermined and the threat of eviction could be used to nullify the operation of rent regulations." ([Baar, supra](#), 35 Rutgers L.Rev. at p. 833.)

Accordingly, section 14 of the ordinance <sup>54</sup> restates this court's established [\*\*\*\*99] holding that a landlord's retaliation against a tenant for the tenant's assertion or exercise of rights is a defense to eviction. ( [Schweiger v. Superior Court \(1970\) 3 Cal.3d 507, 517 \[90 Cal.Rptr. 729, 476 P.2d 97\]](#).) The section then provides that, in an action by the landlord to recover possession or in an affirmative action taken by the tenant for damages, "evidence of the assertion or exercise by the tenant of rights under this Ordinance within six months prior to the alleged act of retaliation shall create a presumption that the landlord's act was retaliatory." As originally enacted, the section provided that "[presumption]" means that the Court must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence." After the trial court's judgment in this case the latter sentence was amended in 1982 (see *ante*, p. 654, fn. 2) to [\*694] read, "[presumption]" means that the Court must find the existence of the fact presumed unless and until its nonexistence is proven by a preponderance of the evidence."

[\*\*\*\*100] Questions regarding the legality of the preamendment presumption are clearly moot. Nevertheless, it would be imprudent to avoid analysis of plaintiffs' challenges to the amended language at this time. Clearly, those parts of section 14 that were simply reenacted by the amendment are properly before us now. ( [Carter v. Stevens \(1930\) 208 Cal. 649, 651 \[284 P. 217\]](#).) The question regarding the effect of the amendment is purely one of law ( [Carman v. Alvord \(1982\) 31 Cal.3d 318, 324 \[182 \(\\*\\*301\) Cal.Rptr. 506, 644 P.2d 192\]](#)); moreover, the question arises in a facial attack on appeal from an order denying an injunction, and therefore is properly resolved by this court at this time. ( [Complete Service Bureau v. \\*\\*\\*722 San Diego Med. Soc. \(1954\) 43 Cal.2d 201, 207 \[272 P.2d 497\]; Cal-Dak Co. v. Sav-On Drugs, Inc. \(1953\) 40 Cal.2d 492, 496-497 \[254 P.2d 497\]](#).)

#### 1. Classification of the Presumption

Plaintiffs claim that section 14 purports to create a presumption affecting the burden of proof, and that such presumptions created by municipal ordinance are preempted by state law. ( [Evid. Code, § 500](#).) Defendants apparently respond that [\*\*\*\*101] section 14 creates merely a presumption affecting the burden of producing or going forward with evidence, and that, even if it does create a presumption affecting the burden of proof, [section 500](#) and other relevant sections of the Evidence Code allow such a presumption.

<sup>54</sup> As amended in 1982 (see *ante*, p. 654, fn. 2), the section provides (deletions are stricken with a horizontal line; additions are in italics): "No landlord may threaten to bring, or bring, an action to recover possession, cause the tenant to quit the unit involuntarily, serve any notice to quit or notice of termination of tenancy, decrease any services or increase the rent where the landlord's intent is retaliation against the tenant for the tenant's assertion or exercise of rights under this Ordinance. Such retaliation shall be a defense to an action to recover possession, or it may serve as the basis for an affirmative action by the tenant for actual and punitive damages and injunctive relief. In an action by or against a tenant, evidence of the assertion or exercise by the tenant of rights under this Ordinance within six months prior to the alleged act of retaliation shall create a presumption that the landlord's act was retaliatory. 'Presumption' means that the Court must find the existence of the fact presumed unless and until its nonexistence is proven by a preponderance of the evidence. A tenant may assert retaliation affirmatively or as a defense to the landlord's action without the aid of the presumption regardless of the period of time which has elapsed between the tenant's assertion or exercise of rights under this Ordinance and the alleged act of retaliation."

### a. Presumption Affecting the Burden of Producing Evidence

**HN38** [+] The burden of producing evidence refers to a party's obligation to introduce evidence sufficient to establish a *prima facie* case, or, in other words, sufficient to avoid nonsuit. ( [Evid. Code, § 110](#)) "A presumption affecting the burden of producing evidence is a presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied." ( [Evid. Code, §603](#)) The code makes clear that the purpose of such a rebuttable presumption relates solely to judicial efficiency, and does not rest on any public policy extrinsic to the action in which it is invoked. A presumption affecting the burden of producing evidence is based on an underlying logical inference that the presumed fact very likely follows from the proved fact; the presumption is designed to avoid unnecessary proof of facts [\*\*\*\*102] likely to be true if not disputed. Especially relevant to the present case, such a rebuttable presumption is designed to place the responsibility for establishing the nonexistence of certain facts on the party most able to do so. As observed in the California [\*695] Law Revision Commission's comment on [section 603](#), "[the] presumptions described in [that section] are not expressions of policy; they are expressions of experience. They are intended solely to eliminate the need for the trier of fact to reason from the proven or established fact to the presumed fact and to forestall argument over the existence of the presumed fact when there is no evidence tending to prove the nonexistence of the presumed fact."

If the presumption established in section 14 affects the burden of producing evidence, a tenant who shows an assertion or exercise of rights under the ordinance within six months of an eviction proceeding will have established either (1) a *prima facie* defense to eviction (and will hence avoid nonsuit), or (2) a *prima facie* case for damages, unless the landlord rebuts the presumption by evidence supporting its nonexistence by a preponderance of the evidence. ( [Evid. \[\\*\\*\\*\\*103\] Code, §§ 110, 604](#)) As noted in the Assembly Committee on the Judiciary's comment on [section 604](#), "[such] a presumption is merely a preliminary assumption in the absence of contrary evidence."

### b. Presumption Affecting the Burden of Proof

**HN39** [+] The burden of proof, on the other hand, refers to a party's obligation to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact. ( [Evid. Code, § 115](#)) Unlike presumptions affecting the burden of producing evidence, which exist merely to expedite resolution of disputes, "[a] presumption affecting the burden of proof is a presumption established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied, such as the policy in favor of establishment of a parent and child relationship, the validity of marriage, the stability of titles to property . . ." ( [Evid. Code, § 605](#)) The purpose of such a [\*\*302] rebuttable presumption relates to public policy goals "other than or in addition to the policy of facilitating the trial of actions." (Cal. Law Revision Com. com. on [Evid. Code, § 605](#)) As the California Law [\*\*\*723] [\*\*\*\*104] Revision Commission observes, "[frequently], presumptions affecting the burden of proof are designed to facilitate determination of the action in which they are applied. Superficially, therefore, such presumptions may appear merely to be presumptions affecting the burden of producing evidence. What makes a presumption one affecting the burden of proof is the fact that there is always some further reason of policy for the establishment of the presumption. It is the existence of this further basis in policy that distinguishes a presumption affecting the burden of proof from a presumption affecting the burden of producing evidence." (*Ibid.*)

If a presumption affecting the burden of proof is established by section 14, a tenant who shows an assertion or exercise of rights under the ordinance [\*696] within six months of the eviction proceeding will effectively shift to the landlord the burden of disproving the tenant's defense or case for damages, by requiring the landlord to prove to the trier of fact, by a preponderance of the evidence, that eviction was not retaliatory. ( [Evid. Code, §§ 115, 606](#)) In other words, unlike presumptions affecting the burden of producing evidence, [\*\*\*\*105] which would merely protect a tenant against nonsuit, a presumption affecting the burden of proof would shift the ultimate responsibility of persuasion to the landlord.

### c. Presumption Created by the Amendment

Defendants concede that it is difficult to classify the presumption created by section 14. Plaintiffs implicitly recognize the same problem: although they characterized the amended presumption in earlier briefs as a valid

presumption affecting the burden of producing evidence, in recent briefs they claim it is an invalid presumption affecting the burden of proof.

**CA(21a)[]** (21a) Viewing the section's language in the context of the entire ordinance, and in light of the earlier preamendment version, we must agree with plaintiffs that the amended section 14 presumption affects the burden of proof. Regarding the latter point first, we note that the preamendment language paralleled [Evidence Code section 604](#)'s description of the effect of a presumption affecting the burden of producing evidence: former section 14 specified that "the Court must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence." [Evidence Code section 1\\*\\*\\*\\*1061 604](#) similarly provides that a presumption affecting the burden of producing evidence "[requires] the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence."

It thus seems reasonably clear that the former section established a presumption affecting the burden of producing evidence. It would also be reasonable to assume that the amendment was intended to change, rather than simply restate or clarify, the original presumption. First, the amendment specifically omitted reference to introduction of evidence that would support a finding of the presumed fact's nonexistence -- and therefore it departs from the express language of [Evidence Code section 604](#). Moreover, to the extent the amendment was intended to clarify and restate the previous presumption that affected only the burden of producing evidence, the new section would quite obviously be a failure -- because its language describes that kind of presumption even less clearly than did its predecessor.

The suggestion that the amendment was intended to implement a presumption affecting the burden of proof, and not merely one affecting the [\*\*\*\*107] [\*697] burden of producing evidence, is further supported by defendants' own description of the purpose of the amended presumption. Defendants claim the presumption is intended to further the municipality's policy against retaliatory evictions and to promote the policy of encouraging [\*\*303] tenants to exercise their rights under the ordinance. In view of the previous section's subsequent amendment -- and because, as defendants admit, section 14 is designed to further policies extrinsic to, or [\*\*\*724] in addition to, the policy of facilitating determination of particular eviction actions -- we must conclude that the amended section creates a presumption affecting the burden of proof.

## 2. Direct Preemption by the Evidence Code

**CA(22)[]** (22) **HN40[]** Although municipalities have power to enact ordinances creating substantive defenses to eviction ([Birkenfeld, supra, 17 Cal.3d 129, 149](#)), such legislation is invalid to the extent it conflicts with general state law. (*Id. at p. 152*; Cal. Const., art. XI, § 7.) **CA(21b)[]** (21b) Plaintiffs claim that section 14, as amended, directly conflicts with **HN41[]** [Evidence Code section 500](#), which states: "Except as otherwise provided by law, a party has the burden of proof [\*\*\*\*108] as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." They note that under section 14, proof of retaliation is "essential" to establishing the tenant's defense or claim for relief; therefore, they argue, [Evidence Code section 500](#), requires that the tenant prove the fact of retaliation.

Defendants respond that [Evidence Code section 500](#) by its own terms does not apply to situations "otherwise provided [for] by law." Plaintiffs, in turn, maintain that this exception does not contemplate local ordinances or charter amendments.

**HN42[]** The term "law," as used in [Evidence Code section 500](#), is defined as including "constitutional, statutory, and decisional law." ([Evid. Code, § 160](#).) Defendants contend that [section 160](#) was not intended to exclude local ordinances as a source of "law," but was merely intended to make clear that the term "law" includes judicial decisions. (See Cal. Law Revision Com. com. to [§ 160](#).) They therefore invite us to construe "statutory" as including ordinances.

Indeed, there have been cases in which courts have suggested that the term "statute" embraces local ordinances. ([City of Los Angeles v. Belridge Oil Co. \(1954\) 42 Cal.2d 823, 833-834 \[271 P.2d 5\]](#); [King Mfg. Co. v. Augusta \(1928\) 277 U.S. 100, 102-114 \[72 L.Ed. 801, 804-810, 48 S.Ct. 489\]](#).) Neither of those cases, however,

assists defendants. In *Belridge* we observed that a city licensing ordinance could be construed as a statute under the statute of limitations; in *King* the United States Supreme Court [**\*698**] construed an ordinance as a statute for the purpose of satisfying jurisdiction. But, in neither case did the court address issues remotely approaching the question posed here: whether a local ordinance can be deemed a "statute" for purposes of deviating from the established rules of evidence relating to burden of proof.

The answer to this question would seem so settled that, like other firm rules of law, few courts have recently had occasion to address the issue. [HN43↑](#) Long before enactment of [Evidence Code sections 500](#) and [160](#), we suggested that municipal governments have no authority to depart from the common law of evidence. ( [Orena v. City of Santa Barbara \(1891\) 91 Cal. 621, 629 \[28 P. 268\]](#) [an "ordinance is void . . . [to the extent that it purports to] lay down [\*\*\*\*110] rules of evidence . . . ."].) Similarly, commentators have maintained that, "[without] express authority the general rules of evidence or procedure may not be changed by ordinance by a municipal corporation" (9 McQuillin, *Municipal Corporations* (3d ed. 1978) § 27.45, p. 670; see also 2 Dillon, *Municipal Corporations* (5th ed. 1911) § 643, p. 983), and that, "[unlike] the legislature, the governing body of a municipal corporation has no power to prescribe rules of evidence for the guidance of courts. Therefore, a municipal ordinance . . . concerning the burden of proof [is void]." (31 Cal.Jur.3d, [Evidence, § 5](#), at p. 37.) See also [Cohen v. St. Louis Merchants' Bridge Terminal Ry. \(1916\) 193 Mo.App. 69 \[181 S.W. 1080, 1081-1082\]](#) ("the city cannot by ordinance in any wise change or alter the [\*\*\*304] ordinary rules of evidence applicable in this court"); [Fitch v. Pinckard \(1842\) 4 Scam. 69, 78 \(5 Ill. 72, 81\)](#) ("[The] [municipal] corporation exceeded its powers, in declaring that the collector's deed should be evidence [\*\*\*725] of a compliance with all the prerequisites of the ordinance. The legislature alone possesses the power to make, change, [\*\*\*\*111] or alter the rules of evidence."); cf., [The City Council v. Dunn](#) (S.C. 1821) 1 McCord 333 (in absence of statutory provision to the contrary, an ordinance may not depart from the common law rules of evidence).

Given this background, we cannot believe that the Legislature, when it enacted [Evidence Code sections 500](#) and [160](#) in 1965, ever intended municipal ordinances to come within the exception clause of [Evidence Code section 500](#). Whether the Evidence Code directly or by implication preempts a local ordinance that purports to create a presumption shifting the burden of producing evidence is a separate issue, on which we reserve decision. (See [Evid. Code, § 550, subd. \(b\)](#).) For now, we conclude that the Legislature deliberately excluded ordinances from those sources of law that may change the traditional allocation of the burden of proof, and that the presumption in section 14 shifting the burden of proof, on its face, directly conflicts with the Evidence Code. ([§ 500](#).) To that extent, the ordinance is invalid.

#### **[\*699] E. Due Process and Preemption Challenges to the Ordinance's Rent Withholding Provisions**

Section 15<sup>55</sup> [**\*\*\*\*113**] sets out remedies for landlords' violations [**\*\*\*\*112**] of the ordinance -- e.g., failure [**\*\*305**] [**\*\*\*726**] to register pursuant to section 8,<sup>56</sup> or charging of rents above [**\*700**] those permitted under sections 11

<sup>55</sup> This section provides in full: "a. For Violation of Rent Ceilings or Failure to Register. If a landlord fails to register in accordance with Section 8 of this Ordinance, or if a landlord demands, accepts, receives or retains any payment in excess of the maximum allowable rent permitted by this Ordinance, a tenant may take any or all of the following actions until compliance is achieved:

"(1) A tenant may petition the Board for appropriate relief. If the Board, after the landlord has proper notice and after a hearing, determines that a landlord has wilfully and knowingly failed to register a rental unit covered by this Ordinance or violated the provisions of Sections 10, 11 and 12 of this Ordinance, the Board may authorize the tenant of such rental unit to withhold all or a portion of the rent for the unit until such time as the rental unit is brought into compliance with this Ordinance. After a rental unit is brought into compliance, the Board shall determine what portion, if any, of the withheld rent is owed to the landlord for the period in which the rental unit was not in compliance. Whether or not the Board allows such withholding, no landlord who has failed to comply with the Ordinance shall at any time increase rents for a rental unit until such unit is brought into compliance.

"(2) A tenant may withhold up to the full amount of his or her periodic rent which is charged or demanded by the landlord under the provisions of this Ordinance. In any action to recover possession based on nonpayment of rent, possession shall not be granted where the tenant has withheld rent in good faith under this Section.

and 12. Section 15, subdivision (a), provides for tenant-initiated remedies: under subsection (1) of that subdivision, a tenant may petition the Board for permission to withhold rent until the landlord complies with the ordinance. Subsection (2) permits the same withholding remedy, even without Board permission, and provides a defense to unlawful detainer if the tenant believes in good faith that the landlord has not complied with the ordinance.<sup>57</sup> Subsection (3) permits a tenant to sue for injunctive relief, and subsection (4) permits a tenant to sue the landlord for money damages.

Subdivision (c) permits the city attorney to sue landlords for injunctive relief, and subdivision (d) permits the Board to do the same. Subdivision (e) permits the Board to settle claims on behalf of tenants.

Plaintiffs focus on the rent withholding provisions of subdivision (a), subsections (1) and (2), which they claim are preempted by state law. Additionally, plaintiffs assert that subsection (2) denies them due process on numerous grounds. We address plaintiffs' due process claims first.

## 1. Due Process

Subdivision (a), subsection (2), allows a tenant to withhold the "full amount" of his periodic rent until the landlord's compliance with the ordinance [\*\*\*\*114] is achieved. It provides further that "[in] any action to recover possession based on nonpayment of rent, possession shall not be granted where the tenant has withheld rent in good faith under this Section."

### a. Reasonable Relationship to the Purpose of the Ordinance

**CA(23)[](23)** Plaintiffs first contend that the "extreme 'remedy'" of subsection (2) is not reasonably related to the purpose of the ordinance because it is available not only when a landlord charges excessive rents, but also when a

"(3) A tenant may seek injunctive relief on behalf of herself or himself to restrain the landlord from demanding or receiving any rent on the unit until the landlord has complied with the terms of this Ordinance.

"(4) A tenant may file a damage suit against the landlord for actual damages when the landlord receives or retains any rent in excess of the maximum rent allowed under this Ordinance. Upon further proof of a bad faith claim by the landlord or the landlord's retention of rent in excess of the maximum rent allowed by this Ordinance, the tenant shall receive a judgment of up to seven hundred and fifty dollars (\$ 750.00) in addition to any actual damages.

"b. For Violation of Eviction Proceedings. If it is shown in the appropriate court that the event which the landlord claims as grounds to recover possession under Subsection 13.a.(7), Subsection 13.a.(8), Subsection 13.a.(9), or Subsection 13.a.(10) is not initiated within two months after the tenant vacates the unit, or it is shown the landlord's claim was false or in bad faith, the tenant shall be entitled to regain possession and to actual damages. If the landlord's conduct was willful, the tenant shall be entitled to damages in an amount of \$ 750 or three times the actual damages sustained, whichever is greater.

"c. The City Attorney may bring an action for injunctive relief on behalf of the City or on behalf of tenants seeking compliance by landlords with this Ordinance.

"d. The Board may seek injunctive relief to restrain or enjoin any violation of this Ordinance or of the rules, regulations, orders and decisions of the Board.

"e. If a tenant fails to bring a civil or administrative action within one hundred and twenty (120) days from the date of the first occurrence of a violation of this Ordinance, the Board may either settle the claim arising from the violation or bring such action. Thereafter, the tenant on whose behalf the Board acted may not bring an action against the landlord in regard to the same violation for which the Board has made a settlement or brought an action. In the event the Board settles the claim it shall be entitled to retain from any payments made by the landlord, the costs it incurred in settlement, and the tenant aggrieved by the violation shall be entitled to the remainder."

<sup>56</sup> This section provides, inter alia, that by a specified date landlords must file a rent registration form showing rents in effect on certain prior dates for each rental unit covered by the ordinance.

<sup>57</sup> Defendants point out that although the subsection (2) remedy might be more effective, the subsection (1) remedy is available for those tenants who would hesitate to take such action without prior approval of an official agency.

landlord fails to register. As defendants observe, however, ensuring landlord registration is crucial to the purpose of the ordinance, because without registration the ordinance cannot be enforced.

Moreover, defendants note that all other enforcement remedies listed above except for subdivision (a), subsection (2), suffer the same serious weakness: to invoke them can cost substantial amounts of money, either to the tenant or to the Board. At the same time, the structure of the ordinance [**\*701**] makes the question of funding crucial. Section 6, subdivision (n),<sup>58</sup> [\*\*\*\*117] provides that funding for the Board's expenses shall be from annual landlord registration fees,<sup>59</sup> [\*\*306] and not from the city's [\*\*\*\*115] general fund. Therefore, defendants observe, the Board is essentially dependent on landlords' registration fees to (i) pay the staff it needs to [\*\*\*727] gather information for its general rent adjustment hearings under section 11; (ii) pay examiners to handle individual rent adjustment hearings under section 12; and (iii) employ counsel to bring suits under section 15, subdivisions (c) and (d), against landlords who refuse to register or who charge rents beyond the maximum allowed. On the other hand, defendants argue, the tenant-initiated remedies, with the exception of subdivision (a), subsection (2), cannot be relied on to enforce the ordinance. Although subdivision (a), subsection (1), permits a tenant to seek Board authorization to withhold rent, if landlords fail to register, the Board may lack funds to hire hearing examiners and other staff to hold hearings on such petitions. And, whereas subdivision (a), subsection (3), permits a tenant to sue for injunctive relief, there is no certainty that many tenants will expend the time or money to pursue that course. Finally, subdivision (a), subsection (4), permits a tenant to sue for damages when the landlord receives more [\*\*\*\*116] than the maximum rent allowed by the ordinance; and subdivision (b) allows a tenant to sue for damages when the landlord violates certain restrictions on evictions; but neither section gives any remedy for the landlord's failure to register. Other provisions -- section 11, subdivision f, subsection (1),<sup>60</sup> and section 12, subdivision f, subsection (1),<sup>61</sup> forbid a landlord who has failed to register -- "after order of the Board" -- from taking advantage of general and individual rent increases allowed by the Board. But if landlords fail to register in significant numbers, the Board might be unable to hire the staff needed to assist in issuing the "orders" required by these two subsections.

[\*702] Defendants thus proclaim the importance of the section 15, subdivision (a), subsection (2), rent withholding provision: it suffers none of the "weaknesses" discussed above; it is claimed to be simple, direct, and self-enforcing. We conclude that defendants' rent withholding provision is reasonably related to achieving the legitimate purposes of the ordinance.

#### b. Vagueness

[\*\*\*\*118] Plaintiffs next complain that section 15, subdivision (a), subsection (2), is unconstitutionally vague and overbroad. HN44<sup>↑</sup> We will uphold the subsection against this challenge if it (1) gives fair notice of the practice to be avoided, and (2) provides reasonably adequate standards to guide enforcement. ( Connally v. General Const.

<sup>58</sup> That subdivision provides in part: "The Board shall finance its reasonable and necessary expenses for its operation without the use of General Fund monies of the City of Berkeley except as stated in this subsection, by charging landlords an annual registration fee of twelve dollars (\$ 12.00) per unit, per year in the first year of operation. After the first year, upon request by the Board the City Council may make reasonable annual adjustments in the fee. The Board is also empowered to request and receive funding when and if necessary, from any available source, except the City of Berkeley's General Fund, for its reasonable and necessary expenses, including but not limited to salaries and all other operating expenses."

<sup>59</sup> The annual registration fee for the first year of operation was \$ 12 per unit. The city council, on request of the Board, may make reasonable annual adjustments in the fee. (*Ibid.*; see Baar, supra, 35 Rutgers L.Rev. at p. 763, table 5.1 [comparing funding provisions of various rent control ordinances].)

<sup>60</sup> See *ante*, pages 687-689, footnote 44.

<sup>61</sup> That subdivision and subsection provide: "f. No upward adjustment of an individual rent ceiling shall be authorized by the Board under this Section if the landlord:

"(1) Has continued to fail to comply, after order of the Board, with any provisions of this Ordinance and/or orders or regulations issued thereunder by the Board . . . ."

Co. (1926) 269 U.S. 385, 391 [70 L.Ed. 322, 328, 46 S.Ct. 126]; see generally Note, *The Void-for-Vagueness Doctrine in the Supreme Court* (1960) 109 U.Pa.L.Rev. 67; Note, *Due Process Requirements of Definiteness in Statutes* (1948) 62 Harv.L.Rev. 77.)

#### (i) Fair Notice

Fair notice, as applied to the present inquiry, requires only that the subsection's terms be described with a reasonable degree of certainty so that an ordinary landlord can understand what conduct is proscribed on his part, and under what conditions his rent-withholding tenant will be afforded a defense to an unlawful detainer action. (Cf. Burg v. Municipal Court (1983) 35 Cal.3d 257, 270-271 [198 Cal.Rptr. 145, 673 P.2d 732] and cases cited.)

Plaintiffs contend that the subsection is ambiguous "as to the most basic components of the tenant's right to a remedy: who [\*\*\*\*119] may take remedial action, in what [\*\*307] amount and for how long"? We believe that the word "tenant" is clearly limited to a lessee, assignee or sublessee who has been charged excessive rent, or who lives in an unregistered apartment. Plaintiffs [\*\*\*728] also claim the subsection is unclear as to who is to determine whether the landlord has violated the ordinance, and who is to determine when the landlord has achieved compliance. But we believe the answer is obvious: the trial court will determine these issues, if and when the landlord sues to evict for nonpayment of rent. Plaintiffs further claim that the subsection does not specify the amount of rent that may be withheld, but on its face the provision allows withholding "up to the full amount" of the tenant's periodic rent. Although such full withholding may be harsh, plaintiffs cannot successfully contend that it is not rationally related to achieving compliance with the ordinance.

Finally, plaintiffs claim that the subsection "condemns the landlord to an indefinite sentence" because it does not specify when, if ever, the withheld [\*703] rent shall be paid. To the contrary, subsection (2), read in conjunction [\*\*\*\*120] with its introductory provision (subd. (a)), clearly establishes that the withholding remedy is allowed only until the landlord complies with the ordinance by registering and abiding by the maximum rent schedule that applies to him.<sup>62</sup> Nor do we accept plaintiffs' contention that the word "register" provides inadequate notice to landlords. That word, as well as the above terms and provisions, is sufficiently certain to inform landlords of both the conduct needed to comply with the subsection's requirements, and the circumstances that will afford his tenant a defense to an unlawful detainer action.

#### [\*\*\*\*121] (ii) Standards for Enforcement

Plaintiffs also make a cryptic allegation that the subsection's withholding provision and the qualified defense it confers are dangerously susceptible of arbitrary "enforcement" by those who have the power to invoke it -- the tenants. Their concern, apparently, is with the fact that application of the subsection hinges ultimately on a tenant's "good faith belief" that a landlord has failed to comply with the ordinance.

Contrary to plaintiffs' suggestion, however, the question of the applicability of subsection (2) is not contingent on the arbitrary or personal predilections of the tenant. (E.g., Smith v. Goguen (1974) 415 U.S. 566, 573 [39 L.Ed.2d 605, 612, 94 S.Ct. 1242].) Although the "good faith belief" required to invoke the provision is not a precisely measurable standard, neither is it incapable of reasonably exact determination. The determination of whether a tenant had the requisite good faith belief at the time he withheld rent is not to be made by the tenant; it is instead a question for the trial court, to be decided only for the narrow purpose of establishing a defense to a landlord's eviction suit. Thus viewed in proper context, [\*\*\*\*122] the provision poses little threat of arbitrary application, and hence is not properly subject to facial invalidation on this ground.

#### c. Procedural Due Process and Confiscation

<sup>62</sup>Indeed, the record contains the following regulation adopted by the Board on September 24, 1980: "The remedy of rent withholding provided to tenants under 15(a)(1) and 15(a)(2) shall not be construed to relieve the tenant of the obligation to pay whatever rent is subsequently deemed lawfully owed for the time period for which the rent was withheld. This rule shall be publicized and promulgated immediately."

Plaintiffs finally claim that the ordinance provides them no "due process protection" before their rents are "confiscated" pursuant to subdivision (a), subsection (2). Viewing application of the withholding provision in the proper context, however, discloses the false assumptions underlying plaintiffs' [\*704] concern. As noted, the applicability of the withholding provision and the qualified defense it confers comes into question only after the landlord has initiated a wrongful detainer action. The provision affords the landlord no less due process protection than he would have normally; its sole effect is to create a substantive defense to eviction for nonpayment of rent [\*\*308] if the tenant's withholding is found to have been made pursuant to a good faith belief that his landlord had not complied with the ordinance. Similarly, the provision produces no confiscatory result: it does not [\*\*\*729] deprive the landlord of rent due, because, even if it is found that the tenant withheld in good [\*\*\*\*123] faith, the landlord may sue and recover the full amount of back rent as soon as the court is persuaded that compliance with the ordinance has been achieved. On the other hand, if it is found that the tenant's withholding was not in good faith, the landlord may recover possession in unlawful detainer and may also sue for full back rent in an amount consistent with the ordinance. We conclude that, on the face of the ordinance, the withholding and qualified defense provisions of subdivision (a), subsection (2), neither deprive landlords of due process, nor do they produce confiscatory results. (*Cal. Const., art. I, § 7.*) At most, the subsection creates a substantive defense to unlawful detainer actions as a means of ensuring compliance with the ordinance.

## 2. Preemption

**HN45**[ Every California city possesses the general power to "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (*Cal. Const., art. XI, § 7.*) In addition, charter cities have even greater authority: they have exclusive power to legislate over "municipal affairs." (*Cal. Const., art. XI, § 5, subd. (a).*)<sup>63</sup> Similar to the defendant city's [\*\*\*\*124] concession in *Birkenfeld* that "rent control is not a municipal affair as to which a charter provision would prevail over general state law" ([17 Cal.3d at p. 141](#)), defendants now do not claim that provision for rent withholding in section 15, subdivision (a), is a municipal affair that overrides general state law. Instead, defendants assert their power to implement the rent withholding provision based on the right of all cities to regulate matters not in conflict with general laws. Thus, assuming without deciding that the ordinance's rent withholding provisions do not relate to a "municipal affair," we turn to whether defendants' regulation is in conflict with, and hence preempted by, state law. (Hiscocks & [\*705] Backes, *Charter City Financing in California -- A Growing "Statewide Concern"*? (1982) 16 U.S.F. L.Rev. 603, 613-614.)

[\*\*\*\*125] **CA(24a)**[ (24a) Plaintiffs first claim that general law directly conflicts with the rent withholding provisions of subdivision (a). Alternatively, they insist that rent withholding is preempted by implication in light of three statutes that are asserted to occupy the field of "when rent is due." For both contentions, plaintiffs rely exclusively on **HN47**[ [Civil Code section 1947](#), which provides for the timing of the payment of rent if there is no usage or contract to the contrary;<sup>64</sup> [\*\*\*\*126] **HN48**[ [Code of Civil Procedure section 1161](#),<sup>65</sup> which describes the circumstances under which a tenant is guilty of unlawful detainer; and **HN49**[ [Civil Code section 1942](#),<sup>66</sup>

<sup>63</sup> **HN46**[ Article XI, [section 5, subdivision \(a\)](#) provides: "It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith."

<sup>64</sup> **HN50**[ That section states: "When there is no usage or contract to the contrary, rents are payable at the termination of the holding, when it does not exceed one year. If the holding is by the day, week, month, quarter, or year, rent is payable at the termination of the respective periods, as it successively becomes due."

<sup>65</sup> **HN51**[ That section provides: "A tenant of real property . . . is guilty of unlawful detainer: 1. When he continues in possession . . . after the expiration of the term . . . [para.] 2. When he continues in possession . . . after default in the payment of rent . . . [para.] 3. When he continues in possession . . . after a neglect or failure to perform other conditions or covenants of the lease . . ."

which [\*\*\*730] identifies circumstances [\*\*309] under which a tenant may withhold rent and utilize those funds to repair deficiencies rendering the premises untenantable.

[\*\*\*\*127] Defendants respond that these sections have nothing to do with local rent withholding provisions designed to enforce local rent control; that the withholding provisions of the ordinance do not regulate when rent is due, but instead establish a substantive defense to unlawful detainer; and that plaintiffs' cited statutes cannot be interpreted to even address, much less fully occupy, that field. Furthermore, they claim *Birkenfeld* establishes that these provisions are not preempted by state law.

#### a. Direct Conflict

In *Birkenfeld* we responded to three preemption arguments. The plaintiffs in that case claimed preemption of (1) the field of "rent," (2) the field of [\*706] defenses to eviction, and (3) the field of procedural requisites to a landlord filing an eviction action. We determined that the previous ordinance's requirement of a certificate of eviction by the rent control board before a landlord was allowed to commence unlawful detainer proceedings was invalid because such a requirement would "nullify the intended summary nature of the remedy." ([17 Cal.3d 129, 151](#).) By contrast, however, we found that [HN53](#)<sup>66</sup> although there is "extensive state legislation governing many [\*\*\*\*128] aspects of landlord-tenant relationships, some of which pertain specifically to the determination or payment of rent" (citing, *inter alia*, [Civ. Code, § 1942](#) and [Civ. Code, § 1947](#)), "neither the quantity nor the content of these statutes establishes or implies any legislative intent to exclude municipal regulation of the amount of rent based on local conditions." ([Id. at pp. 141-142](#); see [Galvan v. Superior Court \(1969\) 70 Cal.2d 851, 860-864 \[76 Cal.Rptr. 642, 452 P.2d 930\]](#).)

More significant to the present question, we rejected the plaintiffs' claims that the field of defenses to eviction suits is preempted by general law. The former Berkeley ordinance limited permissible bases for eviction to specific enumerated grounds, but omitted a landlord's right to evict merely to terminate the tenancy. The ordinance thus prohibited eviction of a tenant "who [was] in good standing at the expiration of the tenancy unless the premises [were] to be withdrawn from the rental housing market or the landlord's offer of a renewal lease [had] been refused." ([17 Cal.3d at p. 148](#).) Addressing the state law relevant to the issue, we observed that "[HN54](#)<sup>66</sup> *Code of Civil Procedure section [\*\*\*\*129] 1161, subdivision 1*, makes the continuation of a tenant's possession after expiration of the term a form of unlawful detainer for which the landlord may recover possession in summary proceedings under *Code of Civil Procedure section 1164 et seq.* However, these statutory provisions are not necessarily in conflict with the charter amendment's provision forbidding landlords to recover possession upon expiration of a tenancy if the purpose of the statutes is sufficiently distinct from that of the charter amendment. (See [Galvan v. Superior Court, supra, 70 Cal.2d 851, 859](#); *People v. Mueller, supra, [1970] 8 Cal.App.3d 949, 954 [88 Cal.Rptr. 157]*.) The purpose of the unlawful detainer statutes is procedural. The statutes implement the landlord's property rights by permitting him to recover possession once the consensual basis for the tenant's occupancy is at an end. In contrast the charter amendment's elimination [\*\*310] of particular grounds for eviction is a limitation upon the landlord's property rights under the police power, giving rise to a substantive ground of defense in unlawful detainer proceedings. The mere fact that a city's exercise of the [\*\*\*\*130] police power creates such a [\*\*\*731] defense does not bring it into conflict with the state's statutory scheme. Thus . . . [HN55](#)<sup>66</sup> . . . the statutory remedies for recovery of possession and of unpaid rent (see [Code Civ. Proc., §§ 1159- 1179a](#); [Civ. Code, § 1951 et seq.](#)) do not preclude a defense based on municipal rent control legislation enacted pursuant [\*707] to the police power imposing rent ceilings and limiting the grounds for eviction for the purpose of enforcing those rent ceilings." ([Id. at](#)

<sup>66</sup> [HN52](#)<sup>66</sup> That section provides: "(a) If within a reasonable time after written or oral notice to the landlord or his agent, as defined in subdivision (a) of Section 1962, of dilapidations rendering the premises untenantable which the landlord ought to repair, the landlord neglects to do so, the tenant may repair the same himself where the cost of such repairs does not require an expenditure more than one month's rent of the premises and deduct the expenses of such repairs from the rent when due, or the tenant may vacate the premises, in which case the tenant shall be discharged from further payment of rent, or performance of other conditions as of the date of vacating the premises. This remedy shall not be available to the tenant more than twice in any 12-month period . . . . [para.] (d) The remedy provided by this section is in addition to any other remedy provided by this chapter, the rental agreement, or other applicable statutory or common law."

pp. 148-149 (italics added)), citing Inganamort v. Borough of Fort Lee (1973) 62 N.J. 521 [303 A.2d 298, 307] and Warren v. City of Philadelphia (1955) 382 Pa. 380 [115 A.2d 218, 221].)

We believe that the above-quoted language from *Birkenfeld* disposes of plaintiffs' claim that the rent withholding provision of the ordinance directly conflicts with *Code of Civil Procedure section 1161*. It is true that the tenant's good faith defense conferred under subdivision (a), subsection (2), effectively eliminates one ground for eviction, but as we observed in *Birkenfeld*, this exercise of the municipality's police power does not bring the provision into conflict [\*\*\*\*131] with state law, because the statutory remedy for recovery of possession does not preclude limitations on grounds for eviction for the purpose of enforcing a local rent control regulation.

Furthermore, we are not persuaded that the ordinance conflicts with Civil Code sections 1942 or 1947. Neither statute involves the field of defenses to eviction, or enforcement of local rent control ordinances. Section 1942 is this state's "repair and deduct statute." It specifically allows rent withholding, under certain circumstances, in order for a tenant to make needed repairs. Section 1947 merely establishes rules relating to the date at which rent is due, depending on the term of a tenant's holding. We find nothing in either section that directly conflicts with the municipal legislation at issue here. We conclude, as did the Supreme Court of New Jersey in a similar context, that merely because defendants' ordinance "imposes restraints which the State law does not, does not spell out a conflict between State and local law. On the contrary the absence of a statutory restraint is the very occasion for municipal initiative. The police power is vested in local government to the very end that [\*\*\*\*132] the right of property may be restrained when it ought to be because of a sufficient local need." (Inganamort, supra, 303 A.2d at p. 307.)

#### b. Preemption by Implication

We will be reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest to be served that may differ from one locality to another. (Gluck v. County of Los Angeles (1979) 93 Cal.App.3d 121, 133 [155 Cal.Rptr. 435]; Comment, *The California City versus Preemption by Implication* (1966) 17 Hastings L.J. 603, 610.) Furthermore, the mere fact that all three of plaintiffs' cited statutes concern "rent" does not assist them because "[HN56] a field cannot properly consist of statutes unified by a single common noun." (Galvan, supra, 70 Cal.2d 851, 862.) CA(25) (25) A potentially preemptive "field" of state regulation [\*708] is "an area of legislation which includes the subject of the local legislation, and is sufficiently logically related so that a court, or a local legislative body, can detect a patterned approach to the subject." (*Ibid.*)

In In re Hubbard (1964) 62 Cal.2d 119 [41 Cal.Rptr. 393, 396 P.2d 809], we articulated three [\*\*\*\*133] tests to determine in what circumstances chartered cities might be deprived of their supposed exclusive power to legislate in regard to "municipal affairs" pursuant to article XI, section 5 of our Constitution. (Id. at p. 128.) Although we subsequently [\*\*311] declined to follow *Hubbard*'s approach to municipal affairs questions (Bishop v. City of San Jose (1969) 1 Cal.3d 56, 63, fn. 6 [81 Cal.Rptr. 465, 460 P.2d 137]), in Galvan, supra, 70 Cal.2d 851, we adopted *Hubbard*'s three tests as standards by which to judge preemption of municipal exercise of police [\*\*\*732] powers pursuant to article XI, section 7. CA(26) (26) The *Hubbard* factors, reincarnated as a preemption test in *Galvan*,<sup>67</sup> establish that HN57 we may infer an intent to preempt defendants' legislation only if "(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; [or] (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has [\*\*\*\*134] been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality." (70 Cal.2d at pp. 859-860, quoting Hubbard, supra, 62 Cal.2d at p. 128; see also People ex rel. Deukmejian v. County of Mendocino (1984) 36 Cal.3d 476, 485 [204 Cal.Rptr. 897, 683 P.2d 1150]; Palos Verdes Estates, supra, 142 Cal.App.3d 362, 373-374 [quoting and following *Galvan*]; Gregory, supra, 142 Cal.App.3d 72, 82 [quoting and following *Hubbard*]; Bamboo Brothers v. Carpenter (1982) 133 Cal.App.3d 116, 124 [183 Cal.Rptr.

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<sup>67</sup> See Sato, "Municipal Affairs" in California (1972) 60 Cal.L.Rev. 1055, 1073, footnote 68 (*Galvan*'s preemption analysis relies on that part of *Hubbard* relating to municipal affairs).

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[\[748\]](#) [same]; [Music Plus Four, Inc. v. Barnet \(1980\) 114 Cal.App.3d 113, 123 \[170 Cal.Rptr. 419\]](#) [same]; [People v. Mueller \(1970\) 8 Cal.App.3d 949, 953-954 \[88 Cal.Rptr. 157\]](#) [quoting and following both *Hubbard* and *Galvan*]; Comment, *Of Lawyers, Guns, and Money: Preemption and Handgun Control* (1982) 16 U.C. Davis L.Rev. 137, 150-165 [asserting that the *Hubbard* tests are the most widely used approach to the issue of implied preemption]; cf. Rossmann & Steel, *Forging [\*\*\*\*135] the New Water Law: Public Regulation of "Proprietary" Groundwater Rights* (1982) 33 Hastings L.J. 903, 937-942 [analyzing implied preemption under the three *Hubbard/Galvan* tests].)

[\*709] [CA\(24b\)](#) [↑] (24b) Applying these alternative tests, we must conclude that there is no full and complete state coverage of the field of rent withholding so as to "clearly indicate" that the field "has become exclusively a matter of state concern." Neither the quantity nor the content of plaintiffs' cited statutes suggests the Legislature's intent to occupy the field of rent withholding to the exclusion of municipally created defenses to unlawful detainer actions. Nor do the three statutes suggest that the field of rent withholding is clearly a subject of paramount state interest that cannot tolerate any local involvement. Indeed, we fail [\[\\*\\*\\*\\*136\]](#) to discern how defendants' withholding provisions would frustrate state statutory schemes that relate to unlawful detainer procedures, repair and deduct remedies, or that define the duration of rental periods.

Finally, existence of defendants' provisions are likely to have very little effect on transient citizens, much less an effect that outweighs the local benefit to be derived from the withholding provisions. First, many transients will not be affected by the ordinance, because it does not apply to "hotels, motels, inns, tourist homes, and rooming or boarding houses" in which "transient guests" stay for 14 days or less. ([§ 5, subd. \(b\).](#)) Second, to the extent that transients might be affected, the withholding provision would likely have a positive effect, because it would help assure prospective newcomers that established maximum housing rents will be enforced.

We therefore conclude that section 15, subdivision (a), subsections (1) and (2), are not preempted by state law. The ordinance's provision authorizing rent withholding and establishing a qualified defense to unlawful detainer actions regulates a field of great importance to the [\[\\*\\*312\]](#) effective operation of defendants' [\[\\*\\*\\*\\*137\]](#) rent control scheme, and one which is distinct from any other state regulation. Even assuming that state regulations touch on rent withholding, we discern no legislative intent to preempt defendants' regulation.

[\[\\*\\*\\*733\]](#) The judgment is affirmed. The 1982 amendment to section 14, purporting to create a presumption affecting the burden of proof, is invalid. This provision is clearly severable. (§ 16.) All other provisions of the ordinance are valid and enforceable. Each party shall bear its own costs.

**Concur by:** BIRD

## Concur

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**BIRD, C. J.** I agree with Part II of the majority opinion. I also agree with the substantive analysis of the antitrust issues in Part I. However, I write separately to raise a concern regarding the highly unusual manner in which the antitrust issues came before this court.

[\*710] No mention of [antitrust law](#) was made by the litigants in the trial court or in the Court of Appeal below. The argument that federal [antitrust law](#) might render defendants' rent control ordinance invalid was first raised in this court, and then only *after* the decision had been made to grant a hearing. Moreover, that issue was raised by an amicus curiae rather than a [\[\\*\\*\\*\\*138\]](#) party to the appeal.

A cautionary note should be sounded to dispel any belief that this court will routinely agree to address issues presented in this manner.

As the majority correctly note, the issue of whether a municipal regulation might be subject to antitrust scrutiny first arose in [Community Communications Co. v. Boulder \(1982\) 455 U.S. 40 \[70 L.Ed.2d 810, 102 S.Ct. 835\]](#). *Boulder* was decided on January 13, 1982, a month *after* plaintiffs' closing brief had been filed in the Court of Appeal.

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Plaintiffs cannot, therefore, be faulted for failing to raise that issue in the trial court or in their opening and closing briefs in the Court of Appeal.

However, the Court of Appeal did not hear oral argument until July 5, 1983, a year and a half *after* the *Boulder* decision. During that entire period, neither plaintiffs nor amicus attempted to call the case to the lower court's attention -- despite that court's willingness to permit additional briefing as evidenced by its acceptance as late as June 17, 1982, of a brief by amicus curiae for defendants. (See Cal. Rules of Court, rule 14(b).) The Court of Appeal was thus deprived of an opportunity to rule on that [\*\*\*\*139] issue.

The Court of Appeal filed its now-vacated opinion on October 24, 1983. Defendants' petition for hearing was filed in this court on December 7, 1983, nearly two full years after *Boulder* was decided. Plaintiffs' answer to that petition, filed some two weeks later, *made no mention of Boulder or of the possible application of federal antitrust law to this case*. Hence, when this court granted the petition for hearing, it had not been apprised by either party that the case presented issues which, in the majority's words, would force the court to "wander off the map and travel cross country without the benefit of trail or compass." (Maj. opn., *ante*, at p. 663.) The antitrust issues were first brought to the court's attention several weeks later when amicus curiae requested leave to file a brief in support of plaintiffs.

The majority assert that consideration of the antitrust issues is nevertheless proper under several well established principles. They correctly note that on appeal from a judgment granting or denying an injunction, a reviewing court will apply the law as it stands at the time its opinion is filed. ( [Cal-Dak Co. v. Sav-On Drugs, Inc. \(1953\) 140 Cal.2d 492, 496-497 \[254 P.2d 497\]](#).) They also recite the familiar rule which permits a party to raise on [\*711] appeal a new point of law decided while the appeal is pending. ( [Claremont Imp. Club v. Buckingham \(1948\) 89 Cal.App.2d 32, 33 \[200 P.2d 47\]](#).)

However, they do not explain why the same rule should apply where, as here, the new issue is raised not by a party but by an amicus. Nor do they explain the failure of plaintiffs and amicus to request permission [\*\*\*734] to file a supplemental brief in the Court of Appeal raising the new point of law. This court, overriding another Court of Appeal, has held under similar circumstances that the filing by a party of a supplemental brief provides "a satisfactory basis for the unusual practice of considering a point raised for the first time after the opening briefs have been filed." ( [Meier v. Ross General Hospital \(1968\) 69 Cal.2d 420, 423-424, fn. 1 \[71 Cal.Rptr. 903, 445 P.2d 519\]](#).)

Finally, the majority cite several decisions in which this court has held that a party may raise a new issue on appeal if it is strictly one of law, based on undisputed facts and involving important [\*\*\*141] questions of public policy. (Maj. opn., *ante*, at pp. 654-655, fn. 3.) Again, they fail to explain why the same rule should apply to an amicus curiae. More importantly, they fail to address the ramifications of permitting new issues to be raised by nonparties *after* a hearing has been granted in this court.<sup>1</sup>

[\*\*\*142] ""[The] rule is universally recognized that an appellate court will consider only those questions properly raised by the appealing parties. Amicus curiae must accept the issues made and propositions urged by the appealing parties, and any additional questions presented in a brief filed by an amicus curiae will not be considered

<sup>1</sup> None of the cases cited by the majority involved an attempt by an amicus curiae to raise a new issue on appeal, nor does it appear that the new issues were first raised after a hearing had been granted. ( [Frink v. Prod \(1982\) 31 Cal.3d 166, 170 \[181 Cal.Rptr. 893, 643 P.2d 476\]](#); [Carman v. Alvord \(1982\) 31 Cal.3d 318, 323 \[182 Cal.Rptr. 506, 644 P.2d 192\]](#); [UFITEC, S.A. v. Carter \(1977\) 20 Cal.3d 238, 249, fn. 2 \[142 Cal.Rptr. 279, 571 P.2d 990\]](#); [Wong v. Di Grazia \(1963\) 60 Cal.2d 525, 532, fn. 9, 535-541 \[35 Cal.Rptr. 241, 386 P.2d 817\]](#); [Tyre v. Aetna Life Ins. Co. \(1960\) 54 Cal.2d 399, 405 \[6 Cal.Rptr. 13, 353 P.2d 725\]](#); [Burdette v. Rollefson Construction Co. \(1959\) 52 Cal.2d 720, 725-726 \[344 P.2d 307\]](#).)

In [Carman v. Alvord, supra, 31 Cal.3d 318](#), several amici joined the parties in urging this court to resolve an issue first raised on appeal. ( *Id.*, *at p. 324*.) However, the issue had been *raised* by the defendant city in its responsive brief in the Court of Appeal. ( *Id.*, *at p. 323*.) This court concluded that the issue was properly before it under an exception to the rule that "on appeal a *litigant* may not argue theories for the first time []." ( *Id.*, *at p. 324*, *italics added*.)

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[citations].<sup>2</sup> ( *Younger v. State of California* (1982) 137 Cal.App.3d 806, 813-814 [187 Cal.Rptr. 310]; see *E. L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 510-511 [146 \*712] Cal.Rptr. 614, 579 P.2d 505; *Eggert v. Pacific States S. & L. Co.* (1943) 57 Cal.App.2d 239, 251 [136 P.2d 822].)<sup>2</sup>

[\*\*\*\*143] In *Younger*, the appellant attempted in his reply brief in the Court of Appeal to adopt as his own an issue first presented by an amicus curiae. The Court of Appeal refused to address the issue, reasoning that amicus had no standing to raise it and [\*\*314] that the appellant had failed to show good reason for his failure to present the point in his opening brief. ( *Younger v. State of California, supra*, 137 Cal.App.3d at pp. 812-814.)

The present case presents striking similarities. While plaintiffs cannot be faulted [\*\*\*735] for failing to raise the antitrust issues in their opening brief in the Court of Appeal, their failure to raise them in a supplemental brief or in oral argument is unexcused. Nor do they explain their failure to raise the point in the answer to the petition for hearing, even though the legal grounds for doing so had by then existed for nearly two years.

On the basis of the arguments presented in the petition and the answer, this court voted to grant a hearing. Subsequently, amicus curiae requested leave to file its brief presenting the antitrust issues. Only then did plaintiffs jump on the bandwagon. By that time, of course, it was too [\*\*\*\*144] late for the court to consider the possible bearing of the additional issues on its determination whether or not to grant a hearing.<sup>3</sup>

I do not know, of course, whether the vote on the petition for hearing in the present case might have been different had the court been apprised that [\*713] additional issues were lurking in the shadows. However, I submit that in many cases the decision to grant [\*\*\*\*145] or deny hearing might be heavily influenced by the court's awareness or lack of awareness of such issues -- and rightly so.

This court grants only a small percentage of the petitions for hearing filed each year. Petitioners faced with that fact naturally make every attempt to present the issues posed in their appeal in the most favorable light. Troublesome or time consuming secondary issues which were argued in the courts below may be deemphasized or omitted entirely from the petition for hearing. The court is able in these instances to review the briefs filed in the Court of Appeal and the lower court's opinion to identify such hidden issues and consider them in deciding whether a hearing is advisable.<sup>4</sup>

<sup>2</sup> Several exceptions have been recognized, none of which is applicable in the setting of the present case. (See *E. L. White, Inc. v. City of Huntington Beach, supra*, 21 Cal.3d at p. 511 [issue raised by amicus curiae considered because, on appeal from a judgment of dismissal following the sustaining of a general demurrer without leave to amend, court was required to affirm judgment if correct on any theory; appeal also presented a question of jurisdictional dimension]; cf. *People v. Coleman* (1942) 53 Cal.App.2d 18, 32 [127 P.2d 309] ["ignoring" general rule to permit amicus curiae to raise new objection to jury instructions in criminal appeal].)

Another exception is presented by an automatic appeal from a judgment imposing a penalty of death. In an automatic appeal, this court has a statutory duty to examine the complete record to determine whether the defendant was given a fair trial. ( *People v. Stanworth* (1969) 71 Cal.2d 820, 833 [80 Cal.Rptr. 49, 457 P.2d 889]; *Pen. Code, § 1239, subd. (b)*.) Accordingly, an amicus will be permitted to raise a new issue bearing on that question. ( *People v. Easley* (1983) 34 Cal.3d 858, 863-864 [196 Cal.Rptr. 309, 671 P.2d 813] [rehearing granted to consider issues raised by amicus curiae after initial decision filed but before the opinion became final].)

<sup>3</sup> In this respect, the problem presented here differs from the one confronting the Court of Appeal in *Younger*. With certain exceptions, this court has discretion as to which cases it will hear. The Courts of Appeal, again with minor exceptions, must rule on all duly filed appeals from final judgments and appealable orders. (See *Cal. Const., art. VI, §§ 11, 12*; Cal. Rules of Court, rules 28, 29; *Code Civ. Proc., § 901 et seq.*; 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 30, p. 4045.) Hence, this court has an additional basis for insisting upon timely notification of the issues posed by an appeal.

<sup>4</sup> On May 6, 1985, this particular problem will be lessened considerably when a recently approved amendment to the California Constitution takes effect. ( *Cal. Const., art. VI, § 12*, as adopted Nov. 6, 1984.) The amendment will permit this court, inter alia, to review only those issues which it considers most important in a case and leave intact the lower court's decision on all other

[\*\*\*\*146] Where, as here, an issue that could have been raised in the Court of Appeal is not raised until after that court has filed its opinion and after a hearing has been granted, this court is hindered in two important ways from performing its responsibilities most effectively. First, the court is denied the opportunity to consider whether hearing should be denied in light of the additional issue. Second, assuming that a hearing would have been granted in any event, the court is deprived of the lower court's views on the issue.

Accordingly, both parties and amici<sup>5</sup> should bear a heavy burden in this court when they attempt, after a hearing has been granted, to raise an issue which they could have raised earlier. The burden should be especially great where the issue could have been raised before the decision of the Court of Appeal became final as to that court. In all but the rarest cases, this [\*\*315] court should refuse to consider a new issue that has been raised in such a belated manner. Otherwise, amici control the issues this court considers and decides -- a most curious method of appellate review.

[\*\*\*\*147]

**Dissent by:** LUCAS

## Dissent

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**LUCAS, J.** I respectfully dissent.

[\*\*\*736] In my view, and without considering any of the other substantial objections raised by plaintiff landlords, the Berkeley rent control ordinance is [\*714] invalid because it calls for the fixing of maximum rents in violation of federal antitrust law (Sherman Antitrust Act, 15 U.S.C. § 1). Indeed, the ordinance would appear to constitute a per se illegal price-fixing scheme routinely condemned by the federal courts. Accordingly, we should declare the ordinance a *nullity*, as mandated by the supremacy clause of the United States Constitution. (Art. VI, cl. 2.)

As I will demonstrate, a municipality's participation in, or approval of, a price-fixing scheme should not shield it from antitrust scrutiny. If such a scheme indeed constitutes a per se violation of the Sherman Antitrust Act, then an irreconcilable conflict exists between the municipal ordinance and federal antitrust policy which voids the ordinance under supremacy principles. (See Rice v. Norman Williams Co. (1982) 458 U.S. 654, 659-661 /73 L.Ed.2d 1042, 1049-1050, 102 S.Ct. 3294.) Such a conflict is presented here.

### I. Antitrust [\*\*\*\*148] Scrutiny of Municipal Activity: the Background

Not every state or local governmental activity having anticompetitive effects is invalid under the Sherman Antitrust Act. Thus, in Parker v. Brown (1943) 317 U.S. 341 /87 L.Ed. 315, 63 S.Ct. 307, the United States Supreme Court held that the federal antitrust laws do not preclude anticompetitive programs adopted and enforced *by the states* as a matter of state policy. (Id. at pp. 351-352 /87 L.Ed. at p. 326.) This "state action" exemption does not extend, however, to a state's local political subdivisions (such as Berkeley) unless the state has "clearly articulated and affirmatively expressed" the anticompetitive policy being implemented by the local entity. (Community Communications Co. v. Boulder (1982) 455 U.S. 40, 54 /70 L.Ed.2d 810, 820, 102 S.Ct. 835 [hereafter *Boulder*]; see also Lafayette v. Louisiana Power & Light Co. (1978) 435 U.S. 389, 410 /55 L.Ed.2d 364, 381, 98 S.Ct. 1123 [plurality opn.].) In short, as *Boulder* established, cities, like private entities, "must obey the antitrust laws." (455 U.S. at p. 57 /70 L.Ed.2d at p. 822), quoting the *Lafayette* plurality.)

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issues. (See Legislative Analyst's Analysis, Ballot Pamp., Proposed Amend. to Cal. Const., Supreme Court: Transfer of Causes and Review of Decisions, Gen. Elec. (Nov. 6, 1984) p. 28.)

<sup>5</sup>The burden of satisfying the requirements for timely presentation of issues should be added to that of overcoming the well established general rule which bars amici from raising new issues on appeal. (See *ante*, at p. 711.)

[\*\*\*\*149] It is uncontradicted that the California Legislature has not directly spoken on the subject of rent control, much less "clearly articulated and affirmatively expressed" any policy favoring local ordinances such as Berkeley's. Defendants assert that the requisite "state policy" is evidenced by legislation calling upon local governments to assist in providing a "decent home and suitable living environment for every California family." ([Health & Saf. Code, §§ 50003, 50005](#).) The Legislature has expressly qualified that state policy, however, by declaring that nothing in the division which contains the foregoing provisions "shall authorize the imposition of rent regulations or controls" (with exceptions not applicable here). (*Id.*, § 50202.) [\*715] Similarly, the "local planning" policy of the state ([Gov. Code, §§ 65100-65761](#)) provides that "[nothing] in this article shall be construed to be a grant of or a repeal of any authority which may exist of a local government to impose rent controls . . . ." (*Id.*, § 65589, subd. (b).) Such neutrality on the part of the state is plainly insufficient to insulate Berkeley's ordinance from antitrust scrutiny. ([Boulder, supra \[\\*\\*\\*\\*150\], 455 U.S. at p. 55 \[70 L.Ed.2d at p. 821\]](#).)

## II. Antitrust Scrutiny of Berkeley's Ordinance

The Berkeley rent control ordinance is *unquestionably* an anticompetitive price-fixing scheme -- it imposes maximum ceilings on rents charged by private landlords. And had Berkeley's landlords privately agreed to fix maximum rents, their scheme [\*\*316] would have been severely and speedily punished, for maximum pricing by private entities has been consistently condemned as *per se illegal* under the so-called "per se" price-fixing rule. ([Arizona v. Maricopa County Medical Society \(1982\) 457 U.S. 332 \[73 L.Ed.2d 48, 102 S.Ct. 2466\]](#) [hereafter *Maricopa*]; [Albrecht v. Herald Co. \[\\*\\*\\*737\] \(1968\) 390 U.S. 145 \[19 L.Ed.2d 998, 88 S.Ct. 869\]](#); [Kiefer-Stewart Co. v. Seagram & Sons \(1951\) 340 U.S. 211 \[95 L.Ed. 219, 71 S.Ct. 487\]](#).) Does it make a difference that the price-fixing scheme attacked here is municipally sponsored?

Some cases indicate that, in determining whether to apply the "per se illegal" label to a particular restraint or scheme, we should undertake a limited inquiry into the "pernicious effects" and "redeeming virtues," if any, [\*\*\*\*151] inherent in the challenged program. ([Continental T. V., Inc. v. GTE Sylvania Inc. \(1977\) 433 U.S. 36, 50 \[53 L.Ed.2d 568, 580, 97 S.Ct. 2549\]](#); [Northern Pac. R. Co. v. United States \(1958\) 356 U.S. 1, 5 \[2 L.Ed.2d 545, 549, 78 S.Ct. 514\]](#); see also [Broadcast Music Inc. v. CBS \(1979\) 441 U.S. 1, 19-20 \[60 L.Ed.2d 1, 16, 99 S.Ct. 1551\]](#).) Other cases seem to support the idea that such an inquiry is unnecessary where a maximum price-fixing scheme is involved. (See generally [Maricopa, supra](#), [per se rule applied to invalidate maximum pricing arrangement in health care plan].) In any event, as I explain, Berkeley's rent control ordinance clearly has "pernicious" anticompetitive effects without any overriding "redeeming virtues."

### A. Anticompetitive effects

Economists are virtually unanimous in their condemnation of rent control laws. (E.g., Baird, *Rent Control: The Perennial Folly* (1980) pp. 54-78; *Rent Control, A Popular Paradox* (The Fraser Institute edit. 1975) [essays by nine economists]; Muth, *Redistribution of Income Through Regulation* [\*716] *in Housing* (1983) [32 Emory L.J. 691, 698](#); see also Rabin, *The Revolution in Residential* [\*\*\*\*152] *Landlord-Tenant Law* (1984) [69 Cornell L.Rev. 517, 555](#) [quoting Ludwig von Mises' conclusion that governmental attempts to fix the price of a commodity make conditions worse].) In the view of most of these economists, rent control schemes cause what a Supreme Court plurality has called "serious economic dislocation." (See [Lafayette, supra, 435 U.S. at pp. 412-413 \[55 L.Ed.2d at pp. 382-383\]](#).)

For example, Professor Milton Friedman, writing in collaboration with Professor George Stigler, observed that "Rent ceilings, therefore, cause haphazard and arbitrary allocation of space, inefficient use of space, retardation of new construction and indefinite continuance of rent ceilings, or subsidization of new construction and a future depression in residential building. Formal rationing by public authority would probably make matters worse." (Friedman & Stigler, *Roofs or Ceilings? The Current Housing Problem*, in *Rent Control, A Popular Paradox, supra*, p. 100.)

In addition, rent control measures bring about the very evils that have prompted the United States Supreme Court's condemnation of private maximum-price arrangements. Rent control laws cripple the economic freedom [\*\*\*\*153] of landlords and thereby restrain their ability to sell housing in accordance with their own best judgment exercised in light of market conditions. (See [Kiefer-Stewart, supra, 340 U.S. at p. 212 \[95 L.Ed. at p. 223\]](#).) Moreover, maximum rents may be fixed too low to encourage, or even permit, landlords to furnish services or facilities deemed

37 Cal. 3d 644, \*716 693 P.2d 261, \*\*316 209 Cal. Rptr. 682, \*\*\*737 1984 Cal. LEXIS 141, \*\*\*\*153

necessary or desirable by their tenants. (See [Albrecht, supra, 390 U.S. at pp. 152-153 \[19 L.Ed.2d at pp. 1003, 1004\]](#).) Where is the competitive incentive under a rent control scheme?

As previously indicated, just as maximum pricing of goods and services generally discourages entry into the market (see [Maricopa, supra, 457 U.S. at p. 348 \[73 L.Ed.2d at p. 61\]](#)), maximum rents have a negative impact on the production of new housing (Hirsch, *From "Food for Thought" to "Empirical Evidence" About Consequences of Landlord-Tenant Laws* (1984) [69 Cornell L.Rev. 604, 609-610](#); Siegan, [\[\\*\\*317\] Commentary on Redistribution of Income Through Regulation in Housing, supra, 32 Emory L.J. 721, 723](#)), thereby inevitably putting an upward pressure on price as demand increases. In sum, the pernicious effects on the competitive market [\[\\*\\*\\*\\*154\]](#) are many, apparent, and long-standing.

#### [\[\\*\\*\\*738\] B. Redeeming Virtues](#)

Does rent control have any "redeeming virtues" which would override its anticompetitive effects? Berkeley points to alleged public welfare features [\[\\*717\]](#) which supposedly justify rent control. As I indicated above, if landlords privately agreed to fix maximum rents, their scheme *unquestionably* would be struck down as per se illegal despite asserted socially "redeeming" features, such as, for example, the financial boon to their tenants. In the private sphere, "redemption" is limited to a showing of offsetting procompetitive gains -- effects on *competition* are the sole and governing consideration in such cases. ([National Soc. of Professional Engineers v. U.S. \(1978\) 435 U.S. 679, 690-696 \[55 L.Ed.2d 637, 649-653, 98 S.Ct. 1355\]](#); see also [Continental T. V., supra, 433 U.S. at pp. 57-58 \[53 L.Ed.2d at pp. 584-585\]](#).) Does it make a difference that a city, rather than a landlord, is claiming redeeming features unrelated to competition? I certainly can see no logic in such a proposition.

To allow a local governmental entity to excuse a price-fixing scheme on the basis of asserted [\[\\*\\*\\*\\*155\]](#) public health, safety or welfare considerations would enmesh the courts in an impossible task of weighing the "apples" of social welfare with the "oranges" of antitrust policy. (See [Boulder, supra, 455 U.S. at p. 67 \[70 L.Ed.2d at p. 829\]](#) [dis. opn. of Rehnquist, J.].)

Municipalities very well may be able to justify their anticompetitive programs under certain limited circumstances not involved here. Perhaps a city can point to a factor such as the existence of a "natural monopoly" (e.g., a unique resource such as a natural harbor) which requires price regulation. (See 3 Areeda & Turner, [Antitrust Law](#) (1978) para. 621b, at pp. 50-51; see also [Omega Satellite Products v. City of Indianapolis \(7th Cir. 1982\) 694 F.2d 119, 127](#) [natural monopoly in cable television].) Other justifications doubtless exist. But dissatisfaction with the price level attained through lawful and open competition, i.e., through the normal operation of the free enterprise system, cannot justify anticompetitive price restraints of the kind imposed here. Otherwise, there would exist no practical limits whatever on the authority of a municipality to tamper with the price structure established [\[\\*\\*\\*\\*156\]](#) by the open market.

Price competition is the "central nervous system of the [free market] economy." ([U.S. v. Socony-Vacuum Oil Co. \(1940\) 310 U.S. 150, 226, fn. 59 \[84 L.Ed. 1129, 1169, 60 S.Ct. 811\]](#).) Price fixing, whether privately or publicly inspired, thus endangers the free economic system to which Congress has entrusted the prosperity of the entire nation. If our 38,500 county, municipal and township governments (Bureau of the Census, *Statistical Abstract of the United States* (1984) at p. 294) with their broad authority for general governance "were free to make economic choices . . . without regard to their anticompetitive effects, a serious chink in the armour of antitrust protection would be introduced at odds with the comprehensive [\[\\*718\]](#) national policy Congress established." ([Lafayette, supra, 435 U.S. at p. 408 \[55 L.Ed.2d at pp. 379-380\]](#) [plurality opn., fn. omitted].)

In my view, then, the City of Berkeley's belief that, in essence, rents were too "high" in relation to the city's tenants' ability to pay would not constitute an excuse for tampering with the free market mechanism, nor would the resultant decreased rents amount to a "redeeming [\[\\*\\*\\*\\*157\]](#) virtue" overriding the anticompetitive effects of rent control. Accordingly, the ordinance was per se illegal under the Sherman Antitrust Act and should be declared invalid on that basis.

### III. *The Majority's Four-part Test*

Although the challenged ordinance contemplates a per se illegal price-fixing scheme under the foregoing analysis, I observe [\*\*318] that its invalidity would be apparent even under the majority's own novel test, an approach involving a "more accommodating standard" than the per se rule would require. (*Ante*, p. 667.)

The majority acknowledges that Berkeley's ordinance would be unacceptable if "[\*\*739] equally effective" and "less intrusive" alternative means were available to accomplish the same result. (*Ante*, p. 678.) Yet isn't it evident that such alternative means indeed exist? If the city fathers (and mothers) believe that rents are too high in Berkeley, several solutions come to mind which would be more consistent with the operation of the free market system. *Rent subsidies* may be provided to needy tenants. *Public housing projects* may afford additional rental units. Property may be municipally acquired through *negotiated [\*\*\*\*158] purchase or condemnation*. (See, e.g., Gov. Code, §§ 37350 [city may purchase and hold real property for common benefit]; 37350.5 [eminent domain]; Health & Saf. Code, §§ 50735-50743 [programs for low-income rental housing].)

In short, given the foregoing alternatives, why should competition between Berkeley's landlords be stifled in order to provide for the social welfare of Berkeley's tenants? Surely the "less intrusive," and "equally effective" method of accomplishing this end would be to spread the financial burden among *all* city taxpayers.

#### IV. Conclusion

The federal antitrust laws have been called the Magna Carta of the free market system. ( *United States v. Topco Associates (1972) 405 U.S. 596, 610 [31 L.Ed.2d 515, 527, 92 S.Ct. 1126]*.) These laws are as important to the preservation of market freedom as the Bill of Rights is to the protection [\*719] of individual liberties. (*Ibid.*) Consistent with the overriding principle of supremacy of federal law (U.S. Const., art. VI, cl. 2), we should declare null and void the Berkeley rent control law at issue here.<sup>1</sup>

[\*\*\*\*159] I would reverse the judgment and remand the case for further proceedings addressed to the antitrust issue.<sup>2</sup>

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End of Document

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<sup>1</sup> Plaintiffs herein seek a declaratory judgment and injunctive relief to enjoin operation of the ordinance. Although the issue of available remedies in a federal court action was left open in *Boulder, supra*, 457 U.S. at page 56, footnote 20 [70 L.Ed.2d at p. 822], I assume that relief in state court cases such as this is limited to declaratory and injunctive relief and would preclude recovery of damages. (See *Rice v. Norman Williams Co., supra, 458 U.S. at p. 658, fn. 4 [73 L.Ed.2d at p. 1049]*.)

<sup>2</sup> Application of the antitrust laws requires factual and legal determinations regarding the existence of "concerted activity" and a substantial effect upon interstate commerce. Although my view of the record suggests that both elements exist here, I would not object to a remand limited to these issues.

## Blank v. Kirwan

Supreme Court of California

August 1, 1985

L.A. No. 32012

**Reporter**

39 Cal. 3d 311 \*; 703 P.2d 58 \*\*; 216 Cal. Rptr. 718 \*\*\*; 1985 Cal. LEXIS 308 \*\*\*\*; 1985-2 Trade Cas. (CCH) P66,741

WARREN BLANK, Plaintiff and Appellant, v. KEVIN KIRWAN et al., Defendants and Respondents

**Prior History:** [\*\*\*\*1] Superior Court of Los Angeles County, No. C-291713, Eli Chernow, Judge.

**Disposition:** For the foregoing reasons, the judgment is affirmed.<sup>9</sup>

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## Core Terms

government action, cause of action, poker, Cartwright Act, Sherman Act, allegations, public official, first amended complaint, zone, trial court, conspiracy, anti trust law, prosecute, legalize, effects, sham, anticompetitive, demurrs, coconspirator, defendants', unfair competition, initiation, ordinances, contends, asserts, genuine, italics, lease, sufficient to constitute, economic relations

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## LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > Defects of Form

Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > Demurrs

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

### **HN1[] Defenses, Demurrs & Objections, Defects of Form**

Courts treat demurrs as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law. Courts also consider matters which may be judicially noticed. Further, courts give complaints reasonable interpretations, reading them as a whole and their parts in context.

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<sup>9</sup>We decline the request of City of Bell to judicially notice the minutes of certain meetings of the city council on the ground that they are not relevant to the issues before us. We also decline the city's request to impose sanctions on plaintiff pursuant to [Code of Civil Procedure section 907](#): the city does not succeed in showing, nor does it appear to us, "that the appeal was frivolous or taken solely for delay . . ." ( [Code Civ. Proc., § 907](#).)

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Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > Defects of Form

Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > Demurrs

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

## **HN2** [] **Defenses, Demurrs & Objections, Defects of Form**

When a demurrer is sustained, the court determines whether the complaint states facts sufficient to constitute a cause of action. When it is sustained without leave to amend, the court decides whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the court has abused its discretion. The burden of proving such reasonable possibility is squarely on the plaintiff.

Civil Rights Law > ... > Section 1983 Actions > Elements > Protected Rights

Constitutional Law > Substantive Due Process > Scope

Civil Rights Law > Protection of Rights > Section 1983 Actions > General Overview

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

## **HN3** [] **Elements, Protected Rights**

To state a due process cause of action under [42 U.S.C.S. § 1983](#), a party must, as a threshold matter, allege a liberty or property interest within the protection of [U.S. Const. amend. XIV](#). A property interest is defined as "a legitimate claim of entitlement to a benefit." Thus, to have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it.

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

Constitutional Law > Equal Protection > Nature & Scope of Protection

Civil Rights Law > Protection of Rights > Section 1983 Actions > General Overview

## **HN4** [] **Protection of Rights, Section 1983 Actions**

To state an equal protection cause of action under [42 U.S.C.S. § 1983](#), a party must set forth facts showing some intentional and purposeful deprivation of constitutional rights.

Civil Rights Law > Protection of Rights > Conspiracy Against Rights > Elements

Constitutional Law > Equal Protection > National Origin & Race

Constitutional Law > Equal Protection > Nature & Scope of Protection

## **HN5** [] **Conspiracy Against Rights, Elements**

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To state a cause of action under [42 U.S.C.S. § 1985\(3\)](#), a party must allege some racial or class-based, invidiously discriminatory animus behind the conspirators' action.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

## [HN6](#) Antitrust & Trade Law, Sherman Act

The Cartwright Act, [Cal. Bus. & Prof. Code § 16700](#), generally declares that every trust is unlawful, against public policy, and void. For purposes of the Act, the term "trust" includes any combination of capital, skill, or acts by two or more persons to create or carry out restrictions in trade or commerce. [Cal. Bus. & Prof. Code § 16720\(a\)](#). In interpreting the Cartwright Act, courts look to the Sherman Act, [15 U.S.C.S. § 1](#), and cases construing it. The Cartwright Act is patterned after the Sherman Act and both statutes have their roots in the common law.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

Antitrust & Trade Law > Sherman Act > General Overview

## [HN7](#) Scope, Exemptions

The Noerr-Pennington doctrine declares that efforts to influence government action are not within the scope of the Sherman Act, [15 U.S.C.S. § 1](#), regardless of anticompetitive purpose or effect. The doctrine rests on statutory interpretation. In other words, the doctrine states that efforts to influence government action do not fall within the scope of the Sherman Act in the first place, not that they are removed from the act by an exemption.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Governments > Courts > Judicial Comity

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

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

## [HN8](#) Exemptions & Immunities, Noerr-Pennington Doctrine

Although resting on statutory interpretation, the Noerr-Pennington doctrine is reinforced by two constitutional considerations: (1) the [U.S. Const. amend. I](#) right to petition the government, and (2) comity, i.e., noninterference on the part of courts with governmental bodies that may validly cause anticompetitive effects, and with efforts intended to influence such bodies.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

#### **HN9** [blue download icon] Antitrust & Trade Law, Sherman Act

It is only when efforts to influence government action are a "sham" that they fall outside the protection of the Noerr-Pennington doctrine and within the scope of the Sherman Act, [15 U.S.C.S. § 1](#). Such efforts amount to a sham when though ostensibly directed toward influencing governmental action, they are actually nothing more than an attempt to interfere directly with the business relationships of a competitor. Such efforts, by contrast, do not amount to a sham when, no matter how anticompetitive in purpose or effect, they constitute a genuine effort to influence government action. In other words, efforts to influence government action are a sham only when the person or persons making such efforts invokes the process of governmental decisionmaking for the injury that the process alone will work on competitors.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Governments > Local Governments > Claims By & Against

#### **HN10** [blue download icon] Regulated Practices, Price Fixing & Restraints of Trade

The actions of political subdivisions of the state, and the effects of such actions, are outside the scope of the Cartwright Act, [Cal. Bus. & Prof. Code § 16700](#).

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

#### **HN11** [blue download icon] Exemptions & Immunities, Noerr-Pennington Doctrine

When an alleged anticompetitive effect is caused by government action that is itself outside the scope of the antitrust laws, it is untenable to hold that the participation of a public official renders the efforts to influence such government action violative of the law.

Constitutional Law > Separation of Powers

#### **HN12** [blue download icon] Constitutional Law, Separation of Powers

The constitutional doctrine of separation of powers precludes judicial inquiry into the motivation or mental processes which may underlie action by a nonjudicial agency of government.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

#### **HN13** [blue download icon] Exemptions & Immunities, Noerr-Pennington Doctrine

For purposes of the Noerr-Pennington doctrine, impropriety and genuineness are not related.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

#### **HN14** [blue icon] Exemptions & Immunities, Noerr-Pennington Doctrine

Whatever sense it might make to deny Noerr-Pennington protection to a conspiracy including public officials when it seeks government action itself violative of the antitrust laws, it is not rational to deny it to such a conspiracy when it seeks government action not violative of the antitrust laws.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Criminal Law & Procedure > ... > Abuse of Public Office > Illegal Political Activity > Penalties

#### **HN15** [blue icon] Exemptions & Immunities, Noerr-Pennington Doctrine

A private antitrust complaint is not the appropriate vehicle for state criminal laws whose enforcement is entrusted to state or local prosecutors.

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

#### **HN16** [blue icon] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

Insofar as the Cartwright Act, [Cal. Bus. & Prof. Code § 16700](#), sets up a code of ethics at all, it is a code that condemns trade restraints.

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

#### **HN17** [blue icon] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

See [Cal. Bus. & Prof. Code § 16600](#).

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

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

#### **HN18** [blue icon] Regulated Practices, Trade Practices & Unfair Competition

Unfair competition is defined to include unlawful, unfair, or fraudulent business practice and unfair, deceptive, untrue, or misleading advertising. [Cal. Bus. & Prof. Code § 17200](#). An "unlawful business activity" includes anything that can properly be called a business practice and that at the same time is forbidden by law.

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

## [\*\*HN19\*\*](#) [blue document icon] Price Fixing & Restraints of Trade, Vertical Restraints

A vertical relationship between a competitor and a third party does not support a cause of action for unfair competition as an illegal business practice absent allegations that the relationship is unlawful in itself or that it inflicts legal injury on consumers.

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

## [\*\*HN20\*\*](#) [blue document icon] Intentional Interference, Elements

The elements of the tort of intentional interference with prospective economic advantage are: (1) an economic relationship between the plaintiff and some third person containing the probability of future economic benefit to the plaintiff, (2) knowledge by the defendant of the existence of the relationship, (3) intentional acts on the part of the defendant designed to disrupt the relationship, (4) actual disruption of the relationship, and (5) damages to the plaintiff proximately caused by the acts of the defendant.

Governments > Local Governments > Claims By & Against

Torts > Business Torts > Commercial Interference > General Overview

Governments > Legislation > Overbreadth

Governments > Local Governments > Licenses

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

## [\*\*HN21\*\*](#) [blue document icon] Local Governments, Claims By & Against

The tort of intentional interference with prospective economic advantage protects the expectancies involved in ordinary commercial dealings and not the expectancies, whatever they may be, involved in a governmental licensing process.

Contracts Law > Contract Interpretation > General Overview

## [\*\*HN22\*\*](#) [blue document icon] Contracts Law, Contract Interpretation

See [Cal. Code Civ. Proc. § 1060](#).

Civil Procedure > ... > Defenses, Demurrsers & Objections > Affirmative Defenses > General Overview

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

## [\*\*HN23\*\*](#) [blue document icon] Defenses, Demurrsers & Objections, Affirmative Defenses

See [Cal. Code Civ. Proc. § 583\(a\)](#).

Civil Procedure > ... > Pleadings > Service of Process > General Overview

## **HN24** [ ] **Pleadings, Service of Process**

See [Cal. Code Civ. Proc. § 581\(a\)](#).

Civil Procedure > ... > Pleadings > Service of Process > General Overview

## **HN25** [ ] **Pleadings, Service of Process**

A written stipulation between attorneys recognizing jurisdiction of the court over the parties constitutes a general appearance by the defendant. But a party who merely seeks an extension of time to plead cannot reasonably be deemed to make a general appearance. His purpose may be to obtain adequate time to determine whether or not to object to the jurisdiction of the court.

## **Headnotes/Summary**

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### **Summary**

#### **CALIFORNIA OFFICIAL REPORTS SUMMARY**

In an action by an unsuccessful applicant for a license to operate a poker club against a city, public officials and private individuals alleging in essence that the private-individual and the public-official defendants successfully conspired to legalize and monopolize the operation of poker clubs in the city through government action, including zoning restrictions and the denial of a license to plaintiff, the trial court sustained demurrers to the amended complaint without leave to amend and granted motions to dismiss for failure to prosecute pursuant to former [Code Civ. Proc., § 581a, subd. \(a\)](#). (Superior Court of Los Angeles County, No. C-291713, Eli Chernow, Judge.)

The Supreme Court affirmed. The court held that plaintiff's complaint failed to state facts sufficient to constitute a cause of action under the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)), and could not be amended to state such a cause of action, in view of the doctrine that efforts to influence government action are not within the scope of the Cartwright Act regardless of anticompetitive purpose or effect. It held defendants' efforts, according to the very allegations of the pleading, were directed at influencing government action and as such were squarely within the protection of the doctrine. Because the government action alleged and its effects were not within the scope of the act, the court held, under the doctrine neither were the efforts made to influence such action and to cause such effects. It held the fact city officials may have been coconspirators and the tactics used to influence the government action illegal did not preclude application of the doctrine. It also held plaintiff failed to state causes of action for violation of federal civil rights, interference with prospective economic advantage, or unfair competition. The court further held that, since plaintiff did virtually nothing to prosecute the action for almost three and one-half years after it was filed, the trial court did not abuse its discretion in dismissing it for failure to prosecute. (Opinion by Mosk, J., with Kaus, Broussard, Reynoso and Grodin, JJ., concurring. Separate concurring opinion by Lucas, J., with Bird, C. J., concurring.)

### **Headnotes**

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

**Appellate Review § 128—Review—Generally—Scope and Extent—Rulings on Demurrers.**

--In reviewing the sufficiency of a complaint against a general demurrer, the demurrer is treated as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. The complaint is given a reasonable interpretation, read as a whole and its parts in their context. When a demurrer is sustained, courts determine whether the complaint states facts sufficient to constitute a cause of action, and when it is sustained without leave to amend, courts must decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion; if not, there has been no abuse of discretion. The burden of proving the reasonable possibility is on the plaintiff.

#### CA(2) [ ] (2)

##### **Civil Rights § 8—Actions—Federal Law—Due Process.**

--To state a due process cause of action for a violation of civil rights under [42 U.S.C. § 1983](#), a party must, as a threshold matter, allege a liberty or property interest within the protection of [U.S. Const., 14th Amend.](#) A property interest is defined as a legitimate claim of entitlement to a benefit, which means more than an abstract need or desire for it, and more than a unilateral expectation of it.

#### CA(3) [ ] (3)

##### **Civil Rights § 8—Actions—Federal Law—Equal Protection.**

--To state an equal protection cause of action for a civil rights violation under [42 U.S.C. § 1983](#), a party must set forth facts showing some intentional and purposeful deprivation of constitutional rights.

#### CA(4) [ ] (4)

##### **Civil Rights § 8—Actions—Federal Law—Discrimination.**

--To state a cause of action under [42 U.S.C. § 1985\(3\)](#), for a civil rights violation, a party must allege some racial or perhaps otherwise class-based invidiously discriminatory animus behind the conspirators' action.

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

##### **Monopolies and Restraints of Trade § 10—Under Cartwright Act—Remedies of Individuals—Attempts to Influence Public Officials.**

--In view of the doctrine that efforts to influence government action are not within the scope of the Sherman Act (or the Cartwright Act) regardless of anticompetitive purpose or effect, a complaint alleging that an individual and a public-official defendant successfully conspired to legalize and monopolize the operation of poker clubs in a city through government action, including zoning restrictions and a denial of a license to plaintiff, did not state facts sufficient to constitute a cause of action under the Cartwright Act. Because government action was the legal cause of whatever injury plaintiff may have suffered, and because such government action and its effects are not within the scope of the act, neither were efforts made to influence such actions and to cause such effects; accordingly, defendants could not be liable.

#### CA(6) [ ] (6)

##### **Monopolies and Restraints of Trade § 6—Under Cartwright Act—Precedent—Sherman Act.**

--In interpreting the Cartwright Act, courts properly look to the Sherman Act in cases construing it, since the Cartwright Act is patterned after the Sherman Act and both statutes have their roots in the common law.

#### CA(7) [ ] (7)

##### **Monopolies and Restraints of Trade § 4—Sherman Act—Influencing Government Action.**

--The doctrine that efforts to influence government action are not within the scope of the Sherman Act regardless of anticompetitive purpose or effect rests on statutory interpretation and is reinforced by two constitutional considerations: the right to petition the government guaranteed by *U.S. Const., 1st Amend.*, and comity, that is, noninterference on the part of the courts with governmental bodies that may validly cause otherwise anticompetitive effects and with efforts intended to influence such bodies. It is only when efforts to influence government action are a "sham" that they fall outside the protection of the doctrine within the scope of the Sherman Act. Such efforts amount to a sham when, though ostensibly directed toward influencing governmental action, they are actually nothing more than an attempt to interfere directly with the business relationships of a competitor. Such efforts do not amount to a sham when, no matter how anticompetitive in purpose or effect, they constitute a genuine effort to influence government action.

#### CA(8) [ ] (8)

##### **Monopolies and Restraints of Trade § 6—Under Cartwright Act—Influencing Government Action—Conspiracy of Public Officials.**

--Under the doctrine that efforts to influence a government action are not within the scope of the Cartwright Act regardless of anticompetitive purpose or effect, the fact that a public official has participated in efforts to influence government action is generally immaterial. The immateriality of participation by a public official is supported by constitutional considerations (*U.S. Const., 1st Amend.--right* to petition) and comity (separation of powers precluding judicial inquiry into the motivation or mental processes underlying action by a nonjudicial agency of government).

#### CA(9) [ ] (9)

##### **Monopolies and Restraints of Trade § 6—Under Cartwright Act—Influencing Government Action—Exception.**

--Under the doctrine that efforts to influence government action are not within the scope of the Cartwright Act regardless of anticompetitive purposes or effect, unless such efforts are a "sham," the fact such efforts to influence government action are improper does not invoke the "sham" exception.

#### CA(10) [ ] (10)

##### **Monopolies and Restraints of Trade § 6—Under Cartwright Act—Influencing Government Action—Improper Conduct by City Officials.**

--The doctrine that efforts to influence government action are not within the scope of the Cartwright Act regardless of anticompetitive purpose or effect was applicable to an action by an unsuccessful applicant for a license to operate a poker club against a city, public officials and private individuals, even though it was alleged city officials initiated and directed efforts to legalize and monopolize the operation of poker clubs in the city and sought and received bribes for their undertaking. Such action was the act of a political subdivision of the state and as such was outside the scope of the Cartwright Act. When the government action sought falls outside the scope of the antitrust

laws, the official capacity of the person who initiates and directs efforts to influence such action cannot trigger antitrust liability.

#### [CA\(11\)](#) [] (11)

##### **Unfair Competition § 4—Acts Constituting Unfair Competition.**

--*Bus. & Prof. Code, § 16600*, providing that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void," generally proscribes contracts under which one or more of the parties agrees to restrict his activity in the market place in some way.

#### [CA\(12\)](#) [] (12)

##### **Unfair Competition § 4—Acts Constituting Unfair Competition.**

--A vertical relationship between plaintiff's competitor and a third party does not support a cause of action for unfair competition as an illegal business practice absent, for example, allegations that the relationship is unlawful in itself or that it inflicts legal injury on consumers.

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

##### **Interference § 7—Interference With Prospective Economic Advantage—Actions and Remedies.**

--A complaint alleging that but for defendants' acts in securing from a city a monopoly to operate poker clubs plaintiff would have made some undetermined profit operating a poker club in the city did not state a cause of action for intentional interference with prospective economic advantage.

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

##### **Interference § 6—Interference With Prospective Economic Advantage—Elements.**

--The elements of the tort of intentional interference with prospective economic advantage are: an economic relationship between plaintiff and some third person containing the probability of future economic benefits to plaintiff; knowledge by defendant of the existence of the relationship; intentional acts on the part of defendant designed to disrupt the relationship; actual disruption of the relationship; and damages to plaintiff proximately caused by defendants' acts.

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

##### **Dismissal and Nonsuit § 42—Involuntary Dismissal—Delay in Bringing Action to Trial ([Code Civ. Proc., § 583](#))—Relief—Appeal, Mandamus, and Prohibition—Scope of Review.**

--When the trial court has ruled on a motion to dismiss an action for want of prosecution, unless a clear abuse of discretion is shown and unless there has been a miscarriage of justice, a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power. The burden is on the party complaining to establish an abuse of discretion.

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

**Dismissal and Nonsuit § 27—Involuntary Dismissal—Delay in Bringing Action to Trial ([Code Civ. Proc., § 583](#))—Two-year Limitation—Discretion of Court—Exercise of Discretion.**

--The trial court properly dismissed an action not brought to trial within two years (former [Code Civ. Proc., § 583, subd. \(a\)](#)) where from the date the action was filed until the date the trial court made its rulings--a period of almost three and one-half years--plaintiff did virtually nothing to prosecute the action, and where the object of the little action he did take was to delay prosecution. The fact defendants agreed to take their demurrer off calendar indefinitely for the benefit of plaintiff and at plaintiff's request did not excuse plaintiff from his obligation to prosecute the action.

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

**Dismissal and Nonsuit § 23—Involuntary Dismissal—Delay in Bringing Action to Trial ([Code Civ. Proc., § 583](#))—Application and Construction of Statutes.**

--The legislative policy underlying [Code Civ. Proc., § 583](#), requiring timely prosecution of actions, is not grounded solely in prejudice caused by delay to a defendant. Its purpose is also to expedite the administration of justice by compelling every person who files an action to prosecute it with promptness and diligence.

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

**Appearance § 5—General Appearance—By Stipulation.**

--Although a written stipulation between attorneys recognizing jurisdiction of the court over the parties constitutes a general appearance by defendant, a party who merely seeks an extension of time to plead cannot reasonably be deemed to make a general appearance. His purpose may be to obtain adequate time to determine whether or not to object to the jurisdiction of the court.

**Counsel:** Julius Grush and John D. Wilson for Plaintiff and Appellant.

Rosenberg, Nagler & Weisman, Weisman, Butler & Watson, Mark L. Weisman, Marylin Jenkins White, Dana E. Watson, Wildman, Harrold, Allen, Dixon, Barash & Hill, Barash & Hill, Jerry M. Hill, Christina L. Machon, J. Robert Flandrick, City Attorney, Burke, Williams & Sorensen, Virginia R. Pesola and Geoffrey V. Morson for Defendants and Respondents.

**Judges:** Opinion by Mosk, J., with Kaus, Broussard, Reynoso and Grodin, JJ., concurring. Separate concurring opinion by Lucas, J., with Bird, C. J., concurring.

**Opinion by:** MOSK

## **Opinion**

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[\*316] [\*582] [\*\*60] [\*\*\*720] We must decide whether efforts to influence municipal action that are intended to and actually do produce anticompetitive effects are violative of the Cartwright Act when both private individuals and public officials participate. We conclude the act does not apply and hence the judgment must be affirmed.

[\*\*61] I

The factual background and procedural history of this action are somewhat complicated. On June 29, 1978, the city council of defendant City of Bell enacted Ordinance No. 806, which legalized the operation of poker clubs in the city and established a structure of regulation. In August 1978 the city council adopted zoning ordinances adding a new

zone classification for commercial and manufacturing uses (the C-M zone) to the city's zoning regulations and reclassifying to the C-M zone a certain 20-acre parcel controlled by defendants Crow, Crow Los Angeles No. 8, and Trammell Crow [\*317] Co. (hereafter the Crow defendants).<sup>1</sup> [\*\*\*721] Poker clubs were designated as one of a number of permitted uses in the C-M zone. The voters of the city subsequently approved the zoning ordinances.

[\*\*\*3] In the fall of 1978 plaintiff and defendant California Bell Operations (a limited partnership whose general partners were defendants Kirwan, Gasparian, and Simonian) each applied for a poker club license. In December 1978 the city council approved the application of California Bell Operations. At plaintiff's request the city council put off its consideration of his application because he had not obtained, as Ordinance No. 806 required, a lot of at least 7.5 acres properly zoned. California Bell Operations had previously obtained such a lot in the 20-acre parcel.

On July 17, 1979, plaintiff filed his original complaint in this action. In May 1980 the city council formally denied plaintiff's application. In October 1980 plaintiff filed his first amended complaint, in which he alleged six causes of action: (1) violation of his civil rights, against all named defendants and all doe defendants including public officials of the City of Bell; (2) unfair competition ([Bus. & Prof. Code, § 16700 et seq.](#)), against all defendants except the City of Bell; (3) unfair competition (*id.*, § 16600), against Crow Los Angeles No. 8 and Kirwan; (4) unfair competition (*id.*, [§ 17200](#)), against [\*\*\*\*4] all defendants except the City of Bell; (5) intentional interference with prospective economic advantage, against all defendants except the City of Bell; and (6) declaratory relief. In July 1982 plaintiff amended his first amended complaint to name defendant Werrlein, a former member of the city council, as one of the doe public-official defendants.

In December 1980 Kirwan and the Crow defendants demurred to the first amended complaint. In October 1982 Kirwan moved for dismissal for failure to prosecute pursuant to former [Code of Civil Procedure section 583, subdivision \(a\)](#); the City of Bell, Werrlein, and the Crow defendants subsequently joined in this motion. Also in October 1982 the City of Bell and Werrlein demurred, and California Bell Operations, Gasparian, and Simonian moved for dismissal for failure to prosecute pursuant to former [Code of Civil Procedure section 581a, subdivision \(a\)](#).<sup>2</sup>

[\*\*\*5] On December 9, 1982, the trial court sustained the demurrs without leave to amend and granted motions to dismiss. From the ensuing judgment of dismissal plaintiff appeals.

[\*318] II

Plaintiff contends the trial court erred in sustaining the demurrs without leave to amend.

**CA(1)[↑]** (1) In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. "[HN1\[↑\]](#) We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." ([Serrano v. Priest \(1971\) 5 Cal.3d 584, 591 \[96 Cal. Rptr. 601, 487 P.2d 1241, 41 A.L.R.3d 1187\]](#).) Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in [\*\*62] their context. ([Speegle v. Board of Fire Underwriters \(1946\) 29 Cal.2d 34, 42 \[172 P.2d 867\]](#).) [HN2\[↑\]](#) When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. (See [Hill v. Miller \(1966\) 64 Cal.2d 757, 759 \[51 Cal. Rptr. 689, 415 P.2d 33\]](#).) And when it is sustained without leave to amend, we decide [\*\*\*6] whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. ([Kilgore v. Younger \(1982\) 30 Cal.3d 770, 781 \[180 Cal. Rptr. 657, 640 P.2d 793\]](#); [Cooper v. \[\\*\\*\\*722\] Leslie Salt Co. \(1969\) 70 Cal.2d 627, 636 \[75 Cal. Rptr. 766, 451 P.2d 406\]](#).) The burden of proving such reasonable possibility is squarely on the plaintiff. ([Cooper v. Leslie Salt Co., supra, at p. 636](#).)

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<sup>1</sup> It is not clear from the record which of the Crow defendants actually owned the 20-acre parcel. For purposes of this action, however, the question is immaterial.

<sup>2</sup> Plaintiff did not oppose the motion to dismiss pursuant to former [Code of Civil Procedure section 581a, subdivision \(a\)](#), insofar as it related to Gasparian and Simonian.

In his first amended complaint, plaintiff alleges in essence as follows. Defendants -- who include private individuals and city officials -- conspired to legalize and monopolize the operation of poker clubs in the City of Bell, acting on the "inside information" that the city was considering adopting ordinances legalizing poker clubs and restricting them to a certain part of the city. Defendants agreed to attempt to secure government action under which (1) poker clubs would be legalized, (2) such clubs would be allowed only in a to-be-created C-M zone, and (3) only the 20-acre parcel would be so zoned; they also agreed that only California [\*\*\*\*7] Bell Operations would be permitted to obtain the requisite 7.5-acre lot in such parcel. Accordingly, Kirwan obtained from Trammell Crow Co. an option to lease eight acres of the twenty-acre parcel and an option to purchase an additional five acres. The so-called conspiracy was successful. For their participation California Bell Operations and its general partners Kirwan, Gasparian, and Simonian received a monopoly; the Crow defendants received help from the city-official defendants in securing from the city certain permits, approvals, and other action favorable to their interests; and the city-official defendants received from the private defendants "rewards, things of value, and other valuable consideration."

[\*319] In the second amended complaint he proposes to file, plaintiff -- except as otherwise noted in the following discussion -- makes essentially the same allegations but with greater specificity.

As will appear, the first amended complaint does not state facts sufficient to constitute a cause of action, and plaintiff does not carry his burden of proving a reasonable possibility that the defects can be cured by amendment.

A

Plaintiff originally contended that by [\*\*\*\*8] alleging a successful conspiracy to legalize and monopolize poker clubs in his first cause of action, he stated facts sufficient to make out causes of action under [section 1983 of title 42 of the United States Code](#) for due process and equal protection violations and a cause of action under [section 1985\(3\)](#) of the same title for an equal protection violation.

[CA\(2\)\[↑\]](#) (2) [HN3\[↑\]](#) To state a due process cause of action under [section 1983](#), a party must, as a threshold matter, allege a liberty or property interest within the protection of the Fourteenth Amendment. ([Board of Regents v. Roth \(1972\) 408 U.S. 564, 570-572 \[33 L. Ed. 2d 548, 556-558, 92 S. Ct. 2701\]](#).) A property interest is defined as "a legitimate claim of entitlement to [a benefit]." ([Id., at p. 577 \[33 L. Ed. 2d at p. 561\]](#).) Thus, "[to] have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it." (*Ibid.*)

The defendants sought dismissal of this claim on the ground, among others, that plaintiff had no property interest in the award of the license. The court agreed and granted the motion.

In this court plaintiff abandoned [\*\*\*\*9] his due process claim. In effect he conceded that although he may have an "abstract need" or "desire" for or a "unilateral expectation" [\*\*63] of a poker club license, he is unable to show that he has any "legitimate claim of entitlement" to it.

[CA\(3\)\[↑\]](#) (3) [HN4\[↑\]](#) To state an equal protection cause of action under [section 1983](#) a party "must set forth facts showing some intentional and purposeful deprivation of constitutional rights." ([Powell v. Workmen's Compensation Bd. of State of New York \(2d Cir. 1964\) 327 F.2d 131, 137](#); accord, e.g., [Jones v. Community Redevelopment Agency \(9th Cir. 1984\) 733 F.2d 646, 649-650](#).) Plaintiff now concedes he cannot set forth any such facts: the conspiracy as alleged sought to enrich the coconspirators, not to [\*\*\*723] deprive plaintiff of any of his constitutional rights.

[\*320] [CA\(4\)\[↑\]](#) (4) Finally, [HN5\[↑\]](#) to state a cause of action under [section 1985\(3\)](#), a party must allege, inter alia, "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." ([Griffin v. Breckenridge \(1971\) 403 U.S. 88, 102 \[29 L. Ed. 2d 338, 348, 91 S. Ct. 1790\]](#).) No such animus is stated in the allegations of the first [\*\*\*\*10] amended complaint or in those of the proposed second amended complaint. Plaintiff recognizes this fact and has now abandoned his [section 1985\(3\)](#) cause of action.

B

**CA(5a)** Plaintiff still contends the trial court erred in sustaining the demurrers to the second cause of action without leave to amend. Specifically, he argues that the first amended complaint states facts sufficient to constitute a cause of action under the Cartwright Act, and that even if it does not, the second amended complaint he proposes to file would do so. The claim is unpersuasive.

**HN6** The Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)) generally declares that "every trust is unlawful, against public policy and void." (*Id.*, § 16726.) For purposes of the act, the term "trust" includes any "combination of capital, skill or acts by two or more persons . . . [to] create or carry out restrictions in trade or commerce." (*Id.*, § 16720, subd. (a).) **CA(6)** In interpreting the Cartwright Act, we properly look to the Sherman Act and cases construing it: "the Cartwright Act is patterned after the Sherman Act and both statutes have their roots in the common law." ([Marin County Bd. of Realtors, Inc. v. Palsson \(1976\) \\*\\*\\*\\*11 16 Cal.3d 920, 925 \[130 Cal. Rptr. 1, 549 P.2d 833\].](#)) As we conclude and all parties agree, the cases relevant here are those that have articulated and construed what is commonly referred to as the *Noerr-Pennington* doctrine or immunity.

**CA(7)** Stated most generally, **HN7** the *Noerr-Pennington* doctrine declares that efforts to influence government action are not within the scope of the Sherman Act, regardless of anticompetitive purpose or effect. ([Eastern R. Conf. v. Noerr Motors \(1961\) 365 U.S. 127, 135-144 \[5 L. Ed. 2d 464, 469-475, 81 S. Ct. 523\]](#) [legislative and executive branches]; [Mine Workers v. Pennington \(1965\) 381 U.S. 657, 669-672 \[14 L. Ed. 2d 626, 635-637, 85 S. Ct. 1585\]](#) [executive branch]; [California Transport v. Trucking Unlimited \(1972\) 404 U.S. 508, 509-511 \[30 L. Ed. 2d 642, 645-646, 92 S. Ct. 609\]](#) [judicial branch and administrative agencies].)

The doctrine "rests on statutory interpretation . . ." ([In re Airport Car Rental Antitrust Litigation \(N.D.Cal. 1981\) 521 F. Supp. 568, 575](#); see [Noerr, 365 U.S. at pp. 135-137 \[5 L. Ed. 2d at pp. 469-471\]](#); [Pennington, \[\\*321\] 381 U.S. at p. 669 \[14 L. Ed. 2d at p. 635\]](#); see generally [\\*\\*\\*\\*12 Handler & De Sevo, \*The Noerr Doctrine and Its Sham Exception\* \(1984\) 6 Cardozo L. Rev. 1, 3-5, 25, 36](#) [hereafter Handler & De Sevo].) In other words, the doctrine states that efforts to influence government action "do[] not fall within the scope of the Sherman Act in the first place, not that [they are] removed from the act by an exemption." ([In re Airport Car Rental Antitrust Litigation, supra, at p. 575](#); accord, Handler & De Sevo, *supra*, at pp. 3-5, 25.)

**HN8** Although resting on statutory interpretation the *Noerr-Pennington* doctrine is reinforced by two constitutional considerations: the First Amendment right to petition the government ([California Transport, 404 U.S. at pp. 510-511 \[\\*641\] \[30 L. Ed. 2d at pp. 646-647\]](#); [Noerr, 365 U.S. at pp. 137-138 \[5 L. Ed. 2d at pp. 470-471\]](#); see generally Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine* (1977) 45 U. Chi. L. Rev. 80 [hereafter Fischel]) and comity, i.e., noninterference on the part of the courts with governmental bodies that may validly cause otherwise anticompetitive effects and with efforts intended to influence such [\\*\\*\\*\\*13](#) bodies ([Noerr, supra, at pp. 137, 139 \[5 L. Ed. 2d at pp. 470, 472\]](#); [Metro Cable Co. v. CATV of Rockford, Inc. \(7th Cir. 1975\) 516 F.2d 220, 224, 227](#); [\\*\\*\\*\\*724 Note, \*The Noerr-Pennington Doctrine and the Petitioning of Foreign Governments\* \(1984\) 84 Colum. L. Rev. 1343, 1344](#), fn. 10 [hereafter *Noerr-Pennington Abroad*]; see generally 1 Areeda & Turner, *Antitrust Law* (1978) para. 204d, pp. 49-50 [hereafter 1 Areeda & Turner].) ([Affiliated Capital Corp. v. City of Houston \(S.D. Tex. 1981\) 519 F. Supp. 991, 1024](#); [Wilmorite, Inc. v. Eagan Real Estate, Inc. \(N.D.N.Y. 1977\) 454 F. Supp. 1124, 1136](#), affd. (2d Cir. 1978) [578 F.2d 1372](#), cert. den., 439 U.S. 983 [58 L. Ed. 2d 655, 99 S. Ct. 573].)<sup>3</sup>

[\\*\\*\\*\\*14 HN9](#)

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<sup>3</sup>The courts (see, e.g., [In re Airport Car Rental Antitrust Litigation \(N.D.Cal. 1979\) 474 F. Supp. 1072, 1083-1084](#)) and commentators (see, e.g., Fischel, *supra*, 45 U. Chi. L. Rev. at pp. 87-88) that conclude or suggest that the *Noerr-Pennington* doctrine results from constitutional adjudication rather than statutory interpretation seem misled by *California Transport*. In considering the applicability of the *Noerr-Pennington* doctrine to the judicial sphere, *California Transport* bypasses discussion of statutory interpretation to deal immediately with constitutional considerations ([404 U.S. at pp. 510-511 \[30 L. Ed. 2d at pp. 646-647\]](#)), perhaps because the legislative history of the Sherman Act does not as plainly support the applicability of the doctrine to that sphere as it does to the other spheres (see *Noerr-Pennington Abroad, supra*, 84 Colum. L. Rev. at pp. 1351-1352 [the act was intended to protect "politics . . . and not . . . appeals to nonpolitical government bodies such as courts."]).

It is only when efforts to influence government action are a "sham" that they fall outside the protection of the *Noerr-Pennington* doctrine and within the scope of the Sherman Act. (*California Transport, 404 U.S. at pp. 511-516 [30 L. Ed. 2d at pp. 646-649]*; *Noerr, 365 U.S. at p. 144 [5 L. Ed. 2d at p. 475]*; see generally Areeda, *Antitrust Law* (1982 supp.) [para. ] 202, pp. 4-5 [hereafter Areeda, Antitrust Supplement].) Such efforts amount to a sham [\*322] when though "ostensibly directed toward influencing governmental action, . . . [they are] actually nothing more than an attempt to interfere directly with the business relationships of a competitor . . . ." (*Noerr, supra, at p. 144 [5 L. Ed. 2d at p. 475]*.) Such efforts, by contrast, do not amount to a sham when, no matter how anticompetitive in purpose or effect, they constitute a "genuine effort to influence [government action] . . . ." (*Ibid.*) In other words, efforts to influence government action are a sham only when the person or persons making such efforts "[invokes] the process of [governmental] decisionmaking for the injury that *the process alone* will work on competitors . . ." [\*\*\*\*15] (*Litton Systems, Inc. v. American Tel. & Tel. Co.* (2d Cir. 1983) *700 F.2d 785, 810*, italics added; accord, Handler & De Sevo, *supra*, 6 Cardozo L. Rev. at pp. 7-14.)

**CA(5b)[]** (5b) With these considerations in mind, we turn to the case before us. In the first amended complaint, plaintiff alleges in essence that the private-individual and the public-official defendants successfully conspired to legalize and monopolize the operation of poker clubs in the City of Bell through government action. Such allegations, however, do not state facts sufficient to constitute a cause of action under the Cartwright Act.

First, defendants' efforts, according to the very allegations of the pleading, were directed at influencing government action and as such are squarely within the protection of the *Noerr-Pennington* doctrine. "Construing the allegations of [plaintiff's] complaint liberally, it asserts nothing more than that [defendants] sought to obtain a monopoly from City. This is precisely the type of conduct that *Noerr-Pennington* protects." (*Hopkinsville Cable TV v. Pennyroyal* [\*\*65] *Cablevision, Inc.* (W.D. Ky. 1982) *562 F. Supp. 543, 546*.)<sup>4</sup>

[\*\*\*\*16] Second, government action, again according to the very allegations of the pleading, is the legal cause of whatever injury plaintiff may have suffered. The legal cause of plaintiff's alleged injury is the city council's legalization of poker clubs and its subsequent denial of plaintiff's application -- not, [\*\*\*725] as he sometimes argues, the alleged real estate transactions between Kirwan and the Crow defendants. These transactions may have facilitated some aspects of the conspiracy, but that is all: they are not alleged to, nor could they, prevent plaintiff or any other applicant from obtaining a lot of requisite size outside the C-M zone and having it rezoned to allow a poker club. According to his own admission, plaintiff evidently declined to make the [\*323] attempt on the ground it would have been futile: "the application process was a sham and a fraud, because, among other things . . . [para. ] [the] defendants knew and intended and concealed that defendant California Bell Operations, Ltd. would be the only applicant to receive a permit, and that all other applications would be denied." Thus, the real estate transactions do not constitute a necessary cause of [\*\*\*\*17] his alleged injury. Nor, as a matter of law, do they constitute a sufficient cause: there could have been no injury absent the city council's enactment of the poker club and zoning ordinances and its denial of plaintiff's application. Because government action is the legal cause of whatever injury plaintiff may have suffered, defendants cannot be liable. (*In re Airport Car Rental Antitrust Litigation, supra, 521 F. Supp. at p. 574*; Handler & De Sevo, *supra*, 6 Cardozo L. Rev. at p. 46 [Sherman Act].)

Third, the government action alleged here cannot violate the Cartwright Act. **HN10**[] The actions of political subdivisions of the state, such as the City of Bell, and the effects of such actions are outside the scope of the act. (*People ex rel. Freitas v. City and County of San Francisco* (1979) *92 Cal. App. 3d 913, 920-921 [155 Cal. Rptr. 319]*; *Widdows v. Koch* (1968) *263 Cal. App. 2d 228, 235 [69 Cal. Rptr. 464]*; Folsom & Fellmeth, Cal. *Antitrust Law* and Practice (1983) § 6 at pp. 5-6; see *Bus. & Prof. Code, § 16702*.) Because the government action alleged here and its effects are not within the scope of the act, under the *Noerr-Pennington* doctrine neither [\*\*\*\*18] are efforts made to influence such action and to cause such effects. (*Metro Cable Co. v. CATV of Rockford, Inc.*,

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<sup>4</sup> Plaintiff seems to rely on *Woods Exploration & Pro. Co. v. Aluminum Co. of Amer.* 5th Cir. 1971) *438 F.2d 1286*, for the proposition that the *Noerr-Pennington* doctrine is inapplicable to the licensing process. Whether or not Woods in fact supports such a proposition is irrelevant since *California Transport* is to the contrary (*404 U.S. at pp. 509-511 [30 L. Ed. 2d at pp. 645-646]*).

supra, 516 F.2d at p. 229 [Sherman Act].) To hold individual defendants liable under the Cartwright Act for influencing government action that is itself outside the scope of the act is untenable. (See *People ex rel. Freitas v. City and County of San Francisco, supra, at pp. 925-926.*)

**CA(8)** [↑] (8) To avoid this conclusion, plaintiff contends that he has alleged city officials were coconspirators and that consequently the *Noerr-Pennington* doctrine does not apply.

First, the authority he cites is of dubious value, comprising dicta in *California Transport* ([404 U.S. at p. 513 \[30 L. Ed. 2d at p. 647\]](#)) and *Independent Taxicab Operators' Ass'n. v. Yellow Cab Co. (N.D.Cal. 1968) 278 F. Supp. 979, 985. The latter is of little weight because it relies on *Harman v. Valley National Bank of Arizona (9th Cir. 1964) 339 F.2d 564*, which the subsequently decided *Noerr* and *Pennington* cases have undermined (*Sun Valley Disposal Co. v. Silver State Disposal Co. (9th Cir. 1969) 420 F.2d 341, 342*).*

Second and more important, the fact that a [\*\*\*\*19] public official has participated in efforts to influence government action is generally immaterial. (See, e.g., [\*324] *Metro Cable Co. v. CATV of Rockford, Inc., supra, 516 F.2d at p. 230*; [\*\*66] *Cow Palace, Ltd. v. Associated Milk Producers, Inc. (D. Colo. 1975) 390 F. Supp. 696, 704-705*; Fischel, *supra*, 45 U. Chi. L. Rev. at p. 115; Note, *Application of the Sherman Act to Attempts to Influence Government Action* (1968) 81 Harv. L. Rev. 847, 856-857; see also *First Am. Title Co. of S.D. v. S.D. Land Title Ass'n (8th Cir. 1983) 714 F.2d 1439, 1446* [recognizing that the so-called "official coconspirator" exception has been criticized and refusing to rely on it].)

The immateriality of participation by a public official is supported by the First Amendment considerations involved in the *Noerr-Pennington* doctrine. In *Metro Cable Co. v. CATV of Rockford, Inc.*, the plaintiff made substantially the same argument as plaintiff offers here: it alleged [\*\*\*726] that the defendant city officials were coconspirators on the ground that they had been persuaded by other defendants to support their application for a cable television franchise and [\*\*\*20] to oppose the plaintiff's application, and that they had been given campaign contributions in exchange for their undertaking. In rejecting this contention the court reasoned as follows: "These allegations do not take the case outside the protection of the *Noerr* doctrine. Plaintiff's position is in essence that an agreement to attempt to induce legislative action is a 'conspiracy,' and that if some of the 'conspirators' persuade a member of the legislative body to agree to support their cause, he becomes a 'coconspirator' and a Sherman Act violation results. Such a rule would in practice abrogate the *Noerr* doctrine. It would be unlikely that any effort to influence legislative action could succeed unless one or more members of the legislative body became such 'co-conspirators.' A holding that participation by members of the legislative body to the extent alleged here rendered the *Noerr* doctrine inapplicable to a campaign to induce legislative action, would . . . ' . . . be tantamount to outlawing all such campaigns.'" ([516 F.2d at p. 230](#).)

The immateriality of participation by a public official is supported as well by the comity considerations involved in the *Noerr-Pennington* [\*\*\*21] doctrine. **HN11** [↑] When as in this case the anticompetitive effect alleged is caused by government action that is itself outside the scope of the antitrust laws, it would be untenable to hold that the participation of a public official renders the efforts to influence such government action violative of the law. Such a result follows, of course, when the official's motivation is altogether proper. But it also follows when it is not -- at least in cases such as this in which the official is a member of a nonjudicial body. **HN12** [↑] "[The] constitutional doctrine of separation of powers precludes judicial inquiry into the 'motivation or mental processes' which may underlie action by a nonjudicial agency of government." (*In re Fain (1976) 65 Cal. App. 3d 376, 393, fn. 14 [135 Cal. Rptr. 543]*; see, e.g., *Fletcher v. Peck (1810) 10 U.S. (6 Cranch) 87, 130 [\*325] [3 L. Ed. 162]*; *County of Los Angeles v. Superior Court (1975) 13 Cal.3d 721, 723, 727, fn. 5 [119 Cal. Rptr. 631, 532 P.2d 495]*.) Thus, the official's motives, no matter how self-interested they may be, cannot vitiate otherwise valid government action. (See, e.g., *Fletcher v. Peck, supra, at p. 130*; *County* [\*\*\*22] of *Los Angeles v. Superior Court, supra, at pp. 723, 727, fn. 5; In re Fain, supra, at p. 393, fn. 14*.)

In a final attempt to show that the first amended complaint states facts sufficient to constitute a cause of action under the Cartwright Act, plaintiff asserts the case falls within the "sham" exception. It clearly does not. Defendants' actions as alleged amounted to a "genuine effort to influence [government action] . . ." ([Noerr, 365](#)

U.S. at p. 144 [5 L. Ed. 2d at p. 475].) **CA(9)[<sup>↑</sup>]** (9) Plaintiff urges in effect that because such actions were improper they were not "genuine." **HN13[<sup>↑</sup>]** For the purposes of the *Noerr-Pennington* doctrine, however, impropriety and genuineness are not related. (See, e.g., *Bustop Shelters v. Convenience & Safety Corp.* (S.D.N.Y. 1981) 521 F. Supp. 989, 995 [although "the attempt to influence [\*\*67] governmental officials in the instant case . . . may have been improper," it was "no sham . . . but . . . clearly an example of a 'genuine effort to influence' official action"]; Handler & De Sevo, *supra*, 6 Cardozo L. Rev. at p. 8.) Indeed, not only were defendants' efforts genuine, they were also successful -- and as such incapable of being [\*\*\*23] deemed a mere sham. ( Gorman Towers, Inc. v. Bogoslavsky (8th Cir. 1980) 626 F.2d 607, 615; 1 Areeda & Turner, *supra*, [para. ] 203c, p. 44; Handler & De Sevo, *supra*, at pp. 30-31.)

In his proposed second amended complaint, plaintiff claims, there would be allegations to the effect that the city-official defendants initiated and directed the efforts to legalize and monopolize the operation of poker clubs in the City of Bell, and [\*\*\*727] that they sought and received bribes for their undertaking. Plaintiff argues in essence that the addition of such allegations would take the case outside the scope of the *Noerr-Pennington* doctrine. The First Amendment considerations reflected in the doctrine, he contends, are not implicated under such circumstances: to begin with, the efforts to influence government action were not initiated and directed, as in the typical *Noerr-Pennington* situation, by private individuals exercising their right to petition, but rather by public officials acting corruptly; next, the tactics used were not, as in the typical *Noerr-Pennington* situation, entitled to First Amendment protection, but rather are punishable under the criminal [\*\*\*24] law. Because, he concludes, First Amendment considerations are therefore not implicated, the *Noerr-Pennington* doctrine is not applicable. Plaintiff's argument is unconvincing.

**CA(10)[<sup>↑</sup>]** (10) Even assuming that plaintiff is correct in asserting that First Amendment considerations are not implicated, we must nevertheless conclude [\*326] that the *Noerr-Pennington* doctrine is applicable or, in other words, that whatever anticompetitive effects plaintiff might be able to prove are plainly not within the scope of the Cartwright Act. The reason is simple: although First Amendment considerations may not be implicated, comity considerations are. The government action alleged here -- which is the legal cause of any anticompetitive effects -- is the action of a political subdivision of the state and as such is outside the scope of the Cartwright Act. Plaintiff has not attacked the validity of such action directly, and may not attack it indirectly by alleging the corruption of some or all of the public officials involved (see, e.g., Fletcher v. Peck, supra, 10 U.S. (6 Cranch) at p. 130; County of Los Angeles v. Superior Court, supra, 13 Cal.3d at pp. 723, 727, fn. 5; *In re* [\*\*\*25] Fain, supra, 65 Cal. App. 3d at p. 393, fn. 14). Thus, because the government action alleged here and whatever anticompetitive effects it may have had are not within the scope of the Cartwright Act, neither are the efforts to influence such action and to cause such effects.

Our conclusion is not affected by the identity of the persons initiating or directing such efforts. In *Affiliated Capital Corp. v. City of Houston*, on which plaintiff relies, the federal district court held that an "official coconspirator" exception exists and that a public official's initiation and direction of efforts to influence government action for his own benefit satisfies the requirements of such an exception. (519 F. Supp. at pp. 1012-1023.) We cannot follow that trial court's lead. First, as we have concluded, no generally applicable "official coconspirator" exception exists. Second, the government action involved in *Affiliated Capital Corp.* fell within the scope of the antitrust laws; the governmental action alleged here does not. **HN14[<sup>↑</sup>]** Whatever sense it might make to deny *Noerr-Pennington* protection to a conspiracy including public officials when it seeks government action itself violative [\*\*\*26] of the antitrust laws, it is not rational to deny it to such a conspiracy when it seeks government action *not* violative of the antitrust laws. Third, official initiation and direction of a conspiracy may be material to the applicability of the *Noerr-Pennington* doctrine when, as in *Affiliated Capital Corp.*, only First Amendment considerations are [\*\*68] present -- for example, such initiation and direction may show that the conduct involved cannot properly be characterized as petitioning -- but they seem clearly immaterial when as here comity considerations are present: when the government action sought falls outside the scope of the antitrust laws, the official capacity of the person who initiates and directs efforts to influence such action cannot trigger antitrust liability.

Nor is our conclusion affected by the character of the tactics used to influence government action. Although at times he concedes that the *Noerr-Pennington* doctrine is applicable to efforts that include illegal tactics, plaintiff generally

argues that it is not. Relying, for example, on *Woods Exploration* [\*327] and *Pro. Co. v. Aluminum* [\*\*\*728] Co. of Amer., *supra*, [\*\*\*\*27] 438 F.2d 1286, he asserts that the First Amendment was not intended to protect such conduct. Whether plaintiff's contention is rational on this point is largely immaterial: the antitrust laws were plainly not intended to proscribe such conduct (*Noerr, 365 U.S. at pp. 140-141, 145 [5 L. Ed. 2d at pp. 472-473, 475]*; see, e.g., Handler & De Sevo, *supra*, 6 Cardozo L. Rev. at p. 8 [Sherman Act]).

Thus, in *Cow Palace, Ltd. v. Associated Milk Producers, Inc.* (D. Colo. 1975) *390 F. Supp. 696*, in granting the defendant's motion to dismiss for failure to state a claim the court held that the plaintiff's allegation that the defendant's efforts to influence government action included the making of illegal campaign contributions and the payment of bribes to federal officials did not take the case out of the *Noerr-Pennington* doctrine. Rejecting the plaintiff's argument -- in substance the same as plaintiff's here -- that the protection of the *Noerr-Pennington* doctrine is no broader than that of the First Amendment, the court reasoned: "In *Noerr*, the defendants had allegedly engaged in deliberate deception of 'the public and public officials.' The Court notes that [\*\*\*\*28] such deception, 'reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned.' [Citation.] The Court does not explicitly tell us whether or not such 'reprehensible' conduct might be within the guarantees of the First Amendment. But resolution of that issue was unnecessary since the *conduct itself* was outside the intended scope of the Sherman Act." (*Id. at p. 701*, italics in original.)

Similarly, in *Schenley Industries, Inc. v. N.J. Wine & Spirit Whole*. *Ass'n (D.N.J. 1967) 272 F. Supp. 872*, the court struck portions of the complaint alleging lobbying as part of a conspiracy in violation of the Sherman Act. Rejecting Schenley's contention that illegal tactics could remove lobbying from the protection of the *Noerr-Pennington* doctrine, the court reasoned: "Since political activity to influence public officials is beyond the purview of the Act, it does not matter that independently illegal acts can be shown; separate civil or criminal actions might lie against the perpetrators, but the lobbying is not thereby transmuted into a violation of the Act. *HN15*<sup>5</sup> A private antitrust complaint is not the appropriate vehicle for state criminal laws whose [\*\*\*29] enforcement is entrusted to state or local prosecutors. [Fn. omitted.]" (*Id. at p. 885*.)

Finally, plaintiff asserts that because he would allege that defendants' efforts included illegal conduct, he would satisfy the requirements of the sham exception and consequently state a cause of action under the Cartwright Act. But even if such efforts were altogether illegal, they were -- as plaintiff impliedly admits -- "[genuinely intended] . . . to influence [government action] . . ." (*Noerr, 365 U.S. at p. 144 [5 L. Ed. 2d at p. 475]*.)

[\*328] Our conclusion that plaintiff has not stated a Cartwright Act cause of action does not, of course, imply that we take lightly, less still condone, unethical and illegal conduct, especially on the part of public officials. But as the United States Supreme Court said of the Sherman Act -- and as we say here of the Cartwright Act -- "*HN16*<sup>5</sup> Insofar as that Act sets up a code of ethics at all, it is a code that condemns *trade restraints* . . ." (*Noerr, 365 U.S. at p. 140 [5 L. Ed. 2d at p. 473]*, italics added.) Because there is [\*\*69] here no trade restraint violative of the Cartwright Act, we cannot hold defendants liable [\*\*\*30] under the act no matter how reprehensible their conduct may be. Recognizing that "[the] antitrust laws were never meant to be a panacea for all wrongs" (*Parmelee Transportation Company v. Keeshin* (7th Cir. 1961) *292 F.2d 794, 804*, cert. den., *368 U.S. 944* [7 L. Ed. 2d 340, 82 S. Ct. 376]), we therefore leave defendants to be sued or prosecuted under other laws -- as, it appears, they have been.<sup>5</sup>

[\*\*\*31] [\*\*\*729] C

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<sup>5</sup> As we judicially notice (*Evid. Code, § 452, subd. (d)*), Werlein, Kirwan, and Simonian, among others, were indicted by a federal grand jury for mail fraud (*18 U.S.C. § 1341*), owning and conducting an illegal gambling business (*id.*, § 1955), interstate travel in aid of racketeering enterprises (*id.*, § 1952), aiding and abetting (*id.*, § 2), and racketeering (*id.*, §§ 1962 (a), 1963) -- all arising from the alleged conspiracy to legalize and monopolize the operation of poker clubs in the City of Bell and related activities. To date, on guilty pleas Kirwan has been sentenced to six months in a community facility, and Werlein has been sentenced to three years in prison, fined \$ 21,000, and ordered to forfeit about \$ 400,000 in profits he made from the poker club.

Plaintiff contends that by alleging in his third cause of action that the purchase option and a lease arising from the lease option are contracts in restraint of trade, he has or could allege facts sufficient to constitute a cause of action for unfair competition under *Business and Professions Code section 16600*. The point is cursorily presented and, in any event, without merit.

**CA(11)[↑] (11) HN17[↑]** *Business and Professions Code section 16600* provides in relevant part that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." The provision generally proscribes contracts under which one or more of the parties agrees to restrict his activity in the marketplace in some way. (See, e.g., *Muggill v. Reuben H. Donnelley Corp. (1965) 62 Cal.2d 239, 242-243 [42 Cal. Rptr. 107, 398 P.2d 147, 18 A.L.R.3d 1241]* [covenant not to compete in employment agreement]; *Monogram Industries, Inc. v. Sar Industries, Inc. (1976) 64 Cal. App. 3d 692, 697-698 [134 Cal. Rptr. 714]* [covenant not to compete in agreement on sale of stock in a corporation]; *Dayton Time Lock Service, Inc. v. Silent Watchman [\*\*\*\*32] Corp. (1975) 52 Cal. App. 3d 1, 6-7 [124 Cal. Rptr. 678]* [exclusive-dealing agreement].)

[\*329] Plaintiff, however, does not allege or propose to allege that either the purchase option or the lease is or contains a contract under which any of the parties agrees to restrict his activity in the marketplace in any way; he merely asserts that these agreements affect *his* ability to compete. Accordingly, plaintiff does not and cannot state a cause of action under *section 16600*.

D

Plaintiff makes a perfunctory contention that by alleging in his fourth cause of action a conspiracy to legalize and monopolize the operation of poker clubs, he has stated a cause of action for unfair competition under *Business and Professions Code section 17200*. He is unpersuasive.

"**HN18[↑]** Unfair competition is defined to include 'unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising.' ( *Bus. & Prof. Code, § 17200*.) . . . An 'unlawful business activity' includes "'anything that can properly be called a business practice and that at the same time is forbidden by law.'" ( *People v. McKale (1979) 25 Cal.3d 626, 631-632 [159 Cal. Rptr. 811, 602 [\*\*\*\*33] P.2d 731]*.)

Although "California courts have consistently interpreted such language broadly" ( *id. at p. 632*), plaintiff has nevertheless failed to make or propose the requisite allegations. First, the conspiracy in the broad sense -- defendants' efforts to influence government action toward the legalization and monopolization of poker clubs -- cannot properly be called a business practice. But even if it could, plaintiff does not and cannot effectively state that it is forbidden by law: defendants' efforts, as we have concluded, [\*70] cannot violate the Cartwright Act. Second, although the purchase option and the lease evidence what might be termed a business practice -- specifically, a vertical relationship between Trammell Crow Co., the optionor and lessor, and Kirwan, the optionee and lessee -- they are not, under plaintiff's allegations, forbidden by law. **CA(12)[↑] (12) HN19[↑]** A vertical relationship between the plaintiff's competitor and a third party does not support a cause of action for unfair competition as an illegal business practice absent, for example, allegations that the relationship is unlawful in itself or that it inflicts legal injury on consumers. (See *Plotkin v. [\*\*\*\*34] Tanner's Vacuums (1975) 53 Cal. App. 3d 454, 459-460 [125 Cal. Rptr. 697]*.)

E

**CA(13)[↑] (13)** Plaintiff contends that by alleging in his fifth cause of action that but for defendants' [\*\*\*\*730] acts he would have made some undetermined profit operating a poker club in the City of Bell, he has stated or can state a cause [\*330] of action for intentional interference with prospective economic advantage. This point lacks merit.

**CA(14)[↑] (14) HN20[↑]** The elements of the tort of intentional interference with prospective economic advantage are: (1) an economic relationship between the plaintiff and some third person containing the probability of future economic benefit to the plaintiff; (2) knowledge by the defendant of the existence of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and

(5) damages to the plaintiff proximately caused by the acts of the defendant. ( [Buckaloo v. Johnson \(1975\) 14 Cal.3d 815, 827 \[122 Cal. Rptr. 745, 537 P.2d 865\]](#).)

In neither the first amended complaint nor the proposed second amended complaint does plaintiff state such a cause of action, because the first element of the [\*\*\*\*35] tort is lacking. Although plaintiff does not identify the other party to the "economic relationship," the result we reach is the same for each of the parties he suggests.

If, as seems the more reasonable reading, plaintiff is attempting to allege that the requisite economic relationship is with the city, he fails adequately to state the first element. First, "[the] relationship between [plaintiff] and the City cannot be characterized as an economic relationship. It was [plaintiff's] relationship to a class of as yet unknown [patrons] which was the prospective business relationship." ( [Asia Investment Co. v. Borowski \(1982\) 133 Cal. App. 3d 832, 841 \[184 Cal. Rptr. 317, 30 A.L.R.4th 561\]](#).)

Second, even if the relationship between plaintiff and the city could be so characterized, it would make little difference. [HN21](#)[] The tort has traditionally protected the expectancies involved in ordinary commercial dealings -- not the "expectancies," whatever they may be, involved in the governmental licensing process. (See Prosser & Keeton, The Law of Torts (5th ed. 1984) § 130, p. 1006.) Plaintiff does not attempt to justify such an expansion of the tort. Nor would he likely have [\*\*\*\*36] been successful if he had. Under Ordinance No. 806 the city council's discretion to grant or deny an application for a poker club license is so broad as to negate the existence of the requisite "expectancy" as a matter of law. Thus, "no facts are alleged . . . showing that the plaintiff had any reasonable expectation of economic advantage which would otherwise have accrued to him . . ." ( [Campbell v. Rayburn \(1954\) 129 Cal. App. 2d 232, 234 \[276 P.2d 671\]](#).)

If however, plaintiff is attempting to allege that the requisite economic relationship is with the class of potential poker club patrons, he still fails adequately to state the first element. In light of the city council's broad [**\*331**] discretion to grant or deny a license application, plaintiff has pleaded and can plead no protectible "expectancy," but at most a hope for an economic relationship and a desire for future benefit.

## F

Plaintiff contends that he has stated or can state a cause of action for declaratory relief in his sixth cause of action.

[\*\*71] [HN22](#)[] [Code of Civil Procedure section 1060](#) provides in relevant part: "Any person *interested* . . . under a contract . . . may . . . bring an original action [\*\*\*\*37] . . . for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract." (Italics added.) Plaintiff is not legally interested in the contracts as to which he seeks a declaration of validity -- the lease option, the lease, and the purchase option between Trammell Crow Co. and Kirwan -- nor does he argue that he is. Accordingly, he does not and cannot state a cause of action for declaratory relief.<sup>6</sup>

## [\*\*\*731] III

Plaintiff's next contention is that the trial court abused its discretion in granting the motion of Kirwan, Werrlein, City of Bell, and the Crow defendants to dismiss the action pursuant to [\*\*\*\*38] former [HN23](#)[] [Code of Civil Procedure section 583, subdivision \(a\)](#), for failure to prosecute.

Former [section 583, subdivision \(a\)](#), provided in relevant part: "The court, in its discretion, may dismiss an action for want of prosecution . . . if it is not brought to trial within two years after it is filed."<sup>7</sup> [CA\(15\)](#)[] (15) When the trial

<sup>6</sup> [Siciliano v. Fireman's Fund Ins. Co. \(1976\) 62 Cal. App. 3d 745 \[133 Cal. Rptr. 376\]](#) -- the only case on which plaintiff relies -- is plainly not to the contrary. There, as all parties recognized, the plaintiff was legally interested in the contract in question; indeed, he was a party to it.

<sup>7</sup> Former [section 583](#) was repealed in 1984. (Stats. 1984, ch. 1705, § 4.) The substance of the sentence quoted above is continued in [Code of Civil Procedure section 583.420, subdivision \(a\)](#).

court has ruled on such a motion, "'unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.'" ( *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566 [86 Cal. Rptr. 65, 468 P.2d 193]; accord, *Martindale v. Superior Court* (1970) 2 Cal.3d 568, 574 [86 Cal. Rptr. 71, 468 P.2d 199].) "The burden is on the party complaining to establish an abuse of discretion . . ." ( *Denham v. Superior Court*, *supra*, at p. 566.)

[\*\*\*\*39] [\*332] [CA\(16\)](#) Plaintiff has not carried his burden, and we shall not disturb the court's order. From the date this action was filed until the date the trial court made its rulings -- a period of almost three and one-half years -- plaintiff did virtually nothing to prosecute this action. Indeed, the object of the little action he did take was to delay prosecution: plaintiff continually requested defendants to agree to continue hearings on their demurrers and finally obtained an agreement to take the demurrs off calendar indefinitely.

Plaintiff's reliance on *Meraia v. McCann* (1978) 83 Cal. App. 3d 239 [147 Cal. Rptr. 756], is ill-founded. Although it contains some broad language (at p. 243) that appears to support plaintiff's position that an open-ended extension of time, such as the one obtained here, excuses a plaintiff from his obligation to prosecute during its term, *Meraia* properly read holds only that when and while a defendant obtains and enjoys an open-ended extension for his benefit and at his request, he may not complain that the plaintiff has not diligently prosecuted the action. Here defendants agreed to take their demurrer off calendar indefinitely for the [\*\*\*\*40] benefit of plaintiff and at plaintiff's request.

Plaintiff makes two further contentions. First, he claims, defendants have not been prejudiced by his failure to prosecute. [CA\(17\)](#) But even if they have not, "[the] legislative policy underlying [section 583](#) is not grounded solely in prejudice caused by delay to a defendant. Its purpose, too, is to expedite the administration of justice by compelling every person who files an action to prosecute it with promptness and diligence." ( *Sprajc v. Scandinavian Airlines System, Inc.* (1966) 240 Cal. App. 2d 935, 938 [50 Cal. Rptr. 181]; accord, *Lopez v. Larson* (1979) 91 Cal. App. 3d 383, 400 [153 Cal. Rptr. 912]; *Dunsmuir Masonic Temple v. Superior Court* (1970) 12 Cal. App. 3d 17, 22-23 [90] [\*\*721] Cal. Rptr. 405].) Second, plaintiff asserts, the factors listed in former California Rules of Court, rule 203.5 (current rule 373(e)), which the trial court was required to consider in ruling on defendants' motion, supported denial. But he cites nothing in the record to support such an assertion. Finally, plaintiff argues, the trial court was without jurisdiction to hear the motion because of certain alleged time defects in [\*\*\*\*41] its notice. The point lacks merit. First, the alleged defects he cites are in the notice of a *different* motion. Second, the parties apparently agreed on dates for defendants to respond to the first amended complaint and for a hearing on such responses. Thus, plaintiff evidently waived whatever time defects may have existed.

#### IV

Plaintiff's final contention is that the trial court erred in granting the motion [\*\*\*\*732] of California Bell Operations to dismiss pursuant to former [HN24](#) [Code of \[\\*333\] Civil Procedure section 581a, subdivision \(a\)](#). That section provided in relevant part, "No action . . . shall be further prosecuted, and no further proceedings shall be had therein, and all actions . . . shall be dismissed . . ., unless the summons on the complaint is served and return made within three years after the commencement of said action, except where . . . the party against whom the action is prosecuted has made a general appearance in the action." <sup>8</sup> The provision was mandatory and jurisdictional. ( *Gonsalves v. Bank of America* (1940) 16 Cal.2d 169, 172, [105 P.2d 118].)

[\*\*\*\*42] Conceding as he must that the provision is otherwise applicable because he did not meet the service and return requirements, plaintiff argues that the express "general appearance" exception has been satisfied. The facts are otherwise. By letter dated August 10, 1982, counsel for California Bell Operations confirmed an agreement with plaintiff that her client "shall have to and including August 30, 1982 to plead or otherwise respond to the first amended complaint . . ." [CA\(18\)](#) (18) True, [HN25](#) "[a] written stipulation between attorneys recognizing jurisdiction of the court over the parties constitutes a general appearance by the defendant." ( *General Ins. Co v.*

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<sup>8</sup> Former [section 581a](#) was repealed in 1984. (Stats. 1984, ch. 1705, § 3.) The substance of subdivision (a) is continued, with changes not material here, in current sections 583.210, 583.220, 583.230, 583.240, 583.250.

Superior Court, (1975) 15 Cal.3d 449, 453 [124 Cal. Rptr. 745, 541 P.2d 289], original italics deleted.) But a party, like California Bell Operations, "who merely seeks an extension of time to plead cannot reasonably be deemed to make a general appearance. His purpose may be to obtain adequate time to determine whether or not to object to the jurisdiction of the court." ( Busching v. Superior Court (1974) 12 Cal.3d 44, 51 [115 Cal. Rptr. 241, 524 P.2d 369].)

In any event, dismissal was proper. By August 10, 1982, the [\*\*\*\*43] three-year period that began with the filing of the complaint on July 17, 1979, had already run. Even if entering into the stipulation could be deemed to constitute a general appearance, dismissal was nevertheless mandatory: "a general appearance *after* the three years had run did not operate to deprive a defendant of his right to a dismissal . . ." ( *Id. at p. 52*, italics in original.)

For the foregoing reasons, the judgment is affirmed.<sup>9</sup>

**Concur by:** LUCAS

## Concur

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[\*334] **LUCAS, J.** I concur in the judgment for the reasons stated in parts III and IV [\*\*\*\*44] of the majority opinion. However, I believe that the majority opinion's analysis of the *Noerr-Pennington* [\*\*73] doctrine's application is unnecessary to the result and therefore neither join in nor dissent to my colleagues' premature discussion.<sup>1</sup>

The majority opinion begins by stating "We *must* decide whether efforts to influence municipal action that are intended to and actually do produce anticompetitive effects are violative of the Cartwright Act when both private individuals and public officials participate." (*Ante*, at p. 316, italics added.) However, in my opinion there was no such necessity: even if it had been determined that plaintiff could have stated a Cartwright cause of action it would have [\*\*\*733] been of no avail because the [\*\*\*\*45] action had been properly dismissed.

I agree that application of the *Noerr-Pennington* doctrine in the context presented here is an interesting question. Nonetheless, I conclude that its resolution was not required and has no effect on the outcome of this case because dismissal was simultaneously and properly granted pursuant to the application of settled principles of law.

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<sup>9</sup> We decline the request of City of Bell to judicially notice the minutes of certain meetings of the city council on the ground that they are not relevant to the issues before us. We also decline the city's request to impose sanctions on plaintiff pursuant to Code of Civil Procedure section 907: the city does not succeed in showing, nor does it appear to us, "that the appeal was frivolous or taken solely for delay . . ." ( Code Civ. Proc., § 907.)

<sup>1</sup> This view of course also extends to the other contentions more summarily dealt with in section II, subdivisions A, C, D, E, and F of the majority opinion. My focus on *Noerr-Pennington* treatment is due to its primacy in the opinion and its novelty.

## **State of California v. Levi Strauss & Co.**

Supreme Court of California

March 20, 1986

S.F. No. 24699

**Reporter**

41 Cal. 3d 460 \*; 715 P.2d 564 \*\*; 224 Cal. Rptr. 605 \*\*\*; 1986 Cal. LEXIS 324 \*\*\*\*; 1986-1 Trade Cas. (CCH) P67,018

THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. LEVI STRAUSS & CO., Defendant and Respondent;  
HANNAH KERNER, Intervener and Appellant

**Subsequent History:** [\*\*\*\*1] Appellant's petition for a rehearing was denied May 29, 1986, and the opinion was modified to read as printed above.

**Prior History:** Superior Court of the City and County of San Francisco, No. 739024, Ira A. Brown, Jr., Judge.

**Disposition:** The judgment is affirmed. The cause is remanded to the trial court for further proceedings consistent with the views expressed in this opinion.

## **Core Terms**

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settlement, intervenor, consumer, attorney general, class member, class action, trial court, notice, claimants, fluid recovery, refund, trust fund, percent, residue, distributed, damages, escheat, mailing, courts, funds, parens patriae, objectors, parties, purposes, proposed settlement, attorney's fees, fluid, estimated, purchases, cases

## **LexisNexis® Headnotes**

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Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > Settlements > Settlement Agreements > General Overview

### **HN1[ Class Actions, Compromise & Settlement**

Where, as a result of the passage of time and changes in the position of an appellant no practical purpose would be served by invalidating a settlement of a many-years-old class action, the approval of the settlement by the trial court may be affirmed.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > Settlements > Settlement Agreements > General Overview

### **HN2[ Class Actions, Compromise & Settlement**

A settlement must be approved or rejected as a whole since it is impossible to determine whether the parties considered the different portions of the agreement to be interdependent.

[Civil Procedure > Appeals > Amicus Curiae](#)

[Civil Procedure > Special Proceedings > Class Actions > General Overview](#)

[Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement](#)

[Civil Procedure > Settlements > Settlement Agreements > General Overview](#)

### **HN3** Appeals, Amicus Curiae

An appellate court can properly affirm an appeal of a settlement of a class action when the court is confronted with a fait accompli in that substantial funds have already been disbursed and the only effective means to prevent further expenditures of class funds, and to vindicate the claimants' current expectations, is to affirm the settlement, especially where the appellant is principally concerned not with reversing the settlement, but with advocating a particular use for the residue remaining after individual distribution.

[Civil Procedure > Remedies > General Overview](#)

[Estate, Gift & Trust Law > Trusts > Charitable Trusts](#)

[Civil Procedure > Special Proceedings > Class Actions > General Overview](#)

### **HN4** Civil Procedure, Remedies

Courts must fashion consumer class action remedies to meet the changing needs of modern industrial society. Damage distribution poses special problems in consumer class actions. Often, proof of individual damages by competent evidence is not feasible. Each individual's recovery may be too small to make traditional methods of proof worthwhile. In addition, consumers are not likely to retain records of small purchases for long periods of time. In response to these problems, the courts have turned to the equitable doctrine of *cy pres* to put the funds would be put to the next best use, in accord with the dominant purposes of the class action. In the class action context, the *cy pres* doctrine is generally denominated "fluid recovery."

[Civil Procedure > Remedies > General Overview](#)

[Civil Procedure > Special Proceedings > Class Actions > General Overview](#)

### **HN5** Civil Procedure, Remedies

The propriety of fluid recovery in a particular case depends upon its usefulness in fulfilling the purposes of the underlying cause of action. Fluid recovery may be essential to ensure that the policies of disgorgement or deterrence are realized. Without fluid recovery, defendants may be permitted to retain ill gotten gains simply because their conduct harmed large numbers of people in small amounts instead of small numbers of people in large amounts.

[Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation](#)

41 Cal. 3d 460, \*460 715 P.2d 564, \*\*564 224 Cal. Rptr. 605, \*\*\*605 1986 Cal. LEXIS 324, \*\*\*\*1

Civil Procedure > Special Proceedings > Class Actions > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

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

## [\*\*HN6\*\*](#) [] **Private Actions, State Regulation**

Fluid recovery methods may be employed in appropriate cases under Cartwright Act, [Cal. Bus. & Prof. Code § 16720 et seq.](#), California's **antitrust law**. The purposes of the private damages action for violations of the Cartwright Act include disgorgement and deterrence as well as compensation.

Civil Procedure > Remedies > General Overview

Civil Procedure > Special Proceedings > Class Actions > General Overview

## [\*\*HN7\*\*](#) [] **Civil Procedure, Remedies**

The implementation of fluid recovery involves three steps. First, the defendant's total damage liability is paid over to a class fund. Second, individual class members are afforded an opportunity to collect their individual shares by proving their particular damages, usually according to a lowered standard of proof. Third, any residue remaining after individual claims have been paid is distributed by one of several practical procedures that have been developed by the courts.

Civil Procedure > Remedies > General Overview

Real Property Law > Ownership & Transfer > Death & Incapacity > Escheat

Civil Procedure > Special Proceedings > Class Actions > General Overview

## [\*\*HN8\*\*](#) [] **Civil Procedure, Remedies**

The principal methods of fluid recovery include a rollback of the defendant's prices, escheat to a governmental body for either specified or general purposes, establishment of a consumer trust fund, and claimant fund sharing. All of these methods promote the policies of disgorgement and deterrence by ensuring that the residue of the recovery does not revert to the wrongdoer. However, they differ substantially in their compensatory effect and in their suitability for particular cases. In determining which method to employ, the courts should consider: (1) the amount of compensation provided to class members, including nonclaiming (or silent) members; (2) the proportion of class members sharing in the recovery; (3) the extent to which benefits will spill over to nonclass members and the degree to which the spillover benefits will effectuate the purposes of the underlying substantive law; and (4) the costs of administration.

Civil Procedure > Remedies > General Overview

Civil Procedure > Special Proceedings > Class Actions > General Overview

## [\*\*HN9\*\*](#) [] **Civil Procedure, Remedies**

Under the price rollback approach to fluid recovery, the uncollected portion of the fund is distributed through the market by lowering the price of a defendant's product for a specified period. Price rollbacks are particularly effective for remedying overcharges on items which are repeatedly purchased by the same individuals. In cases involving such repeat items, the individuals who were overcharged are likely to benefit from the reduced prices. However, this method is not appropriate in nonmonopoly markets like the jeans market since it compels consumers to collect their refunds by making further purchases of the defendant's products, to the detriment of the defendant's competitors.

Civil Procedure > Remedies > General Overview

Real Property Law > Ownership & Transfer > Death & Incapacity > Escheat

Civil Procedure > Special Proceedings > Class Actions > General Overview

#### **HN10**[ Civil Procedure, Remedies

Since earmarked escheat depends for its success upon the active cooperation of the government, it should not be employed as a method of fluid recovery where the relevant governmental body opposes its use.

Civil Procedure > Remedies > General Overview

Real Property Law > Ownership & Transfer > Death & Incapacity > Escheat

Civil Procedure > Special Proceedings > Class Actions > General Overview

#### **HN11**[ Civil Procedure, Remedies

One method of fluid recovery is general escheat: payment of the recovery to the general fund of a governmental body. Of all the fluid recovery devices, general escheat provides the least focused compensation to the class. The benefits of the recovery are spread among all taxpayers, and there is no attempt to ensure that the spillover is used to effectuate the purposes of the substantive law. The only advantage of general escheat is ease of administration. Hence, it is usually regarded as a last resort for use where a more precise remedy cannot be found.

Civil Procedure > Remedies > General Overview

Real Property Law > Ownership & Transfer > Death & Incapacity > Escheat

Civil Procedure > Special Proceedings > Class Actions > General Overview

#### **HN12**[ Civil Procedure, Remedies

Under the consumer trust fund approach to fluid recovery, the court appoints a board of directors to administer the recovery in the interests of the class. Like earmarked escheat, the consumer trust fund device uses the residue to further the purposes of the substantive law and provide indirect compensation to class members. Unlike earmarked escheat, there is no danger that the recovery will be submerged in the state's general fund. However, the consumer trust fund device does entail the establishment of a new organization with its own administrative expenses. To avoid this additional cost, some courts have allocated the funds directly to responsible private organizations.

Civil Procedure > Remedies > General Overview

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > ... > Class Actions > Class Members > General Overview

#### **HN13** [ ] Civil Procedure, Remedies

Unlike other methods of fluid recovery, claimant fund sharing uses the entire class recovery to provide monetary compensation to individual class members. Hence, in an appropriate case, it may yield a greater and more direct compensatory impact. However, claimant fund sharing provides no benefits to silent class members. Further, if there is a windfall, it goes not to further the purposes of the substantive law, but to overcompensate legitimate claimants or to pay erroneous or fraudulent claims. Hence, the advantages of claimant fund sharing can only be realized where a large proportion of class members participate and submit accurate claims.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Governments > State & Territorial Governments > Claims By & Against

#### **HN14** [ ] Regulated Practices, Private Actions

The parens patriae statute, [Cal. Bus. & Prof. Code § 16760](#), is not intended to limit the equitable discretion of the courts in managing private consumer class actions. Nor should the courts turn to its narrow provisions for guidance on how to exercise their discretion. Far from being intended to supersede or restrict the private consumer class action, the parens patriae action is designed to provide a means of redress where a private class action is not viable.

Civil Procedure > Remedies > General Overview

Civil Procedure > Special Proceedings > Class Actions > General Overview

#### **HN15** [ ] Civil Procedure, Remedies

It is the correlation or overlap between the injured class of persons and the class to be benefitted, not the absolute number of persons recovering, that provides the principal criterion for assessing the compensatory effectiveness of a distribution plan.

Civil Procedure > Remedies > General Overview

Civil Procedure > Special Proceedings > Class Actions > General Overview

#### **HN16** [ ] Civil Procedure, Remedies

Trial courts should have the full range of alternatives at their disposal in constructing a settlement distribution plan. In choosing the appropriate method, they should consider the amount of compensation provided to class members, the proportion of class members sharing in the recovery, the size and effect of the spillover to nonclass members, and the costs of administration. This disposition is a matter within the discretion of the trial court.

## **Headnotes/Summary**

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**Summary****CALIFORNIA OFFICIAL REPORTS SUMMARY**

The trial court entered a judgment approving a class action settlement of an antitrust action brought by the Attorney General on behalf of the state and consumers against a clothing manufacturer, which sought monetary relief for millions of consumers who were assertedly overcharged on jeans purchased. The settlement yielded an average individual recovery of \$ 2.60-\$ 3. An intervener who challenged both the fairness of the process which led to the settlement and the fairness and reasonableness of the outcome appealed. (Superior Court of the City and County of San Francisco, No. 739024, Ira A. Brown, Jr., Judge.)

The Supreme Court affirmed and remanded for further proceedings, after granting a hearing primarily to consider the appropriate methods for distributing damages in consumer class actions. Although it noted that the distribution plan did not reasonably compensate class members due to the disparity between the size of the class and the successful claimants, the court held, in view of the concessions made by intervener at oral argument, it would serve no practical purpose to invalidate the settlement in the six-year-old class action, adding that the present claims could only be preserved by upholding the settlement. The court discussed the doctrine of "fluid recovery," adapted from the *cy pres* doctrine to the class action context, and stated its ruling would serve as a source of guidance for both the trial court on remand and for other courts in confronting the largely uncharted areas of fluid recovery in consumer class actions. It held the disposition of the residue on remand was a matter within the discretion of the trial court, noting that the suggestion the residue should be used to establish a consumer trust fund had considerable merit. (Opinion by Bird, C. J., with Broussard, Reynoso, JJ., and Sutter (John), J., \* concurring. Separate concurring opinions by Bird, C. J., by Grodin, J., and by Sutter (John), J.\* Separate concurring and dissenting opinion by Lucas, J., with Mosk, J., concurring.)

**Headnotes****CA(1) [blue icon] (1)****Compromise, Settlement, and Release § 11 — Compromise and Release — Enforcement.**

--A settlement must be approved or rejected as a whole since it is impossible to determine whether the parties considered different portions of the agreement to be interdependent.

**CA(2) [blue icon] (2)****Consumer and Borrower Protection Laws § 39 — Consumers' Legal Remedies Act — Remedies and Actions — Class Action.**

--Consumer class actions are an essential tool for the protection of consumers against exploitative business practices.

**CA(3) [blue icon] (3)****Consumer and Borrower Protection Laws § 39 — Consumers' Legal Remedies Act — Remedies and Actions — Class Action — "Fluid Recovery."**

--In the consumer class action context, the *cy pres* doctrine is generally denominated "fluid recovery."

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\* Judge, Alameda County Superior Court, assigned by the Chairperson of the Judicial Council.

**CA(4) [D] (4)**

**Consumer and Borrower Protection Laws § 39 — Consumers' Legal Remedies Act — Remedies and Actions — "Fluid Recovery" — Propriety.**

--The propriety of fluid recovery in a particular consumer class action depends on its usefulness in fulfilling the purposes of the underlying cause of action. Fluid recovery may be essential to insure that the policies of disgorgement or deterrence are realized since, without fluid recovery, defendants may be permitted to retain ill gotten gains simply because their conduct harmed large numbers of people in small amounts instead of small numbers of people in large amounts.

**CA(5) [D] (5)**

**Monopolies and Restraints of Trade § 10 — Under Cartwright Act — Remedies of Individuals — Class Action — Fluid Recovery.**

--Since the purposes of the private damages action for violation of the Cartwright Act include disgorgement and deterrence as well as compensation, fluid recovery methods may be employed in appropriate Cartwright Act cases.

**CA(6) [D] (6)**

**Monopolies and Restraints of Trade § 10 — Under Cartwright Act — Remedies of Individuals — Class Action — Fluid Recovery — Implementation.**

--The implementation of the remedy of fluid recovery in a Cartwright Act case involves three steps. First, defendant's total damage liability is paid over to a class fund. Second, individual class members are afforded an opportunity to collect their individual shares by proving their particular damages, usually according to a lower standard of proof. Third, any residue remaining after individual claims have been paid is distributed by one of several practical procedures developed by the courts.

**CA(7) [D] (7)**

**Monopolies and Restraints of Trade § 10 — Under Cartwright Act — Remedies of Individuals — Class Action — Fluid Recovery — Methods.**

--In determining which method of fluid recovery to employ in a consumer class action, the court should consider the amount of compensation provided to class members, including nonclaiming (or "silent") members; the proportion of class members sharing in the recovery; the extent to which benefits will "spill over" to nonclass members and the degree to which the spillover benefits will effectuate the purposes of the underlying substantive law, and the costs of administration.

**CA(8) [D] (8)**

**Monopolies and Restraints of Trade § 10 — Under Cartwright Act — Remedies of Individuals — Class Action — Fluid Recovery — Price Rollback.**

--Under the price rollback approach to fluid recovery in a class action under the Cartwright Act, the uncollected portion of the recovered fund is distributed to the market by lowering the price of defendant's product for a specified

period. Price rollbacks are particularly effective for remedying overcharges on items which are repeatedly purchased by the same individuals.

CA(9) [ ] (9)

**Monopolies and Restraints of Trade § 10 — Under Cartwright Act — Remedies of Individuals — Class Action — Fluid Recovery — "Earmarked Escheat."**

--Under the "earmarked escheat" form of fluid distribution in a class action under the Cartwright Act, the funds are disbursed to a responsible governmental organization for use on projects that benefit noncollecting class members and promote the purposes of the underlying cause of action. Earmarked escheat provides indirect compensation to silent class members. The recipient governmental body may use class funds to ameliorate the effects of past harm and to reduce the risk of future harm. Another alternative method of fluid recovery is general escheat, whereby payment of the recovery is made to the general fund of a governmental body.

CA(10) [ ] (10)

**Monopolies and Restraints of Trade § 10 — Under Cartwright Act — Remedies of Individuals — Class Action — Fluid Recovery — Consumer Trust Fund.**

--Under the "consumer trust fund" form of fluid recovery in a class action under the Cartwright Act, the court appoints a board of directors to administer the recovery in the interests of the class.

CA(11a) [ ] (11a) CA(11b) [ ] (11b)

**Monopolies and Restraints of Trade § 10 — Under Cartwright Act — Remedies of Individuals — Class Action — Fluid Recovery — Claimant Fund Sharing.**

--On appeal from approval of a class action settlement purportedly resolving an antitrust action brought by the Attorney General on behalf of the state and consumers against a clothing manufacturer for monetary relief for millions of consumers who were assertedly overcharged on clothing, the Supreme Court affirmed the judgment approving a claimant fund sharing plan even though it did not reasonably compensate class members, in view of the disparity between the injured class and the successful claimants, where the intervening party challenging the settlement conceded it would serve no practical purpose to invalidate the settlement, and since an equitable distribution of the sizeable residue could be accomplished on remand.

[See **Cal.Jur.3d**, Monopolies and Restraints of Trade, § 59 et seq.; [Am.Jur.2d, Parties, § 78 et seq.](#)]

CA(12) [ ] (12)

**Monopolies and Restraints of Trade § 10 — Under Cartwright Act — Remedies of Individuals — Class Action — Distribution of Damages.**

--The *parens patriae* statute ([Bus. & Prof. Code, § 16760](#)) which empowers the Attorney General to sue on behalf of persons injured by violations of the Cartwright Act was not intended to supersede or restrict the private consumer class action (being designed to provide a means of redress when a private class action is not viable), and courts should not seek guidance from that statute on how to distribute damages in private consumer class actions. The statute does not prohibit fluid class recovery in private antitrust class actions.

**Counsel:** Anita P. Arriola, Robert L. Gnaizda, Gary J. Near and Oliver Jones for Intervener and Appellant.

Carlyle W. Hall, Jr., Bill Lann Lee and Marilyn O. Tesauro as Amici Curiae on behalf of Intervener and Appellant.

John K. Van de Kamp, Attorney General, Andrea Sheridan Ordin, Chief Assistant Attorney General, Sanford N. Gruskin, Assistant Attorney General, Peter K. Shack and Owen Lee Kwong, Deputy Attorneys General, for Plaintiff and Respondent.

M. Laurence Popofsky, Robert J. Vizas, Jessica S. Pers and Heller, Ehrman, White & McAuliffe for Defendant and Respondent.

**Judges:** Opinion by Bird, C. J., with Broussard, Reynoso, JJ., and Sutter (John), J., \* concurring. Separate concurring opinions by Bird, C. J., by Grodin, J., and by Sutter (John), J. \* Separate concurring and dissenting opinion by Lucas, J., [\*\*\*\*2] with Mosk, J., concurring.

**Opinion by:** BIRD

## **Opinion**

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[\*464] [\*\*565] [\*\*\*606] This court granted a hearing in this case primarily to consider the appropriate methods for distributing damages in consumer class actions. That issue arose as an aspect of intervenor's appeal from the superior court's approval of a class action settlement. As will appear below, it is now clear that [HN1](#)[] as a result of the passage of time and changes in the position of intervenor no practical purpose would be served by invalidating the settlement of this six-year-old class action.

However, a sizable residue has developed in the intervening period, consisting of damages due to claimants who can no longer be located and interest on those damages. This residue remains unallocated under the settlement approved by the trial court. Today's ruling will serve as a source of guidance both for the trial court on remand in allocating the residue and for other courts in confronting the largely uncharted area of fluid recovery. Therefore, it is appropriate to address the damage distribution issue on which hearing was [\*\*\*3] granted.

I.

Intervenor appeals from the superior court's approval of a class action settlement. The settlement purports to resolve the widely publicized antitrust action brought by the Attorney General on behalf of the state and consumers against Levi Strauss & Co., a clothing manufacturer. The action sought monetary relief for millions of consumers who were assertedly overcharged on jeans purchased during the early 1970's.

As finally approved, the settlement yielded between 35 and 40 cents per pair of jeans, an average individual recovery of \$ 2.60-\$ 3. The Attorney General's office was awarded \$ 1.2 million in attorney fees, and the costs of administration were estimated at \$ 1.8-\$ 2.2 million. The total amount allocated to consumers was approximately \$ 9.3 million. This amount, plus accumulated [\*465] interest, is currently deposited with the state pending the outcome of this appeal.

Intervenor, along with 19 objectors,<sup>1</sup> challenged both the fairness of the process [\*\*566] [\*\*\*607] which led to the settlement and the fairness and reasonableness of the outcome. First, she questioned the settlement's plan for distributing the money to individual consumers. [\*\*\*4] She argued that the court erred in approving the distribution of class funds on the basis of claims nearly 95 percent of which were unsworn and unverified. She also suggested that the individual recoveries are trivial and where -- as here -- there is no feasible method for verifying the

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\* Judge, Alameda County Superior Court, assigned by the Chairperson of the Judicial Council.

<sup>1</sup> Intervenor's attorneys represent eight organizational and eleven individual objectors. The organizational objectors are the American G.I. Forum, Chinese for Affirmative Action, Glide Memorial Methodist Church, League of United Latin American Citizens, Los Padrinos, Mexican American Political Association, National Association for the Advancement of Colored People -- Western Region, and Oakland Citizens Committee for Urban Renewal.

overwhelming majority of claims, an aggregate remedy such as the establishment of a consumer trust fund should be preferred.

Second, intervener maintained that the trial court failed to provide adequate means for dissenting class members to participate and express their preferences. Specifically, [\*\*\*\*5] she argued that the court denied her attempts to discover the factual and economic basis of the settlement, placed obstacles in the way of participation by objectors, failed to file or respond to the over 300 objections that were submitted, denied her a modest sum to conduct a poll of class preferences, and approved a nonneutral class notice that promoted the settlement and failed to provide information essential to an intelligent choice.

The facts are set forth in detail below.

On May 5, 1976, after an extensive investigation, the Federal Trade Commission (the Commission) issued an administrative complaint against Levi Strauss & Co. The complaint charged the company with pressuring retailers to maintain high prices in violation of federal antitrust law.

In late 1977, the Commission and the company entered into a consent decree. By the terms of the decree, the company agreed to cease all efforts to control retail pricing.

Some time later, the then Attorney General, Evelle Younger, obtained the results of the Commission's investigation and began his own inquiry into the impact of the company's activities on California consumers. On the basis of the information thus acquired, [\*\*\*6] he tentatively decided to bring suit alleging [\*466] violations of the Cartwright Act ([Bus. & Prof. Code, § 16720 et seq.](#)),<sup>2</sup> California's antitrust law. He informed the company of his intent and began negotiations for a settlement.

Between March and June of 1978, the Attorney General and Levi Strauss negotiated their first proposed settlement in the amount of \$ 3.5 million. The settlement provided that the money be distributed to individuals on a pro-rata basis according to the number of pairs of men's and boys' jeans purchased during the period 1972-1975.

In June of 1978, the state, represented by the Attorney General, commenced this action in the superior court, both as a class action on behalf of itself and similarly situated consumers ([Code Civ. Proc., § 382](#)) and as a suit *in parens patriae* on behalf of its residents ([§ 16760](#)). At the same [\*\*\*7] time, the Attorney General notified the court of the proposed settlement.

Shortly afterward, a number of prospective interveners including Hannah Kerner, the present named intervener, learned of the proposed settlement and filed a declaration in opposition. It argued that individual distribution would produce only small individual returns and that, without prohibitively expensive security measures, a large percentage of the fund would be distributed to persons who did not in fact purchase jeans during the relevant period. It also averred that the requirement of written claim forms would discourage low income and minority members of the class from [\*\*567] claiming and receiving their fair share of the recovery.

[\*\*\*608] As an alternative to individual distribution, interveners' declaration proposed that the settlement money be used to establish a nonprofit corporation which would administer a "consumer trust fund." This corporation would engage in consumer protection projects, including research and litigation. It would be controlled by a board of nine directors, five appointed by the Governor and four by the Attorney General. The corporation would be organized so that [\*\*\*8] it could receive funds from future class action settlements.

The court granted leave to intervene.

In the early fall of 1978, the Attorney General and the company had a dispute over the accuracy of the sales figures used as a basis for the proposed settlement. As a result, the proposed settlement was abandoned and the Attorney General commenced discovery.

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<sup>2</sup> Unless otherwise noted, all statutory references are to the Business and Professions Code.

In January of 1980, then Attorney General George Deukmejian moved to certify a class consisting of all current California residents who purchased [\*467] Levi Strauss products at retail during the 1972-1975 period. At various times, the Attorney General estimated that this class consisted of from several to 7 million households.

While the class certification motion was under consideration by the court, the Attorney General and the company negotiated what might be called a "gamble" agreement. This agreement provided that if the requested class or a specified variant were certified, the company would pay \$ 12.5 million. However, if the class were not certified, the company would pay \$ 5.5 million.

In July of 1980, the court certified the class as requested. Shortly thereafter, the Attorney General and the company informed [\*\*\*\*9] the court of the second proposed settlement, which -- like the first -- provided for individual distribution. Costs of distribution were projected to be as high as \$ 2.2 million. In addition, the Attorney General's office was to receive an attorney's fee of \$ 1.2 million.

The court determined that the new proposed settlement merited consideration and granted the Attorney General \$ 75,000 from the settlement fund to prepare a plan of distribution.

Intervener reasserted her objections to an individual distribution plan and averred that a substantial percentage, if not a majority, of the class shared her views. She moved for \$ 12,000 to enable her to conduct a survey of class preferences and to study ways to prevent fraud and to encourage participation by minority and low income class members. This motion was denied pending the development of the Attorney General's plan.

In November of 1980, the Attorney General submitted his plan of distribution. It provided for individual notices, printed in English and Spanish, to be mailed to 8.6 million households. An additional 3.4 million notices were to be made available at various pickup centers around the state.

The legal notice of [\*\*\*\*10] settlement, which set forth the terms of the agreement and the options available to class members, was sandwiched between an introductory letter, signed by the Attorney General, and a claim form for those class members who desired to participate in the settlement. The Attorney General's letter, labeled "Cash Refund Notice," urged eligible consumers to claim their cash refunds by returning the enclosed claim form. It stated that the Attorney General "has settled" the action and that purchasers are now eligible for a cash refund of up to \$ 2.00 per pair." It did not mention the legal requirement that the court approve.

[\*468] The notice was to be mailed in a folded cover instead of an envelope. The proposed design of this cover is depicted below.<sup>3</sup> [\*\*568] [\*\*\*609]

The plan provided for a two-week campaign of television and radio advertising to be aired in conjunction with the mailing of notices. [\*\*\*\*11] This campaign, which featured personal appearances by the Attorney General, was to be organized around the pocket-and-bills logo so that recipients of the mailed notice could distinguish it from commercial bulk mailings.

The plan gave consumers six weeks from the start of the mailing process to return their claim forms and/or objections or to opt out of the settlement. No verification of purchase was required, but claims were to be analyzed according to unspecified "fraud tests."

Intervener reasserted her objections to the individual distribution plan. In addition, she charged that the notice and media campaign improperly provided free political exposure for then Attorney General Deukmejian.

A short time thereafter, the Attorney General proposed revisions to the notice, including deletion of the "Pocket Money" slogan on the cover. At the same time, he informed the court that he would seek an entertainment industry figure to replace him in the media campaign.

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<sup>3</sup> Substantially reduced, the proposed cover appeared as depicted: [SEE ILLUSTRATION IN ORIGINAL]

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In January of 1981, the court approved the distribution plan, including the notice as revised by the Attorney General. A hearing on the fairness of [\*469] the settlement was set for April 27, 1981. The Attorney [\*\*\*\*12] General was granted \$ 1.2 million out of the settlement fund to cover preliminary expenses.

Beginning February 21, notices were mailed to 8.6 million households. An additional 1.5 million forms were made available at post offices. The media campaign ran simultaneously with Michael Landon replacing the Attorney General in the television commercials.

As finally approved, the notice was labeled "Notice of Cash Refund" on its address cover. The back cover contained the language: "State of California, Attorney General's Office; Consumer Cash Refund; You May Be Eligible For A Cash Refund From The State of California; Please Read The Attached Notice Carefully." The record does not reveal the final graphic design of the cover. The introductory [\*\*569] [\*\*\*610] letter was unchanged from the original proposed notice.<sup>4</sup>

[\*\*\*13] By April 6, the deadline for responding to the notice, 1.4 million forms claiming 37 million pairs of jeans had been received. Between 345 and 510 objections were submitted,<sup>5</sup> and 111 exclusions were filed. The objections were never made part of the record.

According to the Attorney General, 24 percent of the claims alleged 10 or more purchases per individual during the 5-year period. Twelve percent claimed more than 15 purchases, 5 percent more than 21, and 1 percent more than 35.

The Attorney General recommended that the top 1 percent of the claims be treated as suspect.<sup>6</sup> Each person submitting a suspect claim would be required to submit a [\*\*\*14] notarized confirmation that the information contained [\*470] in the claim was accurate. Failure to do so would result in denial of compensation.

The fairness hearing was held as scheduled on April 27. Plaintiff, defendant, and intervenor each argued their positions concerning the fairness of the settlement. An undetermined number of objectors also attended but did not testify. From the record, it appears that the court neither prohibited nor solicited their participation.

Prior to the hearing, both plaintiff and intervenor had moved for attorney fees, plaintiff for \$ 1.2 million and intervenor for \$ 120,000. However, these motions were not discussed at the hearing. Instead, by agreement of the parties and the court, the question of attorney fees was postponed to a second hearing.

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<sup>4</sup> The cover letter, signed by then Attorney General Deukmejian, read as follows:

"Cash Refund Notice

"Dear Californian,

"As Attorney General of the State of California, I am pleased to inform you that my office has settled a lawsuit on your behalf, involving the price practices of Levi Strauss & Co. If you or any member of your household purchased Levi's men's and boys' denim or corduroy jeans between January 1, 1972 and December 31, 1976, you are now eligible for a cash refund of up to \$ 2.00 per pair. In most cases, no proof of purchases will be required. This is your claim form. Please read the simple instructions, fill it out and mail it back to us. I urge you to claim your cash and refund now.

"Most Cordially,

(Signature)"

<sup>5</sup> Television station "KPIX" filed objections on behalf of 155-165 persons. The Attorney General maintains that these objections were not submitted in compliance with the terms of the notice. Because the trial court did not include in the record any objections other than intervenor's, this court is unable to judge the merits of the Attorney General's argument.

<sup>6</sup> Claims submitted by households of more than 12 persons, a much smaller proportion of the total claims, were also to be deemed suspect.

On May 15, the trial court approved the settlement. It ordered that the top 5 percent [\*\*\*\*15] of claims (more than 21 pairs of jeans per individual) be treated as suspect. It also granted the Attorney General's motion for attorney fees and denied intervenor's. The promised hearing on the question of attorney fees was never held.

In early November, the state issued a progress report on claims processing. Pursuant to the court's order designating the top 5 percent of claims as suspect, over 75,000 claims had been returned with instructions to resubmit with a notarized statement confirming their veracity. Over 80 percent of these claims were not resubmitted. A similar percentage of claims returned as suspect because of excessive household membership (over 12 individual claimants) were not resubmitted. In all, over \$ 1.6 million in suspect claims were eliminated.

Pursuant to intervenor's request for findings of fact and conclusions of law, the state submitted proposed findings. Intervenor responded with numerous objections. On November 16, 1981, the court entered its final judgment, adopting verbatim plaintiff's proposed findings.

## II.

The course of events described above presents this court with a difficult problem. Nearly \$ 1.5 million of the settlement fund [\*\*570] [\*\*\*\*16] [\*\*\*611] has already been spent on the present distribution plan. Intervenor criticizes this expenditure, but does not contend that reversal would somehow restore the funds. Further, over 1 million household claims have been received and processed, thereby inducing legitimate expectations of compensation among class members. Intervenor remains critical of this method of distribution to individual consumers [\*471] on the basis of largely unverified claims. Nonetheless, at oral argument, intervenor joined amici Consumers Union et al. in urging that -- with some additional security precautions -- these claims be honored. However, this court can preserve the present claims only by upholding the settlement. [CA\(1\)](#)[] (1) (See [Trotsky v. Los Angeles Fed. Sav. & Loan Assn. \(1975\) 48 Cal.App.3d 134, 153 \[121 Cal.Rptr. 637\]](#), [[HN2](#)[]] a settlement must be approved or rejected as a whole since it is impossible to determine whether the parties considered the different portions of the agreement to be interdependent.) In view of the concessions made by intervenor at oral argument, it would serve no practical purpose to invalidate the settlement in this six-year-old [\*\*\*\*17] class action.

[HN3](#)[] In a sense, this court is confronted with a fait accompli. The only effective means to prevent further expenditures of class funds and to vindicate the claimants' current expectations -- ends desired by all the parties -- is to affirm the settlement.

Indeed, it appears that intervenor and amici are principally concerned not with reversing the settlement, but with advocating a particular use for the residue remaining after individual distribution. They estimate that this residue will be substantial since the settlement fund has accumulated considerable interest and since many claimants can no longer be located. Intervenor and amici have devoted their principal efforts to arguing that this sum should be used to establish a "consumer trust fund." Their proposal is entirely consistent with affirmance.

## III.

[CA\(2\)](#)[] (2) Since the pathbreaking case of [Vasquez v. Superior Court \(1971\) 4 Cal.3d 800 \[94 Cal.Rptr. 796, 484 P.2d 964, 53 A.L.R.3d 513\]](#), the California courts have recognized that the consumer class action is an essential tool for the protection of consumers against exploitative business practices. The Vasquez decision challenged the [\*\*\*\*18] trial courts to develop "pragmatic procedural devices" to "simplify the potentially complex litigation while at the same time protecting the rights of all the parties." ( *Id. at p. 820*; cf. [Sindell v. Abbott Laboratories \(1980\) 26 Cal.3d 588, 610 \[163 Cal.Rptr. 132, 607 P.2d 924, 2 A.L.R.4th 1061\]](#), cert. den. 449 U.S. 912 [66 L.Ed.2d 140, 101 S.Ct. 286] [[HN4](#)[]] courts must fashion consumer class action remedies to meet the changing needs of modern industrial society.).

Damage distribution, the crux of the present case, poses special problems in consumer class actions. Often, proof of individual damages by competent evidence is not feasible. Each individual's recovery may be too small to [\*472] make traditional methods of proof worthwhile. In addition, consumers are not likely to retain records of small purchases for long periods of time.

In response to these problems, the courts have turned to the equitable doctrine of *cy pres*. This doctrine originated in the law of charitable trusts. Where compliance with the literal terms of a charitable trust became impossible, the funds would be put to "the next best use," in accord [\*\*\*\*19] with the dominant charitable purposes of the donor. (See *Estate of Tarrant* (1951) 38 Cal.2d 42, 49 [237 P.2d 505, 28 A.L.R.2d 419], and cases cited.) **CA(3)**[<sup>18</sup>] (3) In the class action context, the *cy pres* doctrine is generally denominated "fluid recovery."

**CA(4)**[<sup>19</sup>] (4) **HN5**[<sup>20</sup>] The propriety of fluid recovery in a particular case depends upon its usefulness in fulfilling the purposes of the underlying cause of action. ( *Bruno v. Superior Court* (1981) 127 Cal.App.3d 120, 129 [179 Cal.Rptr. 342] [hereafter *Bruno*], citing *Simer v. Rios* (7th Cir. 1981) 661 F.2d 655, 676; *Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 389 [134 Cal.Rptr. 393, 556 P.2d 755] (conc. opn. of Tobriner, J.).) Fluid recovery may be essential to ensure that the policies of disgorgement or deterrence [\*\*571] [\*\*\*612] are realized. ( *Simer v. Rios, supra*, 661 F.2d at p. 676.) Without fluid recovery, defendants may be permitted to retain ill gotten gains simply because their conduct harmed large numbers of people in small amounts instead of small numbers of people in large amounts.

**CA(5)**[<sup>21</sup>] (5) [\*\*\*20] The parties do not dispute that **HN6**[<sup>22</sup>] fluid recovery methods may be employed in appropriate Cartwright Act cases. (See *Bruno, supra*, 127 Cal.App.3d at p. 132.) As the *Bruno* court pointed out, the purposes of the private damages action for violations of the Cartwright Act include disgorgement and deterrence as well as compensation. ( *Id.*, at pp. 132-133.)<sup>7</sup>

**CA(6)**[<sup>23</sup>] (6) [\*\*\*21] **HN7**[<sup>24</sup>] The implementation of fluid recovery involves three steps. (See generally, Malina, *Fluid Class Recovery as a Consumer Remedy in Antitrust Cases* (1972) 47 N.Y.U. L.Rev. 477, 482.) First, the defendant's total damage liability is paid over to a class fund. Second, individual class members are afforded an opportunity to collect their individual shares by proving their particular damages, usually according to a lowered standard of proof. Third, any residue remaining after individual claims have been paid is distributed [\*473] by one of several practical procedures that have been developed by the courts.

In order to assess the propriety of the fluid recovery method selected by the trial court in the present case, it is necessary to review briefly the available alternatives. **HN8**[<sup>25</sup>] The principal methods include a rollback of the defendant's prices, escheat to a governmental body for either specified or general purposes, establishment of a consumer trust fund, and claimant fund sharing. All of these methods promote the policies of disgorgement and deterrence by ensuring that the residue of the recovery does not revert to the wrongdoer. However, they differ substantially [\*\*\*22] in their compensatory effect and in their suitability for particular cases.

**CA(7)**[<sup>26</sup>] (7) In determining which method to employ, the courts should consider: (1) the amount of compensation provided to class members, including nonclaiming (or "silent") members; (2) the proportion of class members sharing in the recovery; (3) the extent to which benefits will "spill over" to nonclass members and the degree to which the spillover benefits will effectuate the purposes of the underlying substantive law; and (4) the costs of administration. (See generally, Shepherd, *Damage Distribution in Class Actions: The Cy Pres Remedy* (1972) 39 U.Chi. L.Rev. 448, 464 [hereafter *Cy Pres Remedy*].)

**CA(8)**[<sup>27</sup>] (8) **HN9**[<sup>28</sup>] Under the price rollback approach, the uncollected portion of the fund is distributed through the market by lowering the price of the defendant's product for a specified period.<sup>8</sup> For example, the class action in *Daar v. Yellow Cab* (1967) 67 Cal.2d 695 [63 Cal.Rptr. 724, 433 P.2d 732] was resolved by "refunding" taxicab overcharges through a court-ordered reduction in fares. (See *Blue Chip Stamps v. Superior Court, supra*, 18 Cal.3d at p. 388, fn. 1 [\*\*\*23] (conc. opn. of Tobriner, J.).)

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<sup>7</sup> The concurring and dissenting opinion concedes that fluid recovery may be employed in an appropriate Cartwright Act case. (See conc. & dis. opn., *post*, at pp. 489-490.) The concurring and dissenting opinion also implicitly approves two other aspects of the *Bruno* opinion: the rejection of federal precedents holding fluid recovery to be unlawful ( *Bruno, supra*, 127 Cal.App.3d at pp. 128-129), and the determination that fluid recovery is not barred under *Blue Chip Stamps v. Superior Court, supra*, 18 Cal.3d 381 ( *Bruno, supra*, 127 Cal.App.3d at p. 126).

<sup>8</sup> The following discussion owes much to the scholarly brief submitted by amici Consumers Union et al.

Price rollbacks are particularly effective for remedying overcharges on items which are repeatedly purchased by the same individuals. In cases involving such "repeat items," the individuals who were overcharged are likely to benefit from the reduced prices. (See 3 Newberg, *Class Actions* (1977) § 4620, p. 85; see also *Cy Pres* [\*\*572] [\*\*\*613] *Remedy*, *supra*, 39 U.Chi. L.Rev. at pp. 461-462.)

None of the parties has proposed a price rollback in the present action. This method is not appropriate in nonmonopoly markets like the jeans market since it compels consumers to collect their refunds by making further [\*474] purchases of the defendant's products, to the detriment of the defendant's competitors. (See 3 Newberg, *Class Actions*, *supra*, § 4620, p. 85; *Cy Pres Remedy*, *supra*, 39 U.Chi. L.Rev. at pp. 462-463.) Further, the price of jeans to the consumer [\*\*\*\*24] is fixed not by the defendant, but by independent retailers. Hence, a price rollback would pose difficult if not insuperable management problems.

**CA(9)[↑] (9)** A second form of fluid distribution is "earmarked escheat." Under this approach, the uncollected funds are disbursed to a responsible governmental organization for use on projects that benefit noncollecting class members and promote the purposes of the underlying cause of action.

*Market St. Ry. Co. v. Railroad Commission* (1946) 28 Cal.2d 363 [171 P.2d 875], though not a class action, provides an example of this method. In that case, this court was faced with the problem of how to refund over \$ 700,000 in streetcar overcharges. Individual riders had been offered an opportunity to collect refunds by submitting sworn applications, but less than \$ 15,000 had been claimed. This court awarded the remaining funds to the City and County of San Francisco, which had purchased the railway subsequent to the overcharges, for the improvement of street car services. The court reasoned that the people of San Francisco, who had paid the overcharges in the first place, would benefit from the improvements. (*Id.*, at pp. 366, 372-373.) [\*\*\*\*25] <sup>9</sup>

Earmarked escheat provides indirect compensation to silent class members. The recipient [\*\*\*\*26] governmental body may use class funds to ameliorate the effects of past harm and to reduce the risk of future harm. Administrative costs are minimized by utilizing already extant governmental bodies to administer the fund.<sup>10</sup>

[\*475] **HN10[↑]** Since earmarked escheat depends for its success upon the active cooperation [\*\*\*\*27] of the government, it should not be employed where -- as in the present case -- the relevant governmental body opposes its use.

**HN11[↑]** Another alternative is general escheat: payment of the recovery to the general fund of a governmental body. Of all the fluid recovery devices, general escheat provides the least focused compensation to the class. The benefits of the recovery are spread among all taxpayers, and there is no attempt to ensure that the spillover is used to effectuate the purposes of the substantive law. (See generally, *Economic Analysis*, *supra*, 34 Stan.L.Rev. at p. 180.) The only advantage of general escheat is ease of administration. Hence, it is usually regarded as a last resort for use where a [\*\*573] [\*\*\*614] more precise remedy cannot be found. (See, e.g., *Developments in the Law -- Class Actions* (1976) 89 Harv.L.Rev. 1318, 1523, fn. 353.)

<sup>9</sup> Similarly, the settlement in a more recent case provided for the defendant oil company to make annual contributions both to the State Department of Health Services, earmarked for environmental health purposes, and to the State Water Pollution Cleanup and Abatement Account. (*People ex rel. George Deukmejian v. Occidental Petroleum Corp.* (E.D.Cal. Feb. 6, 1981) Civ. No. 5-79-989 [unpublished stipulated settlement included in the record of the present case].) Other examples abound. (See, e.g., *United States v. Exxon Corp. (D.D.C. 1983) 561 F.Supp. 816, 856-857*, affd. in relevant part (T.E.C.A. 1985) *773 F.2d 1240*, pp. 1280-1287 [recovery in oil overcharge case paid to the United States Treasury for future distribution to states for use in state and federal energy conservation and related programs]; see generally, 3 Newberg, *Class Actions*, *supra*, § 4620, p. 86.)

<sup>10</sup> Some commentators have suggested that the benefits of earmarked escheat may be diluted since there is nothing to prevent the Legislature from reducing appropriations to the recipient agency by the amount of the damage award. (See, e.g., Durand, *An Economic Analysis of Fluid Class Recovery Mechanisms* (1981) 34 Stan.L.Rev. 173, 180-181 [hereafter *Economic Analysis*].) However, earmarked escheats can be conditioned on the state's promise not to divert previously budgeted funds. (See *Cy Pres Remedy*, *supra*, 39 U.Chi. L.Rev. at p. 458, fn. 42.) Though the court's ability to enforce such conditions may be limited, there is no reason to assume that the state would act in bad faith.

**CA(10)[<sup>11</sup>]** (10) Intervener advocates a relatively new and increasingly popular form of fluid recovery -- the establishment of a "consumer trust fund." **HN12[<sup>12</sup>]** Under this approach, the court appoints a board of directors to administer the recovery in the interests of the class. (See generally, Nash, *Collecting [\*\*\*\*28] Overcharges From the Oil Companies: The Department of Energy's Restitutionary Obligation* (1980) 32 Stan.L.Rev. 1039, 1057-1058.)

Like earmarked escheat, the consumer trust fund device uses the residue to further the purposes of the substantive law and provide indirect compensation to class members. Unlike earmarked escheat, there is no danger that the recovery will be submerged in the state's general fund. However, the consumer trust fund device does entail the establishment of a new organization with its own administrative expenses. To avoid this additional cost, some courts have allocated the funds directly to responsible private organizations. (For examples of this approach, see cases cited in *In re Folding Carton Antitrust Litigation (N.D.Ill. 1983) 557 F.Supp. 1091, 1109, fn. 10*, affd. in part and revd. in part (7th Cir. 1984) 744 F.2d 1252.)<sup>11</sup>

[\*\*\*\*29] **CA(11a)[<sup>13</sup>]** (11a) Finally, the residue, or the fund itself, may be divided among the individual claimants. As initially approved, the present settlement incorporated [\*476] this "claimant fund sharing" approach. (See generally, *Economic Analysis, supra*, 34 Stan.L.Rev. at pp. 177-178.)<sup>12</sup>

**HN13[<sup>14</sup>]** Unlike other methods of fluid recovery, claimant fund sharing uses the entire class recovery to provide monetary compensation to individual class members. Hence, in an appropriate case, it may yield a greater and more direct compensatory impact.

However, claimant fund sharing provides [\*\*\*\*30] no benefits to silent class members. Further, if there is a windfall, it goes not to further the purposes of the substantive law, but to overcompensate legitimate claimants or to pay erroneous or fraudulent claims. Hence, the advantages of claimant fund sharing can only be realized where a large proportion of class members participate and submit accurate claims. (See generally, *Economic Analysis, supra*, 34 Stan.L.Rev. at p. 178.)

Intervener argues that the trial court abused its discretion in approving the present claimant fund sharing plan. First, she contends that the individual recoveries were so small that only a minority of class members bothered to file claims. She points out that although over 1 million households did come forward, that number must be measured against the total size of the class, estimated by the Attorney General at between 3 and 7 million households. If the fund had been distributed as planned, 60 to 80 percent of the class would have received no compensation -- direct or indirect.

In addition, she asserts that a large percentage of the recovery went to pay inflated or baseless claims. The accuracy of the distribution hinged on class members' [\*\*\*\*31] ability [\*574] [\*\*\*615] to recall small purchases made more than six years earlier. An informal poll conducted by intervener suggested that a large percentage of consumers could not remember the number of Levi's jeans they had purchased during the relevant period.

This problem was, according to intervener, exacerbated by widespread fraud. The settlement provided no safeguard against fraud for 95 percent of the claims. The 5 percent of claimants who alleged the largest number of jeans were required to resubmit their claims with a sworn statement. Over 80 percent of these claimants preferred

<sup>11</sup> Of course, a court considering the allocation of funds to an existing private body must be mindful of possible conflicts of interest. An organization seeking the right to administer class funds may view a large recovery as a pot of gold to fund projects ranked high on the group's own agenda but of little or no benefit to the class. Trial courts are frequently called upon to make similar assessments when deciding whether a plaintiff seeking to maintain an action on behalf of a class will fairly and adequately represent the interests of all members of the class. (See 4 Witkin, Cal. Procedure (3d ed. 1985) Pleading, §§ 207-209, pp. 245-248.) Where such a conflict is identified, earmarked escheat or the creation of a new body to administer the consumer trust fund may provide suitable alternatives.

<sup>12</sup> Claimant fund sharing can be used as a method for distributing the residue -- that portion of the fund that remains after class members have proved their actual damages. It also can be employed, as here, to distribute the entire fund to individual claimants on a pro-rata basis. Had distribution in this case not been delayed by the appellate process, the class fund would have been distributed pro-rata, leaving little if any residue.

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to abandon their refunds rather than confirm their claims on pain of perjury. The magnitude of this negative [\*477] response casts doubt on the accuracy of claims beyond the top 5 percent as well.

Further, there appears to be no reported decision in any jurisdiction approving a plan so lacking in safeguards against fraud. The Attorney General cites [\*In re Coordinated Pretrial Proceedings, etc. \(D.Minn. 1975\) 410 F.Supp. 706\*](#). However, the distribution plan in that case required proof for all above-average claims. ([\*Id., at p. 713.\*](#)) The opinion [\*\*\*\*32] does not reveal whether notarization or other sworn verification was required.

Finally, intervenor suggests that administrative expenses and attorney fees were grossly disproportionate to the compensation received by the average claimant. Administrative expenses were projected at over \$ 2 million. The Attorney General was awarded \$ 1.2 million in attorney fees. By contrast, the average individual's recovery was projected at the time of the court's ruling on the settlement to total between \$ 2.60 and \$ 3, or 30-40 cents per pair of jeans. Hence, it appears that the only substantial beneficiaries of the settlement were a few large claimants -- including the state -- and the Attorney General, who gained not only the fee award for his office, but also substantial free publicity for his then upcoming gubernatorial campaign.

**CA(12)↑ (12)** The dissent's response to intervenor's arguments is twofold. First, the dissent suggests that trial courts should turn to the *parens patriae* statute ([§ 16760](#)) for guidance on how to distribute damages in private consumer class actions. (See conc. & dis. opn., *post*, at p. 490.) However, [HN14↑](#) that statute was not intended to limit the equitable [\*\*\*\*33] discretion of the courts in managing private consumer class actions. Nor should the courts turn to its narrow provisions for "guidance" on how to exercise their discretion.

The *parens patriae* statute empowers the Attorney General to sue on behalf of persons injured by violations of the Cartwright Act. ([§ 16760, subd. \(a\)\(1\).](#)) Its damage distribution provisions are narrowly drawn. Subdivision (e)(1) requires that monetary relief recovered pursuant to the *parens patriae* power be distributed "[in] such manner as the superior court . . . in its discretion may authorize to insure, to the extent possible, that each person be afforded a reasonable opportunity to secure his appropriate portion . . ." Subdivision (e)(3) provides that the residue "shall be treated . . . as unclaimed property," and eventually escheat to the state's general fund.

The concurring and dissenting opinion's reliance on the *parens patriae* statute finds no justification in law or policy. Far from being intended to supersede or restrict the private consumer class action, the *parens patriae* action is designed to provide a means of redress where a private class action is not viable. (See generally, [\*\*\*\*34] Jones, *Perspectives in Consumer Advocacy: [\*478] Antitrust Parens Patriae Suits Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act -- A Solution for Wrongs Without Redress* (1977) 5 Pepperdine L.Rev. 77, 78.)<sup>13</sup>

The Court of Appeal's well-reasoned opinion in [\*Bruno, supra, 127 Cal.App.3d 120\*](#) [\*\*575] [\*\*\*616] is instructive on the relation between the *parens patriae* power and private class actions. In that case, the plaintiff class proposed that damages be distributed by a price rollback or earmarked escheat. The defendant sought to strike these methods from the complaint, arguing that the *parens patriae* statute prohibited them in private consumer class actions. ([\*Id., at p. 133.\*](#)) The court held that [\*\*\*\*35] the proposed methods should not be stricken from the complaint and stated: "The fact that the law empowers the Attorney General . . . to bring *parens patriae* antitrust lawsuits and specifies the methods for distributing the damages they recover evidences no legislative intent to prohibit fluid class recovery in private antitrust class actions." (*Ibid.*)

In short, as the Attorney General himself convincingly argued in his memorandum in support of certification of the present class, the *parens patriae* statute was not intended to impose any restrictions on the conduct of private consumer class actions.<sup>14</sup>

<sup>13</sup> The reserve role of the *parens patriae* action is readily apparent from the fact that it, unlike the private class action, does not provide for the recovery of treble damages. ([§ 16760, subd. \(a\)\(2\); § 16750, subd. \(a\).](#))

<sup>14</sup> This conclusion is in no way altered where, as here, the two types of action are brought together and settled together. To hold otherwise would penalize the Attorney General and the class for employing the *parens patriae* action in its intended role as a backup for private class actions. In view of this conclusion, it is not necessary to decide whether the *parens patriae* statute

[\*\*\*\*36] Nor should the courts seek guidance from the *parens patriae* statute. The two-pronged approach of the statute -- individual distribution or general escheat -- is overly restrictive in the class action context. It would disfavor or preclude two of the most widely used and effective methods of fluid recovery -- the earmarked escheat and the consumer trust fund. Moreover, general escheat, the residue distribution method mandated by the statute, provides the least focused compensatory effect of any of the various methods of fluid recovery. (See *ante*, at p. 475.) To compel the use of this method would be to cripple the "substantial compensatory function" of the private class action (*Bruno, supra, 127 Cal.App.3d at p. 134*).<sup>15</sup>

[\*\*\*\*37] [\*479] **CA(11b)**<sup>16</sup> (11b) Aside from invoking the *parens patriae* statute, the concurring and dissenting opinion asserts that the distribution plan reasonably compensated class members since about 1.2 million families may ultimately recover between \$ 10 and \$ 12 each. Though the 1.2 million figure seems impressive at first glance, it is meaningful only when compared with the total class size. As the concurring and dissenting opinion recognizes, **HN15**<sup>17</sup> it is the "correlation' or 'overlap' between the injured class of persons and the class to be benefitted" (conc. & dis. opn., *post*, at p. 490) -- not the absolute number of persons recovering -- that provides the principal criterion for assessing the compensatory effectiveness of a distribution plan.

The trial court made no finding as to the size of the class. Further, the court denied intervenor's attempt to discover that information. The Attorney General estimated the class size at between 3 and 7 million households. With only this broad estimate to go by, the 1.2 million figure -- between 20 and 40 percent of the class -- does not support the concurring and dissenting opinion's summary assertion that the settlement as initially [\*\*\*\*38] approved reasonably compensated class members. This conclusion is strengthened by the likely high incidence of erroneous or fraudulent claims.

#### IV.

Due to the practical considerations set forth earlier in this opinion, this court has concluded that the judgment should be [\*\*576] [\*\*\*617] affirmed. But far more is at stake than the decision whether to affirm or reverse. Today's ruling will serve as a source of guidance for both the trial court on remand and for other courts in confronting the largely uncharted area of fluid recovery in consumer class actions.

In both contexts, the sound approach of *Vasquez* continues to provide the proper framework. **HN16**<sup>18</sup> The trial courts should have the full range of alternatives at their disposal. In choosing the appropriate method, they should consider the amount of compensation provided to class members, the proportion of class members sharing in the recovery, the size and effect of the spillover to nonclass members, and the costs of administration.

The disposition of the residue on remand is a matter within the discretion of the trial court. However, it should be noted that under the criteria set forth here, amici's suggestion that [\*\*\*\*39] the residue should be used to establish a consumer trust fund has considerable merit. It is estimated that up to one-half of the original group of claimants may have moved since 1981. Claimants who have moved may be difficult to locate. Hence, further attempts to distribute the entire fund to individual claimants would result in an even lower rate of participation than did the original plan. Amici's consumer [\*480] trust fund plan -- or a plan employing earmarked escheat in place of the consumer trust fund -- would provide some indirect compensation for silent class members, while ensuring that the residue of the recovery is used on projects designed to effectuate the aims of the Cartwright Act.

The judgment is affirmed. The cause is remanded to the trial court for further proceedings consistent with the views expressed in this opinion.

operates retroactively to cover this action. The alleged violations occurred in 1972-1976. Section 16760 was enacted in 1977. (Stats. 1977, ch. 543, § 1, p. 1747.)

<sup>15</sup> By contrast, the statute's approach is consistent with the character of the *parens patriae* action, which is less concerned with compensation. "The most reasonable interpretation of section 16760, subdivision (e) is that the Legislature has sanctioned the use of a civil action by the Attorney General . . . regardless of the compensatory effect of the action." ( *Bruno, supra, 127 Cal.App.3d at pp. 133-134*.)

**Concur by:** BIRD; GRODIN; SUTTER; LUCAS (In Part)

## Concur

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**BIRD, C. J.**, Concurring. In order to secure a majority for today's decision, I have omitted any discussion of intervenor's challenges to the trial court's procedural rulings from my opinion. I write separately to emphasize that today's affirmance should not be taken to indicate approval [\*\*\*\*40] of those procedural rulings. The trial court denied intervenor's discovery, placed procedural barriers in the way of objector participation, omitted written objections from the record, refused to fund a survey of class preferences, and approved a nonneutral class notice. In my view, these rulings, taken together, amounted to an erroneous handling of the action. That this error does not warrant reversal is due not to its alleged harmlessness but to the unacceptability -- acknowledged by all the parties -- of setting this action back to square one.

By way of background, commentators have long recognized that the class action device seeks to fulfill two sometimes contradictory purposes. On the one hand, the class action is a means of enforcing the law. And, the law exists apart from the class membership's preferences. (See Special Project, *The Remedial Process in Institutional Reform Litigation* (1978) 78 Colum.L.Rev. 784, 893.)

On the other hand, the class action is a means of enabling unorganized groups to redress their grievances through the legal process. As such, it does not dispense with the longstanding principle that individuals should control litigation [\*\*\*\*41] brought on their behalf. (See *Mandujano v. Basic Vegetable Products, Inc.* (9th Cir. 1976) 541 F.2d 832, 834-835 [hereafter *Mandujano*].) As Professors Cover and Fiss have observed, the class action device "may have an ultimately dehumanizing effect if it is imbued with a life on its own, apart from the natural persons for whom it was once a tool." (Cover & Fiss, *The Structure of Procedure* (1979) p. 255.)

[\*\*577] [\*\*\*618] Trial courts face the difficult task of managing class actions so that both of these purposes are fulfilled. An overemphasis on class participation can [\*481] be costly and may render an action unmanageable. On the other hand, an exclusive concern with enforcement of the law may deprive class members of their rights to influence the conduct of actions brought on their behalf.

In the factual and procedural setting of the present case, participatory concerns come to the fore. Class members are not disputing whether or to what extent the defendant violated the law. Their disagreement, which concerns the method for distributing the recovery, does not threaten the viability of the class action.<sup>1</sup> Hence, judicial recognition [\*\*\*\*42] of class dissent will not defeat enforcement of the law.

More fundamentally, the choice among the possible forms of fluid recovery is not clearly compelled by law. (See majority opn., *ante*, at pp. 472-479.) Nor can this choice be reduced to a simple matter of immediate economic interests, as can be done in some class actions for damages. (See Rhode, *Class Conflicts in Class Actions* (1982) 34 Stan.L.Rev. 1183, 1200 [hereafter *Rhode*].) Evaluating the relative merits of [\*\*\*\*43] distributing the recovery to a consumer trust, to the state, or to individuals involves value judgments more significant than a simple calculation of how many pennies each individual will eventually receive.

In exercising their discretion to choose among various legally valid remedies, courts should consider not only the logical merits of the various proposals, but also the breadth and depth of class support for those proposals. Consideration of those factors can minimize the danger that judges will substitute their own value judgments for those of the class. (See Garth, *Conflict and Dissent in Class Actions: A Suggested Perspective* (1982) 77 Nw. U.L. Rev. 492, 520, 531-532 [hereafter *Garth*]; Rhode, *supra*, 34 Stan.L.Rev. at pp. 1198-1202.)

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<sup>1</sup> By comparison, the concerns weighing against an emphasis on class participation and dissent are far stronger at the class certification stage. If the class is not certified, the harm caused by the defendant's violation may never be remedied in any fashion. (Cf. *Johnson v. Georgia Highway Express, Inc.* (5th Cir. 1969) 417 F.2d 1122, 1124 [differences among class members held not to warrant denial of certification, but subclassing and intervention might be necessary at the remedial stage].)

Trial courts are accorded broad discretion in organizing pretrial proceedings in complex class actions. (See, e.g., *Grunin v. International House of Pancakes* (8th Cir. 1975) 513 F.2d 114, 121 [notice]; *Cotton v. Hinton* (5th Cir. 1977) 559 F.2d 1326, 1333 [discovery].)<sup>2</sup> However, viewed in the light [\*482] of the preceding discussion and the applicable case [\*\*\*\*44] law, it is apparent that the trial court's procedural rulings, taken together, exceeded the bounds of that discretion.

First, intervener contends that the court erred in denying her attempt to discover the factual basis of the settlement. Intervener made two unsuccessful attempts at discovery. In early March, intervener served interrogatories on the Attorney General. These interrogatories sought to discover information relating to the conduct of settlement negotiations and, in particular, the factual basis of the settlement. The Attorney General objected [\*\*\*\*45] to every question, primarily on the ground that the interrogatories were not timely. Three weeks before the fairness hearing, intervener moved to compel answers. This motion was denied.

In June, intervener propounded interrogatories and requests for documents relating to the Attorney General's attorney fee request. Again, the Attorney General objected [\*\*578] [\*\*\*619] and the trial court denied intervener's motion to compel.

Since objecting interveners are in an adversary relationship with both plaintiffs and defendants, they are "entitled to at least a reasonable opportunity to [conduct] discovery against both." ( *Girsh v. Jepson* (3d Cir. 1975) 521 F.2d 153, 157.)

Moreover, what transpires in settlement negotiations is highly relevant to the assessment of a proposed settlement's fairness. (See *In re General Motors Corp. Engine Interchange Lit.* (7th Cir. 1979) 594 F.2d 1106, 1124 [hereafter GM], citing the Manual for Complex Litigation (1982 ed.) § 1.46, pp. 53-54.) Even attorneys general are not immune from careful oversight in their roles as class representatives. "[The] prestige attendant upon negotiating a large settlement [\*\*\*\*46] against a corporate defendant and thereby acquiring reputations as consumer advocates may place public attorneys in a situation analogous to private counsel who hope to win large fee awards." ( GM, *supra*, 594 F.2d at p. 1125.)

The Attorney General contends that the denial of discovery was proper because the trial court had before it sufficient information to intelligently approve the settlement. The Attorney General points out that the record comprised nearly 2,000 pages, including "statistical and economic data."

However, the record lacked information that was essential to the court's assessment of the distribution plan. Most important, there were no facts on which to base a finding of class size. Yet, class size is of the essence in determining the compensatory effectiveness of a claimant fund sharing plan. [\*483] Such a plan can scarcely be considered reasonable as the sole means of distributing a class fund if the overwhelming majority of class members recover nothing. (See Durand, *An Economic Analysis of Fluid Class Recovery Mechanisms* (1981) 34 Stan.L.Rev. 173, 178.)

In addition, intervener sought to discover sales statistics in order [\*\*\*\*47] to determine the composition of the class by economic and social group. This information was necessary to determine whether the plan systematically discriminated against lower income and/or minority groups, a charge made by such intervening organizations as the NAACP.

In short, intervener sought information that was essential to the determination of the settlement's compensatory efficiency and basic fairness. Accordingly, the trial court should have granted her motion to compel discovery.

<sup>2</sup>Though not binding on this court, federal law concerning class action procedures has been applied where consistent with California law and policy. (See *La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, 872 [97 Cal.Rptr. 849, 489 P.2d 1113]; compare *Bruno v. Superior Court* (1981) 127 Cal.App.3d 120, 128 [179 Cal.Rptr. 342] [rejecting federal case law that was inconsistent with California policy].)

Next, intervener contends that the trial court erred in failing to provide for effective participation by objectors. She points out that would-be objectors were told to mail copies of their written objections to five different addresses. This requirement imposed a burden out of proportion to the likely size of the average individual recovery. There is no apparent reason why the Attorney General could not have received the objections at a single location and sent them on to counsel, thereby saving each individual additional postage.

Further, the over 300 objections actually received were not included in the record or accorded a reasonable response. It is well established that before a settlement [\*\*\*\*48] may be approved, "[each] objection . . . must become a part of the record of the case [and] [the] trial court . . . must review carefully these objections." (*Mandujano, supra, 541 F.2d at p. 835*; see also *Boyd v. Bechtel Corp. (N.D.Cal. 1979) 485 F.Supp. 610, 617*.) "The Court should examine the settlement in light of the [substantial] objections raised and set forth on the record a reasoned response to the objections including findings of fact and conclusions of law necessary to support the response." (*Cotton v. Hinton, supra, 559 F.2d at p. 1331*, citing *Mandujano, supra, 541 F.2d 832*.) A trial court's failure to perform these duties has been held to warrant reversal. (*Id., at pp. 836-837*.)

The Attorney General argues that inclusion of the objections in the record would have served no purpose. He points out that the court had before it his two-page summary of objections and argues that an examination of this summary is enough to [\*\*579] [\*\*\*620] show that all of the objections either were baseless or were argued vigorously by intervener.

[\*484] However, without copies [\*\*\*\*49] of the objections this court cannot intelligently review the trial court's apparent determination that none of them merited a reasoned response on the record. For example, it is impossible to determine whether the nine objectors whose objections were summarized as "Politics" had a substantial point to make. The same is true of the 13 persons who made "general" objections to the disbursement plan and the 25 who proposed that the refund go to charity, a consumer group, or the State of California. Experience shows that a broad rejection of objections may, on review, turn out to be erroneous. (See, e.g., *GM, supra, 594 F.2d at p. 1136* [quoting from objectors' letters to refute argument raised by settlement proponent].)

More fundamentally, the trial court's reliance on summarized objections makes a mockery of objectors' due process rights. Class members have a due process interest in expressing their own views to the courts, not in having those views reduced to one-line summaries and expressed by other parties.

Further compounding the problem, those objectors who attended the fairness hearing did not testify. Although there is nothing in the record to support [\*\*\*\*50] intervener's charge that the court *prohibited* objectors from speaking, it appears that the court did nothing to inform them when they could speak. Courts should not rely on untrained and unrepresented litigants to interrupt court proceedings and insist upon their rights. Here, the court could simply have announced the appropriate time and procedure for making objections.<sup>3</sup>

[\*\*\*\*51] Intervener further contends that the trial court should have granted her request for \$ 12,000 to conduct studies, including a survey of class preferences. The breadth and depth of class opposition is clearly relevant in assessing the fairness and reasonableness of a settlement, particularly where alternative remedies are available. (See, e.g., *Flinn v. FMC Corporation (4th Cir. 1975) 528 F.2d 1169, 1173*, cert. den. (1976) 424 U.S. 967 [47 L.Ed.2d 734, 96 S.Ct. 1462]; *Bryan v. Pittsburgh Plate Glass Co. (PPG Indus., Inc.) (3d Cir. 1974) 494 F.2d 799, 803*, cert. den., 419 U.S. 900 [\*485] [42 L.Ed.2d 146, 95 S.Ct. 184].)<sup>4</sup> Courts have relied upon class elections to

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<sup>3</sup> According to the record, up to 344 persons may have informed the court that they wished to object at the fairness hearing.

In its findings of fact, the trial court stated that "345 persons, including the intervenor, filed objections to the proposed settlement in accordance with the terms of the class notice." The class notice stated: "If you wish to object to the settlement, you must file a notice of intention to appear and state all of the reasons you object to the proposed settlement in writing by April 6, 1981." The intervener informed the court of her intention to appear. There is nothing in the record to indicate that the other 344 objectors did not do likewise.

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reject the remedial proposals advanced by class representatives. (See, e.g., *East Texas Motor Freight v. Rodriguez* (1977) 431 U.S. 395, 405 [52 L.Ed.2d 453, 463, 97 S.Ct. 1891]; see generally, Garth, *supra*, 77 Nw. U.L. Rev. at p. 532.)

[\*\*\*\*52] Whether or not to spend class funds on elections or surveys must depend on the facts in each case. As noted above, the circumstances of the present case weigh heavily in favor of revealing class sentiments. (See *ante*, at pp. 480-482.) An affirmative effort to elicit class views is particularly appropriate where -- as here -- the small sum at stake for any particular individual renders a class member's failure to object useless as an indicator of class sentiment. (See *Developments in the Law -- Class Actions* (1976) 89 Harv. L.Rev. 1318, 1567-1568.) The proposed settlement's plan of distribution greatly exacerbated that problem by requiring would-be [\*\*\*621] objectors [\*\*580] to mail copies of their objections to five different locations. Accordingly, intervener's suggestion that the court should have authorized the funds for a survey has much to recommend it.

Finally, intervener maintains that the class notice approved by the trial court was nonneutral in violation of the case law.

The class notice must "fairly apprise the class members of the terms of the proposed compromise and of the options open to dissenting class members." ( *Trotsky v. Los Angeles Fed. Sav. & Loan Assn.* (1975) 48 Cal.App.3d 134, 151-152 [121 Cal.Rptr. 637].) [\*\*\*\*53] It must be "'scrupulously neutral' and emphasize that the court is expressing no opinion on the merits of the case or the amount of the settlement." ( *Grunin v. International House of Pancakes*, *supra*, 513 F.2d at p. 122, citing *Philadelphia Housing Auth. v. American R. & S. San. Corp.* (E.D.Pa. 1970) 323 F.Supp. 364, 378, and *Cannon v. Texas Gulf Sulphur Company* (S.D.N.Y. 1972) 55 F.R.D. 308, 313, fn. 2.) The court should clearly indicate that it has done nothing more than determine that "there is, in effect, 'probable cause' to submit the proposal to members of the class and to hold a full-scale hearing on its fairness . . . ." (Manual for Complex Litigation, *supra*, § 1.46, p. 55.)

The requirement of neutral notice is particularly important where -- as here -- there has been no ongoing communication between attorneys and class members, and the notice constitutes the first and only official communication to the overwhelming majority of class members.

[\*486] In the present case, the trial court made a commendable attempt to cut costs and stimulate response by mailing the legal notice of the proposed settlement [\*\*\*\*54] along with a "notice of cash refund" and the form for claiming the refund. Unfortunately, due to the layout and ordering of the packet, the announcement of the "cash refund" overshadowed the legal notice itself. Viewed as a whole, the mailing was far from "scrupulously neutral."

The front cover was labelled "Notice of Cash Refund." The back cover also referred exclusively to the cash refund. The return address was that of the Attorney General, not the court. Upon opening the mailing, the recipient would first see the cover letter, entitled "Cash Refund Notice" and signed by the Attorney General. This letter informed the reader that the Attorney General "has settled" a lawsuit and that purchasers of men's and boys' jeans "are now eligible for a cash refund of up to \$ 2.00 per pair." (Italics added.) The letter further explained that the mailing was "your claim form" and urged the reader to "read the simple instructions, fill it out and mail it back to us." There was no mention that the settlement had yet to be approved or that the recipient had any option other than filling out the form (and receiving up to \$ 2 per pair claimed) or not filling it out (and receiving nothing). [\*\*\*\*55] <sup>5</sup>

<sup>4</sup> It should be noted that the courts are not mechanically *bound* by expressions of class opposition. ( *Flinn, supra*, 528 F.2d at p. 1173; *Bryan, supra*, 494 F.2d at p. 803.) The many arguments against placing undue reliance on majority sentiment are discussed in Rhode, *supra*, 34 Stan.L.Rev. at pages 1232-1242.

<sup>5</sup> The cover letter, signed by then Attorney General Deukmejian, read as follows:

"Cash Refund Notice

"Dear Californian,

"As Attorney General of the State of California, I am pleased to inform you that my office has settled a lawsuit on your behalf, involving the price practices of Levi Strauss & Co. If you or any member of your household purchased Levi's men's and boys'

The Attorney General maintains that the design of the cover and the inclusion of the introductory letter are irrelevant to the sufficiency of the notice. He contends that the legal notice itself, which followed the cover letter, fairly and impartially informed class members [\*\*\*\*56] of the settlement terms and their options.

However, the notice of proposed settlement must be viewed as a whole and assessed in light of its impact on the ordinary class member. Common sense suggests that cover labels and introductory letters [\*\*581] [\*\*\*622] are generally intended to describe and introduce the entire contents of a communication. The assertions that the Attorney General "has settled" the action and that certain purchasers "are now eligible" for refunds strongly implied that the settlement had already been approved and all that remained was to distribute the refund. Hence, readers might well conclude from the labels and the [\*487] letter that they were being asked only to fill out the claim form. They might see no need to plow through the tedious "Legal Notice."<sup>6</sup>

[\*\*\*\*57] The potential for misunderstanding was exacerbated by the media campaign, which was timed to coincide with the mailing. Television ads featuring Michael Landon echoed the cover letter in asserting that the Attorney General "[had] settled" the suit, in referring to the notice as a "cash refund announcement," and in urging consumers to claim their refunds. Also, these ads said nothing about the necessity for court approval of the settlement.

Further, the legal notice itself did little to dispel the potential for confusion created by the cover, the introductory letter, and the media campaign. Although the notice did accurately describe the terms of the settlement and set forth the legal options available to the individual (i.e., participation, objection, or opting out of the settlement), it did nothing to describe the options available to the class if the settlement were not approved. (Cf. National Conference of Commissioners on Uniform State Laws, Proposed Uniform Class Actions Act § 12(c)(4), reprinted in 32 Bus. Law. 83, 93-94 (1976) [notice of proposed settlement should include a description and evaluation of alternatives considered by the representative [\*\*\*\*58] parties].)

In line with the need for pragmatic procedural devices to solve the complex problems of class actions (see [Vasquez v. Superior Court \(1971\) 4 Cal.3d 800, 820 \[94 Cal.Rptr. 796, 484 P.2d 964, 53 A.L.R.3d 513\]](#)), the court could have provided the class members with some description of the actual consequences of acquiescence or objection. For example, the court could have permitted intervener and the Attorney General to include in the notice brief arguments for their remedial proposals. Further, the court could have given some indication of the likely consequences of proceeding to trial. For example, according to the Attorney General's own estimate, the action might have yielded \$ 20 to \$ 80 million in damages *prior to trebling* had a trial occurred.

In conclusion, the trial court unduly restricted the class members' participation. Where -- as here -- there is a substantial intra-class dispute over alternative, legally permissible remedies, trial courts should make special efforts to ascertain class preferences and promote effective participation. In this light, the trial court's procedural rulings, taken together, unduly discouraged class [\*\*\*\*59] participation.

[\*488] **GRODIN, J.** I agree with the majority's quite sensible conclusion that "as a result of the passage of time and changes in the position of intervener no practical purpose would be served by invalidating the settlement of this six-year-old class action." (Majority opn., *ante*, p. 464.) That being the case, I find it unnecessary to take sides in what appears to me a wholly gratuitous debate between the majority and the dissent as to whether the trial court abused

denim or corduroy jeans between January 1, 1972 and December 31, 1976, you are now eligible for a cash refund of up to \$ 2.00 per pair. In most cases, no proof of purchases will be required. This is your claim form. Please read the simple instructions, fill it out and mail it back to us. I urge you to claim your cash and refund now.

"Most Cordially,

(Signature)"

<sup>6</sup> It is instructive to compare the notice in the present case with the "Sample Class Action Notice . . . with Proof of Claim Form" provided in the Manual for Complex Litigation. The sample notice begins with an announcement of the action. It then sets forth briefly the positions of the parties and the options available to class members. The instructions concerning the filing of proofs of claim come last. (Manual for Complex Litigation, *supra*, § 1.45(II), pp. 217-222.)

its discretion in approving the present claimant fund sharing plan in the first place. (*Id., ante*, p. 476 *ff.*; p. 481 *ff.*) The only remaining question is what the trial court should do with the residue. With one minor [\*\*582] [\*\*\*623] reservation,<sup>1</sup> I concur in the majority's useful discussion of various forms of "fluid recovery" as a guide to the trial court's discretion upon remand. (Majority opn., *ante*, pp. 471-476.)

[\*\*\*\*60] **SUTTER (John), J.**\* The majority opinion, in which I concur, does not hold that the trial court abused its discretion and I find no such abuse. The comments in that opinion about certain of the trial court's rulings are, of course, dicta and some are based on hindsight. An example is the conclusion that many claims may have been fraudulent because 80 percent of those in the 5 percent group (those alleging that they purchased the largest number of jeans), who were required to verify their claims, abandoned the claims rather than confirm them by a sworn statement. Obviously, at the time of his order, the trial judge had no way of knowing how many claimants would decide to abandon their claims.

In addition to guidelines for future cases set forth in the majority opinion, I would add another caveat for trial judges: beware of conflicts of interest, not only of private organizations, as observed in the opinion (majority [\*\*\*\*61] opn., *ante*, p. 475, fn. 11), but also of plaintiffs who are elected public officials.<sup>1</sup> The trial court should consider such questions as these: to what extent, if at all, does plaintiff seek a particular plan of distribution or notice for self-promotion rather than for the best interest of the class? Does plaintiff resist fluid recovery, at least in part, because such a method of distribution would not call for sending notices generating favorable publicity to his or her constituents? Possible conflicts of interest can and should be avoided or minimized -- for example, by requiring that notice to potential class members be mailed out by and returned to someone other than the plaintiff.

**Dissent by:** LUCAS (In Part)

## Dissent

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**LUCAS, J., Concurring and Dissenting.** I concur in the majority opinion to the extent that it affirms [\*\*\*\*62] the judgment and remands the cause to the trial [\*489] court for further proceedings, including disposition of the settlement "residue" in an appropriate manner.

I dissent, however, to the majority's glowing approval of the "consumer trust fund" device as a possible distribution method in cases of this kind, and to the majority's strong suggestion, approaching a direction, that the settlement residue be allocated to the creation of such a fund. In my view, while the trust fund device, and other "fluid recovery" methods, might be appropriate in certain limited situations, this is not one of them.

By way of background, the Court of Appeal in [\*Bruno v. Superior Court \(1981\) 127 Cal.App.3d 120, 123-124 \[179 Cal.Rptr. 342\]\*](#), explained the concept of "fluid recovery" as follows: "The topic of fluid class recovery regularly arises in class actions . . . where the class has many members with relatively small individual claims. In such circumstances, if the class recovers a favorable judgment, it is likely that only a fraction of the class members will have the desire, and documentation, to file an individual claim for part of the damages. Fluid class recovery [\*\*\*\*63] is thus invariably suggested as a way to distribute the usually substantial amount of remaining damages. The theory underlying fluid class recovery is that since each class member cannot be compensated exactly for the damage he or she suffered, the best alternative is to pay damages in a way that benefits as many of the class members as possible and in the approximate proportion that each member has been damaged, even

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<sup>1</sup> I suggest that the "price rollback" remedy is not a method of distributing "residue" (majority opn., p. 473), but an alternative to the creation of residue.

\* Judge, Alameda County Superior Court, assigned by the Chairperson of the Judicial Council.

<sup>1</sup> [\*Business and Professions Code section 16760, subdivision \(g\)\*](#) authorizes district attorneys as well as the Attorney General to file *parens patriae* actions.

though, most probably, some injured class members will **[\*\*583] [\*\*\*624]** receive no compensation and some people not in the class will benefit from the distribution; or, as one commentator states it, 'where funds cannot be delivered precisely to those with primary legal claims, the money should if possible be put to the "next best" use.' [Citation.]

"Fluid class recovery normally will be accomplished by either one of the two methods suggested by petitioners. The defendant may be required to lower prices for a period of time or the residue of damages may be given to the state to be used to benefit class members. [Citation.]" Although *Bruno* was entirely silent on the issue, the majority argues that a desirable variation on the second method of fluid recovery **[\*\*\*\*64]** is to establish an independent organization -- a consumer trust fund -- to benefit the class.

Here, however, the trial court specifically found: "The proposed plan of distribution is the best feasible method of giving each class member a reasonable opportunity to claim his or her respective share of the settlement fund; the proposed plan of distribution has adequate safeguards to insure against any undue or fraudulent claims being paid from the settlement fund; there is no basis for concluding that the proposed plan of distribution discriminates **[\*490]** against any class members . . . ." Clearly, the trial court did not abuse its discretion in rejecting alternative proposals.

All parties hereto agree that fluid class recovery may possibly serve in an appropriate case as an alternative to more traditional distribution systems. As *[Bruno, supra](#)*, indicates, where the injured class members cannot be compensated exactly for the damage they suffered because, for example, of their probable lack of interest in filing a claim or their inability to document their entitlement to a share of the proceeds, a court may consider fluid recovery. (*[127 Cal.App.3d at p. 123](#)*) **[\*\*\*\*65]**

On the other hand, any kind of "fluid recovery," including the creation of a trust fund, may be inappropriate, in a particular case, because of an insufficient "correlation" or "overlap" between the injured class of persons and the class to be benefitted by the form of recovery proposed. (*[Id., at p. 132](#)*.)

Although it is unclear the extent to which the *parens patriae* provisions of the Cartwright Act apply to this case, those provisions afford guidance to the trial courts (see *[Vasquez v. Superior Court \(1971\) 4 Cal.3d 800, 820 /94 Cal.Rptr. 796, 484 P.2d 964, 53 A.L.R.3d 513](#)*), and they reflect a policy favoring *individual* recovery wherever possible. Among other things, those provisions (1) limit recovery of damages to "Any person who is injured in his business or property . . ." (*[Bus. & Prof. Code, § 16750, subd. \(a\)](#)*), (2) authorize the Attorney General "to secure monetary relief . . . for injury sustained by . . . natural persons to their property . . ." (*[§ 16760, subd. \(a\)\(1\)](#)*), and (3) mandate that each injured person be given "a reasonable opportunity to secure his appropriate portion of the monetary **[\*\*\*\*66]** relief" so awarded (*id.*, subd. (e)(1)). Finally, the act provides that any funds awarded by the court as monetary relief which are not "exhausted by distribution . . . [to injured persons] shall be treated . . . as . . . unclaimed property" subject to escheat to the state. (*Id.*, subd. (e)(3).)

Applying the considerations previously set forth in *[Bruno, supra](#)*, to the present case, the trial court's distribution plan reasonably assures that the settlement fund will be paid to those consumers actually injured by Levi Strauss' alleged misconduct, thereby obviating any resort to a trust fund remedy. The size of individual claims evidently was not so trivial as to discourage their filing, as approximately 1.3 million claims were filed; the average family ultimately may recover from \$ 10 to \$ 12 according to Levi Strauss' calculations. Moreover, lack of documentation was no obstacle to individual recovery in this case, for the trial court relieved claimants of that obligation, recognizing the likelihood that few potential class members **[\*491]** would have retained any proof of purchase or similar confirmatory documents.

**[\*\*584] [\*\*\*625]** The majority, **[\*\*\*\*67]** characterizing the consumer trust fund device as "increasingly popular" and "widely used" (*ante*, pp. 475, 478), cites no case, and our research has uncovered none, that overturned a trial court's settlement distribution plan in favor of a consumer trust fund or other "fluid recovery" long after claims had been filed and substantial monies expended in administering claim procedures. Indeed, our research has uncovered no California case in which the trial court has ever found a consumer trust fund to be appropriate. In the federal courts, several circuits have held or implied that fluid class recovery is never permissible. (*[Eisen v. Carlisle](#)*

& Jacqueline (2d Cir. 1973) 479 F.2d 1005, vacated on other grounds ([1974\) 417 U.S. 156 \[40 L.Ed.2d 732, 94 S.Ct. 2140\]](#); [Windham v. American Brands, Inc. \(4th Cir. 1977\) 565 F.2d 59](#), cert. den. (1978) 435 U.S. 968 [56 L.Ed.2d 58, 98 S.Ct. 1605]; [In re Hotel Telephone Charges \(9th Cir. 1974\) 500 F.2d 86](#).) At least one federal appellate court has overturned a trial court's decision to create a consumer trust fund. ( [In re Folding Carton Antitrust Litigation \(7th Cir. 1984\) 744 F.2d 1252](#).) [\*\*\*\*68] Apart from this lack of support for fluid recovery in general, requiring such a recovery here would be unwise in light of the present status of this case. To declare nugatory at this late stage the trial court's efforts to achieve an equitable distribution directly to injured claimants would serve no overriding public purpose. Indeed, it would result in an inexcusable waste of time, money and effort heretofore expended by the settling parties.

Both the majority and the concurring opinions of Chief Justice Bird nonetheless criticize both the terms of the settlement and the trial court's various rulings in support thereof. In light of the fact that neither opinion would, at this late date, overturn the settlement, and indeed the intervenor/appellant at oral argument stipulated that the settlement should be approved, these criticisms seem entirely misplaced. Nonetheless, in the interest of fairness to the trial judge and the parties to the settlement, I will briefly comment upon the charges which were seemingly accepted by the majority. (I do not respond to the more personal views expressed in the concurring opinion, as those views do not command majority support.)

First, the majority [\*\*\*\*69] opinion appears to adopt the intervenor's assertion that "only a minority of class members bothered to file claims." (*Ante*, p. 476.) Yet by the April 6, 1981, deadline, 1.3 million claims for 37 million pairs of men's and boys' jeans had been received, a substantial number of claims given the relatively small amounts which were involved. The majority also seems to credit the intervenor's argument that "a large percentage of the [\*492] recovery went to pay inflated or baseless claims," and that "widespread fraud" took place. (*Ibid.*) I cannot agree.

The detailed statistics presented by the Attorney General showed that the average individual claim was for eight pairs of jeans over the course of five years and that the median claim was six pairs. Neither figure is inherently improbable for many people. The trial court could reasonably have concluded that most claimants made good faith estimates of their purchases and that no substantial fraud occurred. Further, the court's requirement that the largest 5 percent of total claims be treated as suspect (requiring further verification) reasonably prevented fraudulent claims. The top 5 percent claimed 20 or more pairs over [\*\*\*\*70] the 5-year period. Absolutely no evidence suggests that those who claimed fewer than that number (some 95 percent of the claimants) were, on a large-scale basis, overstating their claims.

The majority also seems to endorse the intervenor's suggestion that the Attorney General was awarded attorney fees which were "grossly disproportionate" to the settlement. (*Id., at p. 477.*) This point lacks merit. The court awarded \$ 1.2 million to the Attorney General's office as attorney fees. The declarations submitted in support of the fee request show that over 7,800 hours [\*\*626] were expended by the Attorney General's [\*\*585] office, and other evidence confirmed that the fee awarded was reasonable in light of the professional standing of the attorneys who worked on the case, the amount of the settlement (\$ 12.25 million) in relation to prior settlements by Levi Strauss, and the fees awarded in similar cases.

In short, the trial court acted well within its discretion in approving the settlement and ordering its distribution in the manner previously discussed. Although a substantial residue of funds remains undistributed, the question of the proper disposal of these funds is [\*\*\*\*71] not presently before us. We should not attempt to influence the trial court's ultimate decision in that regard by praising the "considerable merit" (*ante*, p. 479) of a consumer trust fund, a doubtful device which, in my view, remains essentially untested and possesses substantial countervailing disadvantages, particularly in this case.

## King v. Meese

Supreme Court of California

October 26, 1987

L.A. No. 32133

**Reporter**

43 Cal. 3d 1217 \*; 1987 Cal. LEXIS 446 \*\*; 743 P.2d 889; 240 Cal. Rptr. 829

M. L. KING et al., Plaintiffs and Appellants, v. GEORGE MEESE, as Director, et al., Defendants and Respondents

**Prior History:** [\*\*1] Superior Court of Los Angeles County, No. C565535, Norman R. Dowds, Judge.

**Disposition:** Our order of December 5, 1985, enjoining enforcement of the provisions of [Vehicle Code sections 16028 through 16035](#) is vacated. The order of the trial court denying the motion for a preliminary injunction is affirmed. The case is remanded for further proceedings consistent with the foregoing opinion.

## Core Terms

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rates, drivers, insurers, plaintiffs', south central, private insurance, financial responsibility, coverage, assigned risk, driving, license, trial court, state action, preliminary injunction, residents, premium, fine, procedural due process, classification, delegation, regulation, declarations, merits, driving record, decisions, automobile liability insurance, unfair discrimination, geographic area, private insurer, proceedings

## LexisNexis® Headnotes

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Criminal Law & Procedure > Commencement of Criminal Proceedings > Accusatory Instruments > Citations

Insurance Law > ... > Coverage > Compulsory Coverage > Operator License Suspensions

Insurance Law > ... > Coverage > Compulsory Coverage > General Overview

### [\*\*HN1\*\*](#) Accusatory Instruments, Citations

The 1984 Robbins-McAlister Financial Responsibility Act (the 1984 Act), 1984 Cal. Stat. 1322, allows a peace officer to request proof of financial responsibility "whenever a notice to appear is issued" for any alleged moving violation. [Cal. Veh. Code § 16028](#). Failure to provide such proof is itself an infraction. However, if it is established that the driver actually was financially responsible at the time in question notwithstanding the lack of written evidence, the citation will be dismissed. [Cal. Veh. Code § 16028\(e\)](#). If such proof is not forthcoming, the driver is subject to a fine ranging from \$ 100 to \$ 240. [Cal. Veh. Code § 16028\(a\)](#). Moreover, within 60 days of that conviction, the driver must provide proof of financial responsibility (and maintain it for three years) or the driver's license will be suspended. [Cal. Veh. Code § 16034](#).

43 Cal. 3d 1217, \*1217 1987 Cal. LEXIS 446, \*\*1

Insurance Law > ... > Coverage > Compulsory Coverage > General Overview

## **HN2** Coverage, Compulsory Coverage

See [Cal. Veh. Code §16028\(a\)](#).

Insurance Law > ... > Coverage > Uninsured Motorists > General Overview

Insurance Law > Liability & Performance Standards > Good Faith & Fair Dealing > General Overview

Insurance Law > ... > Coverage > Compulsory Coverage > General Overview

## **HN3** Coverage, Uninsured Motorists

In California, in addition to the regular and customary sources for the purchase of insurance coverage which most are familiar with, drivers may be insured through the California Automobile Assigned Risk Plan (CAARP). [Cal. Ins. Code § 11620 et seq.](#) By statute this plan is available to any driver otherwise entitled to insurance but who has been unable in good faith to obtain it within the past 60 days. [Cal. Ins. Code § 11620](#); California Automobile Assigned Risk Plan § 2430. All insurers are required to participate in the program. [Cal. Ins. Code § 11620](#). CAARP offers the statutorily required minimum insurance plus optional medical and uninsured motorist coverage. California Automobile Assigned Risk Plan §§ 2406-2408.

Insurance Law > Industry Practices > Rate Regulation > General Overview

Insurance Law > ... > State Insurance Commissioners & Departments > Hearings & Orders > Hearings

## **HN4** Industry Practices, Rate Regulation

The California Automobile Assigned Risk Plan, [Cal. Ins. Code § 11620](#), rates are set by the insurance commissioner after public hearings, and are based on a number of classifications (including geographical area).

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

## **HN5** Appellate Jurisdiction, Final Judgment Rule

Placement in the California Automobile Assigned Risk Plan (CAARP), [Cal. Ins. Code § 11620 et seq.](#), results as a condition of being unable to procure insurance through ordinary means. The inability to procure insurance by ordinary means is, of course, the result of determinations made by individual insurers to refuse to provide coverage to the driver in question. Hence, eligibility for CAARP is not reviewable because there is no decision to review.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

## **HN6** Standards of Review, Abuse of Discretion

The trial court must be affirmed unless it abused its discretion in denying a preliminary injunction.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

### **HN7** [down] **Injunctions, Preliminary & Temporary Injunctions**

In exercising its discretion, the trial court must consider two interrelated factors, specifically, the likelihood that plaintiffs will prevail on the merits at trial, and the comparative harm to be suffered by plaintiffs if the injunction does not issue against the harm to be suffered by defendants if it does.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

### **HN8** [down] **Injunctions, Preliminary & Temporary Injunctions**

The trial court must consider the likelihood of plaintiffs' ultimate success on the merits in determining whether to issue a preliminary injunction. Although consideration of this issue does not entail final adjudication of the ultimate rights in controversy, it does affect the showing necessary to a balancing-of-hardships analysis. That is, the more likely it is that plaintiffs will ultimately prevail, the less severe must be the harm that they allege will occur if the injunction does not issue. This is especially true when the requested injunction maintains, rather than alters, the status quo.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

### **HN9** [down] **Injunctions, Preliminary & Temporary Injunctions**

On review, a trial court's order with regard to a preliminary injunction may be affirmed if either the balance-of-hardships analysis or plaintiffs' likelihood of success considerations would alone support the ruling. However, if the trial court relies on but one of the foregoing, the reviewing court must determine whether that reliance conclusively supports the trial court's determination regardless of the remaining considerations.

Constitutional Law > Substantive Due Process > Scope

Criminal Law & Procedure > ... > Vehicular Crimes > License Violations > General Overview

Governments > State & Territorial Governments > Licenses

### **HN10** [down] **Constitutional Law, Substantive Due Process**

It is well established in California that the privileges conferred by a driver's license constitute an important property right, although not so fundamental a right as to trigger a strict scrutiny analysis.

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

Criminal Law & Procedure > Sentencing > Fines

Governments > State & Territorial Governments > Licenses

### **HN11** [down] **Procedural Due Process, Scope of Protection**

Before any criminal sanction is imposed for failure to establish financial responsibility, such as a fine, the state must comply with a panoply of procedures. Moreover, under the 1984 Robbins-McAlister Financial Responsibility Act, 1984 Cal. Stat. 1322, a license can be suspended only after such an adjudication. Hence, at one level, there is ample due process before any sanctions are imposed for lack of financial responsibility.

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > State Regulation

Civil Rights Law > ... > Elements > Color of State Law > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

#### **HN12** [down] **Energy & Utilities, State Regulation**

Only in extreme cases of pervasive state regulation, coupled with a state-guaranteed monopoly, has the court equated private decisions with state action.

Civil Rights Law > ... > Elements > Color of State Law > General Overview

#### **HN13** [down] **Elements, Color of State Law**

It is only when state law encourages the decision-making procedure in question, or when a statute permits that which had been prohibited by common law, that the decisions of private parties can potentially be considered state actions.

Civil Rights Law > ... > Elements > Color of State Law > General Overview

Governments > State & Territorial Governments > Licenses

#### **HN14** [down] **Elements, Color of State Law**

The state's decision to impose a fine or suspend a license is a state action.

Civil Rights Law > ... > Elements > Color of State Law > General Overview

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

#### **HN15** [down] **Elements, Color of State Law**

In determining whether procedural due process is afforded plaintiffs, it is axiomatic that a court look only to the asserted state duty and cognizable state action. Thus, if the state provides a program to satisfy its duty, and that program is procedurally adequate, then the state action is constitutional.

Constitutional Law > Congressional Duties & Powers > Necessary & Proper Clause

Governments > Legislation > Enactment

## **HN16** [blue icon] Congressional Duties & Powers, Necessary & Proper Clause

The great weight of California authority has found a delegation of legislative power to industrial or professional associations only where statutes gave such groups the power to initiate or enact rules that acquired the force of law. Other decisionmaking authority, even if the decision had a significant impact on a person's daily life, has not constituted a delegation.

Constitutional Law > Congressional Duties & Powers > Necessary & Proper Clause

## **HN17** [blue icon] Congressional Duties & Powers, Necessary & Proper Clause

A statute does not delegate legislative authority to a private industry unless it empowers that industry to initiate or enact rules that have legal force. A statute that merely permits a private seller to decide to whom to sell, and at what price, is not unconstitutional.

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

Constitutional Law > Separation of Powers

## **HN18** [blue icon] Procedural Due Process, Scope of Protection

So long as a legislatively mandated system meets minimum procedural due process standards, the court cannot look behind the enacted framework to replace the legislature's social judgment with its own.

## **Headnotes/Summary**

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### **Summary**

#### **CALIFORNIA OFFICIAL REPORTS SUMMARY**

In an action by individual plaintiffs seeking to restrain the enforcement of the Robbins-McAlister Financial Responsibility Act (Stats. 1984, ch. 1322), which makes it an infraction for a motorist stopped for a moving violation to fail to provide proof of financial responsibility, the trial court denied plaintiffs' motion for a preliminary injunction, finding that the balance of hardship favored defendants, the former Director of the Department of Motor Vehicles, the Commissioner of the California Highway Patrol, the Attorney General, and the Sheriff of Los Angeles County. The trial court inferred from the enactment of the act itself that the Legislature had determined that substantial harm was being caused by uninsured drivers, especially if their victims were not themselves insured. (Superior Court of Los Angeles County, No. C565535, Norman R. Dowds, Judge.)

The Supreme Court vacated its order staying enforcement of the act, affirmed the trial court's order denying the motion for a preliminary injunction, and remanded for further proceedings. The court held the California Automobile Assigned Risk Plan ([Ins. Code, § 11620 et seq.](#)) provided the required access to insurance in a manner that comports with procedural due process. It held the plan effectively guarantees that insurance is offered and available to all eligible drivers in the state, and requires the program's rates to be set by the Insurance Commissioner after public hearings. The court further held the regulatory structure did not constitute a delegation of legislative authority to the private insurance industry, applying the longstanding rule that a statute does not delegate legislative authority to a private industry unless it empowers that industry to initiate or enact rules that have legal force. The court held plaintiffs were not likely to prevail on the merits, and the trial court's decision to deny the motion for a preliminary

injunction should therefore be affirmed. (Opinion by Panelli, J., with Lucas, C. J., Arguelles, Kaufman, JJ., and Feinerman (Robert), J., \* concurring. Separate concurring opinion by Broussard, J., with Mosk, J., concurring.)

## **Headnotes**

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

#### **Injunctions § 21—Preliminary Injunctions—Appeal—Denial of Preliminary Injunction.**

--On review of the denial of a preliminary injunction, the trial court must be affirmed unless it abused its discretion in making its determination. In exercising its discretion, the trial court must consider two interrelated factors: the likelihood that plaintiff will prevail on the merits at trial, and the comparative harm to be suffered by plaintiff if the injunction does not issue against the harm to be suffered by defendant if it does. The more likely it is that plaintiff will ultimately prevail, the less severe must be the harm that they allege will occur if the injunction does not issue. This is especially true when a requested injunction maintains, rather than alters, the status quo.[See **Cal.Jur.3d**, **Injunctions**, § [104; Am.Jur.2d, Injunctions, § 24.](#)]

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

#### **Injunctions § 21—Preliminary Injunctions—Appeal—Preliminary Injunction.**

--On review, a trial court's order with regard to a preliminary injunction may be affirmed if either the balance-of-hardships analysis or plaintiff's likelihood of success considerations would alone support the ruling. However, if the trial court relies on but one of the foregoing, the reviewing court must determine whether that reliance conclusively supports the trial court's determination regardless of the remaining considerations.

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

#### **Automobiles and Highway Traffic § 4—Operators' Licenses—Regulation and Licensing of Drivers—Privilege.**

--The privileges conferred by a driver's license constitute an important property right, although not so fundamental a right as to trigger a strict scrutiny analysis.

### **CA(4)** [4] (4)

#### **Automobiles and Highway Traffic § 37—Criminal Offenses—Financial Responsibility Law—Procedural Due Process.**

--Under the Robbins-McAlister Financial Responsibility Act (Stats. 1984. ch. 1322), making it an infraction for a motorist stopped for a moving violation to fail to provide proof of financial responsibility, the California Automobile Assigned Risk Plan (CAARP, [Ins. Code, § 11620 et seq.](#)) provides the required access to insurance in a manner that comports with procedural due process. CAARP effectively guarantees that insurance is offered and available to all eligible drivers and requires that the program's rates are to be set by the Insurance Commissioner after public hearings. Motorists have no procedural due process right to examine and challenge the decisionmaking process of private insurers. The acts of private insurers in setting rates or denying coverage are not state acts. Only in extreme cases of pervasive state regulation coupled with a state-guaranteed monopoly are private decisions equated with state action.

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\* Presiding Justice, Court of Appeal, Second Appellate District, Division Five, assigned by the Chairperson of the Judicial Council.

CA(5) [ ] (5)

**Constitutional Law § 43—Distribution of Governmental Powers—Delegation of Power—To Private Agencies—Insurance Companies—Financial Responsibility Law.**

--The Robbins-McAlister Financial Responsibility Act (Stats. 1984, ch. 1322), making it an infraction for a motorist stopped for a moving violation to fail to provide proof of financial responsibility, does not constitute a delegation of legislative authority to the private insurance industry. A statute does not delegate legislative authority to a private industry unless it empowers that industry to initiate or enact rules that have legal force. A statute that merely permits a private seller to decide to whom to sell, and at what price, is not unconstitutional. (disapproving [Rosner v. Peninsula Hospital Dist. \(1964\) 224 Cal. App. 2d 115 \[36 Cal. Rptr. 332\]](#), to the extent it is inconsistent.)

**Counsel:** Armando M. Menocal III, Angela Glover Blackwell, Lois Salisbury and James R. Wheaton for Plaintiffs and Appellants.

Paul Hoffman, Mark D. Rosenbaum, Gary Williams, Wesley Fenderson, Jr., City Attorney (Compton), Troy B. Smith, Deputy City Attorney, Harry M. Snyder and Gail K. Hillebrand as Amici Curiae on behalf of Plaintiffs and Appellants.

John K. Van de Kamp, Attorney General, Henry G. Ullerich and Christopher C. Foley, Deputy Attorneys General, for Defendants and Respondents.

Ronald A. Zumbrun, Anthony T. Caso, Lee Roy Pierce, Jr., Allen M. Katz, Munger, Tolles & Olson, Horvitz, Levy & Amerian, Ellis J. Horvitz, Peter Abrahams, O'Donnell & Gordon, Pierce O'Donnell, Anne B. Roberts, [\*\*2] Gail Ruderman Feuer and Allan Ides as Amici Curiae on behalf of Defendants and Respondents.

**Judges:** Opinion by Panelli, J., with Lucas, C. J., Arguelles, Kaufman, JJ., and Feinerman (Robert), J., \* concurring. Separate concurring opinion by Broussard, J., with Mosk, J., concurring.

**Opinion by:** PANELLI

## **Opinion**

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[\*1220] In this case we are called upon to determine whether, as plaintiffs allege, the 1984 Robbins-McAlister Financial Responsibility Act (Stats. 1984, ch. 1322), when considered in relation to the relevant provisions of the Insurance Code pertaining to automobile insurance, fails to provide drivers with adequate procedural due process of law. For the reasons set forth below we hold that plaintiffs' concerns are legally without merit, and are more properly addressed to the Legislature than to the courts.

### I. *Legislative Framework*

California first enacted a financial responsibility law in 1929, which, like those that followed, required all drivers to be "financially responsible" (usually by means of insurance) for any injury they caused [\*\*3] while driving. However, enforcement of the requirement was triggered only when the driver was *at fault* in an accident causing either bodily injury, or property damage in excess of \$ 100 (later amended to \$ 200). Even then, there was no sanction for failing to have insurance if the driver was able to post a bond in an amount determined by the Department of Motor Vehicles (DMV) to be sufficient to meet the likely liability. Failure to either post a bond or provide proof of financial responsibility resulted in suspension of driving privileges.

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\* Presiding Justice, Court of Appeal, Second Appellate District, Division Five, assigned by the Chairperson of the Judicial Council.

In 1931, we held this law constitutional as against a substantive due process challenge, specifically that not all drivers could afford to comply with the law, and that negligent wealthy drivers could continue to drive but that not so negligent but less affluent drivers could have their licenses suspended. ([Watson v. Department of Motor Vehicles \(1931\) 212 Cal. 279 \[298 P. 481\].](#))

In 1974, the financial responsibility law was amended to require the posting of a bond or the filing of proof of financial responsibility whenever a driver was *involved* in an accident resulting in either bodily injury, or property damage **[\*\*4]** exceeding \$ 200, regardless of fault. That too was held to be constitutional in light of an uncodified statute declaring that the purpose of the law was not so much to deter negligent drivers, but rather to insure that everyone, negligent or not, was able to compensate for any harm they **[\*1221]** caused while driving. (Stats. 1974, ch. 1409, § 1, held constitutional in [Anacker v. Sillas \(1976\) 65 Cal. App. 3d 416, 421-422 \[135 Cal. Rptr. 537\].](#))

In 1984, the Legislature, concerned that too many motorists still were not financially responsible, enacted the Robbins-McAlister Financial Responsibility Act (1984 Act). In addition to the requirements of prior enactments, **HN1**<sup>1</sup> the 1984 act allows a peace officer to request proof of financial responsibility "whenever a notice to appear is issued" for any alleged moving violation. ([Veh. Code, § 16028.](#))<sup>1</sup> Failure to provide such proof is itself an infraction. (*Ibid.*) However, if it is established that the driver actually was financially responsible at the time in question notwithstanding the lack of written evidence, the citation will be dismissed. ([Veh. Code, § 16028 \[\\*\\*5\] , subd. \(e\).](#)) If such proof is not forthcoming, the driver is subject to a fine ranging from \$ 100 to \$ 240. ([Veh. Code, § 16028, subd. \(a\).](#)) Moreover, within 60 days of that conviction, the driver must provide proof of financial responsibility (and maintain it for three years) or the driver's license will be suspended. ([Veh. Code, § 16034.](#))

**[\*\*6]** From the foregoing, it is clear that the 1984 Act significantly increased the need for insurance. Now, for the first time, failure to have written evidence of financial responsibility is itself an offense. Nonetheless, the full implications of the financial responsibility laws cannot be understood without reference to the Insurance Code.

California is a so-called "open rate" state, that is, rates are set by insurers without prior or subsequent approval by the Insurance Commissioner (Commissioner). ([Ins. Code, § 1850.](#)) This is not to say, however, that there is absolutely no regulation of the rates. California law does require that rates not be "excessive, inadequate or unfairly discriminatory." ([Ins. Code, § 1852.](#)) No rate is excessive unless: "(1) such rate is unreasonably high for the insurance provided and (2) a reasonable degree of competition does not exist in the area with respect to the classification to which such rate is applicable." (*Ibid.*) Risk classifications are permissible if based on any **[\*1222]** reasonable (i.e., actuarially sound), and not prohibited, ground. ([Ins. Code, § 1852 \[\\*\\*7\] , subd. \(d\).](#)) Although the term "unfairly discriminatory" is not defined in [Insurance Code section 1852, section 11628](#) of that code prohibits discrimination by an insurer with regard to issuance of policies, or the terms of such policies, on the basis of "race, language, color, religion, national origin, ancestry, or location within the same geographic area." "Geographic area" is defined as an area "not less than 20 square miles," and is made up by combining a series of contiguous zip code zones. Under the statutory scheme, different geographic areas may be treated differently.

Although insurers need not file their rates with the Commissioner, nor obtain approval of rates, the Commissioner may on his own initiative investigate rates. ([Ins. Code, § 12924.](#)) Moreover, a person objecting to a rate or

<sup>1</sup> [Section 16028](#) provides in pertinent part: **HN2**<sup>1</sup> "(a) Every person who drives a motor vehicle required to be registered in this state upon a highway . . . shall, when required by a peace officer pursuant to subdivision (c) or (d), provide evidence of financial responsibility for the vehicle . . . [para. ] (c) Whenever a notice to appear is issued for any alleged violation of this code, . . . the cited driver shall furnish written evidence of financial responsibility, as defined by subdivision (b), upon request of the peace officer issuing the citation . . . If the cited driver fails to provide evidence of financial responsibility at the time the notice to appear is issued, the peace officer may issue the driver a notice to appear for violation of subdivision (a) . . . ."

There are various forms of proof of financial responsibility, but the most common, and the one at issue here, is a certificate of insurance. The certificate must verify that the insured is covered for not less than \$ 15,000 per person bodily injury, \$ 30,000 per accident bodily injury, and \$ 5,000 per accident property damage. ([Veh. Code, §§ 16028, subd. \(b\), 16056.](#))

classification may file a complaint with the insurer and, if dissatisfied with the insurer's response, file a complaint with the Commissioner. ([Ins. Code, § 1858.](#))

The Commissioner may, at his option, dismiss the complaint without investigation. (*Ibid.*) In fact, the Commissioner routinely does so if the complaint **[\*\*8]** fails to come within his perceived jurisdictional powers. A common example of a routinely dismissed complaint is one alleging a refusal by an insurer to provide coverage to an applicant.<sup>2</sup> If the Commissioner does investigate, he may hold public hearings, issue findings, and assess penalties. The decisions of the Commissioner are subject to judicial review. ([Ins. Code, § 1858.6.](#)) Should the Commissioner make a determination that the rates are excessive or are not excessive, then the complainant, on request, is entitled to know the basis of such determination. ([Ins. Code, § 1858.7.](#)) In this regard, plaintiffs allege that only once in the last decade has the Commissioner declared a rate to be excessive.

**[\*\*9] [HN3](#)**

In California, in addition to the regular and customary sources for the purchase of insurance coverage which most are familiar with, drivers may be insured through the California Automobile Assigned Risk Plan (CAARP). ([Ins. Code, § 11620 et seq.](#)) By statute this plan is available to any driver otherwise entitled to insurance but who has been unable in good faith to obtain it within the past 60 days. ([Ins. Code, § 11620;](#) Cal. Admin. **[\*1223]** Code, tit. 10, ch. 5, subch. 3, art. 8, § 2430.)<sup>3</sup> All insurers are required to participate in the program. ([Ins. Code, § 11620.](#)) CAARP offers the statutorily required minimum insurance plus optional medical and uninsured motorist coverage. (CAARP, §§ 2406-2408.)

**[HN4](#)** The CAARP rates are set by the Commissioner after public hearings, and are based on a number **[\*\*10]** of classifications (including geographical area). There is a rate differential of \$ 600 between drivers with no accidents or traffic violations in the last three years and those with twelve or more "points" during that period.<sup>4</sup> (Prior to 1987, the differential was \$ 200.) Under CAARP, the highest annual premium for "good drivers" (i.e., those with zero points) is for youthful drivers in the highest rated geographic areas (e.g., South Central Los Angeles). The annual premium for these drivers is \$ 662. For adult drivers in the highest rated geographic area who have zero points, the annual premium is \$ 516. CAARP provides that the premium can be paid in five installments provided a 25 percent deposit is made. In order to use the installment plan an additional \$ 2 fee per installment is charged. (CAARP, § 2443.1.)

**[\*\*11]** In most parts of the state, CAARP rates are higher than those offered by voluntary insurers. However, in certain areas, including the area in which all plaintiffs reside (South Central Los Angeles), CAARP is allegedly less expensive than non-CAARP insurance. It appears that statewide, approximately 35 percent of those with CAARP insurance are drivers with no points.

Being placed with CAARP is really a "nondecision." That is, no entity "decides" to place a driver in the program. Rather, **[HNS](#)** placement in the plan results as a condition of being "unable to procure [insurance] through

<sup>2</sup>The Commissioner is of the opinion that an insurer may refuse to insure based on any permissible classification. Hence, an insurer may decide not to write any policies in a geographic area without violating the Insurance Code, and so the Commissioner is without jurisdiction to enjoin the conduct. Presumably, though, the Commissioner does have authority to investigate a claim that insurers are refusing to write policies on the basis of race or any other *prohibited* classification, pursuant to [Insurance Code section 11628.](#) We also note that under [Insurance Code section 657,](#) an applicant who is denied coverage by an insurer is entitled to a statement of reasons from the insurer as to why the application was rejected.

<sup>3</sup>All Administrative Code references are to this article, and are hereinafter denominated CAARP followed by the relevant section number.

<sup>4</sup>Points are accumulated based on accidents and vehicular offenses. For example, a first moving violation is generally assigned one point, although a serious moving violation is valued at four points. An accident causing bodily injury or over \$ 250 in property damage is worth two points. Three years is the maximum permissible period for consideration of such an event under the CAARP penalty point system. (CAARP, § 2460.3(a).)

ordinary means." The inability to procure insurance by ordinary means is, of course, the result of determinations made by individual insurers to refuse to provide coverage to the driver in question. Hence, eligibility for CAARP is not reviewable because there is no decision to review.

**[\*1224] II. Factual and Procedural Background of this Litigation**

The individual named plaintiffs in this action are seven residents of South Central Los Angeles.<sup>5</sup> At the time this action was filed, they ranged in age from 19 to 73. Most were retired or unemployed, but one was employed and earning \$ 17,000 [<sup>\*\*12</sup>] a year. Some suffered from medical disabilities (none of which precluded driving), and some relied on driving to go to and from work or to the doctor. Some had been insured in the recent but not immediate past, while others had not been insured.

Despite the above differences, all of the named plaintiffs shared some common characteristics. As previously noted, all lived in South Central Los Angeles. None of them had been involved in an accident or had a traffic violation within the last three years or since they started driving.<sup>6</sup> All have had difficulty finding insurers willing to issue them a policy, and none had found private insurance at premiums below those offered by CAARP. Plaintiffs felt that it was unfair to lump them with bad drivers for insurance purposes notwithstanding their clean driving records, and [<sup>\*\*13</sup>] to be charged correspondingly higher premiums as a result. Many could not afford insurance even under the CAARP or would have difficulty paying the CAARP premiums.

The action was brought on behalf of the named plaintiffs and "all others similarly situated," specifically, licensed drivers who do not have the required "insurance or proof of insurance" and "all who have been fined or lost their licenses" pursuant to [Vehicle Code section 16034](#). The class has not been certified.

The defendants are (in their official capacities) George Meese, former Director of the DMV, James Smith, Commissioner of the California Highway Patrol, John Van De Kamp, Attorney General, and Sherman Block, Sheriff [<sup>\*\*14</sup>] of Los Angeles County. Neither the Commissioner nor any private insurer has been named a party defendant in the action.

Plaintiffs filed their complaint on Friday September 13, 1985, and requested a temporary restraining order enjoining the operation of the 1984 [<sup>\*1225</sup>] Act. The trial court refused to issue the restraining order, but set a hearing date for plaintiffs' motion for a preliminary injunction.

In support of their motion for preliminary injunction, plaintiffs submitted a number of declarations and exhibits.<sup>7</sup> This evidence tended to establish that the level of competition among automobile insurers found elsewhere in the state was lacking in South Central Los Angeles. Most "mainstream" insurers were allegedly refusing to write policies in that area, or would only insure those who already had insurance. Many of the insurers who did offer insurance for the area were said to be "sub-standard," that is, they specialized in high risk customers and hence charged the highest rates. Insurance by mail was also available, but plaintiffs did not discuss this option except to note that such companies "provide no service through agents or offices for acquiring insurance, servicing [<sup>\*\*15</sup>] policies, or handling claims."

Defendants submitted no evidence in opposition to plaintiffs' motion. However, this court may (as did the trial court) infer from enactment of the 1984 Act itself that the Legislature had determined that substantial harm was being caused by uninsured drivers, especially if their victims were not themselves insured.

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<sup>5</sup> The eighth named plaintiff is the United Front Against Insurance Discrimination, a coalition of organizations "to fight automobile insurance discrimination against residents of Los Angeles."

<sup>6</sup> Three years is the length of time that the DMV is generally required to retain data concerning a driver's accidents or traffic infractions. ([Veh. Code, §§ 1807, 12810.5](#)) Most plaintiffs have been "clean" drivers for significantly longer than three years.

<sup>7</sup> In view of the remainder of our opinion, we do not address defendants' objections to the proffered evidence.

The trial court denied plaintiffs' motion, finding that a balance of hardships favored defendants. Plaintiffs then petitioned the Court of Appeal for supersedeas. That court denied the petition. We granted the subsequent petition to this court for review, and stayed enforcement of the 1984 Act. We also transferred the appeal, then pending before the Court of Appeal, to this court.

### III. The Questions Presented

The scope of our task is greatly narrowed not only by the limited attack made by plaintiffs, but also by the various concessions made by **[\*\*16]** defendants. First and foremost, plaintiffs have expressly and repeatedly confined themselves to two main legal theories: (1) By providing no mechanism whereby a driver can question and challenge (a) an insurer's decision not to issue a policy or (b) the rate thereof, and by effectively making the ability to drive contingent on having insurance, the state is denying drivers procedural due process of law; and (2) By effectively requiring drivers to carry insurance, by allowing insurers to decide who will or will not be able to obtain private insurance, and by failing to provide adequate guidelines to insurers in making **[\*1226]** their decision, the Legislature has unconstitutionally delegated its authority to insurers.<sup>8</sup>

**[\*\*17]** Similarly, defendants also concentrate on two major points. First, they contend that since the appeal is from a denial of a preliminary injunction we can affirm the trial court solely by balancing the equities without reaching the merits of plaintiffs' claims. Second, they argue that even if we reach the merits and find that there is a procedural due process interest involved, CAARP meets all constitutional standards, and hence the 1984 Act is constitutional.<sup>9</sup>

**CA(1)** **(1)** As defendants correctly note, at this stage **[\*\*18]** of the proceedings, i.e., denial of a preliminary injunction, **HNG** the trial court must be affirmed unless it abused its discretion in making its determination. (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69 [196 Cal. Rptr. 715, 672 P.2d 121].) **HNT** In exercising its discretion, the trial court must consider "two interrelated factors," specifically, the likelihood that plaintiffs will prevail on the merits at trial, and the comparative harm to be suffered by plaintiffs if the injunction does not issue against the harm to be suffered by defendants (or in this case the people of the State of California) if it does. (*Id. at pp. 69-70.*)

Although there is no data quantifying the harm to be caused by issuing the injunction, there is no doubt that the victims of accidents caused by uninsured drivers suffer greatly, especially if these victims do not themselves have medical or uninsured motorist coverage. Against that unquantified harm, the trial court weighed the effect of the law on plaintiffs. Many members of the putative class were undoubtedly faced with fines and threatened with or actually subjected to suspension of their licenses.<sup>10</sup> Without **[\*\*19]** **[\*1227]** considering the merits, the trial court found that the balance of hardships favored defendants, and therefore denied the injunction.

In doing so, the trial court considered the reasoning of the Michigan Supreme Court in *Shavers v. Kelly* (1978) 267 N.W.2d 72 [267 N.W.2d 72]. That case raised similar issues to those raised here, and is discussed in detail *infra*.

<sup>8</sup> Plaintiffs do not attack the pre-1984 financial responsibility laws, nor do they contend that the 1984 Act denies them substantive due process or equal protection. Moreover, plaintiffs do not allege that the Commissioner is improperly carrying out his duties or that any insurer is failing to comply with the law. We also note that plaintiffs do not argue that private insurance rates are actually "excessive" in violation of *Insurance Code section 1852*. Plaintiffs assert that even if the Commissioner and various insurers had been joined as defendants, and even if we found plaintiffs' legal propositions persuasive, we would be without power to remedy the situation through a decree directed at the Commissioner or any insurer.

<sup>9</sup> For their part, defendants do not strongly argue that the state has no responsibility or duty to provide access by all to insurance at rates set in a constitutionally permissible manner (i.e., neither arbitrarily nor capriciously). They do strongly maintain, however, that private insurers do not constitute an arm of the state, and their acts are not "state acts" cognizable under the *Fourteenth Amendment to the United States Constitution* or *article I, section 7 of the California Constitution*.

<sup>10</sup> We note that the statistics quoted by plaintiffs as establishing the number of citations issued under the 1984 Act prior to the trial court's hearing did not differentiate between those who could not afford or could not obtain insurance, and those who simply would not buy it even if they could afford it.

At this point it is necessary only to point out that the Michigan court agreed with plaintiffs' legal position but stayed the effect of its decision for 18 months so that the Legislature could enact appropriate corrective legislation. Inferentially, then, even after the plaintiffs in that case won on the merits [\*\*20] the Michigan court must have found that a balance of hardships favored defendants.

However, the procedural posture in *Shavers* is strikingly different from that in the instant case. In *Shavers*, the law in question, a no-fault plan which effectively required all drivers to carry insurance, had been in effect, and enforced, for four and one-half years. For the Michigan court to enjoin enforcement would therefore have *changed* the status quo. In contrast, the 1984 Act had only been in effect for a short time when the trial court heard the preliminary injunction motion. Hence, in the case at bench, an injunction would have *maintained* the status quo. We therefore conclude that reference to *Shavers* is of limited value with regard to a balancing-of-hardships analysis.

We conclude that the trial court did not err insofar as it found that the balance-of-hardships analysis favored defendants. However, as previously stated, [HN8](#)[<sup>↑</sup>] the trial court must also consider the likelihood of plaintiffs' ultimate success on the merits in determining whether to issue a preliminary injunction. Although consideration of this issue does not entail final adjudication of the ultimate rights [\*\*21] in controversy ([Cohen v. Board of Supervisors \(1985\) 40 Cal.3d 277, 286 \[219 Cal. Rptr. 467, 707 P.2d 840\]](#)), it does affect the showing necessary to a balancing-of-hardships analysis. That is, the more likely it is that plaintiffs will ultimately prevail, the less severe must be the harm that they allege will occur if the injunction does not issue. This is especially true when the requested injunction maintains, rather than alters, the status quo. ([Continental Banking Co. v. Katz \(1968\) 68 Cal.2d 512, 528 \[67 Cal. Rptr. 761, 439 P.2d 889\]](#)) We believe it is the mix of these factors that guides the trial court in its exercise of discretion.

[CA\(2\)](#)[<sup>↑</sup>] (2) [HN9](#)[<sup>↑</sup>] On review, a trial court's order with regard to a preliminary injunction may be affirmed if either the balance-of-hardships analysis or plaintiffs' likelihood of success considerations would alone support the ruling. ([Cohen, supra, 40 Cal.3d at pp. 286-287](#).) However, if the trial court relies on but one of the foregoing, the reviewing court must determine whether that [\*1228] reliance conclusively supports the trial court's determination regardless of the remaining [\*\*22] considerations.

Although the balance of hardships favors defendants in this case, we cannot say that it tilts so sharply in their favor that it supports the trial court's order irrespective of the likelihood of plaintiffs' success on the merits, especially where, as here, the trial court's order denying the motion had the effect of altering the status quo. Normally, it would be appropriate to remand the case to the trial court for consideration of the latter question. However, plaintiffs have argued, and we agree, that there exist no contested factual questions necessary to resolve the case. In addition, the legal issues have been exhaustively briefed by the parties and numerous amici. In light of these factors and the importance of the case, we take the unusual, but practical, step of reaching and resolving the merits ourselves.

#### IV. Discussion

##### A. Procedural Due Process.

[CA\(3\)](#)[<sup>↑</sup>] (3) [HN10](#)[<sup>↑</sup>] It is well established in California that the privileges conferred by a driver's license constitute an important property right ([Rios v. Cozens \(1972\) 7 Cal.3d 792 \[103 Cal. Rptr. 299, 499 P.2d 979\]; Bell v. Burson \(1971\) 402 U.S. 535 \[29 L. Ed. 2d 90, 91 S. Ct. 1586\]](#)), [\*\*23] although not so fundamental a right as to trigger a strict scrutiny analysis ([Hernandez v. Department of Motor Vehicles \(1981\) 30 Cal.3d 70 \[177 Cal. Rptr. 566, 634 P.2d 917\]](#)). It is equally clear that [HN11](#)[<sup>↑</sup>] before any criminal sanction is imposed for failure to establish financial responsibility, such as a fine, the state must comply with a panoply of procedures. Moreover, under the 1984 Act, a license can be suspended only after such an adjudication. Hence, at one level, there is ample "due process" before any sanctions are imposed for lack of financial responsibility.

But it is plaintiffs' contention that the foregoing process comes too late. The critical moment, according to plaintiffs' theory, occurs when they attempt to obtain insurance from the private insurance market and are unable to do so. [CA\(4\)](#)[<sup>↑</sup>] (4) Plaintiffs assert that they have a substantive right either to participate in the private insurance market or to obtain coverage from the private insurance market and it is this right which cannot be impaired without

procedural protection. Plaintiffs contend they have a procedural due process right to examine and challenge the decisionmaking process of [\*\*24] private insurers.

Plaintiffs' position finds support in *Shavers v. Kelly, supra, 267 N.W.2d 72*. In *Shavers*, the Michigan Supreme Court reviewed a legislatively enacted [\*1229] no fault insurance law, which required all drivers to establish their financial responsibility in order to register or operate a motor vehicle. In most other respects, the legislative framework encompassing financial responsibility and insurance regulation was generally similar to that now in place in California.<sup>11</sup> Michigan also had a program similar in many respects to CAARP.

The *Shavers* court began its consideration by holding that insurers were instruments of the state in carrying out Michigan's no-fault policy, and hence acts by insurers were state acts. Since drivers had a right not to be arbitrarily or capriciously denied by state actions the state-mandated insurance (at fair [\*25] and equitable rates), the court held that procedural due process was required. At a minimum, that required the state to provide a meaningful way for drivers to challenge an insurer's coverage or rate-setting decision. The court also went on to consider the effect of the Michigan assigned risk program, but concluded that the program did not cure the constitutional infirmity.

Although defendants in the instant case attempt to distinguish *Shavers*, there is no reasoned way to do so. Thus, if we applied the reasoning of that case here, we would be compelled to find that plaintiffs would likely prevail on the merits. However, we are not persuaded by the reasoning in *Shavers*, and decline to follow that case in two crucial respects. First, we cannot agree that the acts of private insurers in setting rates or denying coverage are state acts. Second, because of the foregoing, we cannot concur in the Michigan court's summary consideration and rejection of the assigned risk program as a constitutional alternative to meeting due process requirements.

We turn first to the state-action question. We have never held that a private company in a competitive industry is a state agent, [\*26] or that its decisions on how to price and market its product constituted state action. To the contrary, *HN12*[<sup>12</sup>] only in extreme cases of pervasive state regulation coupled with a state-guaranteed monopoly have we equated private decisions with state action.<sup>12</sup>

[\*\*27] [\*1230] There are many products and services the use of which is obligatory to the enjoyment of a state-protected property right, such as fire extinguishers for buildings, or smog control devices or mufflers for cars. The state generally should be able to rely on such products to be supplied by the marketplace, and the suppliers should not become state agents on the ground that state law has created or expanded the demand for their product or mandated its use. Rather, *HN13*[<sup>13</sup>] it is only when state law encourages the decision-making procedure in question, or when a statute permits that which had been prohibited by common law, that the decisions of private parties can potentially be considered state actions. (See *Garfinkle v. Superior Court (1978) 21 Cal.3d 265, 278-279 [146 Cal. Rptr. 208, 578 P.2d 925]* [holding that nonjudicial foreclosure is not state action despite its statutory authorization]; *Kruger v. Wells Fargo Bank (1974) 11 Cal.3d 352, 361-362 [113 Cal. Rptr. 449, 521 P.2d 441, 65 A.L.R.3d 1266]* [refusing to find that the action of a bank in asserting a statutory right of setoff constituted state action].)

Even though the [\*28] acts of insurers in setting rates and their decisions whether to provide coverage are not state actions, as we have already stated *HN14*[<sup>14</sup>] the state's decision to impose a fine or suspend a license is a

<sup>11</sup> However, unlike California, Michigan required that all insurance rates be approved by its insurance commissioner.

<sup>12</sup> See *Gay Law Students Assn. v. Pacific Tel. & Tel. Co. (1979) 24 Cal.3d 458 [156 Cal. Rptr. 14, 595 P.2d 592]*. In *Gay Law Students*, we found that a public utility is more akin to a governmental entity than a purely private employer. As factors leading to that conclusion, we noted the following: "[Breadth] and depth" of governmental regulation; a regulatory framework establishing that the state "expects" a utility to act like a governmental entity, not a private corporation; the fact that the prices charged for the utility and the standards of the facilities were determined by the state; the endowment of the utility with a number of the state's sovereign powers; the guaranteed monopoly status of the utility; the guaranteed return on investment; and the public's need to purchase the monopolistic utility's product. (*Id. at pp. 469-472*.) Insurance companies might possess only the last of the foregoing attributes: the public's need to buy the product. Without more, that does not approach the situation described in *Gay Law Students*.

state action. We must, therefore, consider what process is due to insure that this limited state action is not performed arbitrarily or capriciously.

Plaintiffs contend that the only way to guarantee access to insurance, at "fair and equitable" rates (although not necessarily affordable rates<sup>13</sup>), is to provide the procedural process they request. Defendants do not strongly challenge plaintiffs' contention that by effectively requiring drivers to carry insurance, the state may have a duty to make insurance available to drivers in a manner that is neither arbitrary nor capricious.<sup>14</sup> However, they argue that one way to meet that duty is through the CAARP. We agree.

[\*\*29] We are persuaded that we must look to the CAARP in deciding whether the 1984 Act comports with procedural due process. As part of our analysis, we take note of the assessment by the *Shavers* court of Michigan's Assigned Risk program. That court identified three problems: (1) there was a "statutory presumption that the rates charged will be higher than the [\*1231] rates for motorists in the open marketplace. *M.C.L. § 500.3365*; M.S.A. § 24.13365." (*267 N.W.2d at p. 89*.); (2) the rates set by the program were subject to the same procedural and substantive inadequacies as those found in the private market; and (3) there was no way to challenge placement in the program "with its presumptively higher rates." (*Ibid.*) Having recited these problems, the court summarily concluded that the program was inadequate to meet due process requirements.

We cannot dispose of CAARP as easily. [HN15↑](#) In determining whether procedural due process is afforded plaintiffs, it is axiomatic that we look only to the asserted state duty and cognizable state action. (See *Garfinkle, supra, 21 Cal.3d at pp. 281-282*; *Kruger, supra, 11 Cal.3d at pp. 366-367*.) [\*\*30] <sup>15</sup> Thus, if the state provides a program to satisfy its duty, and that program is procedurally adequate, then the "state action" is constitutional. Inasmuch as we have determined (contrary to the *Shavers* court) that the acts of private insurers do not constitute state actions, we need not consider CAARP in relation to private insurance. Rather, we must look to CAARP standing alone to determine whether it meets the required procedural due process standards.

[\*\*31] In our judgment, CAARP effectively guarantees that insurance is offered and available to all eligible drivers in the state. Further, CAARP requires the program's rates to be set by the Commissioner after public hearings. (*Ins. Code, § 11620*, CAARP, § 2404.) Thus, a plan is in place to meet the state's asserted duty, and the plan is, on its face, procedurally sound. The burden is therefore squarely on the plaintiffs to establish an infirmity in CAARP. In attempting to meet that burden, plaintiffs put forth five arguments (including the three mentioned in *Shavers*). We ultimately conclude that none has merit.

First, plaintiffs allege that CAARP was originally designed to be used by bad drivers. As a consequence, plaintiffs assert that CAARP rates are "presumptively" higher than those of private insurers.<sup>16</sup> In support, they point to [\*1232] the hearsay words of an official in the Commissioner's office: if CAARP rates are lower than those of private insurers, "something is wrong."

<sup>13</sup> Plaintiffs have conceded that if after a due process hearing the same rates were approved as are now in effect, they would have no remedy.

<sup>14</sup> We did not reach this issue in *Watson, supra, 212 Cal. 279*, which concerned a substantive due process challenge to the financial responsibility laws, and plaintiffs do not quarrel with the result in that case.

<sup>15</sup> Plaintiffs cite *Applebaum v. Board of Directors (1980) 104 Cal. App. 3d 648, 657 [163 Cal. Rptr. 831]*, for the proposition that private enterprises affected with a public interest must provide "fair procedures," a notion akin to due process. However, that case and the law review article upon which it relies make it clear that "fair procedures" extend only to membership decisions of work-related entities, such as unions or professional organizations. The only exception is that the doctrine has been extended to a hospital's decisions concerning a doctor's staff privileges. (Sloss & Becker, *The Organization Affected With a Public Interest and Its Members -- Justice Tobriner's Contribution to Evolving Common Law Doctrine* (1977) 29 Hastings L.J. 99.) *Applebaum* has no application to this case.

<sup>16</sup> We note, though, that there is certainly no "statutory presumption" in California that CAARP rates are higher than those in the voluntary market, in contrast to the described situation in Michigan.

[\*\*32] Defendants dispute the accuracy of plaintiffs' premise, but either way it is agreed that 35 percent of those insured through CAARP are drivers with no points and hence are presumptively good drivers. Because of the number of good drivers in the program, CAARP premiums significantly differentiate between drivers with no points and others.<sup>17</sup> [\*\*33] (CAARP, § 2460.3 subd. (g).) In addition, even if "something is wrong," as plaintiffs assert, their remedy is through the Commissioner, who may investigate private insurance rates to determine if they are "excessive" or revise the rates set in CAARP. Plaintiffs have made some showing that a "reasonable degree of competition does not exist in [South Central Los Angeles] with respect to the classification to which such rate is applicable." (*Ins. Code, § 1852.*) That is half of the necessary statutory showing required to obtain relief from the Commissioner.<sup>18</sup>

Second, plaintiffs claim that CAARP "stigmatizes the driver vis-a-vis future insurance opportunities." The only evidence on point is a declaration by an experienced, licensed insurance agent who serves the South Central Los Angeles community. However, that declaration does not show that, for purposes of future insurance opportunities, an insurer treats a CAARP driver any differently from a previously uninsured driver.<sup>19</sup> Therefore, we cannot find that CAARP results in unconstitutional state-mandated stigmatization.

[\*\*34] [\*1233] Third, plaintiffs complain that they cannot challenge CAARP rates, another concern of the *Shavers* court. This is true on an individual premium basis at the time of application. However, unlike private insurance rate-setting systems, CAARP rate criteria are set out publicly, so the application of rate classification to an individual premium is a ministerial task and easily verified by the applicant. On a larger scale, rates are set periodically by the Commissioner after public hearings.<sup>20</sup> Consequently, ample process is afforded with regard to CAARP rates and premiums.

Fourth, plaintiffs note that coverage under the CAARP is limited and they cannot choose their carrier. If they desire additional insurance, they must take out a separate and allegedly expensive supplemental policy with another insurer. Even if true, this additional insurance is not required [\*\*35] by law, and so the need to obtain it is purely self-imposed. Further, plaintiffs specify no reason, and we can discern none, why the inability to choose a particular insurer renders CAARP constitutionally infirm. This allegation therefore can have no effect on plaintiffs' constitutional challenge.

Finally, as in *Shavers*, plaintiffs complain that they cannot challenge their placement in CAARP. But as we noted earlier, there is no single decision consigning someone to that program; only individual decisions of insurers to

<sup>17</sup> In his March 20, 1986, decision, the Commissioner explained that a recent change in the CAARP regulations was designed "to double the premium surcharges [of drivers with points] in order to place the increasing costs of liability insurance on the negligent automobile operator who has documented traffic violations. This change is also necessary to reflect inflation because these fixed surcharges haven't been changed in past years when the base rates were increased." This explanation takes into account much of plaintiffs' concern. Before these changes were adopted, base rates, paid by all CAARP insureds, increased although the dollar differentiation between "good" and "bad" drivers remained constant. In effect, the percentage differential between such drivers decreased each time that the base rates increased. The prior \$ 200 spread between the best and worst drivers did not fully reflect the actuarial difference in the cost of insurance between them. Hence, plaintiffs were correct in asserting that good drivers in CAARP subsidized bad drivers. That concern now has less persuasive force.

<sup>18</sup> As plaintiffs have not filed a complaint with the Commissioner, nor joined him in the present case, we cannot determine whether the rates are actually excessive. We note, though, that such a claim was made in a complaint filed with the Commissioner by the County of Los Angeles. Plaintiffs here are, of course, also free to file a complaint. As stated previously, the Commissioner's final determination is subject to judicial review.

<sup>19</sup> One plaintiff, in his declaration, states that he believes it is "unfair" for him to be placed in CAARP, where he claims he is "lumped with bad drivers," just because of where he lives. This argument was not set forth in plaintiffs' brief as evidence of "stigmatization." Moreover, as plaintiffs themselves point out, 35 percent of those insured through CAARP are good drivers. Given the differentiation in rates based on driving record, and the foregoing statistic, it cannot be said that this declaration, if true, establishes stigmatization.

<sup>20</sup> Plaintiffs expressly concede for purposes of this suit the procedural due process adequacy of the CAARP rate-setting procedures.

refuse to insure, or to charge rates that the applicant finds unacceptable. Thus, plaintiffs' objection is not to CAARP as such, but to the Commissioner's failure to police the insuring decisions and rate schedules of the private insurers.

In sum, because the acts of private insurers do not constitute state actions, plaintiffs have no procedural due process right to review or challenge an insurer's decision concerning the denial of coverage or the premiums charged. Although state action is involved in the suspension of a license or the imposition of a fine for failure to establish financial responsibility, the scope of the state's alleged duty can at most [\*\*36] extend to a duty to provide plaintiffs with the required amount of insurance at rates that are neither arbitrary nor capricious. We therefore conclude that CAARP provides the required access to insurance in a manner that comports with procedural due process.

#### B. Delegation of Power.

Plaintiffs' second argument is dealt with more easily. [CA\(5\)↑ \(5\)](#) They contend that the current regulatory structure in California constitutes a delegation [\*1234] of legislative authority to the private insurance industry, which determines who can purchase insurance (and thus who must resort to CAARP) and what rates they must pay. Such a delegation, plaintiffs maintain, is invalid unless accompanied by clear standards to guide the exercise of the delegated power, and adequate safeguards to limit the exercise of discretion.

However, [HN16↑](#) the great weight of California authority has found a delegation of legislative power to industrial or professional associations only where statutes gave such groups the power to initiate or enact rules that acquired the force of law.<sup>21</sup> Other decisionmaking authority, even if the decision had a significant impact on a person's daily life, has not constituted [\*\*37] a delegation.

[\*\*38] The exception to the rule is [Rosner v. Peninsula Hospital Dist. \(1964\) 224 Cal. App. 2d 115 \[36 Cal. Rptr. 332\]](#). In *Rosner*, a hospital adopted an emergency resolution requiring all staff doctors to carry malpractice insurance, and refused staff privileges to Dr. Rosner because he lacked such coverage. The Court of Appeal struck the resolution because it effectively delegated the determination of who could obtain staff privileges to the insurance industry, and it did so without providing adequate safeguards or standards. However, *Rosner* was rejected in a later Court of Appeal decision also concerning a requirement that all staff doctors carry medical malpractice insurance. ( [Wilkinson v. Madera Community Hospital \(1983\) 144 Cal. App. 3d 436 \[192 Cal. Rptr. 593\]](#).) The *Wilkinson* court, relying on our post-*Rosner* decision in [Wilke & Holzheiser, Inc., supra, 65 Cal.2d 349](#), held that the purported delegation was really no delegation at all. Insurance companies had always been entitled to determine who they would insure. The hospital's rule in no way "authorized a private entity to do anything other than what it [\*\*39] was already entitled to do." ([144 Cal. App. 3d at pp. 445-446.](#))

We adhere to the longstanding rule that [HN17↑](#) a statute does not delegate legislative authority to a private industry unless it empowers that industry to initiate or enact rules that have legal force. A statute that merely permits [\*1235] a private seller to decide to whom to sell, and at what price, is not unconstitutional.<sup>22</sup>

#### V. Conclusion

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<sup>21</sup> See e.g., [Bayside Timber Co. v. Board of Supervisors \(1971\) 20 Cal. App. 3d 1 \[97 Cal. Rptr. 431\]](#) (Forest Practice Act resulted in an unconstitutional delegation-of-power because an industry committee was empowered to initiate rules that governed all lumbering in a region, preempting county regulation); [State Board v. Thrift-D-Lux Cleaners \(1953\) 40 Cal.2d 436 \[254 P.2d 29\]](#) (striking down, in part on a delegation of power theory, legislation authorizing a professional organization to set minimum prices binding upon all members of the profession); [Allen v. California Board of Barber Examiners \(1972\) 25 Cal. App. 3d 1014 \[102 Cal. Rptr. 368, 54 A.L.R.3d 910\]](#) (same); [Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Beverage Control \(1966\) 65 Cal.2d 349 \[55 Cal. Rptr. 23, 420 P.2d 735\]](#), result overruled on other grounds in [Rice v. Alcoholic Bev. etc. Control Appeals Bd. \(1978\) 21 Cal.3d 431 \[146 Cal. Rptr. 585, 579 P.2d 476, 96 A.L.R.3d 613\]](#) (fair trade laws upheld against delegation-of-power challenge because prices were set by individual distillers, not by industry association, and were enforced by contract).

<sup>22</sup> To the extent that *Rosner* is inconsistent with the foregoing, it is disapproved.

We conclude that the 1984 Act comports with all procedural due process and delegation-of-power requirements. Therefore, plaintiffs are not likely to prevail on the merits, and the trial court's decision to deny the motion for a preliminary injunction must be affirmed.

In reaching this conclusion, we are not insensitive to plaintiffs' position. There is a certain appeal to plaintiffs' complaint that those with good driving records, who could possibly afford insurance if they lived in a more affluent area, **[\*\*40]** are unable to obtain insurance in the area where they actually live. As a consequence, they face relatively heavy fines and suspended licenses for a traffic infraction that would otherwise be but a minor annoyance. There is also some persuasive force to plaintiffs' concern that the lack of procedural safeguards in the area of private insurance, which might provide a guaranty that such insurance is offered at fair and equitable rates, leads to a feeling of helplessness among those unable to afford or obtain private insurance. However, their case should be made to the Legislature, not to this court. **HN18**<sup>1</sup> So long as the legislatively mandated system meets minimum procedural due process standards, as we found it does, we cannot look behind the enacted framework to replace the Legislature's social judgment with our own. To do so would be an egregious violation of the separation of powers.

Our order of December 5, 1985, enjoining enforcement of the provisions of [Vehicle Code sections 16028 through 16035](#) is vacated. The order of the trial court denying the motion for a preliminary injunction is affirmed. The case is remanded for further proceedings **[\*\*41]** consistent with the foregoing opinion.

**Concur by:** BROUSSARD

## Concur

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**BROUSSARD, J.** I reluctantly concur in the judgment sustaining the trial court's ruling denying a preliminary injunction to restrain enforcement of the 1984 legislation ([Veh. Code, §§ 16028- 16035](#)) providing that a driver cited for a moving violation must provide proof that he has automobile liability insurance. When we granted review, we saw this case as raising two **[\*1236]** significant constitutional issues: (1) whether the state, having effectively made automobile liability insurance compulsory, had a duty to assure that such insurance was available to all its drivers at reasonable and nondiscriminatory rates <sup>1</sup>; and (2) if so, whether the state's statutory and administrative scheme fulfilled that duty. But a funny thing happened on the way to this forum. The state did not dispute its duty to assure that insurance was available to all on a fair and reasonable basis. <sup>2</sup> Instead, it maintained that the California Automobile Assigned Risk Plan (CAARP) fulfilled that obligation. And plaintiffs, on their part, made no attempt to show that insurance was not available **[\*\*42]** under CAARP on a fair and reasonable basis, and in response to our questions disclaimed any notion that affordability was something to be considered in assessing the reasonableness of insurance rates.

Instead, it turned out that plaintiffs' attack on CAARP was based entirely on popular but mistaken notions **[\*\*43]** concerning the assigned risk program. Plaintiffs assert that CAARP was intended only for drivers with bad records, <sup>3</sup> when in fact it serves the broader purpose of making insurance available to anyone who, for any reason, cannot

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<sup>1</sup> In [Shavers v. Kelley \(1978\) 402 Mich. 554 \[267 N.W.2d. 72\]](#), the Michigan Supreme Court held that "[motorists] are constitutionally entitled to have . . . insurance made available on a fair and equitable basis."

<sup>2</sup> Every state which has enacted compulsory automobile insurance laws (whether liability insurance or no fault insurance) has also enacted procedures for review of private insurance rates, an assigned risk program, or both. Most states go further, requiring advance approval of insurance rates by an insurance commissioner or board, but there appear to be none which do not recognize the obligation to make sure that insurance is available to those required to possess it.

<sup>3</sup> This claim, while plausible on its face, may be historically inaccurate. According to [Cal. State Auto. etc. Bureau v. Downey \(1950\) 96 Cal. App. 2d 876, 880-881 \[216 P.2d 882\]](#), the impetus for the current assigned risk program was the refusal of insurance companies to insure small trucking companies regardless of their accident record.

obtain private insurance at lower rates. They assume that, as persons with good driving records, they were mistakenly relegated to CAARP, and seek to challenge the decision which assigned them to that fate. In fact, there is no such decision; drivers turn to CAARP when they discover that private insurance is not available, or costs more than CAARP insurance. Finally, plaintiffs assume that their CAARP rates are unfairly high because they are calculated on the basis of a pool containing primarily drivers with bad records. But CAARP charges lower rates for drivers with good records. If the rate differential is inadequate, that issue can be raised in rate-making proceedings before the Insurance Commissioner (Commissioner) and on judicial review of those proceedings.

[\*\*44] The failure of plaintiffs' attack on CAARP dooms their request for a preliminary injunction, and requires us to affirm the ruling below. But that [\*1237] outcome for the present appeal leaves a great many unanswered questions. Since this case remains subject to further proceedings in the trial court, and the matter is one of legislative and public concern, I think it appropriate to note some of those questions.

#### (1) *Factual Background of this Litigation*

This case arises from the attempt of the California Legislature to solve a serious social problem -- the uninsured driver -- without taking into account an equally serious problem -- insurance pricing practices which make automobile liability insurance prohibitively expensive for many of the urban poor. The 1984 Legislature enacted Vehicle Code sections 16028 through 16035, which provide that whenever a driver is cited for a moving violation, he must provide proof of financial responsibility upon request of the citing officer. Violators are subject to a fine of \$ 100 to \$ 240 and penalty. The Department of Motor Vehicles (hereafter DMV or department) is notified of the [\*\*45] conviction, and must suspend the violator's driving privileges unless, within 60 days, he provides proof of financial responsibility. Although statutes provide alternative methods of demonstrating financial responsibility,<sup>4</sup> [\*\*46] the only practical method is purchase of an insurance policy with liability coverage equal to or greater than the statutory minimum.<sup>5</sup>

Since previous California law required proof of financial responsibility only after an accident, the new statute radically accelerated the enforcement of the financial responsibility requirements, increasing substantially the number of persons facing revocation of their licenses for noncompliance with those laws. Purchase of liability insurance became a necessity for all drivers, even those with no personal assets to protect.

But as insurance became essential, for many people it was also becoming more difficult to obtain. Private insurance companies were increasingly unwilling to sell liability coverage, at least at affordable rates, to residents of South Central Los Angeles and portions of Oakland.<sup>6</sup> Often a resident of [\*1238] those areas with a perfect driving record could obtain private coverage, if at all, only by paying more than a resident of some other areas with a history [\*\*47] of accidents and violations.<sup>7</sup> The 1984 legislation did nothing to correct this problem.

<sup>4</sup>The other forms of proof may be found in Vehicle Code sections 16053 (certificate of self insurance); 16054 (insurance policy or bond); 16054.2, subdivision (a) (cash deposit of \$ 50,000 with the DMV). The certificate of self insurance can only be issued to fleet owners of more than 25 vehicles. (§ 16053, subd. (a).) The bond mentioned in section 16054, subdivision (a) is not in fact sold by any surety in the state. It is self-evident that a person who cannot afford to pay the several hundred dollars required for minimum liability insurance is equally unable to deposit \$ 50,000 in cash with the DMV as required by section 16054.2, subdivision (a). Accordingly, purchase of an automobile insurance liability policy is, in fact, compulsory.

<sup>5</sup>The minimum insurance currently required is \$ 15,000 liability coverage per person injured, \$ 50,000 per accident, and \$ 5,000 for property damage. (Veh. Code, § 16056, subd. (a).)

<sup>6</sup>The individual plaintiffs in the present case all reside in South Central Los Angeles, and the evidentiary record on which they base their motion for preliminary injunction refers to that area. Statewide information on insurance rates, however, suggests that the problem of obtaining insurance at affordable rates exists in portions of Oakland, and probably in other low-income urban areas.

<sup>7</sup>For discussion of a similar problem involving property insurance, see Note, *Property Insurance and the American Ghetto: A Study in Social Irresponsibility* (1971) 44 So. Cal. L. Rev. 218.

The individual plaintiffs here are seven residents of South Central Los Angeles. Each has submitted declarations in support of plaintiffs' motion for a preliminary injunction; these declarations, collectively, explain the circumstances which gave rise to this action.<sup>8</sup>

[\*\*48] Plaintiff Benita Hill, 28 years old, states that she is unable to work because of a medical condition (lupus) and must drive to medical appointments. She has never received a traffic ticket or been in an accident. Her monthly income is \$ 485. When she sought private insurance, companies quoted annual rates of \$ 1,050 to \$ 1,400, far beyond what she could afford.

Plaintiff Lorene Dilworth, age 69, has had 1 accident, but no traffic tickets. She lives with her son V. La Val Dilworth, age 19, who has a completely clean driving record. He supports them both with a job paying \$ 6.54 per hour. The California Automobile Association presented the best offer of any private insurance company, \$ 2,634 cash or \$ 3,030 on an installment basis to insure the Dilworths' two cars.

Willie Henry, age 73, has had no tickets or accidents for the past 10 years. His income is under \$ 500 per month. Most companies would not insure him because he had been driving without insurance until the present law went into effect. (One company offered coverage at \$ 1,200.) He discovered he could obtain assigned risk coverage at \$ 481 per year, but cannot afford it as this is equal to one month's income.<sup>9</sup> [\*\*49]

[\*1239] Lawrence Wiley is retired on an income of \$ 996 per month. He has had no tickets in the last five years and no accidents. He was unable to get private coverage, and will be forced to purchase an assigned risk policy at \$ 648 to \$ 731.

The declarations of other plaintiffs recite similar facts. They demonstrate that residents of South Central Los Angeles, even those with good driving records, have considerable difficulty obtaining private insurance coverage. When such coverage is available, the price quoted is very high, much higher than prices for other parts of the state, and often far beyond [\*\*50] the means of the applicant. Thus applicants must resort to the assigned risk program, but those rates, while less than private rates, are still prohibitive to many applicants.<sup>10</sup>

Further evidence supports this conclusion. The ruling of the Commissioner on assigned risk rates, filed March 20, 1986, observes that "[for] a variety of reasons, these are difficult times for some of the insurance companies with respect to the willingness to offer basic automobile liability insurance, particularly in the urban areas. Some agent appointments are being terminated, underwriting standards have been tightened, and some premium rates [\*\*51] have increased." Plaintiffs' counsel submitted a declaration quoting Everett Brookhard, chief of the Consumer Affairs Division of the California Department of Insurance: "The biggest problem in South Central Los Angeles is the lack of a competitive market. The distribution system for insurance sales is not there, especially for the large direct sales companies such as Allstate, State Farm and Farmers insurance companies. While a number of companies may actually quote rates for South Central Los Angeles, many fewer of them were actually doing business there, that is writing policies for South Central Los Angeles residents. They might have rates, but there are no agents authorized to write the policies, nor are the distribution or claims systems there to service the customers.

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<sup>8</sup> The declarations refer to insurance rates as of 1985; current rates are generally higher and the magnitude of the problem has, if anything, become worse. (See Dept. Ins. Auto Ins. Premium Survey (July 15, 1987).) The survey gave the example of a policy providing minimum coverage issued to a 45-year-old married couple with clean driving records. Such a policy would cost from \$ 750 to \$ 1,500 in South Central Los Angeles (an average of about \$ 1,000). It would cost from \$ 250 to \$ 400 in San Diego, and from \$ 150 to \$ 300 in Redding.

<sup>9</sup> As of 1985, \$ 481 was the lowest assigned risk rate available for this territory. (Current rates are higher.) It applied to males over 25, or females over 21, who do not use their car to drive to work, and have a completely clean driving record. It is possible that some other plaintiffs could have obtained assigned risk policies for \$ 481, far less than the private rates recited in their declarations.

<sup>10</sup> Typically, assigned risk rates are much higher than private rates. The converse situation in South Central Los Angeles arises not because assigned risk rates are low for that region -- to the contrary, that territory has the highest assigned risk rates -- but because the territorial differences in assigned risk rates are much less than the territorial differences in private rates.

Additionally, even if they published rates, they often impose so many restrictions (e.g., no prior insurance precludes application), that the insurance quoted at those rates is inaccessible. A 'high percentage' of drivers in South Central Los Angeles are uninsured."

Morris Davis, an insurance agent with offices in South Central Los Angeles, declared: "Currently, out of over 400 insurance companies doing business [\*\*52] in California, I only know of approximately 10 who will write liability insurance policies through local agents and brokers for customers whose [\*1240] vehicles are registered in south central Los Angeles. And, of these companies, virtually all are insurance companies denominated as 'sub-standard.' This means that these companies specifically write for customers who are perceived to be the greatest risk, that is, 'sub-standard' customers, and therefore these companies charge the highest rates. Customers residing in south central Los Angeles, especially in certain zip codes, are stigmatized as 'sub-standard' risks, even if they've had no moving violations and no accidents."<sup>11</sup>

[\*\*53] A number of exhibits verify that private insurance rates in South Central Los Angeles are two to three times as high as rates in other areas of the state, with the result that good driver rates in Los Angeles often exceed rates charged drivers with bad records in other areas.

Davis and others speak also of the reluctance of insurance companies to insure persons who were previously uninsured, a problem of particular concern since the purpose of the 1984 legislation was to compel such persons to obtain insurance. They speak also of the difficulty persons with assigned risk insurance experience in later obtaining private insurance.

## (2) Regulation of Private Automobile Liability Insurance

Automobile liability insurance in California is provided primarily by a private, competitive, largely unregulated market. California has less regulation of insurance than any other state, and in California automobile liability insurance is less regulated than most other forms of insurance.

The principal regulatory law, the McBride-Grunsky Regulatory Act of 1947 ([Ins. Code, § 1850 et seq.](#)) enacts the minimal regulation required to exempt California insurance from federal [\*\*54] **antitrust law**. It governs all forms of insurance including automobile liability insurance. The principal provision, [section 1852](#), provides that "Rates shall not be excessive or inadequate, as herein defined, nor shall they be unfairly discriminatory. [para.] No rate shall be held to be excessive unless (1) such rate is unreasonably high for the insurance provided and (2) a reasonable degree of competition does not exist in the area with respect to the classification to which such rate is applicable." No provision defines "unfairly discriminatory" rates. Subdivision (d) permits insurers to classify risks in accord with the probable effect on losses, utilizing "individual experience, location or dispersion of hazard, or any other reasonable considerations."

[\*1241] A person objecting to a rate or classification can complain to the insurer. ([Ins. Code, § 1858.](#)) If dissatisfied with the insurer's action, he can request a hearing before the Commissioner. (*Ibid.*) If the Commissioner believes the complaint states probable cause to find a violation of [section 1852](#), he may hold hearings (§§ 1858.1, 1858.2), render findings ([§ 1858.3](#)), and impose sanctions [\*\*55] ([§ 1858.4](#)).<sup>12</sup> His decisions are subject to judicial review. ([Ins. Code, § 1858.6.](#))

<sup>11</sup> Davis explained that residents can obtain insurance in only three ways, assigned risk, "substandard companies," and insurance by mail. The substandard companies charge more than assigned risk rates. Companies operating by mail "provide no service through agents or offices for acquiring insurance, servicing policies, or handling claims."

<sup>12</sup> As summarized in [County of Los Angeles v. Farmers Ins. Exchange \(1982\) 132 Cal. App. 3d 77, 87 \[182 Cal. Rptr. 879\]](#): "[The] Commissioner has the power to take corrective action as he deems necessary and proper ([Ins. Code, § 1858.3](#)); he can impose a money penalty not to exceed \$ 1,000 for each failure to comply up to a total penalty of and aggregating no more than \$ 30,000 ([Ins. Code, § 1858.3](#)); he can issue an order specifying in what respects a violation exists and require compliance within a reasonable time thereafter ([Ins. Code, § 1855.3, subds. \(b\) and \(c\)](#)); and in addition to the other penalties provided, he may suspend or revoke, in whole or in part, the certificate of authority of an insurer with respect to the class or classes of insurance

[\*\*56] Insurers do not file rates with the Commissioner, nor do rates require his approval. He is forbidden to set or fix rates. ([Ins. Code, § 1850.](#)) Rates come to his attention only when, sua sponte or in response to a complaint, the Commissioner requests such information from the insurer. The Commissioner asserts no authority over refusals to insure, and complaints charging that an insurer has unreasonably refused to insure are routinely rejected as raising an issue beyond the Commissioner's jurisdiction.

The declarations on file in this action make it clear that South Central Los Angeles is not a competitive market. Consequently the Commissioner has authority to determine whether rates charged for that area are "unfairly discriminatory" or "unreasonably high." ([Ins. Code, § 1852.](#)) Efforts to obtain such a determination, however, have failed. The Commissioner appears to assume that so long as a rate is actuarially sound it cannot be unfairly discriminatory or unreasonably high.<sup>13</sup>

[\*\*57] The Commissioner's assumption that an actuarially sound rate is necessarily a fair and reasonable rate is open to challenge. One can argue that it is unfairly discriminatory to use classifications which result in charging good drivers in some areas much more than bad drivers in others parts of the [\*1242] state; it could be considered unreasonable to price liability insurance at levels many cannot afford. Rates which took affordability into account, and weighted driving record more than residence, would go far to alleviate the problem caused by the financial responsibility laws.<sup>14</sup>

[\*\*58] The Commissioner's practices, however, make it difficult for drivers to challenge this assumption. The Commissioner has issued no regulations, and published no decisions, stating explicitly how he or she determines whether a rate is reasonable and nondiscriminatory.<sup>15</sup> Plaintiffs allege that complaints are routinely dismissed without hearing. And the fate of the City of Los Angeles's suit shows that when hearings are held, the result may be a decision unsuitable for judicial review.<sup>16</sup>

specified in such order which fails to comply within the time limited by such lawful order of the Commissioner pursuant to [section 1858.3. \(Ins. Code, § 1858.4.\)](#)"

<sup>13</sup> Plaintiffs challenge the insurers' claim that rates in South Central Los Angeles are actuarially sound, contending that so little private insurance is now sold in that area that the insurers' accident and loss computations are not statistically reliable. Indeed, considering the disparity between private rates and assigned risk rates for that region, it is difficult to believe that both are actuarially sound. The question is one which would have to be tested by inquiry into the rates at a trial on the merits. At this stage of the litigation, however, plaintiffs have presented insufficient evidence for us to conclude that the insurers' rates lack actuarial justification.

<sup>14</sup> The fact that current territorial rates may be actuarially justified does not mean that a rate which placed less weight on residence would be unsound, or would be unfair to residents of low-risk territories. As explained by the United States Supreme Court, discussing a company requirement that women pay more into a retirement program because they live longer as a class, "when insurance risks are grouped, the better risks always subsidize the poorer risks. Healthy persons subsidize medical benefits for the less healthy; unmarried workers subsidize the pensions of married workers; persons who eat, drink, or smoke to excess may subsidize pension profits for persons whose habits are more temperate. Treating different classes of risks as though they were the same for purposes of group insurance is a common practice that has never been considered inherently unfair. To insure the flabby and the fit as though they were equivalent risks may be more common than treating men and women alike; but nothing more than habit makes one 'subsidy' seem less fair than the other." ([Los Angeles Dept. of Water & Power v. Manhart \(1978\) 435 U.S. 702, 710](#), fns. omitted [[55 L. Ed. 2d 657, 666-667, 98 S. Ct. 1370.](#)])

<sup>15</sup> In [Shavers v. Kelley, supra, 267 N.W.2d 72](#), the Michigan Supreme Court found state regulation of automobile insurance rates constitutionally inadequate, in part because "[the] statutory structure against 'excessive, inadequate or unfairly discriminatory' rates is without the support of clarifying rules established by the Commissioner, with legislatively sufficient definition, and without any history of prior court interpretation." (P. 88.)

<sup>16</sup> In 1978 the County of Los Angeles filed a complaint with the Insurance Commission, charging two insurers with 20 specified unlawful practices relating to territorial classifications. The Commissioner conducted public hearings and reached the following conclusions:

"....

[\*\*59] [\*1243] Apart from proceedings through the Insurance Commission, the California statutes provide a judicial remedy against discriminatory insurance practices. The Rosenthal-Robbins Auto Insurance Nondiscrimination Law ([Ins. Code, § 11628 et seq.](#)) prohibits a refusal to issue insurance on the same conditions as in other comparable cases for reasons of race, language, color, religion, national origin, ancestry, or "location within a geographic area." This last phrase is defined, however, as "a portion of this state of not less than 20 square miles defined by description in their rating manual of an insurer . . . . Differentiation in rates between geographical areas shall not constitute unfair discrimination." Thus the law has been interpreted to authorize territorial rate differentials, so long as rates are uniform within 20-square-mile blocks (See [County of Los Angeles v. Farmers Ins. Exchange, supra, 132 Cal. App. 3d 77, 84-85.](#)) The result of the 20-square-mile provision is that insurers can draw lines which have the practical effect of discriminating between applicants on the basis of race.

In sum, the deficiencies in California [\*\*60] legislation and administrative regulation are apparent. The present case, however, is not a very suitable one for examining these deficiencies. Plaintiffs have not sought relief from the Commissioner, and thus may encounter questions of exhaustion of remedies. Even apart from those questions, the absence of the Commissioner as a party litigant may deny the court precise information concerning the Commissioner's policies and practices, and leave the court uncertain as to the reasons which he or she might advance in defense of those policies and practices. Finally, plaintiffs' failure to include insurance companies as defendants limits judicial inquiry into whether insurers are charging unfair or discriminatory rates in violation of [Insurance Code section 1852](#), or following practices which violate [section 11628](#).

### (3) *The California Automobile Assigned Risk Plan*

[Insurance Code section 11620](#), provides simply that the Commissioner "shall approve or issue a reasonable plan for the equitable apportionment, among insurers admitted to transact liability insurance, of those applicants for automobile bodily injury and property damages liability [\*\*61] insurance who are in good faith entitled to but unable to procure such insurance though ordinary methods." Rates are set by the Commissioner after public hearing. Current rates are based on the driver's age, sex, use of the car, and place of [\*1244] residence. Drivers with good records receive a small reduction in rates; those with bad records a somewhat larger increase in rates.

Although assigned risk rates also use territorial classifications, the impact of such classifications is much less than in private rates. Assigned risk rates for South Central Los Angeles run about 15 percent above the average assigned risk rates. The record does not contain equally exact information about private rates, but comments in declarations and briefs suggest that the comparable figure for private rates would exceed 100 percent. It is clear

"2. That the use of territorial classification does constitute a reasonable and credible rating criterion, but that this finding should not be considered a blanket approval of the territorial classification presently used by the insurance industry. '[Concerns] expressed by many individuals who wrote to the Commissioners or testified at the hearings to express their sincere and honest bewilderment about the fact that such costs appear to fall more heavily upon those least able to pay are clearly well deserving of further consideration by the Department to identify these perceived inequities';

"3. That the methodologies used to develop geographical rates reasonably achieve the goals intended and therefore are actuarially valid." ( [County of Los Angeles v. Farmers Ins. Exchange, supra, 132 Cal. App. 3d 77, 84-85](#), summarizing the Commissioner's "Findings and Recommendations" filed Dec. 20, 1979.)

The county then filed suit against the insurers and the Commissioner. The trial court upheld demurrers, with leave to amend as to the Commissioner but without leave to amend as to the insurers. On appeal from the latter ruling, the Court of Appeal held that the county had failed to exhaust its administrative remedies because it had not insisted that the Commissioner render findings on the specific unlawful practices alleged in the original complaint. ( [132 Cal. App. 3d 77, 87.](#))

We have not been informed about any further developments in this suit. And despite the reservations in the Commissioner's 1979 decision, the Commissioner has done little or nothing to curb pricing policies which "fall more heavily on those least able to pay."

that for many drivers in South Central Los Angeles, including many with clean driving records, assigned risk rates are substantially less than available private rates.<sup>17</sup>

[\*\*62] The assigned risk program does overcome some of the objections to private insurance regulation: assigned risk rates are set by the state after public hearing, are available for public scrutiny, and subject to judicial review. It does not, however, eliminate the fundamental problems faced by residents of South Central Los Angeles. Assigned risk rates, like private rates, are established on a basis of weighing revenue against expected loss, with no consideration of affordability.<sup>18</sup> [\*\*63] There appears to be no sense that driving record should be entitled to greater weight, or residence to lesser weight, than the actuarial computations would indicate. As a result, assigned risk rates remain prohibitively high for many residents of urban areas. Such rates, however, are not properly subject to review in the present case, but should be challenged at the rate determination hearing before the Commissioner, or upon judicial review of his determination.<sup>19</sup>

#### **[\*1245] (4) Criminal and License Revocation Proceedings**

Although the present decision upholds the facial validity of the 1984 financial responsibility legislation, it does not determine whether its criminal and revocation procedures can validly be applied to individual cases. If a defendant can show that insurance was not available to him upon a fair and reasonable basis, at rates he could afford, I would think he would have an arguable defense to any criminal proceeding. In *In re Antazo (1970) 3 Cal.3d 100 [89 Cal. Rptr. 255, 473 P.2d 999]*, [\*\*64] for example, we held it unconstitutional to imprison a person because he could not afford to pay a fine. The fact that the statute on its face did not discriminate against the poor (a rich man who refused to pay the fine would also go to jail), we said, did not foreclose a constitutional attack; the practical effect of the statute as applied was to discriminate on the basis of wealth. By the same reasoning, I would question whether the state can constitutionally fine a man because he cannot afford to buy insurance, especially if the reason he cannot afford insurance is that, because of his race and poverty, he lives in a part of the state where insurance rates are far higher than in more affluent areas.

The same concern arises in license revocation proceedings. In *Rios v. Cozens (1972) 7 Cal.3d 792 [103 Cal. Rptr. 299, 499 P.2d 979]*, we observed that "[once] licenses are issued, . . . their continued possession may become essential in the pursuit of a livelihood.' . . . [A] person deprived of the right to drive may forfeit his employment and suffer other disabilities." (P. 796, quoting *Bell v. Burson (1971) 402 U.S. 535, 539 [29 L. Ed. 2d 90, 94, 91 S. Ct. 1586]*.) [\*\*65] The impact of license revocation may be far more severe than a \$ 100 to \$ 240 fine. Realistically, the practical effect of revocation is probably to convert a licensed uninsured driver into an unlicensed uninsured driver. But if the driver again encounters the police, he faces conviction for driving with a revoked license, and a possible jail term.

#### **(5) Conclusion**

<sup>17</sup> Plaintiffs assert that a person insured under the program is often rejected or charged higher rates by private companies when he seeks additional insurance (collision or comprehensive coverage, or liability coverage above the minimum). He may also be subject to discrimination when he later tries to leave the program and obtain private coverage. The Commissioner has taken note of this discrimination, but true to the philosophy that nothing is unfair which is actuarially sound, he has ordered the insurers only to desist from discrimination if they cannot show actuarial justification.

<sup>18</sup> In 1985 the insurers requested an increase in assigned risk rates of 60 percent. The Commissioner granted only a 20 percent increase. His opinion, however, makes no mention of affordability, but rejects the insurers' proposal because it did not take account of investment income.

<sup>19</sup> Amicus Consumers Union did appear at the hearing to set the rates which took effect in January of 1987. It complains that while it was permitted to put on its evidence, it was not permitted to participate as a party and to cross-examine the insurers' witnesses. Consumers Union further claims that the Commissioner's decision simply stated the alternatives and adopted one of them, without considering Consumers Union's contentions -- a format which impedes judicial review. The complaints sound very much like those plaintiffs raise about Commissioner action under *section 1852*.

When it comes to automobile liability insurance, the poor pay more or do without. Private companies have been increasingly unwilling to insure residents of certain low-income urban neighborhoods, particularly South Central Los Angeles. Residents are forced to turn to the assigned risk program, paying rates much higher than available through private insurance to persons living in other areas. Those who cannot afford such rates drive without insurance.

This serious social problem has, with enactment of [Vehicle Code section 16028](#), become a legal problem. That statute was intended to compel previously uninsured drivers to purchase insurance by threatening the violator **[\*1246]** with fines and suspension of his driving privileges, yet it did nothing to ensure that insurance was available. Thus **[\*\*66]** the poor no longer have the option of driving without insurance; to comply with the law, they must stop driving, whatever the consequences.

The state's program for assuring the availability of insurance, however, has not kept pace with its financial responsibility laws. Certain problems are apparent: the failure to consider affordability in regulating private rates and setting assigned risk rates; the failure to consider the unfairness of charging a good driver higher rates because of the poor driving habits of his neighbors; the injustice of geographic boundaries which discriminate against the poor; the procedural deficiencies in the Commissioner's office which make it virtually impossible for an individual to challenge the rates and terms offered him. The present case, however, is not a suitable one for resolving those issues. Plaintiffs have limited their attack to selected procedural issues, avoiding the question whether current private or CAARP rates are fair and reasonable. Nothing presented here would justify a conclusion that the 1984 financial responsibility law is facially unconstitutional. Thus on the record before us I concur with the majority that we should sustain **[\*\*67]** the trial court's ruling denying a preliminary injunction.

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End of Document

## Cal. ex rel. Van De Kamp v. Texaco

Supreme Court of California

October 20, 1988

S.F. No. 24987

**Reporter**

46 Cal. 3d 1147 \*; 762 P.2d 385 \*\*; 252 Cal. Rptr. 221 \*\*\*; 1988 Cal. LEXIS 243 \*\*\*\*; 1988-2 Trade Cas. (CCH) P68,288

THE STATE OF CALIFORNIA ex rel. JOHN K. VAN de KAMP, as Attorney General, etc., Plaintiff and Appellant, v. TEXACO, INC., et al., Defendants and Respondents

**Prior History:** [\*\*\*\*1] Superior Court of Sacramento County, No. 321706, Benjamin A. Diaz, Judge.

**Disposition:** We conclude that neither the Cartwright Act, nor the Unfair Practices Act, was intended to apply to a merger. The judgment of the Court of Appeal is affirmed.

### **Core Terms**

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mergers, Cartwright Act, refiners, crude oil, common law, acquisition, Antitrust, Sherman Act, attorney general, consent order, anti trust law, regulation, preempted, Clayton Act, firms, interstate, effects, cases, state law, interstate commerce, combinations, commerce clause, pipeline, anticompetitive, purposes, parties, oil, preemption, marketing, italics

### **LexisNexis® Headnotes**

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

Civil Procedure > ... > Relief From Judgments > Grounds for Relief from Final Judgment, Order or Proceeding > Void Judgments

#### **HN1[ Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

The Cartwright Act states, in [Cal. Bus. & Prof. Code § 16726](#), that except as provided in this chapter, every trust is unlawful, against public policy and void. "Trust" is defined in [Cal. Bus. & Prof. Code § 16720](#)(a, e) as a combination of capital, skill or acts by two or more persons to create or carry out restrictions in trade or commerce, or to make or enter into or execute or carry out contracts, obligations or agreements of any kind or description, by which they agree to pool, combine, or directly or indirectly unite any interests that they may have connected with the sale or transportation of any article or commodity, that its price might in any manner be affected. The Cartwright Act makes agreements in violation of its provisions void and unenforceable, and subject to injunction and civil actions for damages, or fine or imprisonment, or both.

Governments > Legislation > Interpretation

## **HN2** Legislation, Interpretation

When legislation has been judicially construed and a subsequent statute on the same or an analogous subject is framed in the identical language, it will ordinarily be presumed that the legislature intended that the language as used in the later enactment would be given a like interpretation.

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

## **HN3** Antitrust Statutes, Clayton Act

The drafters did not intend the Cartwright Act, [Cal. Bus. & Prof. Code § 16720 et seq.](#), to regulate the bona fide purchase and sale of one firm by another. Any other interpretation of the drafters' intent cannot be reconciled with the Cartwright Act's history.

Antitrust & Trade Law > Sherman Act > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

## **HN4** Antitrust & Trade Law, Sherman Act

The cases allowing challenges to mergers under the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), require that an actual "restraint of trade" be proved.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

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

Mergers & Acquisitions Law > Antitrust > General Overview

## **HN5** Public Enforcement, State Civil Actions

Common law cases condemning mergers all involved clear, actual threats to competition, not merely incipient threats to competition. "Illegality" under the common law meant only that an agreement was void and unenforceable.

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

46 Cal. 3d 1147, \*1147 762 P.2d 385, \*\*385 252 Cal. Rptr. 221, \*\*\*221 1988 Cal. LEXIS 243, \*\*\*\*1

Mergers & Acquisitions Law > Antitrust > Remedies

Mergers & Acquisitions Law > Antitrust > General Overview

## **[HN6](#) [down] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

The drafters of the Cartwright Act, [Cal. Bus. & Prof. Code § 16720 et seq.](#), intended to make their law applicable only to situations in which the parties improperly collude and continue as separate, independent entities, and not to situations in which, by virtue of purchase and sale, or merger, one or more of the entities ceases to exist.

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

## **[HN7](#) [down] Regulated Practices, Trade Practices & Unfair Competition**

The Unfair Practices Act, [Cal. Bus. & Prof. Code § 17000 et seq.](#), defines "unfair competition" as including unlawful, unfair or fraudulent business practice. The statute is directed at on-going wrongful business conduct. The "practice" requirement envisions something more than a single transaction; it contemplates a pattern of on-going conduct. A complaint that attacks only the merger, and no ongoing conduct, does not state a cause of action under [Cal. Bus. & Prof. Code § 17200](#).

## **Headnotes/Summary**

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### **Summary**

#### **CALIFORNIA OFFICIAL REPORTS SUMMARY**

In an action prosecuted by the Attorney General under the Cartwright Act ([Bus. & Prof. Code, § 16720 et seq.](#)) and the Unfair Practices Act ([Bus. & Prof. Code, § 17000 et seq.](#)) to enjoin one oil company from acquiring the California assets of another oil company pursuant to a merger between the two companies, the trial court sustained defendants' demurrer without leave to amend and dismissed the complaint, ruling that neither the Cartwright Act nor the Unfair Practices Act applies to an acquisition or merger, and that the action was preempted by the supremacy clause (U.S. Const., art. VI, [cl. 2](#)) by virtue of a consent decree issued by the Federal Trade Commission. It also ruled the action was preempted by the commerce clause (U.S. [Const., art. I, § 8, cl. 3](#)). (Superior Court of Sacramento County, No. 321706, Benjamin A. Diaz, Judge.) The Court of Appeal, Third Dist., No. 24506, affirmed, concluding the action was preempted by federal [antitrust law](#) under the supremacy clause.

The Supreme Court affirmed the judgment of the Court of Appeal, holding that neither the Cartwright Act nor the Unfair Practices Act was intended to apply to a merger. Noting that when the Cartwright Act was enacted it contained the well-known limitations on combinations and restraints of trade, but failed to include the latest invention of the evolving antitrust statutes--an antimerger provision--and embraced the term "combination," without attempting to modify the language in order to avoid the prevailing narrow construction of that term that excluded mergers, and that the Legislature has never since adopted an antimerger provision, though other states had, the court held the act was not intended to apply to mergers. It held the Cartwright Act was not modeled after the federal Sherman Act, under which some mergers have been prosecuted, and was not a simple codification of common law rules against illegal combinations. The court further held that the Unfair Practices Act is directed at on-going wrongful business conduct, and that since no such practice was alleged or shown, the complaint attacking only the merger, it did not state a cause of action under that act. (Opinion by Lucas, C. J., with Panelli, Arguelles and Eagleson, J., concurring. Separate concurring and dissenting opinion by Mosk, J., with Broussard and Kaufman, JJ., concurring.)

## **Headnotes**

**CA(1a)** (1a) **CA(1b)** (1b)**Monopolies and Restraints of Trade § 7 — Under Cartwright Act — Prohibited Agreements and Combinations — Mergers.**

-- In an action by the Attorney General under the Cartwright Act ([Bus. & Prof. Code, § 16720 et seq.](#)) to enjoin an oil company from acquiring the California assets of another oil company pursuant to a merger between the two companies, the trial court properly sustained defendants' demurrer without leave to amend and dismissed the complaint, since that act's prohibition against an "unlawful combination of capital" did not, and was not intended to, apply to mergers.[See [Cal.Jur.3d, Monopolies and Restraints of Trade, § 39; Am.Jur.2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, § 617.](#)]

**CA(2a)** (2a) **CA(2b)** (2b) **CA(2c)** (2c)**Monopolies and Restraints of Trade § 7 — Under Cartwright Act — Prohibited Agreements and Combinations — Mergers — Legislative Intent — History.**

-- The legislative history of the Cartwright Act ([Bus. & Prof. Code, § 16720 et seq.](#)) shows that it was not intended to apply to mergers, i.e., the bona fide purchase and sale of one firm by another. The act was patterned after an 1889 Texas act (1889 Tex. Gen. Laws, ch. 117, [§ 1](#)) and an 1899 Michigan act (1899 Mich. Pub. Acts, No. 255, [§ 1 \(1\)](#) and [\(5\)](#)). Thus, the Cartwright Act contained well-known limitations on combinations and restraints of trade, but it failed to include the latest invention of the evolving antitrust statutes -- an antimerger provision -- and it embraced the term "combination," without attempting to modify the language in order to avoid the prevailing narrow construction of that term that excluded mergers. The construction of the term "combination" was both widely known and followed. Moreover, although the Legislature has amended the Cartwright Act at least 26 times between 1909 and the present, it has never enacted a merger provision, although other states have done so, and no state statute similar to the Cartwright Act has been construed as applying to mergers. (Disapproving [Munter v. Eastman Kodak Co. \(1915\) 28 Cal.App. 660 \[53 P. 737\]](#), to the extent it is inconsistent.)

**CA(3)** (3)**Statutes § 26 — Construction — Adopted and Reenacted Statutes.**

-- It is a principle of statutory construction that when legislation has been judicially construed and a subsequent statute on the same or an analogous subject is framed in the identical language, it will ordinarily be presumed that the Legislature intended that the language as used in the later enactment would be given a like interpretation.

**CA(4)** (4)**Monopolies and Restraints of Trade § 2 — Definitions and Distinctions — Sherman Act and Cartwright Act — Mergers.**

--Because historical and textual analysis reveals that the Cartwright Act ([Bus. & Prof. Code, § 16720 et seq.](#)) was not modeled after the Sherman Act ([15 U.S.C. §§ 1-7](#)), but was patterned after two state statutes, judicial interpretation of the Sherman Act, while often helpful, is not directly probative of the Cartwright Act's drafters' intent, given the different genesis of the provision against illegal combinations.

**CA(5)** (5)

**Monopolies and Restraints of Trade § 7 — Under Cartwright Act — Prohibited Agreements and Combinations — Merger — Sherman Act.**

-- The cases allowing challenges to mergers under the Sherman Act require, pursuant to [15 U.S.C. § 1](#), that an actual restraint of trade be proved. To the extent the Cartwright Act ([Bus. & Prof. Code, § 16720 et seq.](#)) could be said to be patterned after the Sherman Act, a merger challenge under the state act would require the same showing, i.e., that the merger "effected" an unreasonable restraint of trade. However, nothing in the Sherman Act or the cases applying it supports the view that the Cartwright Act was intended to apply to mergers at all, much less to mergers that pose, at most, an incipient threat to competition.

**CA(6)[] (6)**

**Monopolies and Restraints of Trade § 6 — Under Cartwright Act — Common Law — Public Policy.**

-- Although the public policy underlying the Cartwright Act ([Bus. & Prof. Code, § 16720 et seq.](#)) is rooted in the common law, that is not to say that the act is confined by, or as broad as, the common law; instead, the act stands on its own, and courts must interpret its words as best they can in order to effectuate the intent, not of "the common law," but of the act's drafters.

**CA(7)[] (7)**

**Monopolies and Restraints of Trade [§ 3](#) — Particular Agreements and Combinations — Common Law.**

-- The clear "majority view" at common law was that certain forms of mergers or acquisitions were "illegal." The test of the legality of a combination, regardless of the form it assumed, lay in the object of the combination, and where the purpose, tendency, or natural consequences of a corporate combination was to monopolize or restrain trade, the combination was illegal. The common law cases condemning mergers all involved clear, actual threats to competition, not merely incipient threats to competition. However, the Cartwright Act ([Bus. & Prof. Code, § 16720 et seq.](#)) departed from the common law in a significant way. "Illegality" under the common law meant only that an agreement was void and unenforceable, or subject to prosecution by the state by quo warranto, while under the Cartwright Act an illegal combination is subject to civil damage awards and criminal punishment, among other sanctions.

**CA(8)[] (8)**

**Unfair Competition [§ 3](#) — Unfair Practices Act — Mergers.**

-- A complaint by the Attorney General challenging a merger between two competing oil companies which attacked only the merger, and no ongoing conduct, did not state a cause of action under the Unfair Practices Act, [Bus. & Prof. Code, § 17200](#). The statute is directed at ongoing wrongful business conduct, not a merger, and the unfair practice requirement envisions something more than a single transaction. The mere fact that the Attorney General asserted that defendants had engaged in certain unlawful practices in the past, and may do so in the future, was insufficient.

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**Judges:** Opinion by Lucas, C. J., with Panelli, Arguelles and Eagleson, JJ., concurring. Separate concurring and dissenting opinion by Mosk, J., with Broussard and Kaufman, JJ., concurring.

**Opinion by:** LUCAS

## Opinion

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[\*1150] [\*\*386] [\*\*\*222] The California Attorney General sued under the Cartwright Act ([Bus. & Prof. Code, § 16720 et seq.](#)) and the [\*\*\*\*2] Unfair Practices [\*1151] Act (*id.*, [§ 17000 et seq.](#)) to enjoin defendants Texaco, Inc., (Texaco) et al., from acquiring the California assets of Getty Oil Company (Getty) pursuant to a merger between the two companies.<sup>1</sup>

**CA(1a)** [↑] (1a) The trial court sustained defendants' demurrer without leave to amend, and dismissed the complaint. In the Court of Appeal, the Attorney General asserted the lower court erred in concluding [\*\*\*3] that neither the Cartwright Act nor the Unfair Practices Act applies to an acquisition or merger, and that the action is preempted by the supremacy clause (U.S. Const., art. VI, [cl. 2](#)) by virtue of a consent decree issued by the Federal Trade Commission (FTC). Additionally, the Attorney General asserted, the lower court erred to the extent it held the action is preempted by the commerce clause (*id.*, [art. I, § 8, cl. 3](#)).

The Court of Appeal held the action preempted by federal **antitrust law** under the supremacy clause, and affirmed judgment for defendants on that ground. We affirm the judgment of the Court of Appeal, but we do not reach the preemption questions because we hold that neither cited state law regulates a merger.

### I. Facts and Procedure

Texaco and Getty entered into a merger agreement under which Texaco would acquire Getty, and thereby become the second largest petroleum company in the United States. Pursuant to [15 United States Code section 18a](#), the firms notified the FTC and the United States Justice Department of their agreement, and the FTC proceeded to investigate whether the proposed merger would violate federal **antitrust law**. Thereafter [\*\*\*4] the FTC filed and accepted comments on a provisional consent order concerning both firms. Based in part on comments from, inter alia, the California Attorney General, the FTC issued a complaint under section 7 of the Clayton Act ([15 U.S.C. § 18](#)), detailing the potential anticompetitive effects of the proposed merger. At the same time, the FTC entered into an agreement, in the form of a consent order, with Texaco. The consent order bound Texaco to divest itself of certain Getty assets located throughout the country; offer pipeline access to former Getty customers; and refrain from acquiring wholesale [\*1152] distribution firms in various states. Regarding California assets, the order required Texaco to sell crude oil of specified grade to certain former Getty customers for five years.

The Attorney General was unsatisfied with the consent order, however, and filed the present action, which essentially copies the FTC's complaint based on section 7 of the Clayton Act. The Attorney General's complaint asserted the merger may in several specific respects substantially lessen competition in the state market for crude oil and related products. In other words, [\*\*\*5] the complaint claimed the merger posed an incipient threat to competition.

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<sup>1</sup> Several days after oral argument in this case, defendant Texaco petitioned under the federal bankruptcy law for protection from creditors. Thereafter the United States Bankruptcy Court, Southern District of New York, approved by order a stipulation between the parties in this suit. The stipulation provides that the parties desire this appeal be determined by this court and that "[neither] Texaco nor the Attorney General shall use the pendency of Texaco's [bankruptcy] case as a basis to challenge the other party's right to proceed with the pending appeal in [this] litigation."

## II. Application of the Cartwright Act to a Merger

### A. Words of the Statute

**HN1** The Cartwright Act (or Act) (Stats. 1907, ch. 530, pp. 984-987) states, "Except as provided [\*\*387] [\*\*\*223] in this chapter, every trust is unlawful, against public policy and void." ([Bus. & Prof. Code, § 16726](#).) The Act defines "trust" as "a combination of capital, skill or acts by two or more persons for any of the following purposes: (a) To create or carry out restrictions in trade or commerce. . . . (e) To make or enter into or execute or carry out contracts, obligations or agreements of any kind or description, by which they . . . [agree] to pool, combine, or directly or indirectly unite any interests that they may have connected with the sale or transportation of any . . . article or commodity, that its price might in any manner be affected." (*Id.* [§ 16720, subds. \(a\) & \(e\)\(4\)](#), italics added.) The Act makes agreements in violation of its provisions void and unenforceable (*id.*, § 16722), and subject to injunction (*id.*, § 16754.5) and civil actions for damages [\*\*\*\*6] (*id.*, § 16750). Another section makes violation of the Act subject to fine or imprisonment, or both. (*Id.*, § 16755, subd. (a).)

The Attorney General asserts that a merger is "precisely" a "combination of capital," hence the statute covers mergers. It is questionable, however, whether the statutory meaning of "combination" is so broad. As defendants suggest, the word combination might well contemplate a situation in which separate entities that maintain separate and independent interests, act in concert -- "combine" -- for a certain purpose, but which thereafter *perdurare*, i.e., continue to maintain their separate identities and interests.<sup>2</sup> A bona fide merger, however, is not such a relationship; in a [\*1153] merger the entities lose forever their separate identities, and become a new, independent entity.

[\*\*\*\*7] Accordingly, we question whether the words of the statute support the Attorney General's assertion that it was intended to apply to mergers. On the other hand, we cannot confidently know, without further inquiry, that defendants' interpretation is the intended one. In this situation, it is appropriate to look beyond the statute's terms to discover its intent. (E.g., [Solberg v. Superior Court \(1977\) 19 Cal.3d 182, 198 \[137 Cal.Rptr. 460, 561 P.2d 1148\]](#).)

### B. Purpose of the Statute

The Attorney General first asserts that his interpretation of the statute, and of the word "combination" in particular, best comports with the asserted "manifest purpose" of the statute: protecting competition. ([Marin County Bd. of Realtors, Inc. v. Palsson \(1976\) 16 Cal.3d 920, 928 \[130 Cal.Rptr. 1, 549 P.2d 833\]](#).) His point, however, begs the question. Beyond doubt, the Act was intended to protect and foster competition. The question is, to what lengths did the drafters intend to go to accomplish that goal? Did they intend to regulate any form of business transaction that may affect competition? Or did they intend merely to regulate certain [\*\*\*\*8] types of collusive arrangements between ongoing, separate businesses? As the following discussion discloses, we conclude the drafters did not intend the Act to regulate a merger.

### C. Derivation of the Statute

In the past, we have attributed various (and sometimes conflicting) roots to the Cartwright Act. We have (i) asserted that it was patterned after a proposed alternative bill to what became the Sherman Act ([15 U.S.C. §§ 1-7](#)) ([Palsson, supra, 16 Cal.3d 920, 926; Cianci v. Superior Court \(1985\) 40 Cal.3d 903, 919 \[221 Cal.Rptr. 575, 710 P.2d 375\]](#)); (ii) suggested that it was modeled after the Sherman Act itself (e.g., [Palsson, supra, 16 Cal.3d at p. 925](#)); and (iii) stated that it codified the common law (e.g., [Corwin v. Los Angeles Newspaper Service Bureau, Inc. \(1971\) 4 Cal.3d 842, 852 \[94 Cal.Rptr. 785, 484 P.2d 953\]](#)). (See Lasky, *Folklore and Myth in Judicial Opinions -- Some Reflections Inspired by Texaco-Getty* (1987) 20 U.C.Davis L.Rev. 591.) As discussed below, the first position -- or at least a variation of [\*\*388] [\*\*\*224] it -- is most historically [\*\*\*\*9] correct, and it discloses most clearly the probable intent of the drafters.

<sup>2</sup> As discussed below, this was the accepted interpretation of "combination" when the statute was enacted. (See *post*, part II.C.1.b.; cf., [G.H.I.I. v. MTS, Inc. \(1983\) 147 Cal.App.3d 256, 266 \[195 Cal.Rptr. 211, 41 A.L.R.4th 653\]](#) [suggesting similar interpretation]; [Bondi v. Jewels by Edwar, Ltd. \(1968\) 267 Cal.App.2d 672 \[73 Cal.Rptr. 494\]](#) [same].)

[\*1154] 1. *The Texas Antitrust Act, and Its Progeny*a. *Senator Reagan's Bills of 1888 and 1890*

As noted above, we have previously stated that the Cartwright Act was modeled after a bill that was proposed (but rejected) in the United States Senate as an alternative to what became the Sherman Act. This shorthand description of the Act's lineage was adequate for purposes of our analysis in *Palsson* and [\*Cianci \(16 Cal.3d 920; 40 Cal.3d 903\)\*](#), but for present purposes we need to analyze in greater detail the Act's ancestry.

The chronology is as follows: Senator Reagan of Texas introduced a short "bill to define trusts" in the United States Senate in 1888, on the same day Senator Sherman of Ohio introduced his bill. (19 Cong.Rec. 7512-7513 (1888).) The Senate did not debate the subject, however, until early 1890. In the meantime, several states passed their own antitrust acts. (Davies, *Trust Laws and Unfair Competition*, Dept. of Commerce, Bureau of Corps. (1916) p. 9 [hereafter Davies]; Rush, *Historic Origins of Anti-Trust Legislation* (1953) 18 Mo.L.Rev. 215, 246; [\*\*\*\*10] Rubin, *Rethinking State Antitrust Enforcement* (1974) 26 U.Fla.L.Rev. 653, 657-658, and authorities cited in fn. 22.) Of those acts, the Maine and Kansas laws were the first. (1889 Me. Acts, ch. 266 (Mar. 7, 1889); 1889 Kan. Sess. Laws, ch. 259 (Mar. 9, 1889).)

The Kansas act, similar to the Maine law, made illegal "all arrangements, contracts, agreements, trusts or combinations . . ." for various improper purposes. (Italics added.) In the next two years, most states that enacted antitrust legislation followed the Kansas-Maine scheme. (1889 Neb. Laws, ch. 69; 1889 Iowa Acts, ch. 28; 1889 Mich. Pub. Acts, No. 225; 1889 Tenn. Pub. Acts, ch. 250; 1889 N.C. Sess. Laws, ch. 374; 1889 Mo. Laws, p. 96; 1890 N.D. Laws, ch. 174; 1890 S.D. Laws, ch. 154.) During the same period, the Texas Legislature considered a number of antitrust bills, and in late March 1889, enacted a law (1889 Tex. Gen. Laws, ch. 117) modeled after Senator Reagan's 1888 Senate bill. (Cotner, James Stephen Hogg (1959) pp. 163-165 [biography of Texas Attorney General, a principal author of the 1889 Texas act]; Mathews, *History, Interpretation and Enforcement of the Texas Antitrust Laws*, in [\*\*\*\*11] Southwestern Legal Foundation, Institute on Antitrust Laws and Price Regulations (1950) pp. 28-29 [hereafter *Texas Antitrust Laws*.]) The body of the Texas act was more detailed than the 1888 Reagan version, but it retained a significant aspect of that bill: unlike the Kansas-Maine approach, the Texas act simply declared "trusts" illegal, and proceeded to define "trust" as a "combination of capital, skill or acts . . ." for various specific improper purposes. (Italics added; compare [\*1155] 1889 Tex. Gen. Laws, ch. 117, [§ 1](#), with the 1888 Reagan bill, 19 Cong.Rec. 7512-7513 (both quoted *post*, fn. 14).)

Accordingly, by the time the United States Senate was ready to debate its own antitrust legislation in 1890, there were two streams of state antitrust laws<sup>3</sup> [\*\*\*\*13] -- the Kansas-Maine format -- a broadly worded law that was followed in at least nine states -- and the Texas format -- a more narrowly worded, specific law which at the [\*\*389] [\*\*\*225] time was followed in only one other state.<sup>4</sup> In March 1890, Senator Reagan introduced an amended version of his earlier bill; this second bill followed closely the words and format of the Texas act. (Compare second [\*\*\*\*12] Reagan bill, 21 Cong.Rec. 2456 (1890), with 1889 Tex. Gen. Laws, ch. 117, [§ 1](#), both quoted *post*, fn. 14.) In response to Senator Sherman's criticism, Senator Reagan told the Senate: "The Senator suggests that my amendment ought to undergo the revision of a committee. I may say to the Senator that much of it is copied out of a law, not a law of Congress but one of the States, which underwent very thorough and searching discussion."

<sup>3</sup> Although overlooked by some prominent commentators who have focused on the history of the federal antitrust laws, it has been correctly observed that "the first legislation spawned by the national antitrust movement of the late nineteenth century occurred at the state level." (Thorelli, *The Federal Antitrust Policy: Origin of An American Tradition* (1955) pp. 155-157; Rubin, *supra*, 26 U. Fla. L.Rev at p. 657, and fn. 21.) Indeed, it appears from the debates of the Sherman Act, and the language of the Clayton Act, that Congress borrowed liberally from state statutes of the day (in addition to the common law). On the subject of mergers, for example, compare the acts of Texas (1899), Mississippi (1900), Texas (1903), and Arkansas (1905), all discussed *post*, pages 1159-1160, with the original language of the Clayton Act (38 Stats. 730 (1914)).

<sup>4</sup> (1890) Miss. Laws, ch. 36.) Still, the Texas law was well publicized in this early period. The Texas bill was presented at conventions of state legislators in 1889 and 1890, and "this attention . . . resulted in several states copying [the Texas bill]." (Mathews, *supra*, *Texas Antitrust Laws*, pp. 29-30; see also Cotner, *supra*, at pp. 165-166.)

(21 Cong.Rec. at p. 2564.) It is plain from this chronology, and from comparison of the 1890 Reagan bill and the 1889 Texas act, that Reagan's newly proffered bill was based on the Texas act (which, as noted, itself had its roots in the first version of the Reagan bill). (See Mathews, *supra*, Texas Antitrust Laws, p. 28; Cotner, *supra*, pp. 161-167.)

b. *Interpretation of the Texas and Michigan Acts*

The Senate rejected Reagan's bill, and enacted a much modified version of Senator Sherman's bill in July 1890. (26 Stats. 209; [15 U.S.C. §§ 1-7.](#))<sup>5</sup> [Section 1](#) of the Sherman Act resembled the Kansas-Maine format: it made illegal "[every] contract, combination in the form of a trust or otherwise, or [\[\\*1156\]](#) conspiracy in restraint of trade or commerce among the several States . . ." ([15 U.S.C. § 1.](#)) [Section 2](#) of the Sherman Act had no counterpart in any of the then-existing state antitrust statutes. It provided: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize [\[\\*\\*\\*\\*14\]](#) any part of trade or commerce among the several states . . . shall be deemed guilty of a felony . . ." (*Id.*, [§ 2.](#))

During the next 17 years, a few states adopted versions of the Sherman Act as their own state antitrust statutes.<sup>6</sup> Most, however, adopted acts more closely based on the original Kansas-Maine<sup>7</sup> [\[\\*\\*\\*\\*15\]](#) or Texas<sup>8</sup> formats. Over the years, a number of states switched back and forth between the latter two models, and many added special provisions in a constant effort to refine and focus the law; Texas, for example, enacted revised laws in 1895, 1899, and 1903. Overall, the trend favored the Kansas-Maine format.<sup>9</sup>

[\[\\*\\*\\*\\*16\]](#) [\[\\*\\*390\]](#) [\[\\*\\*\\*226\]](#) In addition to this legislative action, there also developed between 1896-1904, a substantial body of case law construing the various statutes -- particularly the first Texas act (1889 Tex. Gen. Laws, ch. 117), and one of its progeny, the second Michigan act (1899 Mich. Pub. Acts, No. 255).

<sup>5</sup> See Letwin, *Congress and the Sherman Antitrust Law: 1887-1890* (1956) 23 U. Chi. L.Rev. 221, 249-255; Rubin, *supra*, 26 U. Fla. L.Rev. 653, 661, footnote 38; Thorelli, *supra*, at pages 210-214.

<sup>6</sup> (1890 La. Acts, No. 86; 1905 Neb. Laws, ch. 162, [§§ 1, 2.](#))

<sup>7</sup> In addition to the initial round of states that adopted the Kansas-Maine format (*ante*, p. 1154), at least five more states adopted that format. (1891 Ill. Laws, p. 206; 1897 S.C. Acts, No. 265; 1899 Ark. Acts 41; 1907 Wis. Laws, § 1791j, pp. 432-433; 1907 Ind. Acts, ch. 243.) Moreover, a number of states, some of which had previously embraced the Texas format, subsequently enacted a law using the Kansas-Maine format. (See the laws of Kansas, Texas, and Mississippi, *post*, fn. 9.)

<sup>8</sup> It is widely recognized that the 1889 Texas act served as the model for a number of state acts that followed it. (Rubin, *supra*, 26 U. Fla. L.Rev. 653, 659; Mathews, Texas Antitrust Laws, pp. 29-30.) In addition to the initial laws of Mississippi and Ohio (see 1890 Miss. Laws, ch. 36; 1898 Ohio Laws, p. 143), the Texas act appears to have been the model for the subsequent acts of Kansas, Michigan, North Dakota, South Dakota, Nebraska, as well as forming the basis for later revisions of the Texas antitrust acts. (See *post*, fn. 9.)

<sup>9</sup> Texas enacted a new act, similar in all relevant respects to its first, in 1895. (1895 Tex. Gen. Laws, ch. 83.) Mississippi, in 1900, and Texas, in 1899, switched from the Texas format to the Kansas-Maine format. (1900 Miss. Laws, ch. 88; 1899 Tex. Gen. Laws, ch. 146.) Missouri reenacted its Kansas-type act in 1891 (Mo. Laws, p. 186) and did so again in 1895 (Mo. Laws, p. 237). Texas then switched, as did five other states, from the Kansas-Maine format to the Texas format. (1903 Tex. Gen. Laws, ch. 94; 1897 Neb. Laws, ch. 79; 1897 Kan. Sess. Laws, ch. 265; 1897 S.D. Laws, ch. 94; 1899 Mich. Pub. Acts, No. 255; 1905 N.D. Laws, ch. 188.) In 1893, and again in 1897, Illinois reenacted Kansas-type laws (Ill. Laws, p. 89; Ill. Laws, p. 298). In 1899 Kansas returned to its original format, and Missouri again reenacted a Kansas-type law (1899 Kan. Sess. Laws, ch. 293; 1899 Mo. Laws, p. 314). In 1905, Nebraska switched to a format following the Sherman Act. (1905 Neb. Laws, ch. 162.) Tennessee reenacted a law following the Kansas scheme (1903 Tenn. Pub. Acts, ch. 140), and Michigan returned to a Kansas-type law. (1905 Mich. Pub. Acts, No. 229.) Arkansas reenacted a Kansas-type law (1905 Ark. Acts, No. 1). Finally, Missouri continued to tinker with its Kansas-type law. (1907 Mo. Laws, p. 377.) At least one state enacted a law that combined attributes of the two formats. (1892 La. Acts, No. 90.)

[\*1157] The scope and meaning of the term "combination" in the original Texas act was addressed in a number of decisions by the Texas Supreme Court. Cooperative action for a specified, anticompetitive purpose by otherwise independent, competing firms, was held to be an illegal combination.<sup>10</sup> In *Gates v. Hooper (1897) 90 Tex. 563 [39 S.W. 1079]*, however, the court held the 1889 Texas act did not regulate a purchase by one mercantile company of another. The court reasoned that in such a transaction the parties do not "combine," as that term is used in the statute, because under a sale the parties do not maintain a separate, "otherwise independent and competing" relationship.

[\*\*\*\*17] In *Gates, supra, 90 Tex. 563*, a merchant sold his business to a competitor. The court explained why this transaction did not result in a "combination": "In order to constitute a trust, within the meaning of the statute, there must be a 'combination of capital, skill or acts by two or more.' 'Combination,' as here used means union or association. If there be no union or association by two or more of their 'capital, skill or acts,' there can be no 'combination,' and hence no 'trust.' When we consider the purposes for which the 'combination' must be formed, to come within the statute, . . . we are led to the conclusion that the union or association of 'capital, skill or acts' denounced is where the parties in the particular case designed the united co-operation of such agencies, which might have been otherwise independent and competing, for the accomplishment of one or more of such purposes. In the case stated in the petition there is no 'combination.' The plaintiff bought defendant's goods, together with the goodwill of his business, both of which were subjects of purchase and sale. . . . By this transaction neither the capital, skill, nor acts of the parties [\*\*\*\*18] were brought into any kind of union, association or cooperative action. The purchaser became the owner of the things sold . . ." (*Id., at p. 1080.*)

[\*1158] When confronted with the question of whether the two Michigan acts applied to mergers, the Sixth Circuit Court of Appeals interpreted the word "combination" consistently with *Gates, supra, 39 S.W. 1079*. In *Hitchcock v. Anthony (6th Cir. 1897) 83 Fed. 779*, the court rejected a claim that a sale of one dockyard business to another dockyard company violated the first Michigan act (1889 Pub. Acts, No. 225). That act was modeled after the Kansas-Maine format, and prohibited "all contracts, agreements, [\*\*391] understandings and combinations made" [\*\*\*227] for various anticompetitive purposes. Despite the broadly worded proscription of conduct under the act, the court focused on the word, "combination." The court wrote: "The Michigan statute cited was properly construed by Judge Severens, who tried this case below, when he said that: 'It is aimed at combinations between parties who, having each a separate business with no interest or concern in that of the other, join together [\*\*\*\*19] to restrict the output or enhance the prices of goods; and not to cases where one owning a property which he could devote to a given purpose or not, as he pleases, conveys it to another . . .'." (*Id., at p. 781.*)

Similarly, in *A. Booth & Co. v. Davis (C.C.E.D.Mich. 1904) 127 Fed. 875*, the court stated that Michigan's second act (1899 Pub. Acts, No. 225) did not apply to the sale of one fishing business to another fishing company. This Michigan act, as noted, was modeled after the original Texas act. It made trusts illegal, and defined trust as "a combination of capital, skill or arts<sup>11</sup> by two or more persons . . ." for specified anticompetitive purposes. The federal district court found the act was "directed only against combinations of persons or firms . . . conspiring to co-

<sup>10</sup> The court first confronted the meaning of the term in *Texas & P. Coal Co. v. Lawson (1896) 89 Tex. 400 [34 S.W. 919]*. In that case, a coal company leased some of its land to a saloon owner. The contract provided the company would lease to no other saloon; that it would pay its employees by check, not money; and that the saloon would accept the checks as payment, and remit to the company two-thirds of the profits as rent. The court held this illegal under the statute because "the contract provided, not only for the union or association by the parties of their capital, but also for their united and associated action, during the entire term, in furtherance of the common object, and was, therefore, a 'combination of capital' and 'acts.'" (*Id., at p. 920.*)

Similar decisions focusing on the definition of "combination" were handed down thereafter. (See *Welch v. Phelps & Bigelow Windmill Co. (1896) 89 Tex. 653 [36 S.W. 71]* ["The purpose of the statute was to prohibit 'two or more persons,' etc., from uniting or associating their otherwise independent, separate, and possibly competing 'capital, skill, or acts' . . ."]; *Texas Brewing Co. v. Templeman (1896) 90 Tex. 277 [38 S.W. 27, 28]*; *Fuqua v. Pabst Brewing Co. (1896) 90 Tex. 298 [38 S.W. 29, 30]*.)

<sup>11</sup> See post, footnote 14.

operate in violation of its provisions, and that it contains nothing prohibitive of the acquisition by a person . . . or association . . . All such persons . . . may carry on business . . . provided they do not . . . combine with other persons [or] firms . . . to effect in any way the ends denounced in the statute." ( *Id. at p. 878.*) On appeal, [\*\*\*\*20] the Sixth Circuit agreed: "We think that the intent which [would make a given] contract or combination unlawful was one in which both parties participated, and that the act was not intended to comprise a case where there was a sale and a purchase of property, after which the seller should have no interest in the property, and therefore would have no intent as to its further use." ( *Davis v. A. Booth & Co. (6th Cir. 1904) 131 Fed. 31, 37-38* [construing 1899 Michigan act consistently with 1889 Michigan act].)

The few other state cases of that period addressing the issue and construing similar statutes are in accord, and they demonstrate general awareness [\*1159] of the cases discussed above. For example, the Missouri Supreme Court cited and applied *Gates, supra, 39 S.W. 1079*, in holding a tobacco manufacturing corporation's purchase of another manufacturing corporation did not amount to a "combination." ( *State v. Continental Tobacco Co. (1903) 75 S.W. 737, 747.*) [\*\*\*\*21] And, although its opinion was filed shortly after the Cartwright Act was passed in 1907, the Nebraska Supreme Court also cited *Gates, supra*, (together with *Davis, supra*, 127 Fed. 875, 131 Fed. 31, and *Hitchcock v. Anthony, supra, 83 Fed. 779*), for the proposition that sale of one lumberyard business to another lumber company is not itself an illegal combination. ( *Engles v. Morgenstern (1909) 85 Neb. 51 [122 N.W. 688, 690].*) In summary, at the time the Cartwright Act was enacted there was a recognizable body of case law construing the word "combination" (in both Kansas-Maine and Texas-type acts) as not applying to the purchase of one business by another entity engaged in the same business.

#### c. Development of Antimerger Provisions

In the meantime -- and in the face of the various courts' narrow construction of the term "combination" -- some states amended their earlier acts to adopt provisions that reached beyond the scope of all previous state acts and the Sherman Act. These newer acts, in addition to regulating "trusts" and "combinations" in restraint of trade, also regulated, *inter alia*, monopolies [\*\*\*\*22] <sup>12</sup> and, significantly, corporate mergers.

On the subject of mergers, the third of Texas's antitrust acts -- the act of 1899 -- stated that "monopoly" was unlawful, and broadly defined monopoly as including "all [\*\*392] aggregations, amalgamations, affiliations, [\*\*\*228] consolidations or incorporations of . . . assets [or] property, . . . whether effected by the ordinary methods of partnership or by actual union . . . or an incorporated body resulting from the union of one or more distinct firms or corporations, or by the purchase, acquisition or control of shares or certificates of stock <sup>13</sup> . . . if . . . created or entered into for any one . . . of the purposes named in this act . . ." (1899 Tex. Gen. Laws, ch. 146, § 2.)

[\*\*\*\*23] Similarly, the second Mississippi act provided: "No corporation shall directly or indirectly purchase or own the capital stock, or any part thereof, of any other corporation, nor directly or indirectly purchase, or in any manner acquire the franchise, plant or equipment of any other corporation, [\*1160] if such other corporation be engaged in the same kind of business and be a competitor therein." (1900 Miss. Laws, ch. 88, § 5.)

The fourth (1903) Texas act made illegal any monopoly "effected by either of the following methods: [para. ] When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management or control tends to create a trust . . . [para. ] 2. Where any corporation acquires the shares or certificates of stock or bonds, franchise or other rights, or the physical properties, or any part thereof, of any other corporation or corporations, for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition

<sup>12</sup>(E.g., 1899 Tex. Gen. Laws, ch. 146, §§ 2, 3, 4, 13; 1903 Tex. Gen. Laws, ch. 94, §§ 2, 4; 1900 Miss. Laws, ch. 88, § 2; 1905 Neb. Laws, ch. 162, § 2; see also 1889 Tenn. Pub. Acts, ch. 250, § 1; 1890 La. Acts, No. 86, § 3; 1907 Ind. Acts, ch. 243, § 2.)

<sup>13</sup>Eleven years earlier, a commentator had recommended prohibiting corporations from holding or controlling, directly or indirectly, the stock of another corporation. (Stimson, *Trusts* (1888) 1 Harv.L.Rev. 132, 143.)

is accomplished directly or through the instrumentality of [\*\*\*\*24] trustees or otherwise." (1903 Tex. Gen. Laws, ch. 94, § 2 (1), (2).)

Finally, in 1905, Arkansas amended its earlier act and enacted an antimerger provision worded after the Texas version of 1899. (1905 Ark. Acts, No. 1, § 5.)

d. *Enactment of the Cartwright Act*

**CA(2a)[ (2a)** Against this background of increasingly sophisticated state antitrust statutes and case law, our Legislature in 1907 enacted the Cartwright Act. In doing so it settled on an act patterned closely after the original 1889 Texas act and its progeny, most notably the 1899 Michigan act.<sup>14</sup> The Act [**\*1161**] embraced by our

<sup>14</sup> Comparison of selected relevant language (and enforcement provisions) from the various acts and the Reagan bills of 1889 and 1890 demonstrates that the Cartwright Act, although similar in many respects to the Reagan bill of 1890, is more similar to the Texas and Michigan acts. Comparison also discloses that the language of the Cartwright Act has very little in common with that of the Sherman Act. By way of example, some key passages are set out below, with deviation from the words and punctuation of the Cartwright Act noted by underscoring.

The Cartwright Act. As originally enacted, the Cartwright Act read: "A trust is a combination of capital, skill or acts by two or more persons, firms, partnerships, corporations or associations of persons, or of any two or more of them for either, any or all of the following purposes: [para.] 1. To create or carry out restrictions in trade or commerce. . . . [para.] 5. To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, . . . so as to directly or indirectly preclude a free and unrestricted competition among themselves, . . . or by which they shall 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. . . ." (Stats. 1907, ch. 530, § 1 (1) & (5), pp. 984-985.)

The Reagan Bill of 1888. This bill read: "That a trust is the combination of capital or skill . . . by two or more persons . . . for . . . the following purposes: [para.] First. To create or carry out restrictions on trade . . . [para.] Fourth. To create a monopoly. . . ." (19 Cong.Rec. p. 7512.)

The Texas act of 1889. The original Texas act expanded the scope and specified the reach of the 1888 Reagan bill by rewriting the first sentence, and adding a fifth paragraph. It also narrowed the reach of the act by deleting the monopoly provision. It read as follows: "That a trust is a combination of capital, skill, or acts by two or more persons, firms, . . . corporations, or associations of persons, or of either two or more of them for either, any, or all of the following purposes: First -- To create or carry out restrictions in trade . . . Fifth -- To make or enter into, or execute or carry out any contract , obligation, or agreement of any kind or description . . . to . . . preclude a free and unrestricted competition among themselves . . . or by which they shall agree to pool, combine, or . . . unite any interest that they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected. . . ." (1889 Tex. Gen. Laws, ch. 117, § 1.) The acts of Mississippi and North Dakota closely follow this language. (1890 Miss. Laws, ch. 36, § 1; 1905 N.D. Laws, ch. 188, § 1.)

The Reagan bill of 1890. This second Reagan bill copied the first sentence of the above act, replaced the monopoly provision, renumbered the final sentence as paragraph six, copied the first half of that sentence from the above act, and made syntax and punctuation changes in the last half of that sentence. It read as follows: "That a trust is a combination of capital, skill, or acts by two or more persons, firms, . . . corporations, or associations of persons, or of any two or more of them for either, any, or all of the following purposes: [para.] First. To create or carry out restrictions in trade . . . [para.] Fifth. To create a monopoly . . . [para.] Sixth. To make or enter into or execute or carry out any contract, obligation, or agreement of any kind or description . . . so as to . . . preclude . . . free and unrestricted competition among themselves . . . or by which they shall agree to pool, combine, or . . . unite any interest . . . they may have connected with the sale or transportation of any such article or commodity that its price may, in any manner, be so affected. . . ." (21 Cong.Rec. p. 2456 (1890).)

The Michigan act of 1899. This act modified the first sentence by adding the word "partnerships," substituting "arts" for "acts," and deleting some punctuation. It also deleted the monopoly provision, added an opening clause to the fifth paragraph, made plural that paragraph's list of "contracts, obligations or agreements," added the phrase "directly or indirectly" in two places in the middle of that sentence, and modified (consistently with the 1889 Texas act) the syntax of the final clause of the last sentence ("that its price might in any manner be affected. . . ."). It read: "That a trust is a combination of capital, skill or arts by two or more persons, firms, partnerships, corporations or associations of persons, or of any two or more of them for either, any or all of

Legislature contained [\*\*\*229] the [\*\*393] well-known limitations on combinations in restraint of trade, but it (i) failed to include the latest invention of the evolving antitrust statutes -- an antimerger provision -- and (ii) embraced the term "combination," without attempting to modify the language in order to avoid the prevailing narrow construction of that term.

[\*\*\*\*25] [\*1162] In the absence of contrary indications -- of which we have none -- it must be assumed that our Legislature intended "combination" to have the same meaning under the Cartwright Act as that term was given under the identical words of the original 1889 Texas act and the 1899 Michigan act. [CA\(3\)](#)<sup>↑</sup> (3) [HN2](#)<sup>↑</sup> We have "long recognized the principle of statutory construction that [when] legislation has been judicially construed and a subsequent statute on the same or an analogous subject is framed in the identical language, it will ordinarily be presumed that the Legislature intended that the language as used in the later enactment would be given a like interpretation." (*Belridge Farms v. Agricultural Labor Relations Bd.* (1978) 21 Cal.3d 551, 557 [147 Cal.Rptr. 165, 580 P.2d 665]; see also *Erlich v. Municipal Court* (1961) 55 Cal.2d 553, 558 [11 Cal.Rptr. 758, 360 P.2d 334] [statute patterned after New York statute given same construction as given by New York courts].)

[\*\*394] [CA\(2b\)](#)<sup>↑</sup> (2b) Contrary to the Attorney General's suggestions, the absence of today's computerized [\*\*\*230] legal research systems in 1907 does not [\*\*\*26] diminish the force of this canon. As demonstrated above, the *Gates* and *Davis* courts' construction of the term "combination" was both widely known and followed, explicitly and implicitly, in other courts' interpretations of the same term in cases involving acquisitions. These cases were published in the National Reporter System and the American State Reports, and were available to our Legislature through the Shepard's Citation Service and other resources of the period.

In this case, the presumption of legislative intent (by virtue of previous judicial construction) is additionally strengthened by the history of sister state legislation -- dating from eight years before the Cartwright Act -- designed to regulate mergers. It is clear that the legislatures of the day both (i) recognized the problems posed by mergers, and (ii) were capable of framing legislation designed to regulate such practices. In particular, the fact that the Texas Legislature (to which our Legislature obviously looked for guidance in this area) saw it necessary to twice enact antimerger provisions, but ours did not, strongly suggests our Legislature was content to enact a law of limited scope, which [\*\*\*27] did not address mergers. (See *post*, pp. 1167-1168.)

Finally, our Legislature's inaction on this subject for the past 80 years is significant. Although it has amended the Cartwright Act at least 26 times [\*1163] between 1909 and the present, it has never enacted a merger provision.<sup>15</sup> This stands in contrast to other states that either (i) enacted antitrust legislation with specific antimerger

the following purposes: [para.] 1. To create or carry out restrictions in trade or commerce; . . . [para.] 5. It shall hereafter be unlawful . . . [to] make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, . . . so as to directly or indirectly preclude a free and unrestricted competition among themselves, . . . or by which they shall 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. . . ." (1899 Mich. Pub. Acts, No. 255, [§ 1 \(1\)](#) & [\(5\)](#).) Michigan, in turn, appears to have followed the language of the Ohio act of 1898. (See Ohio Laws, p. 143 et seq., [§ 1 \(1\)](#) & [\(5\)](#).)

(The language of the Sherman Act, by contrast, differed substantially from all of the above. See *ante*, pp. 1155-1156, quoting [15 U.S.C. §§ 1, 2.](#))

In addition to the above noted differences in language and coverage between the Reagan bills and the Cartwright Act, we also note that the two Reagan bills differed in another significant respect from the Cartwright Act, and from the acts of Texas and Michigan: Unlike the latter acts, the Reagan bills contained essentially no enforcement provision. (Compare 19 Cong.Rec. 7512-7513 (1888), and 21 Cong.Rec. 2456 (1890), with 1889 Tex. Gen. Laws, ch. 117, §§ 2-5, 7-9; 1899 Mich. Pub. Acts, No. 255, §§ 2-3, 5-6, 11; and Stats. 1907, ch. 530, §§ 2-3, 5-6, 11.) This, together with the striking similarity between the enforcement provisions of the three acts, further indicates that the Cartwright Act was modeled after the Texas and Michigan acts, and not the Reagan bills or the Sherman Act.

<sup>15</sup> Additionally, it is clear that our Legislature is well aware of the Clayton Act, section 7 of which expressly regulates mergers. ([15 U.S.C. § 18](#); see *post*, fn. 18.) In 1961 the Legislature enacted [Business and Professions Code section 16727](#), essentially adopting [section 3](#) of the Clayton Act ([15 U.S.C. § 14](#)), which deals with exclusive dealing arrangements.

provisions well before the Cartwright Act was passed in 1907 (see *ante*, pp. 1159-1160) or (ii) have since then amended their antitrust laws specifically to address the regulation of mergers or acquisitions. (Some of these provisions were enacted shortly after the Cartwright Act: see, e.g., [Okla. Stat., tit. 79, § 84](#) (1913 Okla. Sess. Laws, ch. 114, [§ 4](#)); La. Rev. Stat. Ann., tit. 51, § 125 (1915 La. Acts, No. 11, § 5). Others are of more recent vintage: [Alaska Stat., § 45.50.568](#) (1975 Alaska Sess. Laws, ch. 53, [§ 1](#)); [Hawaii Rev. Stat., § 480-7](#) (1961 Hawaii Sess. Laws, ch. 190, § 5); [Neb. Rev. Stat., § 59-1606](#) (1974 Neb. Laws, LB 1028, [§ 13](#)); [N.J. Stat. Ann., 56:9-4](#) [\*\*\*\*28] (1970 N.J. Laws, ch. 73, [§ 4](#)); [Wash. Rev. Code, § 19.86.060](#) (1961 Wash. Laws, ch. 216, § 6).) <sup>16</sup> The Attorney General has not cited, nor have we found, a state statute similar to the Cartwright Act that has been construed as applying to mergers. (Cf. *post*, fn. 20.)

[\*\*\*\*29] The foregoing history demonstrates that the drafters of the Cartwright Act must have known the limitations of what they were adopting: The operative words of their act had been construed consistently in at least three published opinions, and Texas, the parent state from which the Cartwright Act was copied, was among the states that had in the interim adopted additional, express statutory provisions clearly extending coverage of their acts to mergers. Instead of adopting one of the newer, more expansive models of antitrust statutes, our Legislature opted for the simpler, judicially construed format first enacted by Texas in 1889. Given this history, we must conclude that the drafters intended that their Act apply, as its words had been [\*\*395] construed, only to entities that "combine," in the sense of those who *perdur*e (i.e., [\*\*\*231] continue as separate, independent, competing entities during and after their collusive action) -- and therefore that [HN3](#)<sup>↑</sup> the drafters did not intend the Cartwright Act to regulate the bona fide purchase and sale of one firm by another. Any other interpretation of the drafters' intent cannot be reconciled with the Act's history. As we explain [\*\*\*30] below, nothing presented by the Attorney General undermines this conclusion.

#### [\*1164] 2. The Sherman Act

[CA\(4\)](#)<sup>↑</sup> (4) The Attorney General cites authorities stating the Cartwright Act is modeled after the Sherman Act. He then asserts that the Sherman Act has been construed as applying to mergers, and concludes that the Cartwright Act should be construed as applying to mergers as well. In light of the above discussion, however, the Attorney General's fundamental premise is flawed. Admittedly, in past statements we have suggested that the Cartwright Act is patterned after the Sherman Act. (E.g., [Palsson, supra, 16 Cal.3d 920, 925](#), and cases cited.) As shown above, however, historical and textual analysis reveals that the Act was patterned after the 1889 Texas act and the 1899 Michigan act, and not the Sherman Act. (See *ante*, fn. 14.) Hence judicial interpretation of the Sherman Act, while often helpful, is not directly probative of the Cartwright drafters' intent, given the different genesis of the provision under review. Nevertheless, even if we were to accept the Attorney General's premise, interpretation of the Sherman Act is unhelpful to the Attorney [\*\*\*31] General's view.

As the Attorney General observes, there are cases allowing challenges to mergers under the Sherman Act. The early cases involved large railroads, the mergers of which would have amounted to an actual restraint of competition. As one commentator noted, these decisions "hinge on the size of the defendant companies." (4 Kitner, Legislative History of the Federal Antitrust Laws and Related Statutes (1980) § 10.77, p. 291 [hereafter Kitner]; see [Northern Securities Co. v. United States \(1904\) 193 U.S. 197 \[48 L.Ed. 679, 24 S.Ct. 436\]](#); [United States v. Union Pacific Railroad Co. \(1912\) 226 U.S. 61 \[57 L.Ed. 124, 33 S.Ct. 53\]](#); [United States v. Reading Co. \(1920\) 253 U.S. 26 \[64 L.Ed. 760, 40 S.Ct. 425\]](#); [United States v. Southern Pacific Co. \(1922\) 259 U.S. 214 \[66 L.Ed. 907, 42 S.Ct. 496\]](#); see also [Davies, supra, pp. 98-105](#).)

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<sup>16</sup> The antimerger provisions of the original three states remain in effect today. ( [Tex. Bus.& Comm. Code Ann., § 15.05\(d\)](#); [Miss. Code Ann., § 75-21-13](#); [Ark. Code Ann., § 4-75-301](#).)

We note that the Uniform State Antitrust Act (1974) does not contain an antimerger provision. This may reflect some commentators' concern about the propriety of such state regulation. (See Rubin, *supra*, 26 U.Fla. L.Rev. 653, 731, 723, fn. 502, and authorities cited.) The drafters of at least one modern state antitrust statute specifically declined to adopt the Clayton Act, which, *inter alia*, regulates mergers. (See [15 U.S.C. § 18](#); coms., III. Stat. Ann., ch. 38, § 60 et seq., p. 441 [drafters' comments on 1965 Ill. Laws, p. 1943].)

Defendants respond that these early cases appear to be based on [section 2](#) of the Sherman Act, which section prohibits monopolies. ([15 U.S.C. § 2](#), quoted *ante*, pp. 1155-1156; see Kintner, *supra*, pp. 3436-3441, quoting FTC [\*\*\*\*32] report.) They then cite authorities stating that the Cartwright Act contains no corresponding provision.<sup>17</sup> The high court's most recent word on the subject, however, defeats defendants' attempted distinction. In [United \[\\*1165\] States v. First Nat. Bank \(1964\) 376 U.S. 665 \[12 L.Ed.2d 1, 84 S.Ct. 1033\]](#), the court cited [Northern Securities Co., supra, 193 U.S. 197](#), and [Union Pacific, supra, 226 U.S. 61](#), and held a bank merger illegal under [section 1](#) of the Sherman Act. ([376 U.S. at pp. 669-670 \[12 L.Ed.2d at p. 5\]](#); see also [U.S. v. Philadelphia Nat. Bank \(1963\) 374 U.S. 321, 354 \[10 L.Ed.2d 915, 939-940, 83 S.Ct. 1715\]](#) ["The Sherman Act, of course, forbids mergers effecting an unreasonable restraint of trade."].)

[\*\*\*\*33] Still, this line of authority ultimately does not assist the Attorney General's position in this case. [CA\(5\)↑](#)  
 (5) [HN4↑](#) The cases allowing challenges to mergers under the Sherman Act require -- pursuant to [section 1](#) of that Act -- that an actual "restraint of trade" be [\\*\\*396](#) proved. ([15 U.S.C. § 1](#), quoted *ante*, p. 1156.) To [\*\*\*232] the extent the Cartwright Act could be said to be patterned after the Sherman Act, a merger challenge under the state Act would require the same showing, i.e., that the merger "effected" an unreasonable restraint of trade. The Attorney General, however, has alleged no such thing; as explained above, his complaint is modeled after the FTC's initial complaint in this matter, and both complaints are clearly framed under section 7 of the Clayton Act. ([15 U.S.C. § 18](#)) That latter Act -- in contrast to the Sherman Act -- allows challenges to *incipient* threats to competition, i.e., "[mergers] with a probable anticompetitive effect . . ." ([Brown Shoe Co. v. United States \(1962\) 370 U.S. 294, 323 \[8 L.Ed.2d 510, 534, 82 S.Ct. 1502\]](#)).<sup>18</sup> In the present case, the Attorney General [\*\*\*\*34] has alleged only that the challenged merger poses a threat to competition; he has not alleged the merger has effectuated an unreasonable restraint of competition.

We reiterate that, contrary to the Attorney General's view, interpretation of the Sherman Act is not directly probative of the intent of the drafters of the Cartwright Act, given the different [\*\*\*\*35] genesis of the provision under review. Nevertheless, in light of the above discussion, it appears that the Attorney General's complaint in this case would not state a cause of action under his cited Sherman Act cases. In fact, his view would require expansion of both the Cartwright and Sherman Acts beyond the scope attributed to them by any court. Nothing in the Sherman Act or the cases applying it supports the Attorney General's view that the Cartwright Act was intended [\*1166] to apply to mergers at all, much less mergers that pose, at most, an incipient threat to competition.

### 3. The Common Law

Defendants attempt to bolster their view of the Cartwright Act by suggesting that (i) the Act is a codification of the common law, and (ii) the common law did not impose restrictions on the outright purchase of one business by another. As we shall explain, both points are mistaken. As we also explain, however, the true state of the common law at the time of the Cartwright Act supports our conclusion about the drafters' intent.

Although there is dictum supporting defendants' first proposition in [Rolley Inc. v. Merle Norman Cosmetics \(1954\) 129 Cal.App.2d 844, 846 \[278 P.2d 63\]](#), [\*\*\*\*36] and subsequent cases (e.g., [Corwin, supra, 4 Cal.3d 842, 852](#)),

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<sup>17</sup> (E.g., Von Kalinowsky & Hanson, *The California Antitrust Laws: A Comparison With the Federal Laws* (1959) [6 UCLA L.Rev. 533, 553](#); but see Folsom & Fellmeth, *California Antitrust Law and Practice* (1983) § 45, pp. 37-38; *Lowell v. Mother's Cake & Cookie Co.* ([1978](#)) [79 Cal.App.3d 13, 23 \[144 Cal.Rptr. 664, 6 A.L.R.4th 184\]](#); *Munter v. Eastman Kodak Co.* ([1915](#)) [28 Cal.App. 660, 666 \[153 P. 737\]](#) [dicta].)

We need not decide the Attorney General's claim that the Cartwright Act reaches monopolistic practices by individual firms, because the Attorney General's complaint does not allege a monopoly.

<sup>18</sup> See Kintner, *supra*, section 10.77, page 292 (Section 7 of the Clayton Act "was designed to reach acquisitions and mergers before they accomplished their anticompetitive effects. [It] was to reach 'incipient monopolies and trade restraints' which would otherwise be immune from attack under the Sherman Act. Therefore, the Clayton Act speaks in terms of probabilities rather than actualities. The Government need not show that a lessening of competition has already occurred, or that it will certainly occur; instead, the Clayton Act merely requires that it is probable that competition will be substantially lessened by the transaction."). (Italics added.)

Rolley is based on a misunderstanding of [\*Speegle v. Board of Fire Underwriters \(1946\) 29 Cal.2d 34 \[172 P.2d 867\]\*](#), in which Justice Traynor explained that the Cartwright Act "articulates in greater detail a public policy against restraint of trade that has long been recognized at common law." (*Id., at p. 44.*) **CA(6)**<sup>↑</sup> (6) Speegle stands simply for the proposition that the public policy underlying the Cartwright Act -- and all early antitrust acts, for that matter -- is rooted in the common law. This is not to say, however, that the Act is confined by, or as broad as, the common law; instead, the Act stands on its own, and courts must interpret its words as best they can in order to effectuate the intent, not of "the common law," but of the Act's drafters. Nevertheless, because the state of the common law at the time the Act was drafted may shed light on the drafters' intent, we will review the common law on the question of "mergers."

As suggested above, defendants assert that the common law distinguished between outright "purchase" or "acquisition," on [\*\*\*\*37] one hand, and "combinations" or "trusts," on the other, and that the former were legal and enforceable whereas the [\*\*397] latter were void and unenforceable. After reading the cases cited by defendants (e.g., [\*\*\*233] [\*Davis v. A. Booth & Co., supra, 131 Fed. 31, 37\*](#); [\*Lumberman's Trust Co. v. Title Ins. Co. \(9th Cir. 1918\) 248 Fed. 212, 217-218\*](#); and [\*Trenton Potteries Co. v. Oliphant \(1899\) 58 N.J.Eq. 507, 524 \[43 A. 723\]\*](#)), we are not persuaded that defendants' interpretation of them is correct: in our view, these cases do not apply the common law. The cited page to *Davis*, for example, is to the court's statutory construction analysis of the Sherman Act, not the common law; the court did discuss the common law on the following page ([\*131 Fed. at p. 38\*](#)), but reached no clear conclusion on the issue here, and it plainly did not announce the rule advanced by defendants. Likewise, *Lumberman's* interprets a state constitutional provision, [\*1167] not a common law rule, and it draws most of its authority from statutory construction cases. *Oliphant*, too, is similarly influenced by statutory [\*\*\*\*38] law. Defendants have cited no authority supporting their view that the rule they advance existed at common law.

**CA(7)**<sup>↑</sup> (7) In any event, the clear "majority view" at common law was that certain forms of mergers or acquisitions were "illegal." As explained by Kintner, *supra*, "the test of the legality of a combination . . . regardless of the form it [assumed] in the object of the combination" (*id.*, § 3.14, p. 118), and "where the purpose, tendency, or natural consequences of a corporate combination was to monopolize or restrain trade, the combination was illegal." (*Id., at p. 114*; see also, [\*Davies, supra, at pp. 65-69\*](#).) Accordingly, there are a number of common law cases in which mergers were held illegal. (E.g., [\*Richardson v. Buhl \(1889\) 77 Mich. 632 \[43 N.W. 1102, 1110\]\*](#) [consolidation of separate, otherwise competing, companies into one large corporation amounted to a restraint of competition, and an illegal monopoly]; [\*People v. Chicago Gas Trust Co. \(1889\) 130 Ill. 268 \[22 N.E. 798, 801-803\]\*](#) [same]; [\*Distilling & Cattle Feeding Co. v. People \(1895\) 156 Ill. 448 \[41 N.E. 188, 202\]\*](#) [\*\*\*\*39] [same].)

Like the courts construing the Sherman Act, however, the above cited **HN5**<sup>↑</sup> common law cases condemning mergers all involved clear, actual threats to competition, not merely incipient threats to competition. And, as explained above, the Attorney General in this case alleged at most an incipient threat.

Moreover, the Cartwright Act (like most states' antitrust statutes) departed from the common law in a significant way. "Illegality" under the common law meant only that an agreement was void and unenforceable ([\*United States v. Addyson Pipe & Steel Co. \(6th Cir. 1898\) 85 Fed. 271, 279\*](#)), or subject to "prosecution by the state by quo warranto . . ." ([\*Distilling & Cattle, supra, 41 N.E. 188, 203\*](#); see also Rush, *supra*, 18 Mo. L.Rev. 215, 219, and cases cited.) Under the Cartwright Act, however, an "illegal" agreement is subject to, inter alia, civil damage awards and criminal punishment. In light of the dramatically enhanced sanctions imposed by the Act, we see no anomaly in the view that **HN6**<sup>↑</sup> the drafters of the Cartwright Act intended to make their law applicable only to situations in which the parties improperly collude [\*\*\*\*40] and continue as separate, independent entities, and not to situations in which, by virtue of purchase and sale, or merger, one or more of the entities ceases to exist. The drafters could reasonably have believed that the existing remedy at common law under the line of cases following [\*Buhl, supra, 43 N.W. 1102\*](#), [\*Chicago Gas, supra, 22 N.E. 798\*](#), and [\*1168] [\*Distilling & Cattle, supra, 41 N.E. 188\*](#), was sufficient to address the anticompetitive effects posed by the latter type of transaction.<sup>19</sup>

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<sup>19</sup> The Attorney General did not challenge the merger on common law grounds, and we do not address the issue here.

In sum, we conclude that the Attorney General's interpretation of the Cartwright Act -- far from being consistent with the common law -- would in fact require a dramatic expansion of the common law. Nothing in the common law compels the Attorney General's interpretation of the Act.

**[\*\*398] [\*\*\*234] 4. Breadth of the Cartwright Act**

Ultimately, [\*\*\*\*41] the Attorney General's view that the Cartwright Act applies to mergers is not supported by analogy to the Sherman Act or the common law. As shown above (i) the Sherman Act is not, contrary to our past statements, directly probative on interpretation of the Cartwright Act; (ii) the cases under both the Sherman Act and the common law show at most a willingness to allow challenges to mergers that actually restrain competition, and not those that pose merely an incipient threat to competition; and (iii) in any event, the remedy at common law was different in kind from that available under the Cartwright Act -- invalidation of the "illegal" agreement, etc., as opposed to civil or criminal sanctions. At bottom, therefore, the Attorney General resorts to the propositions that (a) the acts of Texas, Michigan and numerous other states, and the cases interpreting those acts, are insignificant indicators of the drafters' intent; (b) the Cartwright Act is more expansive than both of its other putative sources (Sherman Act and common law); and (c) the Cartwright Act essentially embodies the later-enacted section 7 of the Clayton Act, which as noted above allows challenges to mergers in their [\*\*\*\*42] incipency.

**CA(1b)[↑] (1b) CA(2c)[↑] (2c)** For the reasons set out above, we conclude that the 1889 Texas act and the 1899 Michigan act, the interpretation of those acts in *Gates, supra, 39 S.W. 1079*, and *Davis, supra*, 127 Fed. 875, 131 Fed. 31, and the striking similarity of the Cartwright Act to those laws, together with the enactment by three states -- including Texas -- of express antimerger provisions, clearly indicates that the drafters did not intend the Cartwright Act to apply to a purchase and sale agreement, or a merger, between otherwise competing firms.

Nor can we agree that the Cartwright Act is somehow broader than the Sherman Act and the common law. For this proposition, the Attorney General cites our statement in *Palsson, supra, 16 Cal.3d 920*, that the bill [\*1169] proposed in the United States Senate by Senator Reagan -- on which our act was purportedly based -- "was designed not to narrow the scope of the Sherman Act but to broaden it." (*Id., at p. 926*.) As we have explained above, however, our shorthand description of the Act's derivation in *Palsson*, although adequate for purposes of our [\*\*\*\*43] analysis in that case, was not completely accurate: The Cartwright Act was modeled after the original Texas act of 1889 and the Michigan act of 1899, not the Reagan bill. (See *ante*, fn. 14.) Even assuming, however, that our Act might be in some respects broader than the Sherman Act, we find nothing to indicate that the Act was intended to be broader than -- or even equal to -- the Sherman Act on the question of merger coverage.

In the same vein, the Attorney General also rests on dicta from our recent decision in *Cianci, supra, 40 Cal.3d 903*, to the effect that the Cartwright Act is "broader in range and deeper in reach than the Sherman Act" (*id., at p. 920*), and that it "reaches beyond the Sherman Act to threats to competition in their incipency -- much like section 7 of the Clayton Act . . . -- and thereby goes beyond 'clear-cut menaces to competition' in order to deal with merely 'ephemeral possibilities' [citations]." (*Id., at p. 918*.) In view of the evidence to the contrary, *Cianci*'s conclusory and substantively suspect dicta<sup>20</sup> simply cannot support the Attorney General's claim. In light of (i) the authoritative [\*\*\*\*44] construction of identical language in similar state laws and [\*\*399] [\*\*\*235] (ii) the existence (in at least three states) of explicit merger regulations at the time of the Cartwright Act, we believe that the Legislature did not intend for the Act to reach a merger or acquisition.<sup>21</sup>

**[\*\*\*\*45] III. Application of the Unfair Practices Act to Mergers**

<sup>20</sup> *Cianci*'s dicta is evidently based on *Business and Professions Code section 16720, subdivision (e)(4)*, which prohibits certain activity respecting "any . . . article or commodity, that its price *might in any manner* be affected." (*40 Cal.3d at p. 918*, italics added in *Cianci*.) This provision -- including the underscored phrase -- appears in the original Texas act of 1889, and most acts following it. (See 1889 Tex. Gen. Laws, ch. 117, § 1; e.g., 1890 Miss. Laws, ch. 36, § 1; 1897 Kan. Sess. Laws, ch. 265, § 1; 1897 Neb. Laws, ch. 79, § 1; 1898 Ohio Laws, p. 143, § 1(5); 1899 Mich. Pub. Acts No. 255, § 1(5); N.D. Laws, ch. 188, § 1.) We are aware of no case construing this language as suggested by *Cianci*'s dicta.

<sup>21</sup> To the extent it is inconsistent with our conclusion, we disapprove dicta in *Munter, supra, 28 Cal.App. 660, 666*.

**CA(8)[]** (8) The [HN7\[\]](#) Unfair Practices Act, [Business and Professions Code, section 17000 et seq.](#), defines "unfair competition" as, inter alia, "unlawful, unfair or fraudulent business practice . . ." (*Id.*, [§ 17200](#), italics added.) As we have said, the statute is directed at "on-going wrongful business conduct' . . ." ([People v. McKale \(1979\) 25 Cal.3d 626, 632 \[159 Cal.Rptr. 811, 602 P.2d 731\]](#).) Thus the "practice" requirement envisions something more [\*1170] than a single transaction, as in this case; it contemplates a "pattern' . . . of conduct" ([Barquis v. Merchants Collection Assn. \(1972\) 7 Cal.3d 94, 108 \[101 Cal.Rptr. 745, 496 P.2d 817\]](#)), "on-going . . . conduct" ([id., at p. 111](#)), "a pattern of behavior" ([id., at p. 113](#)), or "a course of conduct." (*Ibid.*) No such "practice" is alleged or shown here. The mere fact that the Attorney General asserts in his brief that defendants have engaged in certain unlawful practices in the past, and may do so in the future, is not enough. The complaint attacks only [\*\*\*\*46] the merger, and no ongoing conduct; hence, it does not state a cause of action under [Business and Professions Code section 17200](#).

#### IV. Conclusion

We conclude that neither the Cartwright Act, nor the Unfair Practices Act, was intended to apply to a merger. The judgment of the Court of Appeal is affirmed.

**Concur by:** MOSK (In Part)

**Dissent by:** MOSK (In Part)

#### Dissent

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**MOSK, J.**, Concurring and Dissenting. I concur in the judgment as to the complaint's cause of action under the Unfair Competition Act ([Bus. & Prof. Code, § 17200 et seq.](#)). I agree with the majority that the complaint fails to effectively allege that the merger of Texaco, Inc. (hereinafter Texaco) and Getty Oil Company (hereinafter Getty) constituted a violation of the statute.

But I dissent from the judgment as to the complaint's cause of action under the Cartwright Act ([Bus. & Prof. Code, § 16720 et seq.](#)). As will appear, this claim states facts on which relief may be granted -- viz., a palpable threat to the general economic welfare of the citizens of this state.

Specifically, contrary to the majority's position the Cartwright [\*\*\*\*47] Act applies to mergers, including the merger alleged here. This conclusion is unavoidable if the statute is construed in accordance with the plain meaning of its express terms and with an eye on the object it seeks to achieve and the evil it aims to prevent.

And contrary to the position of Texaco and Getty, the Cartwright Act claim is not preempted. First, federal statutory law and administrative action do not stand as a bar. It is practically a matter of judicial notice ([Evid. Code, § 452, subd. \(h\)](#)) that the federal government has all but ceased enforcing the federal antitrust laws as they are applicable to mergers (see, e.g., Sullivan, *The Antitrust Division as a Regulatory Agency: An Enforcement Policy in Transition* (1986) 64 Wash. U.L.Q. 997, 1000 [between 1981 [\*1171] and 1986, "the Antitrust Division [of the United States Department of Justice] challenged only twenty-six mergers out of over 10,000 merger applications"]) -- in spite of charges that "lax merger enforcement has led to a rash of mergers among competing firms that have increased concentration, threatening a legacy of higher prices, dampened innovation, and generally [\*\*\*\*48] more lethargic performance by U.S. industries already vulnerable to [\*\*400] [\*\*\*236] foreign competition" (Mem. of Representative Peter W. Rodino, Jr., to Members of Subcom. on Competition and Commercial Law re Oversight Hgs. for the Antitrust Div. on Feb. 26 and Mar. 4 (Feb. 25, 1987) 100th Cong., 1st Sess., p. 1). In such a context, vigorous enforcement of state antitrust laws is plainly necessary. Texaco and Getty, however, erroneously suggest that federal **antitrust law** allows no room for state **antitrust law** and that nonenforcement of the former precludes enforcement of the latter.

Second, on demurrer and without the support of a factual record the [commerce clause of the United States Constitution](#) cannot be held to be preemptive here. It is not seriously disputed that the state's interests in the California petroleum industry generally and in Getty's California assets in particular are great. Texaco and Getty, however, would unjustifiably prevent the state from exercising its police power in this area in furtherance of the general welfare.

I

The basic facts that constitute the background to this action are essentially undisputed.

In January 1984 Texaco and Getty entered [\*\*\*\*49] into an agreement under which Texaco would acquire Getty's stock and merge Getty's assets into its business. Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act (hereinafter HSR), which added section 7A to the Clayton Act and is codified in [section 18a of title 15 of the United States Code](#), Texaco gave notice of the proposed merger to the Federal Trade Commission (hereinafter FTC or Commission), which has traditionally reviewed mergers in the petroleum industry.

Under authority given by HSR among other statutes, the FTC initiated an investigation of Texaco's proposed acquisition of Getty. As a result of its review, the Commission caused a draft complaint to issue. As summarized by the FTC staff: "The proposed complaint states that the Commission has reason to believe that consummation of Texaco's acquisition of the Getty Oil Company ('Acquisition') would violate Section 7 of the Clayton Act [\*1172] [([15 U.S.C. § 18](#))]<sup>1</sup> [\*\*\*\*51] and Section 5 of the Federal Trade Commission Act [([15 U.S.C. § 45](#))].<sup>2</sup> The complaint specifically alleges that the Acquisition may substantially lessen competition in several markets: (1) The manufacture [\*\*\*\*50] and transportation of 'refined light products' (distillate fuel oil, aviation gasoline, gasoline, jet fuels, and kerosene) in the northeastern United States; (2) the wholesale distribution of gasoline and middle distillates (home heating oil and diesel fuel) to retailers in a number of cities and areas in the northeastern United States; (3) the pipeline transportation of refined light product into the state of Colorado; and (4) the sale, pipeline transportation, and refining into petroleum products of heavy crude oil in the state of California." (*FTC, Texaco Inc. and Getty Oil Co.; Proposed Consent Agreement With Analysis to Aid Public Comment*, [49 Fed.Reg. 8550, 8558](#) (Mar. 7, 1984) [hereinafter FTC, *Proposed Consent Agreement*.])

As to the threatened anticompetitive effects of the acquisition in California, in the words of the FTC staff, "The problem arises because Getty owns substantial heavy crude oil reserves in California. This crude oil is denser (lower in gravity) than most crude oil produced in the world and often has a higher nitrogen content. These characteristics make the crude more [\*\*401] [\*\*\*237] costly to refine. Getty has 17 percent of the production of such crude oil in the San Joaquin Valley of California, and about 140 MBD [i.e., thousand] barrels per day production across the entire state. Getty also has an extensive crude oil gathering and trunkline system capable of transporting heavy crude to California refineries. This includes a heavy crude oil trunkline with about 200 MBD in capacity, linking Bakersfield, California to San Francisco.

[\*\*\*\*52] "Getty's crude oil production is about 100 MBD in excess of the operating capacity of its one small refinery in California. Texaco, on the other hand, refines more crude than it produces on the West Coast, with production of only 33 MBD in California, compared to about 153 MBD in refining capacity in California and Washington.

<sup>1</sup> Section 7 of the Clayton Act provides in relevant part: "No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." ([15 U.S.C. § 18](#).)

<sup>2</sup> Section 5(a)(1) of the Federal Trade Commission Act provides: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." ([15 U.S.C. § 45\(a\)\(1\)](#).)

"At present, Getty is a substantial seller of heavy crude oil to 'non-integrated' California refiners -- i.e., refiners that are not also crude oil producers. [\*1173] These non-integrated refiners are to some degree tied to the California heavy crude oil market because of the substantial investment they have made to process this type of crude oil. If such refiners were forced to process lighter, more expensive crude oils, their investment in heavy crude oil processing equipment might no longer be economically viable.

"Non-integrated refiners face an additional problem in gaining access to heavy crude oil. Such crude oil is rarely produced anywhere else [sic] in the world and is not imported. The refiners must therefore rely on California production. However, most California producers are tied to pipeline gathering systems that are privately-owned. [\*\*\*\*53] . . . Unlike the systems in most states, California pipelines are not common carriers. Non-integrated California refiners are therefore not guaranteed access to much of the local crude oil production.

"The above factual situation may have led to a 'two-tier' market. Major gatherers may be able to 'post' and buy crude oil at one price, while non-integrated refiners may be required to pay premiums above the posted price for the more limited supplies of crude oil available to them. (The posted price is the price at which major, integrated purchasers offer to buy crude oil from third parties, rather than the price at which sellers offer to sell crude oil to third parties.) For example, non-integrated refiners cite the \$ 2-\$ 3 per barrel premiums that they have offered for crude oil available from the Elk Hills Naval Petroleum Reserve in California. Texaco, with more refining capacity than West Coast crude production, is in fact one of the few major companies to bid at Elk Hills, winning 10 MBD of crude oil at \$ 2.10 premium above the posted price. Most major integrated oil companies have not participated at the Elk Hills' auctions, relying instead on their own production and purchases [\*\*\*\*54] at the posted price.

"As a result of the acquisition, Texaco may have some incentives to divert the Getty heavy crude oil to its own refining system. This may be more profitable than selling the crude oil to others because of the crude oil Windfall Profit Tax Act of 1980. A sale of the crude oil at a premium over the posted price might, in some situations, increase Texaco's Windfall Profit Tax liability. Alternatively, if Texaco were to process the crude oil internally, it might be able to lower its tax payments by transferring the crude oil into its refinery at the lower posted price and by shifting the profits to its refining subsidiary, where they would be taxed at a lower rate.

"Certain non-integrated California refiners might be vulnerable if Texaco should decide to utilize Getty heavy crude oil in this manner. In particular, non-integrated refiners in the San Francisco area served by the Getty [\*1174] trunkline may have no economic alternative source of supply. If these refineries were to fail and Texaco were to acquire them in order to process additional heavy crude oil, the West Coast refining HHI [i.e., Herfindahl-Hirschman Index, a measure of market concentration] [\*\*\*\*55] would increase by 74 points to 1206. Additional refining failures in other parts of California might result in a greater increase in concentration." (FTC, *Proposed Consent Agreement, supra*, 49 Fed.Reg. at pp. 8561-8562, fns. omitted.)

[\*\*402] [\*\*\*238] On February 13, 1984, in the exercise of its prosecutorial discretion, the FTC entered into a proposed consent order with Texaco in settlement of the draft complaint. Under the proposed consent order, in the summary prepared by the FTC staff, Texaco would be required to: "(a) 'Divest' (sell) certain of Getty's petroleum-related assets in the northeastern United States; (b) divest a Texaco refinery located in the Northeast; (c) vote to expand (for 10 years) a major refined product pipeline that supplies the Northeast and of which Texaco is a co-owner; (d) divest certain Getty petroleum assets in specified Rocky Mountain, midwestern, and southwestern states; and (e) supply certain independent California refiners with Getty crude oil, on specified terms for set time periods." (FTC, *Proposed Consent Agreement, supra*, 49 Fed.Reg. at p. 8558.)

Commissioner Michael Pertschuk issued a statement dissenting from the FTC's decision [\*\*\*\*56] to agree to settle the matter and not challenge the merger: "I dissent from the Commission's decision to accept the consent agreement with Texaco and Getty because it fails to address adequately the central competitive problem in the acquisition -- Texaco's gaining control of Getty's crude oil reserves in California. The Commission acknowledges the competitive risks from the acquisition of these crude reserves -- Texaco's cutting off the flow of crude oil to independent refiners in California. But, instead of stopping Texaco from getting the crude, it opts for an uncertain, temporary and highly regulatory approach which will involve us in overseeing the sale of crude to California refiners.

And, what's more, this dubious half-measure terminates after five years when Texaco will be free to cut off independents.

"....

"This merger is the largest in history. Texaco will pay about \$ 10.1 billion for Getty. The divestiture of assets required by the proposed order amount to about 2% of the total value of the acquisition according to staff, so that the overwhelming percentage of this transaction will survive intact. Texaco is now the fourth largest industrial corporation in the [\*\*\*\*57] U.S. and the third largest oil company with 1982 sales of \$ 47 billion and assets of over \$ 27 billion. Getty is the 14th largest oil company with total 1982 revenues of [\*1175] \$ 12 billion. Getty is the 6th largest oil company in crude reserves, while Texaco is the 8th largest. A combined Texaco-Getty firm will be the third largest crude oil producer and will have almost \$ 60 billion in sales, putting it in a virtual tie with GM and Mobil as the second largest industrial corporation behind Exxon.

"....

"The reason Texaco wants to buy Getty is no secret. No one seriously argues that this merger will lead to even theoretical 'efficiencies' in scale or production synergies or even ethereal management efficiencies from Texaco learning Getty's secrets. Getty has one overriding attraction -- crude oil. It has overall 1.2 billion barrels of proven reserves of crude oil, condensate and natural gas liquids according to a November 1983 report of the American Petroleum Institute. It is the third largest producer of crude oil in California. It, like a number of smaller oil companies rich in crude oil, is an incredibly attractive plum to the major oil companies hungry for dwindling [\*\*\*\*58] reserves. As stock market values of companies remain low compared to the value of the oil assets they own, and exploration costs go up, the incentive to buy another company's oil rather than develop one's own becomes irresistible. Keeping companies from acting on that powerful incentive when the result would be anticompetitive is one reason we have antitrust laws.

"....

"Getty has more crude oil than it can use in California and sells the excess to independent refiners. For example, it supplies Tosco, the largest non-integrated refiner in California. The key competitive problem is that Texaco does not have the same incentives to supply the independent refiners as does Getty. By transferring crude oil to its own refineries rather than sell it on the open market, Texaco can reduce its accounting profits at the crude oil level and, thus, its liability under the Windfall Profits [\*\*403] [\*\*\*239] Tax. In addition, by keeping California heavy crude off the market and helping to push up its price to independent refiners, Texaco can cut the profit margins of independent refiners which are its downstream competitors in the refining market and perhaps precipitate a sale of refining [\*\*\*\*59] assets to itself at bargain prices. Finally, by acquiring Getty's pipelines, Texaco can increase its ability to control the flow of crude oil to refiners, particularly in the San Francisco and Los Angeles areas.

"The majority of the Commission acknowledges all these problems by accepting this consent agreement but opts for a risky regulatory solution and one which evaporates after a limited period of time. ....

[\*1176] "....

"Not only is the Commission willing to roll the dice on its regulatory solution, but it terminates after five years in the case of the requirement to supply crude (and 10 years in case of the requirement to allow access to the Santa Fe Springs-Los Angeles pipeline). The entire justification for the five year limitation in the . . . staff memorandum, as far as I can tell, is one sentence: 'At that point, many industry observers expect there will be sufficient new offshore supplies of heavy crude oil to satisfy all market demands.' This blithely optimistic assertion must be assessed in the context of the staff's arguments that California heavy crude is a separate market and that existing refiners have invested heavily in particular facilities in reliance [\*\*\*\*60] upon its continued supply. In addition, heavy crude oils are not imported and access to supply will continue to be limited by whoever controls the pipelines.

"The staff states that the most likely anticompetitive effect of Texaco's acquisition of Getty's California crude and pipelines 'may be denial of crude oil and transportation to the independent sector of the California refining industry,

leading to refining failures and perhaps a significant increase in West Coast refining concentration.' These economic stakes are too enormous to justify the risks that the Commission is willing to run with this consent agreement." (FTC, *Proposed Consent Agreement*, *supra*, 49 Fed.Reg. at pp. 8562-8564 (dis. statement of Comr. Pertschuk).)

In publishing the proposed consent order, the FTC invited interested members of the public to submit comments within 60 days. In that period, the Attorney General of California, among others, offered comments.

On July 10, 1984, under authority given by HSR among other statutes, the FTC ordered the issuance of the complaint in the form contemplated by the agreement and entered a final consent order that reflected some of the comments made by the Attorney [\*\*\*\*61] General and others, but was substantially the same as the proposed order. (*In re Texaco Inc. and Getty Oil Co. (1984) 104 F.T.C. 241*.)

Again Commissioner Pertschuk dissented: "The final order as adopted by the majority . . . fails to remedy a major competitive problem concerning independent refiners in California and instead creates a highly regulatory, incredibly complex and temporary crude supply program. . . .

"The staff's theory concerning the west coast crude oil market is that Getty has been the largest supplier of heavy crude oil to non-integrated [\*1177] refiners in California. Texaco does not have the same incentives as Getty to supply independent refiners, in large part because of the Windfall Profits Tax, and, therefore, is more likely to divert crude to its own refinery system. Such a diversion would endanger the long run viability of refiners there and provide a means and added incentive for Texaco to attempt to acquire them at distress prices.

"The Commission accepts this theory but opts for the inadequate remedy of requiring Texaco to supply crude oil for five years to independent refiners. This crude allocation scheme has become more complex [\*\*\*\*62] between the initial and final versions of the order because of new questions about how to calculate price, volume, and related terms such as transportation and credit. . . . According to staff, Texaco itself argued in negotiations that it foresaw the possibility of large numbers of disputes [\*\*404] [\*\*240] and the resolution of them 'might take 100 years.' . . . [The] majority's confident reliance on only a five year requirement is speculative and may well prove inadequate." (*In re Texaco Inc. and Getty Oil Co., supra, 104 F.T.C. at pp. 261-262* (dis. statement of Comr. Pertschuk).)

## II

On July 16, 1984, the Attorney General filed the complaint in this action, asserting against Texaco and Getty (hereinafter sometimes referred to collectively as defendants) one cause of action under the Cartwright Act (*Bus. & Prof. Code, § 16720 et seq.*)<sup>3</sup> [\*\*\*\*63] and another under the Unfair Competition Act (*id.*, *§ 17200 et seq.*).<sup>4</sup>

In the Cartwright Act claim, the Attorney General first made several allegations defining the relevant product and geographical markets. Those allegations are in substance as follows.

Crude oil is a relevant product market, and California is a relevant geographical market for this product. California crude oil is a relevant [\*1178] product submarket, and California is the relevant geographic market for this product. In 1982, Getty was the third largest producer of California crude oil, producing about 49 million barrels or about 13 percent of the total production. In the same year Texaco was the seventh largest producer of California crude oil,

<sup>3</sup>The provisions of the Cartwright Act relevant to this action are codified in *Business and Professions Code sections 16720* and *16726*. *Section 16726* declares: "Except as provided in this chapter, every trust is unlawful, against public policy and void." *Section 16720*, in pertinent part, defines a "trust" as "a combination of capital, skill or acts by two or more persons . . . To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they . . . Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any . . . article or commodity, that its price might in any manner be affected." (*Id.*, *§ 16720, subd. (e)(4)*.)

<sup>4</sup>*Business and Professions Code section 17200* provides, in relevant part, that "unfair competition shall mean and include unlawful, unfair or fraudulent business practice. . . ."

producing about 15 million barrels or about 4 percent of the total production. Getty produces substantially more heavy crude oil than it can refine in California, and Texaco produces substantially less heavy crude oil than it can refine [\*\*\*\*64] in the state.

The refining of crude oil is a relevant product market, and California is a relevant geographic market for refining. Texaco has a refinery in the Los Angeles area with a capacity of 75,000 barrels of crude oil per day. Getty has a refinery in the Bakersfield area with a capacity of 63,000 barrels per day. Independent refiners account for about 33 percent of total California refinery capacity and 22 percent of total California motor gasoline refining capacity.

Texaco and other major petroleum companies have historically refrained from selling crude oil to independent refineries in California at competitive prices. Getty has historically been a significant supplier of crude oil to independent refiners in the state. Of its total crude oil production of 130,000 barrels per day in 1983, Getty supplied more than 100,000 barrels per day to independent refiners in California. Texaco's California refinery competes with the refineries of independents.

The marketing of each of several specified products is a relevant product market, and California is a relevant geographic market for each product. One such relevant product market is the marketing of motor gasoline. In 1983 [\*\*\*\*65] Texaco sold about 643 million gallons of motor gasoline in California, and had about 1,221 retail branded outlets. In the same year Getty sold about 116.4 million gallons in the state, and owned 6 retail outlets and supplied 185 California unbranded jobbers with refined petroleum products. Getty has historically supplied motor gasoline to independent marketers in California. Independent refiners have traditionally been the primary suppliers of motor gasoline to independent marketers in the state. Another relevant product market is the marketing of low sulfur fuel. Getty is and has been a significant supplier of low sulfur fuel for [\*\*\*241] Central [\*\*405] and Southern California industrial consumers. In 1983, Getty's production of low sulfur fuel was about 20,000 barrels per day. Texaco has historically refused to sell refined products to independent marketers in California.

The transportation of crude oil through pipelines is a relevant product market. One relevant geographic market for crude oil pipeline operations is [\*1179] between the oil-producing fields in the San Joaquin Valley and refinery centers in the San Francisco area. Another relevant geographic [\*\*\*\*66] market is between the oil producing fields in the San Joaquin Valley and refinery centers in the Los Angeles basin. Crude oil is produced at various places in California. From the wellhead it is delivered through a system of gathering and feeder pipelines to pump stations where it is transported through transmission pipelines to refinery centers. Getty owns and operates a proprietary pipeline system that gathers crude oil in the San Joaquin Valley. Getty owns about 629 miles of pipelines in California; its San Joaquin Valley Pipeline is a major transmission system for the supply of crude oil to San Francisco area refiners and is the only independent pipeline serving that area. Major oil companies in California have been reluctant to permit independent producers and refiners to use their pipeline systems.

The Attorney General then made several allegations to state a Cartwright Act violation. Those allegations are in substance as follows.

On January 6, 1984, Texaco and Getty entered into a merger agreement pursuant to which Getty granted Texaco an option to purchase authorized but unissued shares constituting about 10.2 percent of the total Getty shares that would be outstanding [\*\*\*\*67] after such issuance. On January 6 and 8, Texaco entered into separate agreements to purchase voting securities constituting about 11.8 percent and 40.2 percent of the outstanding Getty shares. On January 9, Texaco commenced a tender offer for 35 percent of Getty voting securities with the intention of effectuating a follow-up merger for the remaining outstanding shares. Texaco's acquisition of Getty's California assets violates the Cartwright Act.

Texaco has an incentive to increase its refining of California crude oil and to lessen competition from independent refiners. Its acquisition of Getty is likely to increase its incentives and ability to deny independent refiners California crude oil and access to proprietary pipelines.

The effect of the acquisition may be substantially to lessen competition in each of the specified relevant markets in California in violation of the Cartwright Act in the following ways, among others: (a) actual competition will be

eliminated between Texaco and Getty in the marketing of California crude oil; (b) actual competition between competitors in general in the relevant product markets in California will be lessened; (c) California independent refiners [\*\*\*\*68] may be denied access to California crude oil that is currently supplied by Getty and is necessary to the profitable operation of their refineries; (d) for reasons unrelated to the efficient use of resources, Texaco may have the incentive and ability to deny, and may in fact deny, independent [\*1180] refiners access to California crude oil and proprietary pipeline transportation, thereby increasing the difficulty of entry into California refining and decreasing the competitive significance of independent California refiners; (e) Texaco's acquisition of Getty will result in significantly higher concentration ratios in the relevant markets; (f) already high barriers to entry in the California crude oil, refining, pipeline transmission systems, and retail product markets will be substantially raised; (g) actual competition between Texaco and Getty for the transportation in California of crude oil and refined products by pipelines will be eliminated; (h) competition in the marketing of motor gasoline and other refined products may be substantially lessened in California such that the prices of these commodities might be affected; (i) competition in the market for California crude oil [\*\*\*\*69] may be substantially lessened such that its price might be affected; and (j) competition in the transportation of California crude oil by pipelines may be substantially [\*\*\*242] lessened [\*\*406] such that the price of the crude oil might be affected.

In the Unfair Competition Act claim, the Attorney General first incorporated by reference the allegations of the Cartwright Act cause of action and then asserted that Texaco's acquisition of Getty's California assets constituted an unfair business practice in violation of the unfair competition statute.

In the complaint's prayer the Attorney General requested the following relief: (a) a temporary restraining order and preliminary injunction requiring Texaco to hold separate and operate separately Getty's California assets pending adjudication of the merits; (b) a declaration that Texaco's acquisition of Getty's California assets violated the Cartwright Act; (c) a declaration that Texaco's acquisition of Getty's California assets violated the Unfair Competition Act; (d) an injunction requiring Texaco to divest itself of Getty's California assets; (e) civil penalties pursuant to the Unfair Competition Act in an amount to be determined [\*\*\*\*70] by the court; (f) costs of suit; and (g) such other and further relief as the court should deem just and proper.

In addition to filing the complaint, the Attorney General also applied for a preliminary injunction to require Texaco to hold and operate Getty's California assets separate pending adjudication of the merits. The court issued an order to show cause.

Defendants generally demurred to the complaint on the following grounds: it failed to allege facts sufficient to state a cause of action under either the Cartwright Act or the Unfair Competition Act; the remedy of divestiture was unavailable under state law; the injunctive relief sought [\*1181] would unduly burden interstate commerce; and enforcement of the Cartwright Act was preempted by the FTC consent order. Defendants also opposed the Attorney General's application for a preliminary injunction.

The court held that the complaint failed to allege facts sufficient to state a claim under either the Cartwright Act or the Unfair Competition Act, and that it could not be amended to allege such facts. Specifically, the court concluded that the Cartwright Act did not apply to mergers by acquisition, and that the Unfair [\*\*\*\*71] Competition Act was not implicated on the facts that were or could be alleged. It added: "In light of the ruling of the Court, the Court does not reach the constitutional issues raised by defendants' arguments under the Supremacy and Commerce Clauses. However, the Court notes that had it ruled otherwise on the general demurrer, it would find that although no claim is made that the Sherman Act, the Clayton Act or the Hart-Scott-Rodino Antitrust Improvements Act preempt application of the Cartwright Act or the Unfair Practices Act, the FTC Consent Order very specifically regulates the conduct of Texaco in California pursuant to the merger. The Court could find that the relief sought in the complaint is therefore barred by the doctrine of preemption." Accordingly, the court sustained the demurrer without leave to amend, discharged the order to show cause and denied the application for preliminary injunction, and entered judgment of dismissal.

On appeal, the Attorney General contended that the Cartwright Act did in fact apply to mergers, that the allegations of the Unfair Competition Act claim were legally sufficient, that the injunctive relief sought was neither preempted by

the consent [\*\*\*\*72] order nor unduly burdensome to interstate commerce, and that an entitlement to a preliminary injunction had been established.

The Court of Appeal affirmed. It concluded that the consent order preempted the action and did not reach the other issues.

Thereupon, the Attorney General petitioned for review, contending that the complaint stated claims under the Cartwright Act and the Unfair Competition Act, and that the action was not preempted by the consent order. Defendants answered the petition and requested that it be denied. They asked, however, that in the event review was granted the court address as an additional issue whether the relief sought [\*\*407] [\*\*\*243] in this action would contravene the commerce clause by directly regulating their interstate operations or by placing an excessive burden on nationwide mergers. The court granted review.

### [\*1182] III

The Attorney General contends that the first cause of action alleges facts that are legally sufficient under the Cartwright Act, is not preempted by HSR itself or by the consent order entered pursuant thereto, is not barred by the commerce clause, and as a result states a claim on which relief may be granted. [\*\*\*\*73] For the reasons that follow, I agree.

A

The first cause of action, as will appear, alleges facts that are legally sufficient under the Cartwright Act.

1

At the threshold it must be determined whether the Cartwright Act in fact applies to mergers. In resolving this issue, I am guided by well settled principles. "[The] fundamental rule [is] that a court 'should ascertain the intent of the Legislature so as to effectuate the purpose of the law.'" ( *Tripp v. Swoap (1976) 17 Cal.3d 671, 679 [131 Cal.Rptr. 789, 552 P.2d 749]*, quoting *Select Base Materials v. Board of Equal. (1959) 51 Cal.2d 640, 645 [335 P.2d 672]*.) In this task it first looks to the language of the statute itself. (E.g., *Brown v. Superior Court (1984) 37 Cal.3d 477, 485 [208 Cal.Rptr. 724, 691 P.2d 272]*; *Tracy v. Municipal Court (1978) 22 Cal.3d 760, 764 [150 Cal.Rptr. 785, 587 P.2d 227]*; *Leroy T. v. Workmen's Comp. Appeals Bd. (1974) 12 Cal.3d 434, 438 [115 Cal.Rptr. 761, 525 P.2d 665]*.)

When the language is clear and there is accordingly no uncertainty as to the legislative intent, it looks no [\*\*\*\*74] further. (E.g., *In re Waters of Long Valley Creek Stream System (1979) 25 Cal.3d 339, 348 [158 Cal.Rptr. 350, 599 P.2d 656]*; *Solberg v. Superior Court (1977) 19 Cal.3d 182, 198 [137 Cal.Rptr. 460, 561 P.2d 1148]*.) In such a case, it does nothing less, and nothing other, than enforce the statute according to its terms. ( *Leroy T. v. Workmen's Comp. Appeals Bd., supra, 12 Cal.3d at p. 438*; accord, *Caminetti v. United States (1917) 242 U.S. 470, 485 [61 L.Ed. 442, 452-453, 37 S.Ct. 192]*.) This is so because, as a general matter, a court follows the plain meaning of a statute. (E.g., *Atlantic Richfield Co. v. Workers' Comp. Appeals Bd. (1982) 31 Cal.3d 715, 726 [182 Cal.Rptr. 778, 644 P.2d 1257]*; *People v. Belleci (1979) 24 Cal.3d 879, 884 [157 Cal.Rptr. 503, 598 P.2d 473]*.)

When, however, a court finds itself compelled to look beyond the statutory language, it applies the "rule that the object which a statute seeks to [\*1183] achieve and the evil which it seeks to prevent are of prime consideration in the statute's interpretation" ( *Judson Steel Corp. v. Workers' Comp. Appeals Bd. (1978) 22 Cal.3d 658, 669 [150 Cal.Rptr. 250, 586 P.2d 564]*; [\*\*\*\*75] accord, *Freeland v. Greco (1955) 45 Cal.2d 462, 467 [289 P.2d 463]*).

Applying these principles I conclude, as I shall explain, that the Cartwright Act applies to mergers.

To begin with, the statutory language in this regard is plain and as such clearly reveals the Legislature's intent, and hence there is no need to look beyond the statute's terms. The act provides in relevant part that "every trust is unlawful, against public policy and void" ( *Bus. & Prof. Code, § 16726*), and defines a "trust" to include "a combination of capital . . . by two or more persons . . . To make or enter into or execute or carry out any contracts,

obligations or agreements of any kind or description, by which they . . . Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any . . . article or commodity, that its price might in any manner be affected" (*id.*, § 16720, subd. (e)(4)).

In this section the term that is crucial for present purposes is "combination." In the abstract, that term broadly refers to any arrangement, regardless of whether the combining entities maintain [\*\*\*\*76] separate and [\*\*408] [\*\*\*244] independent interests and identities after they combine. In its statutory context, the term has the same broad scope: the comprehensive language of the statute plainly requires such a construction. Properly qualified, "combination" might refer narrowly to only that kind of arrangement in which the combining entities maintain separate and independent interests and identities. No such qualification, however, is expressed or implied in the statute. Thus, in accordance with its express terms the Cartwright Act must be understood to cover mergers -- which, of course, constitute one kind of "combination of capital."

Moreover, even if, for purposes of discussion, I should look beyond the language of the Cartwright Act to the object sought and the evil to be prevented, I would come to the same conclusion as to the meaning of "combination" and, more generally, the coverage of the act.

Consumer welfare is a principal, if not the sole, goal of antitrust laws -- of which, of course, the Cartwright Act is one -- and accordingly output restriction is one of their principal targets. ( [Cianci v. Superior Court \(1985\) 40 Cal.3d 903, 918 \[221 Cal.Rptr. 575, 710 P.2d 375\]](#); [\*\*\*\*77] [Marin County Bd. of Realtors, Inc. v. Palsson \(1976\) 16 Cal.3d 920, 935 \[130 Cal.Rptr. 1, 549 \[\\*1184\] P.2d 833\]](#); see, e.g., [National Soc. of Professional Engineers v. U.S. \(1978\) 435 U.S. 679, 686-696 \[55 L.Ed.2d 637, 646-653, 98 S.Ct. 1355\]](#) [discussing federal antitrust laws]; see generally 1 Areeda & Turner, [Antitrust Law](#) (1978) §§ 103-113, pp. 7-33 [hereinafter Areeda & Turner] [same]; Bork, [The Antitrust Paradox](#) (1978) pp. 50-89 [same].)

In other words, "Antitrust laws are designed primarily to aid the consumer. They rest 'on the premise 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.'" ( [Marin County Bd. of Realtors, Inc. v. Palsson, supra, 16 Cal.3d at p. 935](#), quoting [Northern Pac. R. Co. v. United States \(1958\) 356 U.S. 1, 4 \[2 L.Ed.2d 545, 549, 78 S.Ct. 514\]](#).)

Indeed, the Cartwright Act declares as its [\*\*\*\*78] ultimate purpose "*to promote free competition in commerce and all classes of business in this state.*" (Stats. 1907, ch. 530, tit., p. 984, italics in original; see [People v. Sacramento Butchers' Assn. \(1910\) 12 Cal.App. 471, 476 \[107 P. 712\]](#).)

It is beyond question that the consumer's interests can be adversely affected by a "combination" in the form of a merger as well as by a "combination" in which the parties do not attain to full integration.

Thus, when the object the statute seeks to attain and the evil it aims to prevent are considered the construction required by the provision's express terms is confirmed: the Cartwright Act covers mergers.

In [Munter v. Eastman Kodak Co. \(1915\) 28 Cal.App. 660 \[153 P. 737\]](#) -- the first reported decision relevant for present purposes -- the Court of Appeal impliedly construed the Cartwright Act to similar effect. It stated: "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 [\*\*\*\*79] 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. 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, [\*1185] produce, or any commodity." ( *Id. at p. 666*.) The preceding discussion constitutes the closest thing we have to a contemporaneous construction of the Cartwright Act, written as it was less than a [\*\*\*245] decade after the statute was enacted and much before its language could come to [\*\*409]

appear ambiguous and its purpose obscure. As such, it confirms what to my mind stands in no need of further confirmation: the Cartwright Act applies to mergers.

But even if my construction were not compelled by the express language of the Cartwright Act and its manifest purpose, it would be required by certain canons of statutory [\*\*\*\*80] construction. It is clear that "if the statute has been judicially construed, such construction of the statutory words becomes part of the statute 'as if it had been so amended by the legislature.'" ( *In re Davis* (1966) 242 Cal.App.2d 645, 653 [51 Cal.Rptr. 702] (per Kaus, J.), quoting *Winters v. New York* (1948) 333 U.S. 507, 514 [92 L.Ed. 840, 849, 68 S.Ct. 665], and citing *Cramp v. Bd. of Public Instruction* (1961) 368 U.S. 278, 285 [7 L.Ed.2d 285, 291, 82 S.Ct. 275], which itself quotes the *Winters* language.) It follows that "To alter the judicial interpretation of a statute the Legislature must alter the statute." ( *Sharpe v. Superior Court* (1983) 143 Cal.App.3d 469, 474 [192 Cal.Rptr. 16].) Applying these rules I conclude that the Cartwright Act should be construed as applying to mergers: in *Munter v. Eastman Kodak Co., supra*, 28 Cal.App. 660, the Court of Appeal impliedly adopted such a construction, and in the more than 70 years that have followed the Legislature has done absolutely nothing to alter the statute in relevant aspect.

In the course of their discussion, [\*\*\*\*81] the majority reject defendants' claim that the act was merely a codification of the common law, and that under the common law acquisitions were plainly lawful per se and mergers by acquisition were not considered "trusts" or "combinations" subject to prohibition. I agree.

First, the Cartwright Act is not a mere codification of the common law. The act does indeed "have [its] roots in the common law" ( *Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 315 [70 Cal.Rptr. 849, 444 P.2d 481]) -- but not its boundaries. As the court recently explained in *Cianci v. Superior Court, supra*, 40 Cal.3d 903: "At the very least, the Sherman Act codified the common law" ( *id. at p. 919*); but "the Cartwright Act is broader in range and deeper in reach than the Sherman Act" ( *id. at p. 920*), going as it does "beyond the Sherman Act to threats to competition in their incipency -- much like section 7 of the Clayton Act" ( *id. at p. 918*).

In support of their point, defendants rely on *Rolley, Inc. v. Merle Norman Cosmetics* (1954) 129 Cal.App.2d 844 [278 P.2d 63]. [\*\*\*\*82] Their reliance, [\*1186] however, is misplaced. In that case, to be sure, the Court of Appeal did indeed state that the Cartwright Act "is considered basically merely a statutory enactment of the common law of the state." ( *Id. at p. 846*.) In so stating, it misread the following language in *Speegle v. Board of Fire Underwriters* (1946) 29 Cal.2d 34 [172 P.2d 867]: "The Cartwright Act merely articulates in greater detail a public policy against restraint of trade that has long been recognized at common law." ( *Id. at p. 44*.) Read in context, that statement does not support the *Rolley* court's language, appearing as it does in a discussion to the effect that the Cartwright Act is at least as broad in scope as the common law. Nor does the statement support the *Rolley* court's language even when it is read out of its context: the "[articulation] in greater detail [of] a public policy against restraint of trade that has long been recognized at common law" ( *Speegle, supra, at p. 44*) is plainly not equivalent to "merely a statutory enactment of the common law" ( *Rolley, supra, at p. 846*). [\*\*\*\*83] In light of the discussion in *Cianci, supra*, 40 Cal.3d at pages 917-920, the Court of Appeal language in *Rolley* is erroneous.

[\*\*\*246] In any event, the common law is not as defendants represent it to be. To begin with, "trust," which was strictly not a common law term (see Letwin, *Congress and the Sherman Antitrust Law*: 1887-1890 (1956) 23 U. Chi. L. Rev. 221, 240-247 [hereinafter Letwin, *Congress and the Sherman Antitrust Law*]; Stimson, "Trusts" (1887) 1 Harv. L.Rev. 132, 132-133 [hereinafter [\*410] Stimson, "Trusts"]], and "combination," which was (see Letwin, *Congress and the Sherman Antitrust Law*, *supra*, at p. 243), were each broad enough to encompass mergers. To be sure, both terms were typically used to refer to economic arrangements that did not amount to a full integration. (See, e.g., Stimson, "Trusts," *supra*, at p. 133 [discussing trusts]; Letwin, *Congress and the Sherman Antitrust Law*, *supra*, at p. 243 [discussing trusts and combinations].) Each, however, could refer to such an integration.

For example, in *State v. Neb. Distilling Co.* (1890) 29 Neb. 700 [46 N.W. 155], [\*\*\*\*84] the Nebraska Supreme Court declared the conveyance of the Nebraska Distilling Company to the Whiskey Trust to be null and void, holding that the acquisition and consequent merger constituted a "combination" which was in total restraint of trade and as such illegal. ( *Id. at p. 719*.)

Similarly, in the celebrated case of [\*Richardson v. Buhl \(1889\) 77 Mich. 632 \[43 N.W. 1102\]\*](#), the Michigan Supreme Court held the Diamond Match Company to be an illegal "combination." As the opinion makes clear, Diamond was a single corporation which aimed at, and achieved, "the aggregation of an enormous amount of capital, sufficient to buy up and absorb all of that kind of business done in the United States and Canada, to prevent any other person or corporation from engaging in or carrying on [\*1187] the same, thereby preventing all competition in the sale of the article manufactured." ( [\*Id. at p. 657.\*](#)) The court effectively held that the acquisitions and consequent mergers constituted a single grand, and illegal, "combination." As stated above, the case was celebrated. In the long, formal address in which he opened the Senate debate on his [\*\*\*\*85] antitrust bill, Senator John Sherman of Ohio referred to *Richardson v. Buhl* as "quite a leading case" and read into the record the opinion of the court and the concurring opinion in their entirety. (21 Cong. Rec. 2458 (1890).)

Further, in a noted article Frederic J. Stimson recognized that the term "trust" covered arrangements under which one "corporation merely relinquishes [to another] its power of management through and by its own stockholders" and arrangements under which several corporations make an "assignment of all the corporate assets" to a holding company (Stimson, "Trusts," *supra*, 1 Harv. L.Rev. at p. 140). But he also made it plain that the term covered as well an arrangement whereby several corporations "merge . . . themselves, or their franchises . . ." (*Ibid.*)

Moreover, it is not the case that at common law acquisitions were plainly lawful per se. In support of their claim that they were, defendants rely fundamentally on the following language in the New Jersey Supreme Court's opinion in [\*Trenton Potteries Co. v. Oliphant \(1899\) 58 N.J. Eq. 507, 524 \[43 A. 723\]\*](#): "A person engaged in any manufacture or trade, [\*\*\*\*86] having the right to acquire and possess property, and to do with it what he chooses, may lawfully buy the business of any of his competitors. His first purchase would at once diminish competition. If he continued to purchase, each succeeding transaction would remove another competitor. If his capital was large enough to enable him to buy the business of all competitors, the last purchase would completely exclude competition, at least for a time. But in the absence of legislative restrictions (if such could be imposed) upon the acquisition of such property and its use when so acquired, courts could impose no limitations. They would be obliged to enforce such contracts, notwithstanding the effect was to diminish or even to exclude competition."

To my mind, the *Trenton Potteries* language does not present an accurate description of the state of the common law on the point. Indeed, it is at odds with the reasoning and result in [\*Richardson v. Buhl, supra, 77 Mich. 632, \[\\*\\*\\*247\]\*](#) and [\*State v. Nebraska Distilling Co., supra, 29 Neb. 700\*](#) -- cases that even defendants do not claim are aberrations.

As the Kentucky Supreme Court stated in [\*\*\*\*87] [\*Merchants' Ice & Cold Storage Co. v. Rohrman \(1910\) 138 Ky. 530 \[128 S.W. 599\]\*](#): "[We] cannot give our approval to the doctrine [\*\*411] announced by the New Jersey court. It is not only [\*1188] entirely at variance with our public policy as often declared both by the legislative and judicial departments of the state, but it is contrary to the great weight of authority. Indeed we have not found any case that goes so far in an effort to promote trusts and encourage monopolies." ( [\*Id. at pp. 550-551.\*](#))

The Kentucky court explained: "The question is too delicate and involves too many important rights to attempt an accurate statement of principles that might be applied to each case. On the one side, we have the inalienable right of the citizen to contract, and buy and sell, in the open market that which is the legitimate subject of barter and sale, and this privilege should not be abridged without good reason. On the other side, we have the interest of the public that must be protected, even though it cost a part of the liberty of the individual. It is not the purpose of the law to control or hinder enterprising, energetic men, with [\*\*\*\*88] brains or capital, from developing an industry or building up a great trade or business. The largest freedom in commercial enterprises compatible with the public good should be allowed. And so there should be no interference with the right to contract or to buy or sell unless it is apparent that the main purpose and reasonable effect of the contract is to create a condition of affairs that will enable the purchaser to control the market, destroy competition, and create a condition incompatible with the public good." ([\*138 Ky. at p. 543.\*](#))

To the extent that defendants may be understood to argue at bottom that the spirit of the common law would not brook restrictions on the sale and purchase of businesses they are unpersuasive. The common law prohibited

"engrossing," which had originally referred to "buying up large quantities of a good in order to sell it at raised prices . . . , but . . . came to mean cornering the supply of a commodity . . . ." (Letwin, *Congress and the Sherman Antitrust Law*, *supra*, 23 U. Chi. L.Rev. at p. 241; accord, Adler, *Monopolizing at Common Law and Under Section Two of the Sherman Act* (1917) 31 Harv. L.Rev. 246, 257-258.) [\*\*\*\*89] In the face of such a prohibition, it is hard to conclude that the common law would deem the purchase of a business -- through which "cornering" could be effected or furthered -- to be lawful per se.

Defendants also argue that the common law recognized that an acquisition and consequent merger could produce certain efficiencies that an arrangement between the parties not amounting to a full integration could not. For argument's sake I shall assume that defendants are correct. But from that premise it does not follow that the common law did or would treat *all* acquisitions as lawful per se.

[\*1189] In the course of their discussion, however, the majority *do* accept defendants' claim that the Cartwright Act has as its ultimate source a Texas antitrust statute (Act of Mar. 30, 1889, 1889 Tex. Gen. Laws, ch. 117, pp. 141 et seq.), that this statute had been definitively construed in [Gates v. Hooper \(1897\) 90 Tex. 563 \[39 S.W. 1079\]](#), as not covering mergers, and that the Legislature must be deemed to have incorporated that construction. I cannot agree.

For argument's sake, I shall assume that the Cartwright Act in fact has the Texas statute as its [\*\*\*\*90] ultimate source. It does not follow, however, that a California court would be compelled to follow the construction of the statute adopted by the court in *Gates*.<sup>5</sup>

[\*\*\*\*91] [\*\*412] [\*\*\*248] I recognize, to be sure, the rule of statutory construction that "When legislation has been judicially construed and a subsequent statute on the same or an analogous subject is framed in the identical language, it will ordinarily be presumed that the Legislature intended that the language as used in the later enactment would be given a like interpretation." ( [Los Angeles Met. Transit Authority v. Brotherhood of Railroad Trainmen \(1960\) 54 Cal.2d 684, 688 \[8 Cal.Rptr. 1, 355 P.2d 905\].](#))

What the rule establishes, I must emphasize, is only a presumption of legislative intent. Moreover, even when the presumption properly operates it does not compel the adoption of the judicial construction of the other [\*1190] jurisdiction's statute. "In fact, the courts of the adopting state are not absolutely bound and may refuse to follow the construction of the statute if they feel that it is against the weight of authority, the underlying precedent is no longer vital, is inconsistent with policy, or is not based on sound reasoning." (2A Sutherland on Statutes and Statutory Construction (Sands 4th ed. 1984 Singer rev.) § 52.02, p. 522, fns. [\*\*\*\*92] omitted; see also [Acco Contractors, Inc. v. McNamara & Peppe Lumber Co. \(1976\) 63 Cal.App.3d 292, 296 \[133 Cal.Rptr. 717\].](#))

<sup>5</sup> The pertinent discussion in *Gates* is as follows: "In order to constitute a trust, within the meaning of the statute, there must be a 'combination of capital, skill or acts by two or more.' 'Combination,' as here used, means union or association. If there be no union or association by two or more of their 'capital, skill or acts,' there can be no 'combination,' and hence no 'trust.' When we consider the purposes for which the 'combination' must be formed, to come within the statute, the essential meaning of the word 'combination,' and the fact that a punishment is prescribed for each day that the trust continues in existence, we are led to the conclusion that the union or association of 'capital, skill or acts' denounced is where the parties in the particular case designed the united co-operation of such agencies, which might have been otherwise independent and competing, for the accomplishment of one or more of such purposes. In the case stated in the petition there is no 'combination.' The plaintiff bought defendant's goods, together with the good will of his business, both of which were subjects of purchase and sale; and, in order to render the sale of the good will effectual, the seller agreed that he would not, for one year thereafter, do a like business in that town. This was but a kind of covenant or warranty that the purchaser should have the use and benefit of such good will during that year; for it is clear that, if the seller had immediately engaged in a like business at the same place, the purchaser would have had no benefit therefrom. By this transaction neither the capital, skill, nor acts of the parties were brought into any kind of union, association, or co-operative action. The purchaser became the owner of the things sold, and the seller was, by the terms of the contract, restrained from doing a thing which, if done, would have defeated in part the effectiveness of the sale. The agreement that the seller would exert himself to aid the purchaser in securing patronage but constituted the former the agent of the latter for that purpose, and in no wise contravened the statute." ([90 Tex. at pp. 564-565 \[39 S.W. at pp. 1080-1081\].](#))

Were a California court squarely faced with the question whether to follow the Texas court's construction of the Texas statute in *Gates*, I believe it would be compelled to answer it in the negative. In my view, it could not presume that the Legislature approved of the *Gates* holding or intended it to be the law of California. First, the reasoning of *Gates* is unsound: the Texas court recited that the purchaser bought the seller's business, but no more than two sentences later declared, "By this transaction neither the *capital*, skill, nor acts of the parties were brought into any kind of union." ([90 Tex. at p. 564 \[39 S.W. at p. 1080\]](#), italics added.)<sup>6</sup>

Second and perhaps more important, *Gates* is squarely inconsistent with the legislative policy of consumer welfare which underlies and informs the Cartwright Act. Specifically, the opinion must be deemed largely if not primarily an exercise in formalism: its attempt at an economic analysis of the consequences of the acquisition of one person's business by [\*\*\*\*93] another is empty. On its very face, by contrast, the Cartwright Act is concerned with economic effects. Indeed, "the statutory language speaks *solely* in terms of economic effects . . ." ([Cianci v. Superior Court, supra, 40 Cal.3d at p. 918](#), italics added.)<sup>6</sup>

[\*\*\*\*94] [\*1191] [\*\*413] [\*\*\*249] Defendants argue that the Legislature's original intent notwithstanding, the Cartwright Act should not now be construed to apply to the merger at issue here: if the court were to so construe the statute, it would effectively create a new criminal offense without legislative authority and subject them to criminal liability without first giving fair warning. This claim must be rejected out of hand.

Defendants' argument rests on the premise that in enacting the Cartwright Act the Legislature did not intend, and did not clearly reveal its intent, to frame a statute broad enough to include mergers within its scope. That premise, however, has been shown to be false. In any event, defendants' argument is not properly before the court: the action here is civil, not criminal.

<sup>6</sup> The majority present three minor arguments in support of their conclusion that the Cartwright Act cannot be construed to cover mergers. The first is that at the time the statute was enacted the term "combination" referred narrowly to only that kind of arrangement in which the combining entities maintain separate and independent interests and identities. As I have shown, this is not so. The majority may be understood to claim that certain language in [G.H.I.I. v. MTS, Inc. \(1983\) 147 Cal.App.3d 256, 266 \[195 Cal.Rptr. 211, 41 A.L.R.4th 653\]](#), and [Bondi v. Jewels by Edwar, Ltd. \(1968\) 267 Cal.App.2d 672, 678 \[73 Cal.Rptr. 494\]](#), support their construction. They are wrong: that language says nothing more than that "combination" does embrace an arrangement between two or more persons *within a single entity*.

The majority's second argument is that had the Legislature intended the Cartwright Act to apply to mergers it would have inserted an express antimerger provision as other state legislatures had done. But if as I have concluded the language of the act is broad enough to reach mergers, no such express provision was needed. If the Legislature has never expressly provided that the Cartwright Act is applicable to mergers, it is because it has never had to. As I have explained, in [Munter v. Eastman Kodak Co., supra, 28 Cal.App. 660](#), the Court of Appeal stated clearly, albeit impliedly, that although only mergers with anticompetitive effects are unlawful under the Cartwright Act, mergers are indeed within the act's coverage.

The majority's third argument appears to be as follows: in 1961 the Legislature enacted [Business and Professions Code section 16727](#) (hereinafter [section 16727](#)), which essentially incorporated [section 3](#) of the Clayton Act ([15 U.S.C. § 14](#)) prohibiting exclusive-dealing agreements; in so doing it manifested its recognition that the Cartwright Act did not have the reach of the Clayton Act generally; it thereby impliedly recognized that the Cartwright Act did not cover mergers. The argument is unpersuasive. I believe that the Legislature's enactment of [section 16727](#) can reasonably be understood not as the recognition the majority claim it is, but rather as a response to the decision in [Rolley, Inc. v. Merle Norman Cosmetics, supra, 129 Cal.App.2d 844, 845-852](#), which held that the Cartwright Act did not apply to exclusive-dealing agreements.

In an attempt to support their conclusion that the Legislature did not intend to include mergers in the scope of the Cartwright Act, the majority assert that that body may have had a reason to so limit the statute's reach. On this point, however, they engage in mere speculation and conjecture -- and altogether unpersuasive speculation and conjecture at that: in view of the fact that it sought to further consumer welfare by enacting the Cartwright Act, the Legislature cannot reasonably be deemed to have intended the application of the statute to turn on the formal characteristics of an arrangement rather than on its potential economic effects.

Defendants next argue in substance that even if the Cartwright Act was intended to cover mergers, it cannot constitutionally be applied because it contains no standard for determining whether or not a particular merger is lawful. The argument, however, rests on an unsupported premise and must therefore be rejected.

I believe that the Cartwright Act does indeed contain a standard [\*\*\*\*95] of illegality, and that the standard is essentially the same as that of section 7 of the Clayton Act -- which is indisputably clear enough to be understood by those who may come within the reach of the statute, and clear enough to be applied by the courts.

Section 7 declares that an acquisition is unlawful "where in any line of commerce or in any activity affecting commerce in any section of the [\*1192] country, the effect of such acquisition *may be* substantially to lessen competition, or to *tend* to create a monopoly." ([15 U.S.C. § 18](#), italics added.) The Cartwright Act similarly declares that an acquisition is unlawful where as a result of such acquisition the "price [of any article or commodity] *might in any manner* be affected." ([Bus. & Prof. Code, § 16720, subd. \(e\)\(4\)](#), italics added.) Thus, the federal and state standards of illegality are essentially the same.

This court recently recognized as much in [Cianci v. Superior Court, supra, 40 Cal.3d 903](#): "The [Cartwright] Act . . . reaches deep in proscribing anticompetitive conduct . . . . In so doing [it] reaches beyond the Sherman Act [\*\*\*\*96] to threats to competition in their incipiency -- much like section 7 of the Clayton Act . . . ." ([Id. at p. 918](#).)

Further, I believe that the standard of illegality established by the Cartwright Act [\*\*\*\*250] is meaningful. In [Brown Shoe Co. v. United States \(1962\) 370 U.S. 294 \[8 L.Ed.2d 510, 82 S.Ct. 1502\]](#), the United States Supreme Court construed section 7 of the Clayton Act thus: "Congress used the words '*may be* substantially to lessen competition' (emphasis supplied), to indicate that its concern was with probabilities, not [\*\*414] certainties. . . . Mergers with a probable anticompetitive effect were to be proscribed by this Act." ([Id. at p. 323 \[8 L.Ed.2d at p. 534\]](#), fn. omitted.) In this case I have similarly construed the Cartwright Act: the Legislature used the words "that [the] price [of any article or commodity] *might in any manner* be affected" ([Bus. & Prof. Code, § 16720, subd. \(e\)\(4\)](#), italics added), to indicate that its concern was with probabilities, not certainties: mergers with a probable anticompetitive effect were to be proscribed by this act.<sup>7</sup>

[\*\*\*\*97] 2

Turning from the threshold question whether the Cartwright Act applies to mergers, I must now address the question whether the first cause of action alleges facts that are legally sufficient under the statute. For the reasons that follow, I believe that it does.

The first cause of action, in essence, alleges all the elements of a Clayton section 7 claim. Defendants do not dispute the point. Rather, they maintain [\*1193] that the elements of a Cartwright Act claim and those of a Clayton section 7 claim cannot be the same, arguing that the Cartwright Act was enacted earlier and was not intended to go beyond the Sherman Act and the common law, and that the Clayton Act was enacted later and was intended to do so. I am not persuaded.

In making their argument defendants in essence recast aspects of other claims that I have already rejected. First, although the Cartwright Act was, of course, enacted before the Clayton Act, as I have shown it too was intended to go beyond the Sherman Act and the common law. Second and more important, in relevant aspect the statutes are similar: each proscribes mergers with probable anticompetitive effects.

Defendants also argue that the facts [\*\*\*\*98] alleged in the first cause of action are legally insufficient because, if true, they establish not the *probability* of anticompetitive effects but at most the mere ephemeral *possibility* of such

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<sup>7</sup> In [Rolley, Inc. v. Merle Norman Cosmetics, supra, 129 Cal.App.2d 844](#), the court stated: "the Clayton Act is broader in its prohibitions than the Sherman Act. It is in the same respects broader than the Cartwright Act . . . ." ([Id. at p. 851](#).) In [Milton v. Hudson Sales Corp. \(1957\) 152 Cal.App.2d 418 \[313 P.2d 936\]](#), the court followed *Rolley*: "the Clayton Act is broader in its prohibitions than the Sherman Act, and, in the same respects, is broader than the Cartwright Act . . . ." ([Id. at p. 441](#).) In light of the foregoing discussion each statement must be considered erroneous.

effects. "The charges of potential anticompetitive consequences in the complaint," defendants state, "are the very charges addressed and solved by the FTC for a minimum of five years and, in the FTC's judgment (based upon its expertise and extensive sources of information), forever." The point must be rejected.

In its review of a ruling on demurrer, a court "must, under established principles, assume the truth of all properly pleaded material allegations of the complaint" ([Tameny v. Atlantic Richfield Co. \(1980\) 27 Cal.3d 167, 170 \[164 Cal.Rptr. 839, 610 P.2d 1330, 9 A.L.R.4th 314\]](#)), and must therefore look to "the pleading alone and not the evidence or other extrinsic matters which do not appear on the face of the pleading or cannot be properly inferred from the factual allegations of the complaint" ([Executive Landscape Corp. v. San Vicente Country Villas IV Assn. \(1983\) 145 Cal.App.3d 496, 499 \[193 Cal.Rptr. 377\]](#); accord, [Ramsden v. Western Union \(1977\) 71 Cal.App.3d 873, 879 \[138 Cal.Rptr. 426\]](#)). [\*\*\*\*99] The ultimate consequences of the FTC's action may indeed prevent the Attorney General from proving his claim that the merger has probable anticompetitive effects. But such possible future consequences cannot render his allegations legally insufficient: they go only to the *truth* of the claim and hence are immaterial for purposes of demurrer.<sup>8</sup>

[\*1194] [\*\*415] [\*\*\*251] Defendants [\*\*\*\*100] finally assert in a footnote that the allegations of the first cause of action are legally insufficient because they fail to charge anticompetitive purpose. In support they rely on [Jones v. H.F. Ahmanson Co. \(1969\) 1 Cal.3d 93 \[81 Cal.Rptr. 592, 460 P.2d 464\]](#). But that opinion, properly read, states only that anticompetitive purpose must generally be alleged when the plaintiff alleges violations of certain subdivisions of the Cartwright Act other than that relevant here: "That Act makes unlawful any 'trust' ("Bus. & Prof. Code, § 16726), defined as a 'combination of capital, skill or acts by two or more persons for [inter alia] the following purposes: (a) To create or carry out restrictions in trade or commerce . . . (c) To prevent competition in . . . purchase of . . . any commodity.' ("Bus. & Prof. Code, § 16720)." ([1 Cal.3d at p. 118](#).) The subdivision of the Cartwright Act relevant here, by contrast, appears to require only intentional conduct from which anticompetitive effects may result, viz., "a combination . . . by two or more persons . . . To make or enter into or execute or carry [\*\*\*\*101] out any contracts, obligations or agreements . . . , by which they . . . Agree to pool, combine or . . . unite any interests that they may have connected with the sale or transportation of any . . . article or commodity, that its price might in any manner be affected." ([Bus. & Prof. Code, § 16720, subd. \(e\)\(4\)](#).) In any event, the *Jones* court recognized that "it may be sufficient in some instances to allege solely the effect of such combination from which a purpose to eliminate competition may be inferred . . ." ([Id. at p. 119](#).) This, I believe, is such an instance; from the specific allegations of anticompetitive effects stated in the complaint a purpose to eliminate competition may readily be inferred.

In conclusion, I would hold that the first cause of action alleges facts that are legally sufficient under the Cartwright Act.

## B

The first cause of action, as I shall now explain, is not preempted by HSR itself or by the consent order.<sup>9</sup>

<sup>8</sup> I observe in passing that as of this date the FTC's "solution" to the anticompetitive problems posed by the Texaco-Getty merger in California appears destined for failure. As noted above, that "solution" was predicated on the expectation that by 1989, when the part of the consent order requiring Texaco to supply Getty crude oil to independent refiners in the state expires, there would be new supplies of oil from offshore sites to satisfy all market demands. That expectation, however, will likely be frustrated. It currently appears that offshore sites may not even be leased for oil production until 1990 or later.

<sup>9</sup> Defendants have submitted briefs in which they present arguments to the contrary. In the course of my analysis I shall address their points. After briefing was completed, they directed the court's attention to an article by Daniel Oliver, appointed to the FTC as Chairman in 1986, which is essentially devoted to an analysis of the present action: *Federal and State Antitrust Enforcement: Constitutional Principles and Policy Considerations* (1988) 9 Cardozo L.Rev. 1245 [hereinafter Oliver, *Federal and State Antitrust Enforcement*]. Although Chairman Oliver's views cannot be rejected out of hand, they need not be addressed separately: they amount to little more than restatements of arguments presented by defendants.

[\*\*\*\*102] Before I undertake preemption analysis proper, however, I find it necessary to make two general observations relevant to my discussion.

[\*1195] First, state and federal antitrust laws are of concurrent effect and hence the latter generally does not preempt the former. Federal antitrust statutes are intended as a general matter to supplement and not supplant state antitrust laws. (E.g., [R. E. Spriggs Co. v. Adolph Coors Co. \(1974\) 37 Cal.App.3d 653, 660 \[112 Cal.Rptr. 585\]](#); Hovenkamp, *State Antitrust in the Federal Scheme* (1983) [58 Ind. L.J. 375, 375](#) [hereinafter Hovenkamp, *State Antitrust*]; see, e.g., [Younger v. Jensen \(1980\) 26 Cal.3d 397, 405 \[161 Cal.Rptr. 905, 605 P.2d 813\]](#).) As Senator Sherman stated in urging passage of his bill, which is the cornerstone of the entire structure of federal antitrust legislation: "This bill . . . has for its . . . object to invoke the aid of the courts of the United States to deal with the combinations . . . when they affect injuriously our foreign and interstate commerce . . . and in this way to supplement the enforcement of the established rules of the common and [\*\*\*252] [\*\*\*\*103] statute law by the courts of the several States in dealing with combinations that affect injuriously the industrial liberty of the citizens of these states. It is to arm the Federal courts within the limits of their constitutional power that they may co-operate with the State courts in checking, curbing, [\*416] and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States." (21 Cong.Rec. 2457 (1890).) See generally Hovenkamp, *State Antitrust*, *supra*, at p. 378 ["the Fifty-first Congress, which debated and passed the Sherman Act in 1890[,] . . . envisioned a two-level enforcement scheme in which federal law would supplement but not replace, state **antitrust law**"].)

As Professors Phillip Areeda and Donald F. Turner explain in their authoritative treatise: "Many states have antitrust laws of their own -- often in the same general terms as the Sherman Act. Normally, when a state statute is consistent with federal law, the two operate concurrently, unless Congress has expressed an intent exclusively to 'occupy the field.' No such intent has been expressed in the antitrust field, and none has [\*\*\*\*104] been inferred. Nor should it be. While state governments could seek injunctive or damage relief in the federal courts under federal law, there seems little reason to prevent state law from reaching price fixing and similar offenses with a substantial local impact.

"Where state law prohibits the same, or less than the federal antitrust laws, there is, therefore, no general difficulty in giving effect to the state's commands. However, where state law forbids more than federal law -- which is not the usual situation -- the problem is more subtle. *The general answer is that such a state law remains consistent with federal law, and is not preempted. The fact that federal law tolerates certain conduct does not necessarily mean that there is an affirmative federal policy encouraging such conduct.*" (1 Areeda & Turner, *supra*, para. 208, pp. 58-59, fns. omitted, italics [\*1196] added; see Hovenkamp, *State Antitrust*, *supra*, 58 Ind. L.J. at p. 377, fn. 10, and *passim* [as a general matter, state **antitrust law** may constitutionally prohibit what federal **antitrust law** allows]; Note, *The Commerce Clause and State Antitrust Regulation* (1961) 61 Colum. L. Rev. 1469; [\*\*\*\*105] Mosk, *State Antitrust Enforcement and Coordination with Federal Enforcement* (1962) 21 A.B.A. Antitrust Section Rep. 358, 367.)

The "general answer" that Professors Areeda and Turner give is rooted in the very nature of **antitrust law**. Unlike direct government regulation of private economic activity, which is designed to permit only what the government has reviewed and approved as in the public interest, **antitrust law** is intended to proscribe certain conduct and otherwise allow private economic actors to manage their affairs as they see fit. (See generally Baker, *Competition and Regulation: Charles River Bridge Recrossed* (1975) 60 Cornell L. Rev. 159.) In a word, **antitrust law** does not permit and approve, but merely allows.

My second general observation concerns the nature, function, and effective scope of the consent decree or order in federal civil antitrust litigation. A consent decree is a settlement of federal antitrust claims, negotiated by a federal enforcement agency and the defendant, and entered by a federal court as a final judgment. (Schwartz & Flynn, *Antitrust and Regulatory Alternatives* (1977) p. 22 [hereinafter Schwartz & Flynn]; see [Maryland v. United States \(1983\) 460 U.S. 1001, 1002 \[75 L.Ed.2d 472, 473, 610, 103 S.Ct. 1240\]](#) [\*\*\*\*106] (Rehnquist, J., dissenting from summary affirmance) [recognizing that a consent decree in a federal civil antitrust case "is in essence a private agreement between parties to a lawsuit"]; see generally Rep. of Antitrust Subcom., Com. on the Judiciary, *Consent Decree Program of the Dept. of Justice*, 86th Cong., 1st Sess. (1959) p. ix; [United States v. Hartford-Empire Co.](#)

(N.D. Ohio 1940) 1 F.R.D. 424, 426; Note, *The ITT Dividend: Reform of Department of Justice Consent Decree Procedures* (1973) 73 Colum. L. Rev. 594, 595.) In practical effect, the consent decree represents not an approval of any activities or structures by the enforcement agency but simply its determination that [\*\*\*253] the activities or structures as conditioned do not warrant prosecution.

In determining whether and on what terms to effect a settlement, the government enforcement agency in question exercises broad discretion. And in reviewing the exercise of such discretion before entering [\*\*417] judgment, the court does not pass on the merits of the settlement achieved.

"Prior to 1975," as Professors Louis B. Schwartz and John J. Flynn have written, "consent decree [\*\*\*\*107] negotiations were generally secret; third parties [\*1197] affected by the decree had little opportunity or right to participate in formulating the decree; and the [agency] exercised wide discretion, not effectively subject to judicial scrutiny, in making such settlements. In United States v. I.T.T. Corp., 349 F.Supp. 22 (D.C.Conn. 1972), aff'd per curiam, sub. [sic] nom., *Nader v. United States*, 410 U.S. 919, 93 S.Ct. 1363, 35 L.Ed.2d 582 (1973), the consent decree discretion of the [agency] was held to be nonreviewable even upon allegations of 'fraud on the court' with respect to the considerations that influenced the [agency] in settling three merger cases with I.T.T." (Schwartz & Flynn, *supra*, at p. 22, fn. omitted.)

The situation changed somewhat, but not essentially, with the enactment of the Antitrust Procedures and Penalties Act of 1974 (hereinafter APPA), amending section 5 of the Clayton Act (15 U.S.C. § 16), which reformed the consent decree process in the wake of "Revelations during the 'Watergate' episode, questions raised during the confirmation hearings of Attorney General Kliendienst [\*\*\*\*108] [sic], and the subsequent misdemeanor conviction of Kliendienst [sic] for misleading the Judiciary Committee about pressures applied to the Justice Department in settling the I.T.T. cases . . ." (Schwartz & Flynn, *supra*, at p. 22.)

The APPA imposes the following requirements, among others. At least 60 days prior to the effective date of the judgment, the enforcement agency must file the proposed consent decree in the court in which the case is pending and publish it in the Federal Register. (15 U.S.C. § 16(b).) The agency must also file and publish any written comments on the proposal and any responses by the government. (*Ibid.*) Simultaneously with filing the proposal, the agency must file and publish a "competitive impact statement," which must recite "(1) the nature and purpose of the proceeding.; [para. ] (2) a description of the practices or events giving rise to the alleged violation of the antitrust laws; [para. ] (3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and [\*\*\*\*109] the anticipated effects on competition of such relief; [para. ] (4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding; [para. ] (5) a description of the procedures available for modification of such proposal; and [para. ] (6) a description and evaluation of alternatives to such proposal actually considered by the United States." (*Ibid.*) The agency must also publish in general-circulation newspapers specified materials, including summaries of the proposed consent decree and the competitive impact statement. (*Id.*, § 16(c).) The agency must accept, consider, and respond to any written comments submitted on the proposal. (*Id.*, § 16(d).) Finally, "Before entering [the proposed] consent judgment [\*1198] . . . , the court shall determine that the entry of such judgment is in the public interest." (*Id.*, § 16(e).)

Although -- as will appear -- the APPA opens the settlement process to public participation and scrutiny, it does not significantly limit the breadth of the enforcement agency's discretion or broaden the limits of the court's [\*\*\*\*110] review. Consequently, it does not transform the practical effect of the consent decree from a determination that certain activities or structures as conditioned do not warrant prosecution into an approval of such activities or structures.

First, in drafting the competitive impact statement and carrying out its other responsibilities under the APPA, the enforcement agency is not required to make findings on the competitive effects of the underlying [\*\*\*254] activities or structures, nor is it authorized to approve such activities or structures, conditioned or not. Rather, the agency is required only to explain the basis for the exercise of its discretion.

Second, in conducting the review required of it the court determines only [\*\*418] whether the decision to settle the case is in the public interest -- in other words, whether the agency's judgment that the activities or structures as conditioned do not warrant prosecution is within the scope of its broad discretion -- *not* whether the activities or structures themselves are in the public interest.

As Senior Circuit Judge Bailey Aldrich, sitting as a district court, explained in [United States v. Gillette Co. \(D.Mass. 1975\) 406 F.Supp. 713, 716](#): [\*\*\*\*111] "It is not the court's duty to determine whether this is the best possible settlement that could have been obtained if, say, the government had bargained a little harder. The court is not settling the case. It is determining whether the settlement achieved is within the reaches of the public interest. Basically I must look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass." (Accord, [United States v. G. Heileman Brewing Co. \(D.Del. 1983\) 563 F.Supp. 642, 647](#) [78 A.L.R.Fed. 365]; [United States v. Agri-Mark, Inc. \(D.Vt. 1981\) 512 F.Supp. 737, 739](#); [United States v. Carrols Dev. Corp. \(N.D.N.Y. 1978\) 454 F.Supp. 1215, 1222](#); [United States v. Nat. Broadcasting Co., Inc. \(C.D.Cal. 1978\) 449 F.Supp. 1127, 1143](#); 2 Areeda & Turner, *supra*, § 330d, pp. 147-148; 5 Kintner, Federal [Antitrust Law](#) (1984) § 40.25, pp. 209-210; see [Maryland v. United States, supra, 460 U.S. at p. 1005](#) [75 L.Ed.2d at p. 474] (Rehnquist, J., dissenting from summary affirmance) (stating that under the APPA "The question assigned to the district courts" [\*\*\*\*112] is ". . . 'whether the Department of Justice has exercised its prosecutorial discretion well or, perhaps, as well as possible' . . .").)

[\*1199] In light of the nature and function of the consent decree, its effective scope becomes plain. As a negotiated settlement, the consent decree "is binding only upon the parties thereto, and independent private rights may be maintained in separate suits [by third parties]." (Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits -- The Twenty -Third Annual Antitrust Review* (1971) 71 Colum. L. Rev. 1, 17, fn. 88 [hereinafter Handler]; accord, [Sam Fox Publishing Co. v. U.S. \(1961\) 366 U.S. 683, 690](#) [6 L.Ed.2d 604, 81 S.Ct. 1309]; 2 Areeda & Turner, *supra*, para. 330d, p. 143.) Such separate suits, it is plain, may be based on federal law. (Handler, *supra*, at p. 17, fn. 88; [Sam Fox Publishing Co. v. U.S., supra, at p. 690](#) [6 L.Ed.2d at p. 610]; 2 Areeda & Turner, *supra*, para. 330d, p. 143.) A fortiori, they may be based on state law as well: by its terms, the consent decree purports to cover only claims predicated on federal law.

Turning [\*\*\*\*113] to the issue of preemption, I start with a principle derived from the foregoing discussion -- viz., that as a general matter at least, Congress has not granted preemptive effect to the federal antitrust laws or to consent decrees entered pursuant to those laws. From that principle I reason that unless Congress has specially granted preemptive effect to HSR or to consent decrees entered pursuant to HSR, the Texaco-Getty consent order does not bar this action. As I shall explain, I believe that Congress has made no such grant.

Crucial to the resolution of the issue of preemption is, of course, HSR itself -- which, as noted above, is section 7A of the Clayton Act and is codified in [section 18a of title 15 of the United State Code](#). The statute provides in substance as follows. Subsection (a) generally prohibits one firm from acquiring another where a very large merger will result, unless both give advance notice to the FTC and the Justice Department and wait until the expiration of a premerger waiting period. (Clayton Act § 7A(a), [15 U.S.C. § 18a\(a\)](#).)

Subsection (b) provides that generally the premerger waiting period begins when the government receives the [\*\*\*\*114] notification and ends 30 days later. (Clayton Act § 7A(b), [15 U.S.C. § 18a\(b\)](#).)

[\*\*\*255] Subsection (c) exempts a variety of acquisitions that either pose no anticompetitive threats under section 7 of the Clayton Act, or are already subject to advance antitrust review. (Clayton Act § 7A(c), [15 U.S.C. § 18a\(c\)](#).)

Subsection (d) requires the FTC to specify the information to be supplied on the [\*\*419] premerger notification form. (Clayton Act § 7A(d), [15 U.S.C. § 18a\(d\)](#).)

[\*1200] Subsection (e) permits the government to request additional information relevant to a planned acquisition within the 30-day waiting period and, in general, to extend the waiting period up to 20 days after receipt of that information. (Clayton Act § 7A(e), [15 U.S.C. § 18a\(e\)](#).)

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Subsection (f) provides that if the government files an action challenging a proposed merger and seeks injunctive relief, the courts shall give expedited consideration to the action. (Clayton Act § 7A(f), [15 U.S.C. § 18a\(f\)](#).)

Subsection (g) authorizes civil penalties of up to \$ 10,000 per day for violation [\*\*\*\*115] of HSR's requirements and provides that if any firm fails to comply substantially with a request for premerger information, the courts may order compliance and effectively enjoin the pending merger until substantial compliance is achieved. (Clayton Act § 7A(g), [15 U.S.C. § 18a\(g\)](#).)

Subsection (h) provides that premerger information submitted under HSR is confidential and generally not subject to disclosure. (Clayton Act § 7A(h), [15 U.S.C. § 18a\(h\)](#).)

Subsection (i), the savings provision, declares in relevant part as follows: "Any action taken by the Federal Trade Commission or the Assistant Attorney General [in charge of the Antitrust Division of the Department of Justice] or any failure of the Federal Trade Commission or the Assistant Attorney General to take any action under this section shall not bar any proceeding or any action with respect to such acquisition at any time under any other section of this Act or any other provision of law." (Clayton Act § 7A(i), [15 U.S.C. § 18a\(i\)](#).)

Subsection (j) requires the FTC and the Department of Justice to report on their HSR activities annually. (Clayton Act § [\*\*\*\*116] 7A(j), [15 U.S.C. § 18a\(j\)](#).)

Congress's intent in enacting HSR, which may be inferred from the words of the statute itself, is revealed clearly in the legislative history.

"The purpose of [HSR] is to amend the federal anti-merger law, Section 7 of the Clayton Antitrust Act ([15 U.S.C. § 18](#)), by establishing premerger notification and waiting requirements for corporations planning to consummate very large mergers and acquisitions. The [statute] in no way alters the substantive legal standard of Section 7: That statute's longstanding prohibitions against acquisitions that may substantially lessen competition or tend to create a monopoly, remain unaffected by this measure.

"[HSR] will, however, strengthen the enforcement of Section 7 by giving the government antitrust agencies a fair and reasonable opportunity to detect and investigate large mergers of questionable legality before they are consummated. The government will thus have a meaningful chance to win a [\*1201] premerger injunction -- which is often the only effective and realistic remedy against large, illegal mergers -- before the assets, technology, and management of [\*\*\*\*117] the merging firms are hopelessly and irreversibly scrambled together, and before competition is substantially and perhaps irremediably lessened, in violation of the Clayton Act." (H.R. Rep. No. 94-1373, 94th Cong., 2d Sess. (1976) p. 5.)

In addressing the question whether HSR preempts state antitrust laws generally and the Cartwright Act specifically, I am guided by settled principles declared by the United States Supreme Court. "It is well established that within constitutional limits Congress may pre-empt state authority by so stating in express terms. [Citation.] Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be found from a "scheme of federal regulation . . . so pervasive as to [\*\*\*256] make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be [\*\*420] obtained by the federal law and the character of obligations imposed by it may reveal the same purpose." [Citations. [\*\*\*\*118] ] Even where Congress has not entirely displaced state regulation in a specific area, state law is pre-empted to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility,' [citation], or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' [Citation.]" ( [Pacific Gas & Elec. v. Energy Resources Comm'n \(1983\) 461 U.S. 190, 203-204 \[75 L.Ed.2d 752, 765, 103 S.Ct. 1713\]](#).)

Although Congress may preempt by implication, "It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The

exercise of federal supremacy is not lightly to be presumed." ([Schwartz v. Texas \(1952\) 344 U.S. 199, 202-203 \[97 L.Ed. 2d 231, 235, 73 S.Ct. 232\]](#); accord, [New York Dept. of Social Services v. Dublino \(1973\) 413 U.S. 405, 413 \[37 L.Ed.2d 688, 695, 93 S.Ct. 2507\]](#).) Put otherwise, there is an "assumption that the historic police powers of the States [\*\*\*\*119] were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." ([Rice v. Santa Fe Elevator Corp. \(1947\) 331 U.S. 218, 230 \[91 L.Ed. 1447, 1459, 67 S.Ct. 1146\]](#); accord, [P.R. Dept. of Consumer Affairs v. Isla Petroleum \(1988\) 485 U.S. 495, 199 L.Ed.2d 582, 589, 108 S.Ct. 1350, 1353](#).)

I observe at the threshold that the application of preemption analysis appears uncalled for here. Congress has made it plain that HSR is not [\*1202] preemptive: in the savings provision it expressly declares that "Any action taken by the Federal Trade Commission . . . or any failure of the Federal Trade Commission . . . to take any action under this section shall not bar any proceeding or any action with respect to such acquisition at any time under any other section of this Act or any other provision of law." ([15 U.S.C. § 18a\(i\)\(1\)](#), italics added.) If the federal antitrust laws were generally preemptive, the savings provision might perhaps be susceptible of a construction preserving rights of action under federal law alone. But inasmuch as they are not, the savings provision [\*\*\*\*120] cannot be so construed but must be read to mean precisely what it says.<sup>10</sup>

For purposes of discussion, however, I shall proceed to apply preemption analysis. Under such analysis, it is manifest that the general presumption [\*\*\*\*121] of nonpreemption, which is applicable to HSR, cannot be overcome.

First, Congress has not inserted in the statute express language preempting state action. Indeed, as I have shown, the only language bearing on the issue is expressly nonpreemptive.

Second, the scheme of HSR is not so pervasive as to make reasonable the inference that Congress left no room for state action. The statute is limited to premerger notification and review and as such plainly leaves room for the enforcement of the substantive provisions of the Cartwright Act. More particularly, HSR does not touch a field in which the federal interest is so dominant as to preclude enforcement of [\*\*\*257] state laws on the same subject: as I have explained, federal and state antitrust laws are of concurrent effect. Nor is a congressional purpose to preclude the enforcement of the substantive provisions of the Cartwright Act revealed either by the object of HSR -- i.e., the facilitation of early and effective federal review of certain very large mergers -- or by the character of the obligations [\*\*421] it imposes -- i.e., the requirement that merging parties notify the federal government, provide it with certain information, [\*\*\*\*122] and refrain from consummating the merger.

Third, there is no conflict between HSR and the Cartwright Act. It is not physically impossible for merging parties to comply with both the notification requirements of HSR and the substantive requirements of the [\*1203] Cartwright Act. Nor does the Cartwright Act stand as an obstacle to the fulfillment of the notification requirements by the merging parties or to the conduct of review of the proposed merger by the federal government.

Impliedly conceding that HSR itself is not preemptive, defendants argue that the consent order entered pursuant to the statute is. As I shall explain, the point must be rejected.

At the threshold I believe that a court may properly hold the consent order to be nonpreemptive as a matter of law without undertaking additional preemption analysis. If Congress has not granted the FTC authority to preempt state action under HSR, the FTC has no such authority under the statute. (See [Fidelity Federal Sav. & Loan Assn. v. De La Cuesta \(1982\) 458 U.S. 141, 152-154 \[73 L.Ed.2d 664, 674-676, 102 S.Ct. 3014\]](#)) I am unable to find any such

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<sup>10</sup> Defendants' attempt to empty HSR's savings provision of its substance founders on the plain meaning of the words of the clause and hence does not require an extended response. One point, however, may be made. Contrary to defendants' assertion, nothing in the language of HSR, its purpose, or its legislative history supports, less still compels, the conclusion that the statute bars actions in state courts based on state **antitrust law**. The legislative history cited by defendants and rehearsed in Oliver, *Federal and State Antitrust Enforcement*, *supra*, 9 Cardozo L.Rev. at page 1270, establishes only that the savings provision was intended, *inter alia*, to preserve the federal government's right to challenge a merger -- not that it was meant to preclude a challenge founded in state law.

grant of authority. Congress, it is undisputed, has [\*\*\*\*123] not granted preemptive authority expressly. Nor does it appear to have done so impliedly: otherwise, it would not have used the broad and express nonpreemptive language it has used in the savings provision.

Certainly, if Congress had intended to grant the FTC power to authorize mergers capable of preempting state law, it knew how to do so. Indeed, it has given the Interstate Commerce Commission (hereinafter ICC) precisely that power over railroad consolidations, mergers, and acquisitions. Specifically, it has provided that "The [ICC] shall approve and authorize [such] a transaction . . . when it finds the transaction" -- as originally proposed by the parties or as subsequently conditioned by the ICC -- is "consistent with the public interest." ([49 U.S.C. § 11344\(c\)](#)) It has further provided: "A carrier or corporation participating in or resulting from a transaction approved by . . . the [ICC] . . . may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction *without the approval of a State authority*. A carrier, corporation, or person participating in that approved . . . transaction [\*\*\*\*124] *is exempt from the antitrust laws and from all other law, including State and municipal law*, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction." (*Id.*, [§ 11341\(a\)](#), italics added.)

In sum, if Congress had intended to grant the FTC preemptive authority through HSR, it would have used language identical or similar to that quoted above, or at the very least would not have inserted in the statute the savings provision with its broad and express nonpreemptive language.

For purposes of discussion, however, I shall address the issue whether the Texaco-Getty consent order has preemptive effect. As the United States Supreme Court has made clear, in determining whether a particular administrative [\*1204] action is preemptive courts must consider factors developed originally in the context of statutory preemption: "Under the Supremacy Clause, . . . the enforcement of a state regulation may be pre-empted by federal law in several circumstances: first, when Congress, in enacting a federal statute, has expressed a clear intent to pre-empt state law, [citation]; [\*\*\*\*125] second, when it is clear, despite the absence of explicit pre-emptive language, that Congress has intended, by legislating comprehensively, to occupy an [\*\*\*258] entire field of regulation and has thereby 'left no room for the States to supplement' federal law, [citation]; and, finally, when compliance with both state and federal law is impossible, [citation], or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" ([Capital Cities Cable, Inc. v. Crisp \(1984\) 467 U.S. 691, 698-699](#) [[\\*\\*422](#)] [\[81 L.Ed.2d 580, 588-589, 104 S.Ct. 2694\]](#); see also [California Coastal Comm'n v. Granite Rock Co. \(1987\) 480 U.S. 572, 581](#) [[94 L.Ed.2d 577, 107 S.Ct. 1419, 1425](#)] [discussing the second and third factors]; accord, [Silkwood v. Kerr-McGee Corp. \(1984\) 464 U.S. 238, 248](#) [[78 L.Ed.2d 443, 452, 104 S.Ct. 615](#)] [same].)

When administrative action is claimed to preempt by implication, the implication of preemption must be pellucidly clear. "Pre-emption of state law by federal . . . regulation is not favored 'in the absence of persuasive reasons -- either [\*\*\*\*126] that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'" ([Chicago & N. W. Tr. Co. v. Kalo Brick & Tile Co. \(1981\) 450 U.S. 311, 317](#) [[67 L.Ed.2d 258, 264-265, 101 S.Ct. 1124](#)].) "Courts are reluctant to infer preemption, and it is the burden of the party claiming that Congress intended to preempt state laws to prove it." ([Elsworth v. Beech Aircraft Corp. \(1984\) 37 Cal.3d 540, 548](#) [[208 Cal.Rptr. 874, 691 P.2d 630](#)]; accord, [Perdue v. Crocker National Bank \(1984\) 38 Cal.3d 913, 937](#) [[216 Cal.Rptr. 345, 702 P.2d 503](#)]; see, e.g., [Exxon Corp. v. Governor of Maryland \(1978\) 437 U.S. 117, 132](#) [[57 L.Ed.2d 91, 104, 98 S.Ct. 2207](#)].)

As the United States Supreme Court recently stated: "[Because] agencies normally address problems in a detailed manner and speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments, we can expect that they will make their intentions clear if they intend for their regulations to be exclusive. Thus, if an agency does not speak to the question [\*\*\*\*127] of pre-emption, we will pause before saying that the mere volume and complexity of its regulations indicate that the agency did in fact intend to preempt." ([Hillsborough County v. Automated Medical Labs. \(1985\) 471 U.S. 707, 718](#) [[85 L.Ed.2d 714, 724, 105 S.Ct. 2371](#)].)

Applying this analysis to the case at bar, I am of the opinion that the consent order is not preemptive. The first factor, as no one disputes, is absent here: the consent order contains no express statement of preemption.

[\*1205] As to the second factor -- the agency's regulation of the underlying transaction in such a comprehensive manner as to imply an intention to occupy an entire field -- I make the following observation at the threshold. The United States Supreme Court has made it clear that a court should rely on this factor to infer preemption with great caution. "We are even more reluctant to infer pre-emption from the comprehensiveness of regulations than from the comprehensiveness of statutes. As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. To infer pre-emption whenever an agency deals with a problem [\*\*\*\*128] comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence." ( *Hillsborough County v. Automated Medical Labs., supra, 471 U.S. at p. 717 [85 L.Ed.2d at p. 724]*.)

The consent order, though long and detailed, seems hardly comprehensive. Restricting my view to those aspects of the merger that directly concern California, I note that the consent order essentially addresses only one matter material to this action -- viz., the supply of Getty California crude oil to independent refiners -- and does so in provisions that expire by their own terms in 1989. I am unable to conclude that administrative action so limited in scope and temporal effect can properly be [\*\*\*259] deemed "comprehensive." <sup>11</sup>

[\*\*\*\*129] [\*\*423] The third factor to which a court must look to determine whether federal administrative action preempts state law comprises two considerations: whether compliance with both state and federal law is impossible, and whether state law stands as an obstacle to the accomplishment of federal objectives.

In addressing the first consideration, I begin with the observation that the requirement of the impossibility of dual compliance is strictly construed: the federal-state conflict must be actual and unavoidable, not merely possible ( *Askew v. American Waterways Operators, Inc. (1973) 411 U.S. 325, 336-337* ). Guided by such a construction, I believe that the first consideration [\*1206] does not support preemption: compliance with both the Cartwright Act and the consent order simply does not appear to be impossible.

Although defendants do not dispute this conclusion, they may be understood to argue that they could not comply with both the interlocutory and permanent obligations sought by the Attorney General -- viz., that pending conclusion of the action Texaco hold Getty's California facilities and properties separate, and that at the action's conclusion [\*\*\*\*130] it divest itself of those assets -- and the obligations imposed by the consent order -- viz., that Texaco manage Getty's California facilities and properties in a specified manner. The terms of the consent order itself show that such an argument would be specious.

Defendants can comply with both the consent order and the interlocutory relief sought. Under the order Texaco is required to divest itself of certain non-California assets, to hold them separate pending divestiture, and to manage them in a specified manner in the interim. If Texaco can hold non-California assets separate and at the same time manage them in a specified manner, it can evidently do the same with regard to Getty's California facilities and properties.

Defendants can also comply with both the consent order and the permanent relief sought. Under the order, Texaco is not *required* to merge Getty's California facilities and properties into itself, but is merely *allowed* to do so if it

<sup>11</sup> In *Russo v. Texaco, Inc. (E.D.N.Y. 1986) 630 F.Supp. 682, 685*, affirmed (2d Cir. 1986) *808 F.2d 221*, the district court noted with apparent approval language used by the court of Appeal below: "That order 'comprehensively [regulated] the merger between Texaco and Getty on a nationwide basis.'" In reliance on that quotation, defendants argue that the consent order is indeed "comprehensive." Their reliance, however, is misplaced. The district court's approval cannot be understood to extend beyond the Court of Appeal's language to its conclusion that the consent order is "comprehensive" for purposes of preemption. The district court did not address, less still resolve, the issue of preemption. "It is axiomatic that cases are not authority for propositions not considered." ( *People v. Gilbert (1969) 1 Cal.3d 475, 482, fn. 7 [82 Cal.Rptr. 724, 462 P.2d 580]*; accord, *McDowell & Craig v. Santa Fe Springs (1960) 54 Cal.2d 33, 38 [4 Cal.Rptr. 176, 351 P.2d 344]*.)

meets certain conditions. Contrary to what appears to be defendants' argument, by entering into the consent order the FTC did not authorize or approve the merger, but simply declared in effect that the merger as conditioned [\*\*\*\*131] did not warrant prosecution. Thus, Texaco can fulfill the obligations under the consent order and divest itself of Getty's California assets.

But even if the consent order did require Texaco to merge Getty's California facilities and properties into itself, Texaco could still fulfil its obligations under the order and divest itself of those assets. To assure the possibility of dual compliance, the court need only tailor its injunction to become effective on or after expiration of the consent order. I must presume that the trial court would readily do so.

In any event, even if under the terms of the consent order defendants were unable to comply with the interlocutory or permanent obligations sought by the Attorney General, it is undisputed that they are able to comply with the Cartwright Act itself and other relief that may be granted under its provisions. Thus, the order can effectively bar, at most, one form of relief [\*\*\*260] sought under the cause of action. But it simply cannot bar the cause of action itself.

[\*1207] The second consideration also fails to support preemption. Neither the Cartwright Act itself nor the Attorney General's attempt to enforce [\*\*\*\*132] it in this action stands as an obstacle to the objectives Congress sought to attain through the enactment of HSR. Congress's purpose was to "establish[] premerger notification and waiting requirements for corporations planning [\*\*424] to consummate very large mergers and acquisitions" and thereby "[give] the government antitrust agencies a fair and reasonable opportunity to detect and investigate large mergers of questionable legality before they are consummated." (H.R. Rep. No. 94-1373, 94th Cong., 2d Sess., *supra*, p. 5.) It does not appear, nor do defendants claim, that the Cartwright Act in the abstract or this action as an enforcement procedure conflicts with Congress's purpose.

Further, neither the Cartwright Act itself nor this action stands as an obstacle to the objectives the FTC sought to attain through the entry of the consent order -- viz., the carrying out by defendants of the conditions they agreed to in their negotiations with the agency. The Cartwright Act itself plainly does not interfere with defendants' obligations under the consent order. Nor does this action -- far from it: the relief requested by the Attorney General builds on, and certainly does [\*\*\*\*133] not undermine, the obligations arising from the consent order.

Defendants argue that this action does indeed stand as an obstacle to the attainment of federal objectives. None of the grounds on which they rely, however, provides support for their claim.

The first ground is in substance that if a private right of action under state law existed the bargaining power of the federal antitrust enforcement agencies would be undermined. But if the existence of a private right of action under *federal* law does not undermine that bargaining power -- in view of Congress's insertion of the savings provision I am compelled to conclude it does not -- I fail to see, and defendants fail to show, how the existence of a private right of action under *state* law could do so.

The second ground defendants rely on is in essence as follows: one of Congress's goals in enacting HSR was to "prevent the consummation of so-called 'midnight' mergers, which are designed to deny the government any opportunity to secure preliminary injunctions" (H.R. Rep. No. 94-1373, 94th Cong., 2d Sess., *supra*, p. 11); to allow state action against mergers within the coverage of HSR might make merging firms reluctant [\*\*\*\*134] to comply with the statute's notification requirements and lead to the very "midnight" mergers Congress sought to prevent. Again I fail to see, and defendants fail to show, how the existence of a private right of action under state law could make merging firms reluctant to comply with HSR. But even if they were [\*1208] somehow made reluctant to comply, I am confident that comply they would: HSR provides that any person who fails to comply shall be liable for a civil penalty of up to \$ 10,000 *for each day* during which he is in violation of the statute's requirements ([15 U.S.C. § 18a\(g\)\(1\)](#)).

The third ground on which defendants rely is in substance as follows: another of Congress's purposes in enacting HSR was to "advance the legitimate interests of the business community in planning and predictability, by making it more likely that Clayton Act cases will be resolved in a timely and effective fashion" (H.R. Rep. 94-1373, 94th

Cong., 2d Sess., *supra*, p. 11); the existence of a private right of action under state law, however, would inject uncertainty, unpredictability, and delay into the process and thereby frustrate Congress's purpose. The point [\*\*\*\*135] is empty. It is plain from the text of HSR itself ([15 U.S.C. § 18a](#)) and from its legislative history (H.R. Rep. No. 94-1373, 94th Cong., 2d Sess., *supra*, pp. 1, 5-13) that Congress intended to "advance the legitimate interests of the business community in planning and predictability" only insofar as [\*\*\*261] government-prosecuted Clayton Act suits were concerned: otherwise it would surely not have inserted the savings provision, which expressly preserves *inter alia* private rights of action.

The fourth ground on which defendants rely rests on their reading of [Lieberman v. F.T.C. \(2d Cir. 1985\) 771 F.2d 32](#), and *Mattox v. F.T.C. (5th Cir. 1985) 752 F.2d 116*, and is in substance that the existence of a private right of action under state law [\*\*425] would frustrate the centralization of regulation of very large mergers in the federal antitrust agencies. This ground too is insufficient.

To begin with, neither *Lieberman* nor *Mattox* supports defendants' point. In *Mattox* the Fifth Circuit held section 7A(h) of HSR ([15 U.S.C. § 18a\(h\)](#)) -- which provides that premerger information [\*\*\*136] and materials submitted under the statute are confidential -- precludes the disclosure of such information and materials to state attorneys general. To explain its conclusion, the court gave among others the following reason: "Because HSR only covers transactions likely to affect the entire national economy, Congress may have wanted to centralize regulation of such mergers in the FTC and the Justice Department. Disclosure to state attorneys general would tend to balkanize that needed centrality." (752 F.2d at p. 122.)

In *Lieberman* -- in which various state attorneys general sued the FTC alleging it had improperly denied their requests for access to documents generated in connection with the proposed Texaco-Getty merger -- the Second Circuit followed the reasoning of the *Mattox* court and arrived at the same result: "As the *Mattox* Court recognized, giving state authorities the [\*1209] premerger information and the chance to bring suit more easily might well mean big delays in the fast world of mergers -- delays Congress has not countenanced. We doubt if Congress would have intended to have the staffs of fifty state attorneys general sitting as oversight [\*\*\*137] committees reacting to Commission or Justice Department decisions whether to block large-scale mergers of national or international significance." ([771 F.2d at p. 40](#).)

Even if the disclosure of HSR information and materials to state attorneys general would frustrate the timely and effective conduct of premerger review, it does not follow that the existence of a private right of action under state law would do so as well: any suit under state law would, of course, be separate from and, almost necessarily, subsequent to the federal agency's proceedings and hence could not cause them to be delayed or undermined.

Indeed, I am of the opinion that Congress has made it clear that it believes the existence of private rights of action would not frustrate its purposes. Otherwise it would not have inserted the savings provision, which expressly preserves such rights of action, but would likely have provided that review under HSR, like review under the Interstate Commerce Act, "[exempts] [the merging firms] from the antitrust laws and from all other law, including State and municipal law, as necessary to let [them] carry out the transaction, hold, maintain, and operate property, [\*\*\*138] and exercise control or franchises acquired through the transaction." ([49 U.S.C. § 11341](#).)

Not only do *Mattox* and *Lieberman* fail to support defendant's argument on the fourth ground, the predicate on which the argument rests is false. Under HSR the federal antitrust enforcement agencies do not "regulate" -- in the sense of authorizing and approving -- mergers, but merely review them and on that basis decide whether to prosecute an antitrust action against the parties. Accordingly, under HSR a consent decree does not represent or effect the authorization or approval of a merger, but simply makes formal and public the agency's decision that the merger as conditioned does not warrant prosecution.

In conclusion, I would hold that the first cause of action is not preempted by HSR itself or by the consent order entered pursuant thereto.

To "the general rule that state antitrust law may be enforced even though it prohibits [\*\*\*262] less, the same, or more than federal antitrust law" (1 Areeda & Turner, *supra*, para. 208, p. 59), there is an exception that is potentially applicable to this case: "state regulation remains subject to the usual [\*\*\*\*139] imperative that it must not unduly burden interstate commerce" (*ibid.*).

[\*1210] As professor Herbert Hovenkamp has persuasively argued, however, this exception may be more illusory than real. He states: "As a matter of history, applications [\*\*426] of state antitrust laws to situations 'in or affecting' interstate commerce have rarely been condemned and nearly all cases that did condemn such applications were decided before 1935, when judges had a much more restrictive view of the power of the states to regulate in interstate commerce, or to exercise their jurisdiction over persons outside the state. The [United States] Supreme Court has upheld applications of state antitrust laws where significant interstate commerce or extraterritorial activity is involved . . ." (Hovenkamp, *State Antitrust*, *supra*, 58 Ind. L.J. at pp. 386-387, fn. omitted.) He concludes: "Since the Supreme Court has held in a long line of cases that preemption is not to be presumed or inferred, and because Congress clearly intended that state antitrust law not be preempted as a general matter, there are virtually no operative limits on the reach of state antitrust law under the commerce [\*\*\*\*140] clause." (*Id. at pp. 389-390*, italics in original and fns. omitted; see also *Flood v. Kuhn* (2d Cir. 1971) 443 F.2d 264, 267, affd. on other grounds (1972) 407 U.S. 258 [32 L.Ed.2d 728, 92 S.Ct. 2099] [stating it is "difficult[] . . . [to] [determinee] to what extent, if at all, the states are precluded from antitrust regulation of interstate commerce" (italics added).])

But assuming for purposes of discussion that the exception stated above is real and not illusory, for the reasons that follow I believe that it proves to be inapplicable here.<sup>12</sup>

In *Brown-Forman Distillers v. N.Y. State Liquor Auth.* (1986) 476 U.S. 573 [90 L.Ed.2d 552, 106 S.Ct. 2080], [\*\*\*\*141] the United States Supreme Court recently summarized the principles relevant in this context. "This Court has adopted what amounts to a two-tiered approach to analyzing state economic regulation under the Commerce Clause. When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. [Citations.] When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. [Citation.] We have also recognized that there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the . . . [\*1211] balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity." (*Id. at p. 578-579 [90 L.Ed.2d at pp. 559-560, 106 S.Ct. at p. 2084]*.)

Reviewing the [\*\*\*\*142] question after defendants have chosen to forgo the support of a factual record in favor of attacking the complaint on its face by demurrer, I can do nothing other than speculate on "the overall effect of [this action] on both local and interstate activity" (*Brown-Forman Distillers v. N.Y. State Liquor Auth., supra*, 476 U.S. at p. 579 [90 L.Ed.2d at p. 560, 106 S.Ct. at p. 2084]). As a result I am precluded from concluding here that the action is barred by the commerce clause.

Defendants argue strenuously that an order of divestiture would contravene the commerce clause and hence that this cause of action is barred. On this record I do not find a factual basis sufficient to support the premise. But even if the premise were [\*\*\*263] supported, the argument would still lack merit: the conclusion simply does not follow. As I explained above, the fact that one form of relief sought in the cause of action may be barred does not mean that the cause of action itself is barred.

<sup>12</sup> Defendants have submitted briefs in which they present arguments to the contrary. In the course of my analysis I shall address their points. I shall not address, however, the views expressed in Oliver, *Federal and State Antitrust Enforcement*, *supra*, 9 Cardozo L.Rev. 1245: they amount to little more than restatements of arguments set forth by defendants. (See fn. 9, *ante*.)

On the record before the court this case seems similar to *Exxon Corp. v. Governor of Maryland, supra, 437 U.S. 117*. In *Exxon* the United States Supreme Court considered [\*\*\*\*143] the claim of Exxon and other petroleum companies [\*\*427] that the commerce clause was violated by a Maryland statute that prohibited oil producers or refiners from operating retail service stations within the state and that thereby required them to divest themselves of those assets. In rejecting the claims, the court reasoned as follows.

First, the fact that the burden of the divestiture provisions fell solely on interstate firms, the court believed, did not by itself establish a claim of discrimination against interstate commerce: the provisions created no barrier against interstate firms per se -- since interstate marketers who were not producers or refiners were not affected -- nor did they prohibit the flow of interstate goods, place added costs on them, or distinguish between in-state and out-of-state firms. ( [Id. at pp. 125-126 \[57 L.Ed.2d at p. 100\]](#).)

Second, the fact that the burden of state regulation fell on interstate firms, according to the court, did not show that the divestiture provisions impermissibly burdened interstate commerce: "the Commerce Clause [does not] protect[] the particular structure or methods of operation in a retail market. [\*\*\*\*144] [Citation.] . . . [The] Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." ( [Id. at pp. 127-128 \[57 L.Ed.2d at p. 101\]](#).)

Third, a lack of national uniformity in the regulation of retail gasoline marketing, the court concluded, would not impede the flow of interstate [\*1212] goods, and hence the commerce clause did not in itself preempt the entire field and thereby leave no room for regulation by the individual states. ( [Id. at p. 128 \[57 L.Ed.2d at p. 101\]](#).) As the court explained: "[The petroleum companies] point out that many state legislatures have either enacted or considered proposals similar to Maryland's, and that the cumulative effect of this sort of legislation may have serious implications for their national marketing operations. While this concern is a significant one, we do not find that the Commerce Clause, by its own force, pre-empts the field of retail gas marketing. . . . [This] Court has only rarely held that the Commerce Clause itself pre-empts an entire field from state regulation, and then only when a lack of national uniformity would impede [\*\*\*\*145] the flow of interstate goods. [Citations.] The evil that [the petroleum companies] perceive in this litigation is not that the several States will enact differing regulations, but rather that they will all conclude that divestiture provisions are warranted. The problem thus is not one of national uniformity." (*Ibid.* [57 L.Ed.2d at pp. 101-102], fn. omitted.)

The case at bar is similar to *Exxon*. First, the fact that any relief that may be awarded in this action falls solely on interstate firms is fortuitous and does not establish a claim of discrimination against interstate commerce: the action does not threaten to create any barrier against interstate firms, prohibit the flow of interstate goods, place added costs on them, or distinguish between in-state and out-of-state firms. Defendants suggest that the action may have some potential to favor local firms, but fail to show how that may be. Indeed, the purpose and effect of the divestiture that the Attorney General seeks appear simply to be to allow Getty products and facilities to be available to all firms, whether intrastate or interstate, in an open and competitive market.

Second, the fact that [\*\*\*\*146] the burden of the action falls on Texaco and Getty, which are interstate firms, does not show that the action impermissibly burdens interstate commerce: the commerce clause protects from prohibitive state regulations the interstate market, not particular interstate firms or their structure or methods of operation.

Defendants suggest that in *Exxon* the court implied that whereas the commerce [\*\*\*264] clause does not protect "the particular structure or methods of operation *in a retail market*" ([437 U.S. at p. 127 \[57 L.Ed.2d at p. 101\]](#), italics added) -- which they assert is of necessity local -- the clause does protect *their* "structure" and "methods of operation." They are unpersuasive. The fact that it was the *retail* marketing of petroleum products that was implicated in *Exxon* was not material to the issues raised by the parties or to the reasoning the court undertook or the result it [\*\*428] reached. Rather, as the court stated, "The crux of [the petroleum companies'] claim is that . . . [\*1213] [the State] has interfered 'with the natural functioning of the interstate market either through prohibition or though burdensome regulation[]'" [\*\*\*\*147] (*ibid.* [57 L.Ed.2d at p. 101]) -- specifically, by undoing the integration of certain assets in interstate firms. The crux of defendants' claim is similar: this action interferes with the "natural"

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functioning of the interstate market by threatening to undo the integration of Getty's California assets in Texaco. Since the petroleum companies' claim was rejected in *Exxon*, so must defendants' claim be rejected here.

Third, the commerce clause does not by its own force preempt the entire field of the regulation of mergers and thereby leave no room for action by the states. This conclusion follows from the fact that a lack of national uniformity in this field would not impede the flow of interstate goods. That fact, in turn, follows from the basic fact that even insofar as the Attorney General seeks divestiture, this action appears to affect only particular interstate firms and their structure and methods of operation, and not to burden the interstate market itself. That the attorneys general of other states may seek similar relief under their states' antitrust laws, as the high court made clear in *Exxon*, simply does not affect the conclusion.

Against [\*\*\*\*148] my conclusion on the commerce clause issue defendants make two general claims. Their decision to forgo the support of a factual record, however, denies an adequate basis on which to address the contentions and to make a principled determination that this action contravenes the commerce clause. Nevertheless, for purpose of discussion I shall consider the two points.

Defendants first claim that through this action the Attorney General, in contravention of the commerce clause, seeks to directly regulate interstate commerce. In support they argue that an order requiring the divestiture of Getty's California assets would undo the integration of Texaco, which is plainly a firm in interstate commerce, would therefore affect persons and properties outside California, and as a result would amount to direct regulation of interstate commerce. But if the Maryland statute upheld in *Exxon* did not affect direct regulation of interstate commerce -- even though it required the divestiture of Maryland assets of certain interstate firms and thereby undid the integration of those firms and consequently affected persons and properties outside Maryland -- neither would any divestiture order entered [\*\*\*\*149] in this action.

Defendants also argue that this action seeks to prevent the export of Getty crude oil from California or to allocate the supply between intrastate and interstate firms. The argument is altogether empty and indeed disingenuous: [\*1214] what the action clearly seeks is an independent Getty free to deal with other firms, intrastate or interstate, as it sees fit.

Defendants next argue that crude oil is in interstate commerce and as such is beyond the state's power to regulate. For argument's sake I shall assume the factual premise is correct. The conclusion, however, does not follow. For example, even though interstate carriers are in interstate commerce, they are plainly subject to state regulation. ([Colorado Comm'n v. Continental \(1963\) 372 U.S. 714, 718-722 \[10 L.Ed.2d 84, 87-90, 83 S.Ct. 1022\]](#); [Collins v. American Buslines \(1956\) 350 U.S. 528, 530-531 \[100 L.Ed. 672, 675, 76 S.Ct. 582\]; Fry Roofing Co. v. Wood \(1952\) 344 U.S. 157, 161-163 \[97 L.Ed. 168, 73 S.Ct. 204\].](#))

Defendants finally argue that this action seeks to require them to obtain this state's [\*\*\*265] approval before they [\*\*\*\*150] act in other states. Not so: the action seeks only to prevent or mitigate the alleged anticompetitive effects that flow from Texaco's acquisition of Getty's California assets and are felt within California.

Defendants' second claim is that this action's burden on interstate commerce is excessive in relation to the local interests it seeks to protect. They in effect maintain that in view of what they claim to be the "federal policy" on petroleum industry [\*\*429] mergers the national interests are great, and that under [Partee v. San Diego Chargers Football Co. \(1983\) 34 Cal.3d 378 \[194 Cal.Rptr. 367, 668 P.2d 674\]](#), the local interests are small. The argument is unpersuasive.

To begin with, I am reluctant to characterize as "federal policy" what defendants present as such -- i.e., the congressional testimony of a national administration official opposing a blanket prohibition of all mergers in the petroleum industry. The only undoubted general federal policy on petroleum industry and other mergers that I have been able to discover is that reflected in section 7 of the Clayton Act, in which Congress has implicitly but clearly declared that the national [\*\*\*\*151] benefits of a merger must be forgone "where in any line of commerce . . . in any section of the country, the effect of such [merger] may be substantially to lessen competition, or to tend to create a monopoly." ([15 U.S.C. § 18.](#)) Under this policy, the national interests in the Texaco-Getty merger cannot be

considered great -- otherwise the threat of anticompetitive effects in a single section of the country would not be sufficient to prohibit the merger.

But even under the "policy" defendants set forth the conclusion is not significantly different. Since that "policy" merely disfavors the blanket prohibition of petroleum company mergers, it does not necessarily favor any particular merger as procompetitive, and accordingly cannot serve as a [\*1215] predicate for defendants' assertion that the national interests in the Texaco-Getty merger are great.

Moreover, the state's interests in a free and competitive marketplace in the sale and transportation of crude oil seem on their face to be compelling. Nor does *Partee v. San Diego Chargers Football Co., supra, 34 Cal.3d 378* -- when given a fair reading -- lead to any other conclusion. [\*\*\*\*152] In that case we held only that the state's interests in the application of its **antitrust law** to professional sports was not of great urgency: "This opinion has a limited scope. The Cartwright Act remains vital. We do not mean to suggest that multistate activities of other businesses may not be subject to state regulation upon due consideration of the commerce clause. *Our holding is limited to the issue directly before us, the inapplicability of the Cartwright Act to professional football.*" ( *Id. at pp. 385-386, fn. 5*, italics added.)<sup>13</sup>

[\*\*\*\*153] In urging their excessive-burden point defendants rely on the plurality opinion in *Edgar v. MITE Corp. (1982) 457 U.S. 624 [73 L.Ed.2d 269, 102 S.Ct. 2629]*. At the threshold I question whether the *MITE* plurality opinion remains good law after the high court's discussion in *CTS Corp. v. Dynamics Corp. of America (1987) 481 U.S. 69 [95 L.Ed.2d 67, 107 S.Ct. 1637]*. In any event, the opinion does not support defendant's claim.

[\*\*\*266] In *MITE*, a plurality of the United States Supreme Court determined that the Illinois Business Take-Over Act was unconstitutional on the ground that the burden it imposed on interstate commerce was excessive in relation to the local interests it served. It reasoned that the state's interests in protecting local investors (*457 U.S. at pp. 644-645 [73 L.Ed.2d at pp. 284-285]*) and in regulating the internal affairs of a domestic corporation (*id. at pp. 645-646 [73 L.Ed.2d at p. 285]*) were outweighed by [\*\*430] the burden on interstate commerce "[arising] from the statute's . . . nationwide reach which purports to give Illinois the power to determine whether [\*\*\*\*154] a tender offer may proceed anywhere" (*id. at p. 643 [73 L.Ed.2d 284]*).

This case is different. I shall assume for argument's sake that the state's interests in a free and competitive market in the supply and transportation [\*1216] of crude oil are no weightier than the interests the Illinois statute was claimed to further. Nevertheless, I cannot deem the burden, if any, that this action threatens to impose on interstate commerce to be as great as that imposed by the Illinois statute. Whereas that statute had a "nationwide reach which [purported] to give Illinois the power to determine whether a tender offer [might] proceed *anywhere*" (*457 U.S. at p. 643*, italics added), this action -- even if it results in an order of divestiture -- plainly cannot, and indeed does not even purport to, determine whether the Texaco-Getty merger may proceed or survive outside California.

In conclusion, I would hold that the first cause of action is not barred by the commerce clause.

#### IV

The Attorney General contends that the second cause of action alleges facts that are legally sufficient under the Unfair Competition Act, is not preempted by HSR itself [\*\*\*\*155] or by the consent order, is not barred by the

<sup>13</sup> To the extent defendants seek to establish that the state's interests in subjecting the Texaco-Getty merger to review in this action are not compelling by asserting that the Attorney General "cannot cite a single previous instance where this State sought to challenge a merger under the Cartwright Act," they are patently unsuccessful. First, it simply does not follow from the alleged fact that the state has not challenged any other merger under the Cartwright Act that its interests in this particular very large merger in this particular very important industry are not compelling. Second and at least as important, in the past the Cartwright Act was as a practical matter unnecessary in view of the vigorous prosecution of Clayton section 7 actions by federal enforcement agencies and other parties, and the plain receptivity of the federal courts to such actions. That situation, as is commonly recognized, has changed. (See, e.g., Hovenkamp, *State Antitrust*, *supra*, 58 Ind. L.J. at p. 376 ["the notion that federal **antitrust law** is aggressive . . . is largely a thing of the past"].)

commerce clause, and as a result states a claim on which relief may be granted. The contention, as will appear, fails at the threshold.

The statute defines "unfair competition" to mean, as relevant here, "unlawful, unfair or fraudulent business *practice* . . ." ( *Bus. & Prof. Code, § 17200*, italics added.) In so doing it effectively requires what the court variously described in the leading case of *Barquis v. Merchants Collection Assn. (1972) 7 Cal.3d 94 [101 Cal.Rptr. 745, 496 P.2d 817]*, as "a 'pattern' . . . of conduct" ( *id. at p. 108*), "ongoing . . . conduct" ( *id. at p. 111*), "a pattern of behavior" ( *id. at p. 113*), and, "a course of conduct" (*ibid.*).

What the Attorney General challenges in this action is the Texaco-Getty merger. Under the *Barquis* court's construction of the statute, however, the merger itself cannot be characterized as "a 'pattern' . . . of conduct," "ongoing conduct," "a pattern of behavior," "a course of conduct," or anything relevantly similar: it is rather a single act. That the complaint, under [\*\*\*\*156] the Attorney General's reading, alleges that Texaco engaged in certain unlawful, unfair, or fraudulent business practices in the past and may engage in other such practices in the future is simply not enough: the complaint attacks not those past or future practices, but only the merger.

V

For the foregoing reasons I would hold that the judgment of the Court of Appeal should be reversed insofar as it affirms the judgment of dismissal on the first cause of action alleging the Texaco-Getty merger violates the Cartwright Act, and hence I dissent from the judgment of the court in that [\*1217] regard. And I would hold that the judgment of the Court of Appeal should be affirmed insofar as it affirms the judgment of dismissal on the second cause of action alleging the merger violates the Unfair Competition Act, and hence I concur in the judgment of the court in that regard.

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## Manufacturers Life Ins. Co. v. Superior Court

Supreme Court of California

June 1, 1995, Decided

No. S031022.

### **Reporter**

10 Cal. 4th 257 \*; 895 P.2d 56 \*\*; 41 Cal. Rptr. 2d 220 \*\*\*; 1995 Cal. LEXIS 3138 \*\*\*\*; 95 Daily Journal DAR 7060; 95 Cal. Daily Op. Service 4114; 1998-1 Trade Cas. (CCH) P72,195

MANUFACTURERS LIFE INSURANCE COMPANY et al., Petitioners, v. THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Respondent; WEIL INSURANCE AGENCY, INC., Real Party in Interest.

WEIL INSURANCE AGENCY, INC., Petitioner, v. THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Respondent; MANUFACTURERS LIFE INSURANCE COMPANY et al., Real Parties in Interest.

**Prior History:** [\*\*\*\*1] Superior Court of the City and County of San Francisco, No. 920327, Alex J. Saldamando and Ira A. Brown, Jr., Judges.

**Disposition:** The judgment of the Court of Appeal is affirmed.

## **Core Terms**

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Cartwright Act, Practices, Unfair, exemption, cause of action, insurance industry, antitrust, counts, remedies, dictum, insurance business, regulation, superseded, insurers, insurance commissioner, insurance company, trade practice, defendants', displace, unfair competition, civil liability, provisions, demurrsers, brokers, unfair business practice, absolve, relieve, unfair trade practice, specific provision, title company

## **LexisNexis® Headnotes**

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Civil Procedure > Appeals > General Overview

Civil Procedure > Pleading & Practice > Pleadings > General Overview

### **HN1** Civil Procedure, Appeals

For purposes of appellate review, the court assumes that all well-pleaded material allegations of the complaint are true.

Insurance Law > Industry Practices > General Overview

### **HN2** Insurance Law, Industry Practices

See [Cal. Ins. Code § 790.](#)

Insurance Law > Industry Practices > General Overview

### **HN3** Insurance Law, Industry Practices

The California Insurance Commissioner has no power to initiate a criminal proceeding against, or an action to impose civil liability on, a person who engages in unfair trade practices. The authority of the commissioner is limited to enjoining future unlawful conduct and suspending or revoking a license or certificate.

Governments > Legislation > Interpretation

### **HN4** Legislation, Interpretation

Well-established canons of statutory construction preclude a construction that renders a part of a statute meaningless or inoperative. In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all. [Cal. Civ. Proc. Code, § 1858](#). Pursuant to this mandate a court must give significance to every part of a statute to achieve the legislative purpose.

Evidence > Judicial Notice > General Overview

### **HN5** Evidence, Judicial Notice

Pursuant to [Cal. Evid. Code § 459](#), a reviewing court must take judicial notice of any matter that was properly noticed by the trial court or of which the trial court was required to take notice under [Cal. Evid. Code § 451](#). The reviewing court may also take judicial notice of matters specified in [Cal. Evid. Code § 452](#).

Governments > Legislation > Interpretation

Governments > Legislation > General Overview

### **HN6** Legislation, Interpretation

The presumption against finding a pro tanto repeal of a statute in the enactment of subsequent legislation on the subject is so strong that the court will do so only if the later statute revises the earlier in a manner that necessarily implies legislative intent to substitute the new statute for the older.

Insurance Law > Industry Practices > General Overview

### **HN7** Insurance Law, Industry Practices

The Unfair Insurance Practices Act (UIPA), [Cal. Ins. Code § 790 et seq.](#), does not create an exemption from remedies for unlawful conduct in the insurance industry under the Cartwright Act, [Cal. Bus. & Prof. Code § 16720-16770](#), or the Unfair Competition Act, [Cal. Bus. & Prof. Code § 17200 et seq.](#) Because the state scheme of regulation of the insurance industry is not wholly inconsistent with their application, no exemption may be implied.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Insurance Law > Industry Practices > General Overview

### **HN8** Exemptions & Immunities, McCarran-Ferguson Act Exemption

See [Cal. Ins. Code §1861.03\(a\)](#).

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

### **HN9** Regulated Practices, Trade Practices & Unfair Competition

See [Cal. Bus. & Prof. Code § 17205](#).

## **Headnotes/Summary**

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### **Summary**

#### **CALIFORNIA OFFICIAL REPORTS SUMMARY**

An insurance agency brought statutory causes of action against various insurance companies for violation of the Cartwright Act ([Bus. & Prof. Code, §§ 16720, 16721.5](#)), the Unfair Competition Act (UCA) ([Bus. & Prof. Code, § 17200](#)), and the Unfair Insurance Practices Act (UIPA) ([Ins. Code, § 790.03](#)), alleging that the insurance companies had engaged in an unlawful boycott against it. The trial court sustained, with leave to amend, defendants' demurrers to the Cartwright Act causes of action, but overruled the demurrers with respect to the UCA and UIPA claims. Defendants sought a writ of mandate directing the trial court to sustain the demurrers to those counts. Pending the determination of that matter, plaintiff filed an amended complaint in which it again attempted to state the Cartwright Act claims. The trial court again sustained demurrers, and plaintiff petitioned for a writ of mandate to compel the trial court to overrule the demurrers. (Superior Court of the City and County of San Francisco, No. 920327, Alex Saldamando and Ira A. Brown, Jr., Judges.) The Court of Appeal, First Dist., Div. Two, Nos. A052795 and A055038, issued a writ of mandate directing the trial court to set aside its first order insofar as it overruled defendants' demurrers to the cause of action under the UIPA, and to sustain those demurrers without leave to amend. The court also issued a writ of mandate directing the trial court to set aside its second order insofar as it sustained defendants' demurrers to the causes of action under the Cartwright Act, and to overrule the demurrers to those causes of action.

The Supreme Court affirmed the judgment of the Court of Appeal. The court held that neither the language of the UIPA nor its history suggests that the Legislature intended by its enactment to abolish the Cartwright Act and UCA remedies for conduct which the UIPA also proscribes. [Ins. Code, § 790.09](#) (civil and criminal liability is unaffected by cease-and-desist order under UIPA), cannot be construed so as to conclude that, in adopting the UIPA, the Legislature intended that only the Insurance Commissioner be authorized to remedy unlawful conduct by insurance companies. The court also held that a prior opinion of the Supreme Court did not hold that the UIPA exempted the insurance industry from application of the Cartwright Act and other antitrust-related remedies, and that it was not required by principles of stare decisis to construe the UIPA as creating a wholesale exemption from remedies under the Cartwright Act and the UCA for the insurance industry. Moreover, the enactment of [Ins. Code, § 1861.03, subd. \(a\)](#) (insurance business is subject to laws of state applicable to any other business), as part of Prop. 103 did not imply that prior to the adoption of that proposition, the insurance industry was exempt from antitrust regulation other than that of the Insurance Code. Finally, the court held that the Court of Appeal did not "seriously compromise" the

Supreme Court's holding that there may be no private UIPA cause of action under [Ins. Code, § 790.03](#), when it held that, although plaintiff could not plead around the limitation in [Ins. Code, § 790.03](#), against a private civil cause of action under the UIPA by relying on conduct which violated only the UIPA as the basis for a cause of action under the UCA, the conduct on which plaintiff predicated that cause of action also violated the Cartwright Act and thus could form the basis for a cause of action under the UCA. (Opinion by Baxter, J., with Lucas, C. J., Kennard, Arabian, George and Werdegar, JJ., concurring. Separate concurring opinion by Mosk, J.)

## **Headnotes**

### [CA\(1a\)](#) [down] (1a) [CA\(1b\)](#) [down] (1b) [CA\(1c\)](#) [down] (1c)

**Monopolies and Restraints of Trade § 6—Cartwright Act—Remedies Under Act as Superseded by Unfair Insurance Practices Act: Unfair Competition § 3—Unfair Competition Act—Remedies Under Act as Superseded by Unfair Insurance Practices Act: Insurance Companies § 2—Regulation.**

--Neither the language of the Unfair Insurance Practices Act (UIPA) ([Ins. Code, § 790 et seq.](#)) nor its history suggests that the Legislature intended by its enactment to abolish the Cartwright Act ([Bus. & Prof. Code, § 16720 et seq.](#)) and Unfair Competition Act (UCA) ([Bus. & Prof. Code, § 17200 et seq.](#)) remedies for conduct which the UIPA also proscribes. [Ins. Code, § 790.09](#) (civil and criminal liability is unaffected by cease-and-desist order under UIPA), cannot be construed so as to conclude that, in adopting the UIPA, the Legislature intended that only the Insurance Commissioner be authorized to remedy unlawful conduct by insurance companies. Since the Insurance Commissioner has no power to initiate a criminal proceeding against, or an action to impose civil liability on, a person who engages in unfair trade practices, such a construction would render that part of [Ins. Code, § 790.09](#), which preserves civil and criminal liability meaningless. Further, a conclusion that the Legislature intended by [Ins. Code, § 790.09](#), to displace Cartwright Act, Unfair Practices Act ([Bus. & Prof. Code, § 17000 et seq.](#)), and UCA remedies would be contrary to consistent administrative construction of the act and construction by courts in other states which have adopted the same or substantially similar statutes.

[See 1 **Witkin**, Summary of Cal. Law (9th ed. 1987) Contracts, § 575 et seq.; 6 **Witkin**, Summary of Cal. Law (9th ed. 1988) Torts, § 1159 et seq.; 11 **Witkin**, Summary of Cal. Law (9th ed. 1990) Equity, §§ 93, 94.]

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

**Words, Phrases, and Maxims § 7—Absolve.**

--"Absolve" means to set free from an obligation or the consequences of guilt.

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

**Words, Phrases, and Maxims § 7—Obstruct.**

--"Obstruct" means to block or close up by an obstacle.

### [CA\(4\)](#) [down] (4)

**Words, Phrases, and Maxims § 7—Impede.**

--"Impede" means to interfere with or slow the progress of.

**CA(5)[] (5)****Statutes § 16—Repeal—By Implication—Presumption Against.**

--The presumption against finding a pro tanto repeal of a statute in the enactment of subsequent legislation on the subject is so strong that the court will indulge in such a presumption only if the later statute revises the earlier statute in a manner that necessarily implies a legislative intent to substitute the new statute for the older one.

**CA(6a)[] (6a) CA(6b)[] (6b)****Monopolies and Restraints of Trade § 6—Cartwright Act—Remedies Under Act as Superseded by Unfair Insurance Practices Act—Effect of State Decisis: Unfair Competition § 3—Unfair Competition Act—Remedies Under Act as Superseded by Unfair Insurance Practices Act: Insurance Companies § 2—Regulation.**

--In an action by an insurance agency, alleging that defendant insurance companies had engaged in an unlawful boycott against it, the Supreme Court was not required by principles of stare decisis to construe the Unfair Insurance Practices Act (UIPA) ([Ins. Code, § 790 et seq.](#)) as creating a wholesale exemption from remedies under the Cartwright Act ([Bus. & Prof. Code, § 16720 et seq.](#)) and the Unfair Competition Act (UCA) ([Bus. & Prof. Code, § 17200 et seq.](#)) for the insurance industry. A prior opinion by the Supreme Court, in which it was stated that certain statutory and common law protections against combinations in restraint of the insurance trade were superseded by specific provisions of the Insurance Code, did not hold that the UIPA supersedes and displaces the Cartwright Act and the UCA prohibitions on anticompetitive activities and unfair business practices by insurers. Also, the Supreme Court has never held that the insurance industry is exempt from antitrust and unfair competition laws or that it enjoys immunity from civil liability for such conduct. Finally, even if the court accepted the argument that the UIPA and [Ins. Code, § 790.03](#) (prohibited unfair or deceptive acts or practices), supplant the Cartwright Act and UCA, and assuming the prior opinion could be read as holding that [Ins. Code, § 790.09](#) (civil and criminal liability is unaffected by cease and desist order under UIPA), permits only administrative sanctions for anticompetitive activities and unfair business practices proscribed by the UIPA, principles of stare decisis would not have precluded reconsideration of that conclusion.

**CA(7)[] (7)****Monopolies and Restraints of Trade § 6—Cartwright Act—Exemption for Insurance Industry from Remedies Under Act: Unfair Competition § 3—Unfair Competition Act—Exemption for Insurance Industry from Remedies Under Act: Insurance Companies § 2—Regulation.**

--Neither the Cartwright Act ([Bus. & Prof. Code, § 16720 et seq.](#)) nor the Unfair Competition Act ([Bus. & Prof. Code, § 17200 et seq.](#)) creates a wholesale exemption from remedies thereunder for the insurance industry, and, since the state scheme of regulation of the insurance industry is not wholly inconsistent with their application, no exemption may be implied.

**CA(8)[] (8)****Monopolies and Restraints of Trade § 6—Cartwright Act—Remedies Under Act as Superseded by Unfair Insurance Practices Act—Effect of Proposition 103: Unfair Competition § 3—Unfair Competition Act—Remedies Under Act as Superseded by Unfair Insurance Practices Act: Insurance Companies § 2—Regulation.**

--The enactment of [Ins. Code, § 1861.03, subd. \(a\)](#) (insurance business is subject to laws of state applicable to any other business), as part of Prop. 103 did not imply that prior to the adoption of that proposition, the insurance industry was exempt from antitrust regulation other than that of the Insurance Code. Although Prop. 103 was

intended to terminate an insurance industry antitrust exemption, as manifested in [Ins. Code, § 1861.03, subd. \(a\)](#), and in the ballot materials provided to the voters, it also repealed Ins. Code, former §§ 1853, [1853.6](#), and 1853.7. Those sections were part of the McBride-Grunsky Act, which was enacted after the Supreme Court held that the Cartwright Act ([Bus. & Prof. Code, § 16720 et seq.](#)) applied to the insurance industry; they created a partial antitrust exemption applicable only to certain property and casualty lines of insurance. Therefore, the declaration of purpose in [Ins. Code, § 1861.03, subd. \(a\)](#), and the ballot pamphlet statements may have reflected nothing more than an intent to terminate the partial antitrust exemption granted to those lines of property and casualty insurance. Moreover, even assuming that [Ins. Code, § 1861.03](#), did reflect a belief by the drafters of Prop. 103 and the electorate that the Cartwright Act and the Unfair Competition Act ([Bus. & Prof. Code, § 17200 et seq.](#)) were not applicable to the insurance industry, that belief would have been irrelevant. The addition of Ins. Code, § 1861.3, subd. (a), could not have ratified or supplied what was not present in the prior law.

**CA(9) [ ] (9)**

**Unfair Competition § 3—Unfair Competition Act—Cause of Action as Predicated on Violations of Cartwright Act—As Compromising Rule of no Private Cause of Action Under Unfair Insurance Practices Act.**

--In an action by an insurance agency, alleging that defendant insurance companies had engaged in an unlawful boycott against it, the Court of Appeal did not "seriously compromise" the Supreme Court's holding that there may be no private Unfair Insurance Practices Act (UIPA) ([Ins. Code, § 790 et seq.](#)) cause of action under [Ins. Code, § 790.03](#), when it held that, although plaintiff could not plead around the limitation, in [Ins. Code, § 790.03](#), against a private civil cause of action by relying on conduct which violated only the UIPA as the basis for a cause of action under the Unfair Competition Act (UCA) ([Bus. & Prof. Code, § 17200 et seq.](#)), the conduct on which plaintiff predicated that cause of action also violated the Cartwright Act ([Bus. & Prof. Code, § 16720 et seq.](#)) and thus could form the basis for a cause of action under the UCA. A cause of action for unfair competition based on conduct made unlawful by the Cartwright Act is not an "implied" cause of action which the Supreme Court held could not be found in the UIPA. There is no attempt to use the UCA to confer private standing to enforce a provision of the UIPA. Nor is the cause of action based on conduct that is absolutely privileged or immunized by another statute. In holding that the Legislature did not intend to create new causes of action when it described unlawful insurance business practices in [Ins. Code, § 790.03](#), the Supreme Court did not hold that by identifying practices that are unlawful in the insurance industry, practices that violate the Cartwright Act, the Legislature intended to bar Cartwright Act causes of action based on those practices.

[See 6 **Witkin**, Summary of Cal. Law (9th ed. 1988) Torts, § 1172A.]

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No appearance for Respondent.

**Judges:** Opinion by Baxter, J., with Lucas, C. J., Kennard, Arabian, George, and Werdegar, JJ., concurring. Separate concurring opinion by Mosk.

**Opinion by:** BAXTER, J.

## Opinion

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[\*263] [\*\*58] [\*\*\*222] BAXTER, J.

We granted review in this matter to consider the holding of the Court of Appeal [\*\*\*\*3] that the Unfair Insurance Practices Act ([Ins. Code, § 790 et seq.](#)) does not supersede or displace insurance-industry-related claims under the Cartwright Act ([Bus. & Prof. Code, § 16720- 16770](#)) and/or the Unfair Competition Act ([Bus. & Prof. Code, § 17200 et seq.](#)) Simply stated, the issue is whether life insurance, which was not affected by Proposition 103, the 1988 initiative measure which expressly declares that other lines of insurance are subject to antitrust and unfair business practice laws ([Ins. Code, § 1861.03, subd. \(a\)](#)), is exempt from such laws.

We conclude that the decision of the Court of Appeal should be affirmed. Contrary to dictum in three decisions subsequent to [Chicago Title Ins. Co. v. Great Western Financial Corp. \(1968\) 69 Cal. 2d 305 \[70 Cal. Rptr. 849, 444 P.2d 481\]](#) ([Greenberg v. Equitable Life Assur. Society \(1973\) 34 Cal. App. 3d 994, 999, fn. 2 \[110 Cal. Rptr. 470\]](#)); [Liberty Transport, Inc. v. Harry W. Gorst Co. \(1991\) 229 Cal. App. 3d 417 \[280 Cal. Rptr. 159\]](#); [Karlin v. Zalta \(1984\) 154 Cal. App. 3d 953 \[201 Cal. Rptr. 379\]](#)), this court did not hold there that the Legislature had granted the insurance industry a general exemption [\*\*\*\*4] from state antitrust and unfair business practices statutes. Rather, the Legislature intended that rights and remedies available under those statutes were to be cumulative to the powers the Legislature granted to the Insurance Commissioner to enjoin future unlawful acts and impose sanctions in the form of license and certificate suspension or revocation when a member of the industry violates any applicable statute, rule, or regulation. (See, e.g., [Ins. Code, § 704, 704.5, 790.05, 790.07, 10433, 10435, 10450.6, 12900 et seq.](#))

[\*\*\*223] I. BACKGROUND

These related petitions for writ of mandate are directed to several counts in the underlying superior court action by plaintiff Weil Insurance Agency, Inc. (Weil). The defendants are Manufacturers Life Insurance Company, [\*264] other insurers, competing insurance brokers, trade associations, and an officer of one group of competing brokers (defendants). In the counts at issue here, Weil's complaint asserted statutory causes of action for violation of [Business and Professions Code sections 16720, 16721.5, and 17200](#), and [Insurance Code section 790.03](#).<sup>1</sup> [Business and Professions Code sections 16720 and 16721.5](#) are provisions of [\*\*\*\*5] the Cartwright Act. [Business and Professions Code section 17200](#) is part of the Unfair Competition Act (UCA). [Section 790.03](#) is part of the Unfair Insurance Practices Act (UIPA).

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<sup>1</sup> Unless otherwise indicated, all statutory references are to the Insurance Code.

The complaint alleged <sup>2</sup> that Weil operated a successful insurance brokerage and consulting [\*\*59] business in which it advised attorneys regarding settlement annuities. After Weil disclosed to those clients the actual costs of such annuities, the defendant insurance companies boycotted plaintiff's brokerage and conspired to prevent claimants from obtaining the information Weil provided. Allegedly they did so because the information plaintiff provided to attorneys and injury victims had an adverse impact on the ability of liability insurance carriers to settle personal injury claims below their cash settlement value. The complaint alleged that pursuant to the conspiracy, defendants denied injury victims and their attorneys critical information [\*\*\*\*6] regarding annuities used to fund settlement of their claims; boycotted any broker, agent or consultant who provided information and/or consulting services to injury victims and their attorneys; refused to appoint brokers and consultants who did provide the information and/or services; prohibited their brokers, agents and consultants from providing the information and services; falsely disparaged brokers who did provide the information; gave bogus reasons for not dealing with brokers who offered consulting services to injury victims and their attorneys; threatened and intimidated brokers to coerce compliance with their scheme; and caused the trade association (defendant National Structured Settlements Trade Association) to adopt and enforce rules, guidelines and policies in furtherance of their scheme.

The [\*\*\*7] purpose of these actions was to depress the cost of personal injury settlements below their cash value. The complaint alleged that, in furtherance of the conspiracy, and in retaliation for plaintiff's interference with it through its consulting and brokerage practices and efforts to educate the bar and insurance industry through articles authored by one of plaintiff's senior executives, defendants boycotted Weil and used coercion, intimidation, threats, and false disparagement of Weil to cause structured settlement [\*265] annuity brokers and agents with whom Weil did business to discontinue that relationship, and to cause other annuity brokers to refuse all business dealings with Weil. Plaintiff's settlement annuity business was destroyed as a result of defendants' conduct.

The complaint asserted that the conduct also harmed the public in that it constituted price fixing, concerted output restriction, and a boycott, all of which were claimed to be per se violations of the Cartwright Act; its requirement that brokers refrain from dealing with Weil was a per se violation of the Cartwright Act; it constituted an unreasonable restraint intended to monopolize the business of insurance [\*\*\*8] in violation of the UIPA; and it therefore involved unlawful, unfair or fraudulent business practices which violated the UCA.

The trial court sustained defendants' demurrers to Weil's first amended complaint with leave to amend as to the Cartwright Act causes of action, but overruled the demurrers with respect to the UCA and UIPA claims. Defendants then petitioned for a writ of mandate to compel the trial court to sustain the demurrers to those counts and the Court of Appeal issued an order directing the real party in interest to show cause why the peremptory writ should not issue as prayed.

[\*\*\*224] Weil then filed an amended complaint in which it again attempted to state the Cartwright Act claims. The life insurance defendants demurred to the second amended complaint on the ground that the complaint failed to state a cause of action as to those counts. They argued in support of the demurrers that the Cartwright Act had been superseded in the business of insurance by [Insurance Code section 790.03](#), a provision of the UIPA. It relied for that claim on [Chicago Title Ins. Co. v. Great Western Financial Corp., supra, 69 Cal. 2d 305, 322](#) (hereafter *Chicago Title*), and [\*\*\*9] [Greenberg v. Equitable Life Assur. Society, supra, 34 Cal. App. 3d 994](#). The trial court sustained those demurrers, and Weil petitioned for writ of mandate to compel the court to overrule the demurrers.

After the Court of Appeal summarily denied Weil's petition, this court granted review and transferred the matter back to the Court of Appeal with directions to issue an alternative writ. Although the two petitions [\*\*60] had not previously been formally consolidated, the Court of Appeal joined them for purposes of argument and opinion. (See 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 539, pp. 528-529; cf. [Pacific Legal Foundation v. California Coastal Com. \(1982\) 33 Cal. 3d 158, 165, fn. 3 \[188 Cal. Rptr. 104, 655 P.2d 306\].](#)) [\*266]

## II. THE COURT OF APPEAL OPINION

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<sup>2</sup> [HN1](#) For purposes of this review, we assume that all well-pleaded material allegations of the complaint are true. ( [Hendy v. Losse \(1991\) 54 Cal. 3d 723, 727, fn. 2 \[1 Cal. Rptr. 2d 543, 819 P.2d 1\].](#) )

In a thorough and thoughtful review of both the statutory language of the UIPA and its history, and the terms of the UCA, the Court of Appeal held that the UIPA does not supersede or displace actions under the Cartwright Act, and that a private cause of action may be stated under the UCA for violations of the Cartwright Act, but not for violations of the UIPA. We summarize the court's reasoning [\*\*\*\*10] below.

#### A. Cartwright Act.

The Court of Appeal reasoned that the UIPA was enacted pursuant to the authority of the McCarran-Ferguson Act, [15 United States Code sections 1011-1015](#), in order to displace federal law which might otherwise have governed insurance trade practices, displacing the law of any state which did not generally proscribe the same industry conduct.<sup>3</sup> In so doing the Legislature did not intend to shield the industry from otherwise applicable state law. The intent to preserve existing rights and remedies for unlawful business practices in the insurance industry was clear, as the Legislature had expressly provided in the UIPA, in [section 790.09](#), that "[n]o order to cease and desist under [the UIPA] directed to any person or subsequent administrative or judicial proceedings to enforce the same shall in any way relieve or absolve such person from any administrative action against the license or certificate of such person, civil liability or criminal penalty under the laws of this State arising out of the methods, acts or practices found unfair or deceptive." The original UIPA bill did not contain this stipulation, and instead preserved only preexisting powers [\*\*\*\*11] of the commissioner to enforce penalties, fines or forfeitures (Assem. Bill No. 1530 (1959 Reg. Sess.) § 1; see now § 790.08),<sup>4</sup> but from the first amended version of the bill until its passage, the section preserving existing remedies had been included. (Assem. Amend. to Assem. Bill No. 1530 (1959 Reg. Sess.) Apr. 8, 1959; Assem. Amend. to Assem. Bill No. 1530 (1959 Reg. Sess.) May 6, 1959; [\*267] Sen. Amend. to Assem. Bill No. 1530 (1959 Reg. Sess.) June 11, 1959; Stats. 1959, ch. 1737, § 1, p. 4191.)

[\*\*\*\*12] It is probable that the inclusion of [section 790.09](#) reflected the understanding of the Legislature that adoption of the UIPA would make no change in existing law. The Legislative Analyst stated in an analysis of the UIPA bill that it "makes no substantive change in existing law." (Ops. Legis. Analyst, Analysis of Assem. Bill No. 1530 (May 20, 1959) p. 1.)

[\*\*\*225] Moreover, the Court of Appeal observed, the Legislature had included specific provisions exempting specified classes of insurance from other laws. (E.g., § 795.7 [senior citizens health insurance], 1860.1 [casualty insurance rates], 11758 [workers' compensation], 12414.26 [title insurance].) Had the UIPA created a general exemption of insurance from the Cartwright Act and other laws, none of these provisions would have been necessary. Since the Legislature thereby demonstrated that it was aware of the need to create an exemption, and did not do so for other classes of insurance, the UIPA did not displace existing rights and remedies for unlawful business practices in [\*\*61] the insurance industry, among them the Cartwright Act. Finding such displacement would necessarily be to find a pro tanto repeal of [\*\*\*\*13] the Cartwright Act notwithstanding the rule that such repeals are disfavored and will be recognized only when the circumstances reflect a clear legislative intent to do so. (See [Roberts v. City of Palmdale \(1993\) 5 Cal. 4th 363, 379 \[20 Cal. Rptr. 2d 330, 853 P.2d 496\]](#); [Kennedy Wholesale, Inc. v. State Bd. of Equalization \(1991\) 53 Cal. 3d 245, 249 \[279 Cal. Rptr. 325, 806 P.2d 1360\]](#); [Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist. \(1989\) 49 Cal. 3d 408, 419-420 \[261 Cal. Rptr. 384, 777 P.2d 157\]](#); [Hays v. Wood \(1979\) 25 Cal. 3d 772, 784 \[160 Cal. Rptr. 102, 603 P.2d 19\]](#); [Fuentes v. Workers' Comp. Appeals Bd. \(1976\) 16 Cal. 3d 1, 7 \[128 Cal. Rptr. 673, 547 P.2d 449\]](#).)

#### B. UCA.

<sup>3</sup> [HN2](#) [↑] [Section 790](#) expresses that intent: "The purpose of this article is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, Seventy-ninth Congress), by defining, or providing for determination of, all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined."

<sup>4</sup> Section 790.08: "The powers vested in the commissioner in this article shall be additional to any other powers to enforce any penalties, fines or forfeitures, denials, suspensions or revocations of licenses or certificates authorized by law with respect to the methods, acts and practices hereby declared to be unfair or deceptive."

The Court of Appeal recognized that the UIPA does not create a private right of action for violations of its provisions ([\*Moradi-Shalal v. Fireman's Fund Ins. Companies \(1988\) 46 Cal. 3d 287 \[250 Cal. Rptr. 116, 758 P.2d 58\]\*](#) (*Moradi-Shalal*)), and that a plaintiff may not "plead around" that limitation by casting a cause of action based on a violation of the UIPA as one brought under the UCA. The Court of Appeal upheld the overruling [\*\*\*\*14] of defendants' demurrers to the UCA cause of action, however, reasoning that a UCA cause of action may be predicated on a violation of the Cartwright Act. That followed because the UCA defines "unfair competition" as any "unlawful, [\*268] unfair or fraudulent business act or practice" ([\*Bus. & Prof. Code, § 17200\*](#)), and permits any person to sue for injunctive and restitutionary relief for such conduct on behalf of the general public. ([\*Bus. & Prof. Code, § 17204, 17203.\*](#)) A violation of the Cartwright Act is such a practice. ([\*People v. National Association of Realtors \(1981\) 120 Cal. App. 3d 459, 473-475 \[174 Cal. Rptr. 728\], later app. \(1984\) 155 Cal. App. 3d 578 \[202 Cal. Rptr. 243\]; B.W.I. Custom Kitchen v. Owens-Illinois, Inc. \(1987\) 191 Cal. App. 3d 1341, 1348, fn. 6 \[235 Cal. Rptr. 228\].\*](#))

### III. DISCUSSION

Defendants contend that the Court of Appeal erred. Simply stated, their position is that, except to the extent that Proposition 103 applies, the insurance industry is exempt from any antitrust and unfair business practices legislation other than the UIPA. Therefore, insurers are subject only to the regulatory authority of the Insurance Commissioner and there [\*\*\*\*15] is no private right of action to redress injuries brought about by combinations in restraint of trade and other unfair business practices in the insurance industry. They argue that in *Chicago Title* and all subsequent cases the courts have consistently held that the Cartwright Act does not apply to insurance industry practices, that stare decisis counsels adherence to those decisions, and that the *Chicago Title* decision and its progeny have been ratified by subsequent legislation, including Proposition 103. They also argue that the Court of Appeal has misconstrued [\*section 790.09\*](#), the UIPA provision which the court held preserves existing rights and remedies. That section, they argue, establishes only that administrative cease-and-desist orders do not preclude other administrative action related to the same conduct. Finally, they claim that permitting a UCA action for an unfair insurance practice that is prohibited by the UIPA would "seriously compromise" this court's holding in [\*Moradi-Shalal, supra, 46 Cal. 3d 287\*](#), that there is no private cause of action for violations of [\*section 790.03\*](#) even if the conduct also constitutes a violation of the Cartwright Act.

[\*\*\*226] [\*\*\*16] A. *Chicago Title*.

In reaching its conclusion that, in [\*section 790.09\*](#), the UIPA expressly preserved remedies for unlawful conduct in the insurance industry which existed at the time the UIPA was adopted, the Court of Appeal rejected defendants' argument that this court in fact held in *Chicago Title* that the UIPA exempted insurance from the Cartwright Act and other antitrust related remedies, a proposition which [\*Greenberg v. Equitable Life Assur. \[\\*\\*269\] Society, supra, 34 Cal. App. 3d 994 \[\\*\\*62\]\*](#) (*Greenberg*) states was the holding of *Chicago Title*. The Court of Appeal expressed the view that the statement in *Chicago Title* on which defendants relied was dictum, and found it to be neither compelling nor persuasive authority.

The language in *Chicago Title* to which defendants and the Court of Appeal refer appears, italicized, in this passage: "The Cartwright Act, as previously mentioned, is similar in spirit and substance to the federal legislation encompassed by the Sherman (15 U.S.C.A. § 1-7) and Clayton Acts (15 U.S.C.A. § 12-27). Private individuals, businesses, or corporations have, in the absence of express statutory authority, no [\*\*\*\*17] standing to enforce such regulatory statutes. (Cf. [\*Show Management v. Hearst Publishing Co., 196 Cal. App. 2d 606, 612-616 \[16 Cal. Rptr. 731\]; West Coast Poultry Co. v. Glasner, 231 Cal. App. 2d 747 \[42 Cal. Rptr. 297\]; Hudson v. Craft, 33 Cal. 2d 654 \[204 P.2d 1, 7 A.L.R.2d 696\].\*](#)) The Cartwright Act however follows federal policy which expressly contemplates private civil litigation based upon statutes regulating antitrust and unfair trade practices, including illegitimate pricing practices. ([\*Bus. & Prof. Code, § 17040- 17051.\*](#))

*"These statutes and the common law which once constituted the 'protection of the public against combinations in restraint of the insurance trade' ( [\*Speegle v. Board of Fire Underwriters, 29 Cal. 2d 34, 45 \[172 P.2d 867\]\*](#) ) are now expressly superseded and contravened by the specific provisions of the Insurance Code. Counts three (secret rebate), four (discriminatory pricing) and seven (unlawful rebate) clearly concern the regulation of rates charged by title insurers and title companies, and rate regulation has traditionally commanded administrative expertise applied*

to controlled industries. ( [Ins. Code § 12404- 12412](#); [\*\*\*\*18] [County of Placer v. Aetna Cas. etc. Co., 50 Cal. 2d 182 \[323 P.2d 753\]](#); [Division of Labor Law Enforcement v. Moroney, 28 Cal. 2d 344 \[170 P.2d 31\]](#).)" (*Chicago Title, supra, 69 Cal. 2d 305, 322-323*, italics added.)

Defendants argue that the italicized statement is not dictum and that, properly understood, *Chicago Title* held that Cartwright Act remedies for boycotts and other unlawful practices in the insurance industry had been superseded by the UIPA in [section 790.03, subdivision \(c\)](#). We need not decide here whether the passage to which the Court of Appeal referred was dictum or a holding of the court, however, as the passage did not refer to the UIPA. The Insurance Code provisions which *Chicago Title* cited are not part of the UIPA and are not in issue here.

Even assuming arguendo that the reference in *Chicago Title* to the superseding impact of Insurance Code provisions was not dictum, the holding was far narrower than defendants suggest.

[\*270] Consideration of the nature of the action in *Chicago Title* is crucial to understanding that case. It arose on demurrers to the various causes of action stated by the plaintiffs. They sought injunctive [\*\*\*\*19] relief and damages for unfair trade practices and combinations in restraint of trade, including a boycott of the plaintiffs' business. Plaintiffs were "underwritten title companies" that did title searches and examinations and prepared certificates or abstracts of title for title insurers, and delivered the title insurance policies issued by the insurers. (See § 12402.) In the counts at issue in the decision, plaintiffs alleged that the defendants<sup>5</sup> violated antitrust [\*\*\*227] laws, and engaged in price discrimination and unfair trade practices. They accused the defendants of conspiring to provide rebates in order to induce customers to transfer business to defendants.

[\*\*\*\*20] [\*\*63] After explaining that the counts directed to insurance rates could not state a cause of action because specific provisions of the Insurance Code (which are not part of the UIPA) gave the Insurance Commissioner authority over rates, the court went on to say that several other counts did not state a cause of action and that the factual allegations failed to support the charge. The Court of Appeal concluded for that reason that *Chicago Title* held only that the allegations of the complaint were insufficient, and that we had not held that the UIPA superseded the Cartwright Act insofar as insurance industry practices are concerned.

This court adopted, with modifications, the decision of the Court of Appeal in *Chicago Title*. Defendants argue that the court necessarily had the UIPA in mind when it stated that the Cartwright Act had been superseded by the specific provisions of the Insurance Code and that the statement referred to all of the counts of the complaint that were directed to insurance company defendants. They base their argument on a passage in the Court of Appeal opinion which, they assert, addressed the jurisdiction of the Insurance Commissioner. This court [\*\*\*\*21] deleted that passage when it adopted the opinion of the Court of Appeal in *Chicago Title*, however.

Apart from the impropriety of citing and relying on a vacated Court of Appeal opinion, this argument necessarily lacks merit. The opinion of this [\*271] court in *Chicago Title* is the sole source of decision and the reasoning underlying the decision. Moreover, deletion of a passage from a Court of Appeal opinion that is adopted by this court may reflect this court's unwillingness to adopt the view of the Court of Appeal on the deleted matter.

Defendants also argue that this court's analysis of the adequacy of the allegations of the *Chicago Title* complaint to state Unfair Practices Act ( [Bus. & Prof. Code, § 17000 et seq.](#)) violations in counts unrelated to ratemaking addressed only claims made against defendants who were not insurance companies. Therefore, that discussion does not imply that in other circumstances a cause of action for conduct made unlawful by statutes other than the

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<sup>5</sup> The named defendants were: Lehman Brothers, an investment firm; Great Western Financial and Financial Corporation of America, financial holding companies owned by Lehman Brothers; Great Western Savings and Loan Association; Security Title Insurance Company; American Title Company; Summit Title Company; and Sherwood Escrow Company. Many of these defendants were not engaged in the insurance industry and thus did not hold certificates and/or licenses which the commissioner could revoke. The commissioner does have the power to seek an injunction against anyone who is violating or about to violate any provisions of the Insurance Code or regulations issued thereunder. (§ 12928.6.)

Plaintiffs competed directly with Summit Title Company and American Title Company for the business of title insurance companies.

UIPA could be stated against an insurer subject to that act. The discussion in point involved two counts alleging a boycott: "Appellants contend in counts six and eight that the conduct [\*\*\*\*22] of the Sherwood and Great Western groups, respectively, infringes [Business and Professions Code section 17046](#) [part of the Unfair Practices Act]. The attempted application of this section to the facts evidences appellants' misinterpretation of the nature of a boycott. The allegation of boycott cannot be supported in this instance because everyone has the unrestricted right to select customers and sources of supply. ([Bus. & Prof. Code, § 17042](#); [A.B.C. Distributing Co. v. Distillers Distributing Corp., 154 Cal. App. 2d 175, 189 \[316 P.2d 71\]](#)) There is not, and could not be an allegation that it is unreasonable for Sherwood to buy through Summit, or for Great Western Financial to require its subsidiaries in the saving and loan or escrow business to engage the services of the title company in which it likewise has an interest. 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.' [Citation.] Neither do exclusive dealing arrangements constitute boycotts . . . ." ([Chicago Title, supra, 69 Cal. 2d 305, 323-324](#))

[\*\*\*\*23] This passage contemplates the possibility of a Cartwright Act or Unfair Practices Act claim, and rejects the claim stated by plaintiffs only because the facts alleged did not constitute a violation of either act.

Defendants' argument that these counts were not directed against insurance companies and that the discussion anticipates Cartwright Act or Unfair Practices Act claims only against persons or entities that are not engaged in the business of insurance is not supported by the opinion. The "Sherwood group" to which the court referred included [\*\*\*228] both Summit Title Company and Sherwood Escrow Company. ([Chicago Title, supra, 69 Cal. 2d 305, 318](#)) Summit, an underwritten title company (§ 12340.5 [former § 12402]) was [\*272] subject to licensing and regulation under provisions of the Insurance Code. (§ 12389.2 [former \*\*64] § 12396, added by Stats. 1965, ch. 361, § 2, p. 1467.).

Therefore, if the *Chicago Title* statement the Court of Appeal here deemed dictum was instead a holding of this court, the holding was much narrower than defendants' claim. The court said only that sections of the Insurance Code that are not part of the UIPA superseded [\*\*\*\*24] other antitrust and unfair competition laws *insofar as they might apply to conduct related to rates and ratemaking* which are governed by specific provisions of the Insurance Code that authorize some practices and as to others gave the Insurance Commissioner authority to determine the propriety of the conduct. None of the Insurance Code provisions cited by the court in *Chicago Title* is part of the UIPA and this court did not mention the UIPA in the *Chicago Title* opinion. Nor did the court say that in [section 790.09](#) the UIPA reflects legislative intent to displace remedies created by the Cartwright Act or other statutes directed to unfair trade practices.

Had the court concluded in *Chicago Title* that the UIPA displaced preexisting legislation in the field and that the insurance industry was thereby exempted from antitrust and other unfair business practices remedies applicable to other industries, there would have been no need to explain in detail, as the court did ([Chicago Title, supra, 69 Cal. 2d at pp. 324-325](#)), why the allegations supporting the remaining counts of the complaint were insufficient for other reasons to state causes of action under [\*\*\*\*25] the Cartwright Act or the Unfair Practices Act.<sup>6</sup>

[\*\*\*\*26] B. *Legislative history and administrative construction of the UIPA.*

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<sup>6</sup> Possibly the most telling rebuttal to defendants' claim that *Chicago Title* held that antitrust and unfair competition statutes other than the UIPA did not apply to the insurance industry is found by negative implication in the dissent of Justice Mosk. ([Chicago Title, supra, 69 Cal. 2d 305, 328](#) (dis. opn. of Mosk, J.)) In that dissent, Justice Mosk disagreed with the court's conclusion that the complaint did not state a cause of action under the Cartwright Act. The reasoning is directed exclusively to the allegations necessary to plead such a cause of action. Had the court held that the Cartwright Act was superseded by the UIPA, as defendants argue, the absence from the dissent of any reference to or acknowledgment of that holding would be quite remarkable.

Moreover, had the majority held that the UIPA precluded any Cartwright Act claim, the opinion would certainly have responded to the dissent by observing that in light of the holding on the effect of the UIPA, the adequacy of the allegations pleading those causes of action was irrelevant.

**CA(1a)** [↑] (1a) Defendants offer a construction of [section 790.09](#) which, they argue, demonstrates that in adopting the UIPA, the Legislature intended that only the Insurance Commissioner be authorized to remedy unlawful conduct [\*273] by insurance companies. They argue that in providing that a cease-and-desist order does not relieve a person of civil or criminal liability, [section 790.09](#) simply gives nonpreclusive effect to administrative cease and desist orders that are followed by further action by the Insurance Commissioner, and the section has no relevance to the issues in this case. In their view [section 790.09](#) means only that the issuance of a cease and desist order by the Insurance Commissioner does not preclude other action by the commissioner directed to the same impermissible trade practice. Defendants argue that the Court of Appeal erred in its construction of [section 790.09](#) when that court concluded that the section stated that the commissioner's issuance of a cease and desist order shall not "obstruct or impede" the imposition of civil liability or criminal penalties. They perceive a crucial difference in [\*\*\*\*27] the actual language of the statute which provides that such orders do not "relieve or absolve" a person from imposition of civil liability or criminal penalties. That distinction, defendants claim, precludes viewing [section 790.09](#) as a "savings clause" and demonstrates that its purpose is merely to provide that cease and desist orders do not have a preclusive effect.

We agree that the definitions of the words used in the two phrases differ. **CA(2)** [↑] (2) "Absolve" is defined as "to set free from an obligation or the consequences of guilt." (Webster's New Collegiate Dict. (1981) p. 969.) **CA(3)** [↑] (3) "Obstruct" [\*\*229] means "to block or close up by an obstacle," **CA(4)** [↑] (4) while "impede" means "to interfere with or slow the progress of." (*Id. at p. 570.*) **CA(1b)** [↑] (1b) We fail to find in those distinctions the crucial [\*65] difference noted by defendants and do not agree with defendants that "relieve or absolve" is beyond question language of res judicata and claim preclusion. Defendants cite no statute or case using those terms in reference to res judicata and claim preclusion and we are aware of none. The definition of "relieve and absolve" offered by defendants leads us to the same conclusion reached by the Court of [\*\*\*\*28] Appeal. The issuance of a cease-and-desist order enjoining future unlawful conduct does not free the offender from the civil obligation or criminal guilt incurred as a result of the unlawful conduct he has engaged in prior to issuance of the order.

Defendants offer no satisfactory answer to the observation of the Court of Appeal that as defendants construe [section 790.09](#), its reference to civil and criminal liability becomes meaningless. The section provides that a ceaseand-desist order to a person does not "relieve or absolve such person from any administrative action against the license or certificate of such person, *civil liability or criminal penalty* under the laws of this State arising out of the methods, acts or practices found unfair or deceptive." (Italics added.) **HN3** [↑] The Insurance Commissioner has no power to initiate a criminal proceeding [\*274] against, or an action to impose civil liability on, a person who engages in unfair trade practices. The authority of the commissioner is limited to enjoining future unlawful conduct and suspending or revoking a license or certificate. ( [Shernoch v. Superior Court \(1975\) 44 Cal. App. 3d 406, 409 \[118 Cal. Rptr. 680\].](#))

[\*\*\*\*29] That part of [section 790.09](#) which preserves civil and criminal liability would be meaningless if defendants' proposed construction of the section were accepted. **HN4** [↑] Well-established canons of statutory construction preclude a construction which renders a part of a statute meaningless or inoperative. In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all. ( [Code Civ. Proc., § 1858.](#)) Pursuant to this mandate we must give significance to every part of a statute to achieve the legislative purpose. ( [Schwab v. Rondel Homes, Inc. \(1991\) 53 Cal. 3d 428, 435 \[280 Cal. Rptr. 83, 808 P.2d 226\]; J. R. Norton Co. v. Agricultural Labor Relations Bd. \(1979\) 26 Cal. 3d 1, 36-37 \[160 Cal. Rptr. 710, 603 P.2d 1306\].](#))

Not only is the construction defendants suggest inconsistent with the language of [section 790.09](#), but a conclusion that the Legislature intended by [section 790.09](#) to displace [\*\*\*\*30] Cartwright Act, Unfair Practices Act, and UCA remedies would be contrary to consistent administrative construction of the act and available legislative history. It would also be contrary to the conclusion of courts of other states which have adopted the same or similar legislation in order to take advantage of the McCarran-Ferguson Act exemption from application of the federal law that existing rights and remedies are preserved by this provision.

The Cartwright Act (Stats. 1941, ch. 526, § 1, p. 1834) and the Unfair Practices Act ([Bus. & Prof. Code, § 17000 et seq.](#), also added by Stats. 1941, ch. 526, § 1, p. 1834) predate the UIPA (Stats. 1959, ch. 1737, § 1, p. 4191). The Legislature was aware that almost all of the practices which the UIPA prohibits in [section 790.03](#) and defines as "unfair methods of competition and unfair and deceptive acts or practices in the business of insurance" were already proscribed under those acts.<sup>7</sup> When the UIPA was introduced as Assembly Bill No. 1530 in 1958, its acknowledged purpose was to preclude **[\*275]** federal jurisdiction over the business of insurance. [Section 790](#) states that purpose: "The purpose of this article is to regulate trade [\[\\*\\*\\*\\*31\]](#) practices in the [\[\\*\\*66\]](#) [\[\\*\\*\\*230\]](#) business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, Seventy-ninth Congress), by defining, or providing for the determination of, all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined." Lower courts have repeatedly recognized that the purpose of the UIPA is to displace federal law, not existing state law in the field of antitrust and unfair competition. (See, e.g., [Karlin v. Zalta, supra, 154 Cal. App. 3d 953, 966](#); [American Internat. Group, Inc. v. Superior Court \(1991\) 234 Cal. App. 3d 749, 756-758 \[285 Cal. Rptr. 765\]](#).)

**[\*\*\*\*32]** Moreover, as the Court of Appeal recognized, nothing in the history of the UIPA reflects legislative intent to bring about a pro tanto repeal of the Cartwright Act or the UCA.

At the time the bill was passed the Legislative Analyst expressed the view that adoption of the UIPA made no change in existing law, stating: "The bill makes no substantive change in existing law as the insurance commissioner has in the past regulated such matters under his general powers." (Ops. Legis. Analyst, Analysis of Assem. Bill No. 1530 (May 20, 1959) p. 1.) That this understanding of the UIPA was shared by the Legislature is confirmed by that body's enactment of the specific exemptions from antitrust legislation noted above, exemptions that would have been unnecessary had the UIPA effected a blanket exemption of the insurance industry from the rights and remedies available under the Cartwright Act, UCA and other legislation.<sup>8</sup>

**[\*\*\*\*33] [\*276]** As the Court of Appeal noted, [section 790.09](#) was patterned after a draft of the Model Unfair Insurance Practices Act proposed by the National Association of Insurance Commissioners (NAIC) (exhibit B to Rep. of Joint Com. on Federal Legislation, etc. (Jan. 24, 1947) § 8(d); Proceedings, 78th Ann. Sess., NAIC (1947)) p. 398),<sup>9</sup> and has been construed in other states which have adopted the same or substantially similar statute as

<sup>7</sup> Records of the Insurance Commissioner of which the Court of Appeal took judicial notice reflect that in a memorandum to the Insurance Commissioner at the time Assembly Bill No. 1530 was introduced, his chief assistant advised that the acts proscribed by the bill were covered by other statutes, and in particular the acts of boycott, threat, or intimidation were proscribed by the Cartwright Act. The chief assistant expressed concern that notwithstanding other sections of the UIPA, it could be construed to preclude use of the sanctions available under existing law. That concern led to the inclusion of [section 790.09](#) in the proposed legislation.

<sup>8</sup> The Insurance Commissioner, whose office proposed inclusion of [section 790.09](#) in the UIPA to ensure that existing remedies would be preserved, continues to take the position that the Legislature did not intend, by adoption of the UIPA, to supersede the Cartwright Act or any other state laws. Appearing as amicus curiae in support of plaintiff, the commissioner expresses his belief that regulatory enforcement by his office is complementary to the Cartwright Act and the UCA. Both the commissioner and the California District Attorneys Association, which also appears as amicus curiae, express the belief that the public interest is served by vigorous enforcement of all three statutes. The California District Attorneys Association asserts that actions under the UCA have become the principal law enforcement instrument of prosecutors in the areas of consumer protection and unfair competition, with more than 200 such actions being prosecuted annually. The UCA is also the basis for prosecutions brought to supplement provisions of the Health and Safety Code and the Labor Code to remedy public health and sanitation and public safety violations, and its use to supplement other provisions of law has been upheld repeatedly. (See, e.g., [People v. McKale \(1979\) 25 Cal. 3d 626, 632 \[159 Cal. Rptr. 811, 602 P.2d 731\]](#); [People v. Los Angeles Palm, Inc. \(1981\) 121 Cal. App. 3d 25, 33 \[175 Cal. Rptr. 257\]](#); [People v. Casa Blanca Convalescent Homes, Inc. \(1984\) 159 Cal. App. 3d 509 \[206 Cal. Rptr. 164, 53 A.L.R.4th 661\]](#).)

<sup>9</sup> The request of plaintiff that this court take judicial notice of this and other materials related to the adoption of the UIPA, much of which was considered by the Court of Appeal, is granted. [HN5](#) Pursuant to [Evidence Code section 459](#), a reviewing court

preserving remedies already available at the time the UIPA was adopted in those states. (See *Attorney General of Tex. v. Allstate Ins. Co. (Tex.App. 1985) 687 S.W.2d 803, 805; Application of Kusher (1981) 108 Misc. 2d 329 [437 N.Y.S.2d 889, 890-891]; Fischer, etc. v. Forrest T. Jones & Co. (Mo. 1979) 586 S.W.2d 310, 313, 315; Dodd v. Commercial Union Ins. Co. (1977) 373 Mass. 72 [365 N.E.2d 802, 805]; Correa v. Pennsylvania Mfrs. Ass'n. Ins. Co. (D.Del. 1985) 618 F. Supp. 915, 926; Grand Ventures, Inc. v. Whaley (Del.Super.Ct. 1992) 622 A.2d 655, 664; Mead v. Burns (1986) 199 Conn. 651 [509 A.2d 11, 18]; Skinner v. Steele (Tenn.App. 1987) 730 S.W.2d 335, 337-338; Hardy v. Pennock Ins. Agency, Inc [\*\*\*\*34] . (1987) [\*\*\*231] 365 Pa. Super. 206 [\*\*67] [529 A.2d 471, 479]; St. ex rel . Stratton v. Gurley Motor Co. (1987) 105 N.M. 803 [737 P.2d 1180, 1183]; Phillips v. Integon Corp. (1984) 70 N.C.App. 440 [319 S.E.2d 673, 675]; Grams v. Boss (1980) 97 Wis.2d 332 [294 N.W.2d 473, 480].) <sup>10</sup> By contrast, no court has construed a version of [section 790.09](#) in the manner suggested by defendants as intended only to avoid a possible res judicata effect of "merger" of other administrative remedies into an action leading to a cease-and-desist order.*

[\*\*\*\*35] [CA\(5\)](#)<sup>↑</sup> (5) The presumption against finding a pro tanto repeal of a statute in the enactment of subsequent legislation on the subject is so strong that the court will do so only if the later statute revises the earlier in a manner that [\*277] necessarily implies legislative intent to substitute the new statute for the older. ( *Roberts v. City of Palmdale, supra, 5 Cal. 4th 363, 379.*) [CA\(1c\)](#)<sup>↑</sup> (1c) Neither the language of the UIPA nor its history suggests that the Legislature intended by its enactment to abolish the Cartwright Act and UCA remedies for conduct which the UIPA also proscribes.

C. *Stare decisis.*

[CA\(6a\)](#)<sup>↑</sup> (6a) [CA\(7\)](#)<sup>↑</sup> (7) Invoking the principles of stare decisis, defendants next argue that the court should not depart from the construction of the UIPA that courts have followed since this court's decision in *Chicago Title*. As we have explained above, however, the court did not construe the UIPA or [section 790.09](#) of that act in *Chicago Title*, and has never held that the UIPA created a wholesale exemption from the Cartwright Act and UCA remedies for the insurance industry. [HN7](#)<sup>↑</sup> Those acts do not create such an exemption, and, since the state scheme of regulation of the insurance industry is not wholly [\*\*\*\*36] inconsistent with their application, no exemption may be implied. ( *Cianci v. Superior Court (1985) 40 Cal. 3d 903, 922 [221 Cal. Rptr. 575, 710 P.2d 375].*)

[CA\(6b\)](#)<sup>↑</sup> (6b) Defendants also rely on the Court of Appeal interpretation of *Chicago Title* in *Greenberg, supra, 34 Cal. App. 3d 994, 999*, footnote 2, which, they assert, was accepted by this court in *Royal Globe Ins. Co. v. Superior Court (1979) 23 Cal. 3d 880 [153 Cal. Rptr. 842, 592 P.2d 329]* (*Royal Globe*). Defendants recognize that *Royal Globe* was overruled in *Moradi-Shalal*, but argue that *Moradi-Shalal* did not address the claimed insurance industry exemption from antitrust and unfair competition laws, an exemption which, they assert, other courts have continued to recognize since *Moradi-Shalal* was decided.

In *Greenberg, supra, 34 Cal. App. 3d 994*, the plaintiff sought to state a cause of action under section 770 <sup>11</sup> on behalf of himself and a similarly situated class. The complaint alleged that the defendant insurance company, as

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must take judicial notice of any matter that was properly noticed by the trial court or of which the trial court was required to take notice under [Evidence Code section 451](#). The reviewing court may also take judicial notice of matters specified in [Evidence Code section 452](#).

<sup>10</sup> Illinois, New Jersey, and Washington have enacted express exemptions from state [antitrust law](#) for those activities of insurers which are regulated by their insurance commissioners and/or authorized by statute. (Ill. Rev. Stat. ch. 38, par. 60-5 (1969); *N.J. Stat. Ann. § 56:9-5, subd. (b)(4); Wash. Rev. Code § 19.86.170*; see *B & L Pharmacy, Inc. v. Metropolitan Life Ins. Co. (1970) 46 Ill.2d 1 [262 N.E.2d 462]; Washington Osteo. Med. Ass'n v. King Co. Med. S. Corp. (1970) 78 Wn.2d 577 [478 P.2d 228].*)

[HN6](#)<sup>↑</sup> -

<sup>11</sup> Section 770: "No person engaged in the business of financing the purchase of real or personal property or of lending money on the security of real or personal property and no trustee, director, officer, agent or other employee, or affiliate of, any such person shall require, as a condition precedent to financing the purchase of such property or to loaning money upon the security thereof, or as a condition prerequisite for the renewal or extension of any such loan or for the performance of any other act in

security for the balance on home loans it made, required the borrower to [\*278] obtain from the company a policy of whole life insurance equal to the [\*\*\*\*37] loan balance. It was alleged that comparable insurance was available from other insurance companies at a lower premium and that the "tie-in sale" violated section 770. On plaintiff's appeal after the trial court had sustained a demurrer without leave to amend, the Court of Appeal held that while no cause of action had been stated under that section, leave to amend should [\*\*68] [\*\*\*232] have been granted as it appeared that plaintiff could state a UIPA cause of action under [subdivision \(c\) of section 790.03](#) for an unfair business practice as that subdivision should be construed in light of similar statutes prohibiting activities in restraint of trade. In an accompanying footnote the *Greenberg* court stated: "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 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.)" (*Greenberg, supra*, 34 Cal. [\*\*\*\*381] App. 3d 994, 999, fn. 2.)

Contrary to defendants' characterization of our discussion of *Greenberg* in *Royal Globe*, *supra*, 23 Cal. 3d 880, we did not state there that the *Greenberg* [\*\*\*\*39] court had correctly interpreted *Chicago Title* as precluding application of the Cartwright Act to all forms of anticompetitive conduct by insurers. Our opinion said only that the *Greenberg* court had "determined that the general antitrust prohibitions of the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)) were inapplicable to insurance companies and that only [section 790.03](#) prohibits insurers from engaging in anticompetitive activity." (*Royal Globe*, *supra*, 23 Cal. 3d 880, 886-887.) That statement was made in response to an argument that [section 790.09](#) did not provide affirmative authority for filing a civil action for violation of the UIPA. We said that this argument was contrary to the *Greenberg* holding that [section 790.03](#) did afford the basis for a civil suit. We did not hold, as defendants claim, that the *Greenberg* interpretation of *Chicago Title* was correct. That question was not before us in *Royal Globe*.

Defendants' claim that the *Greenberg* interpretation of *Chicago Title* has been "affirmed by all subsequent case authorities" does not withstand examination. Other than [Moradi-Shalal, supra](#), 46 Cal. 3d 287, which, as we have explained, [\*\*\*\*40] does not approve the *Greenberg* interpretation, defendants cite only three cases in support of that proposition. None does so. The court quoted the *Greenberg* statement in [Karlin v. Zalta, supra](#), 154 Cal. App. 3d 953, but in *Karlin* the court concluded that plaintiffs' claims were not governed by the Insurance Code and, as defendants concede, the plaintiffs [\*279] did not state a Cartwright Act claim. Thus, the court had no occasion to apply the *Greenberg* formulation of *Chicago Title*. In *Liberty Transport, Inc. v. Harry W. Gorst Co., supra*, 229 Cal. App. 3d 417, disapproved on other grounds in [Adams v. Murakami \(1991\) 54 Cal. 3d 105, 116 \[284 Cal. Rptr. 318, 813 P.2d 1348\]](#), the court stated in dictum that only the UIPA prohibits anticompetitive behavior by an insurer, citing *Greenberg*. ([229 Cal. App. 3d at p. 432](#).) There, however, the court acknowledged that because *Moradi-Shalal* had only limited retroactivity, the case was governed by *Royal Globe*. ([229 Cal. App. 3d at p. 426, fn. 1](#).) The actual holding was that the statute of limitations did not bar the [section 790.03](#) cause of action stated by the plaintiff.

[Maler v. \[\\*\\*\\*\\*41\] Superior Court \(1990\) 220 Cal. App. 3d 1592 \[270 Cal. Rptr. 222\]](#) affords no more support to defendants. The opinion does not mention either *Chicago Title* or *Greenberg*, holding only that the adoption of [sections 1861.03](#) and [1861.10](#) as part of Proposition 103 at the November 8, 1988, election did not restore or create private causes of action under [section 790.03](#).<sup>12</sup>

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connection therewith, that the person from whom such purchase is to be financed or to whom the money is to be loaned or for whom such extension, renewal or other act is to be granted or performed negotiate any insurance or renewal thereof covering such property through a particular insurance agent or broker."

<sup>12</sup> Contrary to defendants' assertion, [Maler v. Superior Court, supra](#), 220 Cal. App. 3d 1592, did not uphold the sustaining of a demurrer to a UCA cause of action. The trial court had overruled that demurrer (*id. at p. 1596*) and the only issue before the *Maler* court was whether the court erred in sustaining a demurrer to a cause of action for violation of [section 1861.03](#), the section added by Proposition 103 which states that the insurance industry is subject to antitrust and unfair business practices laws. ([220 Cal. App. 3d at p. 1595](#).)

Nor has this court, or any other, accepted defendants' argument that the UIPA [\*\*\*\*42] [\*\*69] [\*\*\*233] exempts insurance companies from other state antitrust laws or from civil liability for anticompetitive conduct.<sup>13</sup> The act itself contains no such exemption and, in the only case in which this court has considered that question, we held that the insurance industry is not exempt from Cartwright Act claims. (*Speegle v. Board of Fire Underwriters* (1946) 29 Cal. 2d 34, 45-46 [172 P.2d 867].) As the Court of Appeal recognized, *Royal Globe* and *Greenberg* recognized such liability, holding only that the statutory authority for a civil action was found in the UIPA, not the Cartwright Act. We have since held in *Moradi-Shalal, supra*, 46 Cal. 3d 287, 304-305, that neither section 790.03 nor section 790.09 creates the basis for a private cause of action, but that insurance companies do have civil liability for such conduct. The Court of Appeal below correctly understood that "*Moradi-Shalal* marks a return to the fundamental principle that the UIPA, like all statutes, is to be applied according to its terms. Its language neither creates new private rights *nor destroys old ones*. This was the view of Justice Richardson[] [who, in his [\*280] [\*\*\*43] dissent,] wrote that section 790.09 'preserves any preexisting civil or criminal liability which the insurer might face under *other statutory or decisional law*.' (*Royal Globe, supra*, 23 Cal. 3d at p. 893 . . .).'" This court did not, as defendants argue, hold in *Moradi-Shalal* that insurers are subject to common law, but not statutory, civil liability for anticompetitive activities and unfair business practices. We said, with respect to third parties and insured who had no cause of action under section 790.03 for bad faith refusal to settle: "[C]ourts retain jurisdiction to impose civil damages or other remedies against insurers in appropriate common law actions, based on such traditional theories as fraud, infliction of emotional distress, and (as to the insured) either breach of contract or breach of the implied covenant of good faith and fair dealing." (*Moradi-Shalal, supra*, 46 Cal. 3d 287, 304-305.) Bad faith refusal to settle is not conduct encompassed by the Cartwright Act. Whether statutory causes of action under the Cartwright Act and the UCA may be stated against an insurance company was not an issue in *Moradi-Shalal* which, in the context [\*\*\*44] of bad faith refusal to settle claims, overruled *Royal Globe Ins. Co., supra*, 23 Cal. 3d 880, and confirmed that section 790.03, subdivision (h), was not the source of a private right of action against an insurer for that conduct.

Addressed in this context, defendants' argument that stare decisis principles mandate adherence to *Chicago Title* must fail. First and foremost, *Chicago Title* did not hold that the UIPA supersedes and displaces the Cartwright Act and UCA prohibitions on anticompetitive activities and unfair business practices by insurers. Second, we have never held that the insurance industry is exempt from antitrust and unfair competition laws or that it enjoys immunity from civil liability for such conduct. Finally, even were we to accept defendants' argument that the UIPA and section 790.03 supplant the Cartwright [\*\*\*45] Act and UCA, and assuming *Chicago Title* could be read as holding that section 790.09 permits only administrative sanctions for anticompetitive activities and unfair business practices proscribed by the UIPA, principles of stare decisis would not preclude reconsideration of that conclusion.

Subdivision (c) of section 790.03 includes among the unfair methods of competition and unfair and deceptive acts or practices in the business of insurance it describes: "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." This broad prohibition of anticompetitive activities and unfair business conduct alone demonstrates that defendants may not claim justifiable reliance on a right to engage in such unlawful conduct. A [\*281] belief that only administrative sanctions are available to deter or punish such conduct is not equivalent to a justifiable belief that the conduct is permissible. Thus, defendants have no basis [\*\*70] [\*\*\*234] for arguing that under their interpretation of *Chicago Title*, they were [\*\*\*46] free to engage in concerted action that tended to result in an unreasonable restraint of trade.

"[T]he doctrine of stare decisis 'is based on the assumption that certainty, predictability and stability in the law are major objectives of the legal system; i.e., that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law.' (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 758, p. 726, and see cases cited.)" (*Moradi-Shalal, supra*, 46 Cal. 3d 287, 296.) Even if defendants believed the Cartwright Act and UCA did not apply to an insurer, however, they would be bound to conform their conduct to the UIPA. That law mirrors the Cartwright Act's prohibition of boycotts and other forms of unfair and

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<sup>13</sup> Defendants appear to argue both that the insurance industry is exempt from antitrust regulation generally and that no private civil remedy for such conduct exists.

anticompetitive conduct. Therefore, defendants will not be heard to complain that they should not suffer civil liability because they lacked "reasonable assurance of the governing rules of law." In essence, their claim is that they believed they could violate the law and be subject only to sanctions imposed by the Insurance Commissioner. Principles of stare decisis do not protect a person from the consequences [\*\*\*\*47] of actions based on such a belief.

#### D. Proposition 103.

**CA(8)** [8] Defendants argue that legislation subsequent to *Chicago Title* has "ratified" the rule that the UIPA supplants the Cartwright Act. They reason that the addition of section **HN8** [8] 1861.03, subdivision (a), to the Insurance Code implies that prior to the adoption of Proposition 103 the insurance industry was exempt from antitrust regulation other than that of the Insurance Code. That subdivision provides: "The business of insurance shall be subject to the laws of California applicable to any other business, including, but not limited to, the Unruh Civil Rights Act (*Sections 51 to 53, inclusive, of the Civil Code*), and the antitrust and unfair business practices laws (Parts 2 (commencing with Section 16600) and 3 (commencing with Section 17500) of Division 7 of the Business and Professions Code)."

Clearly, Proposition 103 was intended to terminate an insurance industry antitrust exemption. That intent is manifest in section 1861.03, subdivision (a), and in the ballot materials provided to the voters. The Legislative Analyst stated in his analysis that "[t]he measure makes insurance companies subject to the state's antitrust [\*\*\*\*48] laws." In the ballot pamphlet argument in favor of Proposition 103 and in rebuttal to the counterargument, proponents [\*282] of Proposition 103 stated that the measure "will also end the insurers' exemption from the antimonopoly laws, . . ." and that it "eliminates the insurance industry's unfair exemption from the antitrust laws." (Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters Gen. Elect. (Nov. 8, 1988) argument in favor of Prop. 103, pp. 100-101, 140.)

However, Proposition 103 also repealed former sections 1853, 1853.6, and 1853.7 of the Insurance Code. Those sections were part of the McBride-Grunsky Act, which was enacted after this court held in *Speegle v. Board of Fire Underwriters, supra, 29 Cal. 2d 34*, that the Cartwright Act applied to the insurance industry; they created a partial antitrust exemption applicable only to certain property and casualty lines of insurance.<sup>14</sup> The McBride-Grunsky Act permitted casualty insurers to engage in rate-setting practices that, but for statutory authorization, would have violated antitrust law. Therefore, the declaration of purpose in section 1861.03, subdivision (a), and the ballot pamphlet statements [\*\*\*\*49] may reflect nothing more than an intent to terminate the partial antitrust exemption granted to those lines of property and casualty insurance. They do not necessarily reflect a belief that other lines of insurance enjoyed a similar exemption, or that the McBride-Grunsky Act had exempted even property and casualty lines from all aspects of antitrust and unfair competition laws.

[\*\*71] [\*\*235] Moreover, even assuming that section 1861.03 did reflect a belief on the part of the drafters of Proposition 103 and the electorate that the Cartwright Act and UCA were not applicable to the insurance industry, that belief would be irrelevant. The addition of section 1861.03, subdivision (a), to the Insurance Code cannot [\*\*\*\*50] ratify or supply what is not present in the prior law.

Proposition 103 does not apply to several lines of insurance, among which is life insurance. (§ 1861.13.)<sup>15</sup> We need not decide if the drafters intended subdivision (a) of section 1861.03 to apply to all aspects of the insurance

<sup>14</sup> Section 1851 excludes eight categories of insurance from the partial antitrust exemption conferred by the McBride-Grunsky Act. Life insurance is among the excluded lines. The others are: reinsurance, marine, title, disability, workers' compensation, mortgage, and county mutual fire insurance.

<sup>15</sup> Section 1861.13: "This article shall apply to all insurance on risks or on operations in this state, except those listed in Section 1851."

Section 1851, like section 1861.13, is part of chapter 9 of division 1 of the Insurance Code, a chapter directed to rates and rating.

industry, however, as there is no way that Proposition 103 can be construed as creating an exemption from antitrust laws for those lines of insurance to which its other provisions do not apply.

#### [\*283] IV. UNFAIR COMPETITION ACT

Relying on this court's decision in *Rubin v. Green* (1993) 4 Cal. 4th 1187, 1201-1202 [17 Cal. Rptr. 2d 828, 847 P.2d 1044], the Court of Appeal held that, because section 790.03 does not create a private civil cause [\*\*\*51] of action, plaintiff could not plead around that limitation by relying on conduct which violates only the UIPA as the basis for a UCA cause of action. It held, however, that the trial court had properly overruled defendants' demurrers to the UCA cause of action because the conduct on which plaintiff predicated that cause of action also violated the Cartwright Act. Therefore, the conduct could form the basis for a cause of action under the UCA.

**CA(9)[]** (9) Defendant contends that this holding will "seriously compromise" our holding in *Moradi-Shalal* that there may be no private UIPA cause of action under section 790.03.

The question the court addressed in *Rubin v. Green, supra, 4 Cal. 4th 1187*, was whether allegedly improper solicitation by an attorney, which could not form the basis of a tort action because the conduct fell within the litigation privilege of Civil Code section 47, subdivision (b), could be the basis of an action for injunctive relief under the UCA. Plaintiff's theory was that the conduct could do so as it was prohibited by Business and Professions Code sections 6152 and 6153. Therefore, it was a species of "unfair competition" as to which, under Business and Professions [\*\*\*52] Code section 17204, plaintiff, acting in the interests of the general public, had standing to seek an injunction.<sup>16</sup>

The court held that the plaintiff could not plead around the absolute bar to relief created by the litigation privilege by recasting the cause of action as one for unfair competition. It analogized such pleading to the attempts to avoid the bar to "implied" private causes of action under section 790.03, which several Courts of Appeal had held could not be avoided by characterizing the claim as one under the UCA. (See *Safeco Ins. Co. v. Superior Court* (1990) 216 Cal. App. 3d 1491 [265 Cal. Rptr. 585]; *Maler v. Superior Court, supra, 220 Cal. App. 3d 1592; Industrial Indemnity Co. v. Superior Court* [\*284] (1989) [\*\*\*53] 209 Cal. App. 3d 1093 [257 Cal. Rptr. 655]; *Lee v. Travelers Companies* (1988) 205 Cal. App. 3d 691, 694-695 [252 Cal. Rptr. 468]; *Doctors' Co. Ins. Services v. Superior Court* (1990) 225 Cal. App. 3d 1284, 1289 [275 Cal. Rptr. 674]; *American Internat. Group, Inc. v. Superior Court* (1991) 234 Cal. App. 3d 749, 768 [285 Cal. Rptr. 765].)

As the Court of Appeal here recognized, however, a cause of action for unfair competition based on conduct made unlawful by the Cartwright Act is not an "implied" cause of action which *Moradi-Shalal* held could not be found in the UIPA. There is no attempt to use the UCA to confer private standing to enforce a provision of the UIPA. Nor is the cause of action based on conduct which is absolutely privileged or immunized by another [\*\*72] [\*\*\*236] statute, such as the litigation privilege of Civil Code section 47, subdivision (b).

This conclusion does not compromise the rule of *Moradi-Shalal* in any way. The court concluded there that the Legislature did not intend to create new causes of action when it described unlawful insurance business practices in section 790.03, and therefore that section did not create a [\*\*\*54] private cause of action under the UIPA. The court did not hold that by identifying practices that are unlawful in the insurance industry, practices that violate the Cartwright Act, the Legislature intended to bar Cartwright Act causes of action based on those practices. Nothing in the UIPA would support such a conclusion. The UIPA nowhere reflects legislative intent to repeal the Cartwright Act

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<sup>16</sup> Business and Professions Code section 17204, a part of the UCA, provides that an action for an injunction against unfair competition may be prosecuted by, among others, "any person acting for the interests of itself, its members or the general public."

insofar as it applies to the insurance industry, and the Legislature has clearly stated its intent that the remedies and penalties under the UCA are cumulative to other remedies and penalties.<sup>17</sup>

## V. DISPOSITION

The judgment of the Court of Appeal is affirmed.

Lucas, C. J., Kennard, J., Arabian, J., George, J., and Werdegar, J., concurred.

**Concur by:** MOSK, J.

## Concur

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[\*\*\*\*55] [\*285] MOSK, J.

I concur in the judgment.

I also generally concur in the majority opinion prepared by Justice Baxter. Its reasoning is substantially sound. Its result is unquestionably correct. On two points, however, I would take a different approach.

I

First, unlike the majority, I would declare that the statement in *Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal. 2d 305, 322-323 [70 Cal. Rptr. 849, 444 P.2d 481] (hereafter sometimes *Chicago Title*), is dictum, not holding, and unsound dictum at that. As the majority themselves clearly show, this language has caused mischief in the past. It should not be allowed to retain any vitality for the future.

"The Cartwright Act," stated the *Chicago Title* court, "is similar in spirit and substance to that federal legislation encompassed by the Sherman (15 U.S.C.A. § 1-7) and Clayton Acts (15 U.S.C.A. § 12-27). Private individuals, businesses or corporations have, in the absence of express statutory authority, no standing to enforce such regulatory statutes. (Cf. *Show Management v. Hearst Publishing Co.*, 196 Cal. App. 2d 606, 612-616 [16 Cal. Rptr. 731]; *West Coast Poultry* [\*\*\*\*56] *Co. v. Glasner*, 231 Cal. App. 2d 747 [42 Cal. Rptr. 297]; *Hudson v. Craft*, 33 Cal. 2d 654 [204 P.2d 1, 7 A.L.R. 696].) The Cartwright Act however follows federal policy which expressly contemplates private civil litigation based upon statutes regulating antitrust and unfair trade practices, including illegitimate pricing practices. ( *Bus. & Prof. Code*, § 17040- 17051 [sic: these provisions belong to the Unfair Practices Act, *not* the Cartwright Act].)

"These statutes and the common law which once constituted the 'protection of the public against combinations in restraint of the insurance trade' ( *Speegle v. Board of Fire Underwriters*, 29 Cal. 2d 34, 45 [172 P.2d 867]) are now expressly superseded and contravened by the specific provisions of the Insurance Code. Counts three (secret rebate), four (discriminatory pricing) and seven (unlawful rebate) clearly concern the regulation of rates charged by title insurers and title companies, and rate regulation has traditionally commanded administrative expertise applied to controlled industries. ( *Ins. Code*, § 12404- 12412; *County of Placer v. Aetna Cas. etc. Co.*, 50 Cal. 2d 182 [323 P.2d 753]; Division [\*\*\*\*57] of *Labor Law Enforcement v. Moroney*, 28 Cal. 2d 344 [170 P.2d 3].) Count three, for instance, is based upon a statute [\*286] ( *Bus. & Prof. Code*, § 17045) aimed at preventing a distributor from discriminating between customers, but fails to allege facts from which a court might properly infer that [\*\*73] [\*\*\*237] the prices charged by Security [a title insurer defendant] or Summit [a title company defendant] differ from customer to customer, and is thus defective. ( *Federal Automotive Services v. Lane Buick Co.*, 204 Cal. App. 2d 689 [22 Cal. Rptr. 603].) Count four, presumably based on the same facts, charges that the discount constitutes a

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<sup>17</sup>  *Business and Professions Code section 17205*: "Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state."

sale of title insurance below cost which is an infraction only if done 'for the purpose of injuring competitors' ( [Bus. & Prof. Code, § 17043, 17049](#)), but a court is not the appropriate initial arbiter of factors involved in insurance costs. Count seven implies that Sherwood (an escrow company [defendant]) acts as 'agent' for real property owners with whom title insurers and title companies are prohibited from splitting fees and that because Summit is controlled by identical interests, the receipt of a title policy from [\*\*\*\*58] Security at a discount constitutes an illegal rebate ( [Ins. Code, § 12404](#)) to Sherwood. The statutory framework, however, specifically contemplates a division of fees between title insurers and title companies which shall be proper unless the method used constitutes such fee divisions 'illegal.' ( [Ins. Code, § 12412, 12404.5, 12405.7](#).) It is not clear from the facts alleged that the discount rendered would or should be considered illegal by the insurance commissioner, or that the practice of extending secret rebates or engaging in unreasonably low or discriminatory pricing policy is followed by the defendants, or any of them.

"[T]he factual allegations, as illustrated, fail in each instance to support the charge. Just as the earlier counts state facts insufficient to establish proscribed conduct on the parts of the alleged actors and thus cannot reach their purported conspirators, so the final counts charging antitrust infringements fall for similar reasons." ( [Chicago Title Ins. Co. v. Great Western Financial Corp., supra, 69 Cal. 2d at pp. 322-323](#), italics added and brackets without enclosed material deleted.)

In my view, *Chicago Title*'s statement is dictum, indeed [\*\*\*\*59] unsound dictum. On this point, I adopt the analysis that Justice Benson set out in his opinion for the Court of Appeal below, which I quote in full.

"Defendants' challenge to the Cartwright Act claims ultimately rests on a single sentence in [Chicago Title Ins. Co. v. Great Western Financial Corp. \(1968\) 69 Cal. 2d 305, 322 \[70 Cal. Rptr. 849, 444 P.2d 481\]](#): 'These statutes and the common law which once constituted "the protection of the public against combinations in restraint of the insurance trade" ( [Speegle v. Board of Fire Underwriters, 29 Cal. 2d 34, 45 \[172 P.2d 867\]](#)) are now expressly superseded and contravened by the specific provisions of the Insurance [\*287] Code.' After scrutinizing this statement in context, we have concluded that *Chicago Title* is neither compelling nor persuasive authority for a rule holding the Cartwright Act superseded by the [Unfair Insurance Practices Act or] UIPA.

"The quoted statement is dictum. Dictum is the 'statement of a principle not necessary to the decision.' ( [People v. Squier \(1993\) 15 Cal. App. 4th 235, 240 \[18 Cal. Rptr. 2d 536\]](#), internal quotation marks omitted.) The *holding* of *Chicago Title* is that [\*\*\*\*60] the complaint failed to adequately plead the elements of a Cartwright Act cause of action, or any other claim. The court undertook a painstaking count-by-count analysis of the complaint, identifying numerous factual and legal deficiencies. <sup>1</sup> [\*\*\*\*61] If the Supreme Court had believed that the statutes cited by the plaintiffs (including the Cartwright Act) were superseded by the Insurance Code, there would have been no occasion for this discussion. [\*\*74] [\*\*\*238] But the court explicitly identified factual insufficiency as the 'determinative' issue. <sup>2</sup>

<sup>1</sup> "FOR EXAMPLE: 'We are persuaded . . . that appellants' vague and conclusionary pleadings fail to allege facts which might reasonably be construed to reveal a wrongful combination.' ( [Chicago Title Ins. Co. v. Great Western Financial Corp., supra, 69 Cal. 2d at p. 315](#).)

" '[T]he factual allegations, as illustrated, fail in each instance to support the charge. Just as the earlier counts state facts insufficient to establish proscribed conduct on the parts of the alleged actors and thus cannot reach their purported conspirators, so the final counts charging antitrust infringements fall for similar reasons.' ( [69 Cal. 2d at p. 323](#), brackets original.)

" 'The allegation of boycott cannot be supported in this instance because everyone has the unrestricted right to select customers and sources of supply.' (69 Cal.[2]d at p. 324.)"

<sup>2</sup> " 'We must determine . . . whether the superior court has jurisdiction to entertain an action based upon appellants' theories, or any of them, and, if so, whether appellants have stated a cause of action against any of the various named defendants. *The latter finding, which is determinative*, is in the negative.' ( [Chicago Title Ins. Co. v. Great Western Financial Corp., supra, 69 Cal. 2d at p. 313](#), italics added.)"

"Dictum, of course, is not controlling authority even when it emanates from the Supreme Court. ( [Grange Debris Box & Wrecking Co. v. Superior Court \(1993\) 16 Cal. App. 4th 1349, 1358 \[20 Cal. Rptr. 2d 515\]](#); cf. [Auto Equity Sales, Inc. v. Superior Court \(1962\) 57 Cal. 2d 450, 455 \[20 Cal. Rptr. 321, 369 P.2d 937\]](#); [Brown v. Kelly Broadcasting Co. \(1989\) 48 Cal. 3d 711, 734-735 \[257 Cal. Rptr. 708, 771 P.2d 406\]](#).) Nonetheless it 'carries persuasive weight and should be followed where it demonstrates a thorough analysis of the issue or reflects compelling logic.' ([Grange, supra, at p. 1358 . . . .](#)) Chicago Title's statement concerning Insurance [\*\*\*62] Code exclusivity satisfies neither of these requirements.

"Like most of the opinion in *Chicago Title*, the quoted statement was authored by a Court of Appeal and 'adopted' by the Supreme Court. ([69 \[\\*288\] Cal. 2d at p. 311](#).) This in itself does not warrant lessened deference, but the statement also betrays a certain lack of authorial attention. To begin with, it confuses the Cartwright Act with the [Unfair Practices Act]. The subject dictum is immediately preceded by a citation to [Business and Professions Code sections 17040- 17051](#). ([69 Cal. 2d at p. 322](#).) These statutes are part of the [Unfair Practices Act] and not, as the author of the dictum seemed to believe, the Cartwright Act. (See *ibid.*; cf. [id. at pp. 315, 322](#) [correctly defining 'Cartwright Act']; [Food & Agr. Code, § 66524, 65521](#) [same]; [Speegle v. Board of Fire Underwriters \[\(1946\) 29 Cal. 2d \[34.\] 42 \[172 P.2d 867\]](#) [same]; cf. [Bus. & Prof. Code, § 17000](#) [defining 'Unfair Practices Act'].) The statement that 'these statutes' have been superseded by the Insurance Code is thus burdened with a glaring anomaly.

"Moreover, the court never identified any provision of the Insurance [\*\*\*63] Code which 'expressly superseded and contravened' any other statute. In particular, *the opinion never mentioned the UIPA*. Instead it cited certain provisions of the Insurance Code involving the regulation of *title insurance rates*. ( [Chicago Title Ins. Co. v. Great Western Financial Corp., supra, 69 Cal. 2d at pp. 322-323](#), citing [Ins. Code, § 12404- 12412](#).) None of those provisions could be said to 'expressly abrogate' any other statute. Indeed, some five years later the Legislature *did* enact an express exemption covering some of the activities authorized by the cited portion of the code. ( [Ins. Code, § 12414.26](#), added by Stats. 1973, ch. 1130, § 15, p. 2314.) The absence of such a statute in 1968 renders the *Chicago Title* dictum nearly unintelligible. Certainly the Legislature could not have given that case the meaning defendants do, or it would not have bothered to enact the cited statute.

"The two paragraphs immediately following the subject dictum suggest that three of the complaint's eleven counts might intrude upon the commissioner's jurisdiction over title insurance rates. ( [Chicago Title Ins. Co. v. Great Western Financial Corp., supra \[\\*\\*\\*64\] , 69 Cal. 2d at pp. 322-323](#).) None of these three counts invoked the Cartwright Act. We note sharp historical and analytical distinctions between the regulation of rate-setting practices and the broad prohibitions in the UIPA. (See [Karlin v. Zalta \[\(1984\) 154 Cal. App. 3d \[953,\] 973-977.\]](#))

"The court thus seemed to say no more than that *part* of the complaint *might* intrude upon regulatory turf. Even with respect to that part of the complaint, however, the court ultimately returned to its *holding*, declaring that the factual allegations under scrutiny 'fail in each instance to support the charge' and that the counts discussed to that point 'state facts insufficient to establish proscribed conduct.' ( [Chicago Title Ins. Co. v. Great Western \[\\*289\] Financial Corp., supra, 69 Cal. 2d at p. 323](#).) The court only then turned to claims [\*\*75] [\*\*239] having any bearing here, declaring that '. . . the final counts charging antitrust infringements fall for similar reasons.' (*Ibid.*) On the next page, the Supreme Court itself inserted a declaration that the Cartwright Act counts failed 'because plaintiffs' vague and conclusionary pleadings fail to [\*\*\*65] allege sufficient facts.' ( [Id. at p. 324.](#))

"It thus appears that the subject dictum means *at most* that the three claims concerning rates were repugnant, or potentially repugnant, to the 'specific provisions of the Insurance Code' concerning rate setting. The allusion to the *Speegle* case, and thus apparently to the Cartwright Act, was not only dictum, but unsound." (Fn. omitted.)

## II

Second, I consider somewhat differently from the majority the question whether the Unfair Insurance Practices Act, codified as article 6.5, commencing with [section 790](#), of chapter 1 of part 2 of division 1 of the Insurance Code, supersedes other law, statutory and decisional, that may be applicable to trade practices in the business of insurance.

The source of the Unfair Insurance Practices Act is, obviously, the Model Unfair Trade Practices Act drafted by the National Association of Insurance Commissioners. The source of the Model Unfair Trade Practices Act is the Federal Trade Commission Act, codified at [section 41 et seq. of title 15 of the United States Code](#). Indeed, the model act "is patterned very closely after" the federal act "and much of the language was lifted bodily" therefrom.

[\*\*\*66] (2 Proceedings of the National Association of Insurance Commissioners (1971) p. 345.)

Let us return to the Unfair Insurance Practices Act itself. [Insurance Code section 790](#) declares that "[t]he purpose of" the act "is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, Seventy-ninth Congress), by defining, or providing for the determination of, all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined." The congressional act referred to is popularly known as the McCarran-Ferguson Act, codified at [section 1011 et seq. of title 15 of the United States Code](#), which in its section 2(b), [section 1012\(b\) of title 15 of the United States Code](#), makes "the Sherman Act, . . . [\*290] the Clayton Act, and . . . the Federal Trade Commission Act . . . [in]applicable to the business of insurance to the extent that such business is . . . regulated by State law."

It seems clear that the Unfair Insurance Practices Act was not *intended* to supersede [\*\*\*67] other law, statutory and decisional, that might be applicable to trade practices in the business of insurance. The majority are right to impliedly approve the reasoning of Justice Benson in his opinion for the Court of Appeal below: The Unfair Insurance Practices Act "was enacted pursuant to the authority of the McCarran-Ferguson Act . . . in order to displace federal law which might otherwise have governed insurance trade practices, displacing the law of any state which did not generally proscribe the same industry conduct. In so doing the Legislature did not intend to shield the industry from otherwise applicable state law." (Maj. opn., *ante*, at p. 266, fn. omitted.)

Less clear, however, is whether the Unfair Insurance Practices Act *has the effect* of superseding other law, statutory and decisional, that may be applicable to trade practices in the business of insurance. Evidently, to use the language of [Insurance Code section 790](#), the act "defin[es], or provid[es] for the determination of, all . . . [trade practices in the business of insurance] in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and . . . prohibit[s] [\*\*\*68] the trade practices so defined or determined." (Italics added.) In so doing, it constitutes a comprehensive statutory scheme governing trade practices in the business of insurance. ( [American Intern. Group, Inc. v. Superior Court \(1991\) 234 Cal. App. 3d 749, 764 \[285 Cal. Rptr. 765\]](#).) Such a scheme may supersede the otherwise applicable common law. (E.g., [I.E. Associates v. Safeco Title Ins. Co. \(1985\) 39 Cal. 3d 281, 285](#) [\*\*\*240] [\*76] [\[216 Cal. Rptr. 438, 702 P.2d 596\]](#).) It may supersede the otherwise applicable statutory law as well.

Weighing all in the balance, however, I believe that the Unfair Insurance Practices Act does *not* have the effect of superseding other law, statutory and decisional, that may be applicable to trade practices in the business of insurance. A supersessive effect should be found if and only if the act may be considered a substitute for such other law. (See [Penziner v. West American Finance Co. \(1937\) 10 Cal. 2d 160, 176 \[74 P.2d 252\]](#).) The condition is not satisfied. The act sets up a regime of direct regulation by public actors through administrative proceedings of various sorts. By contrast, the otherwise applicable law allows [\*\*\*69] "indirect regulation" by both private and public actors through both civil and criminal actions. There is no basis to conclude that the former is a substitute for the latter.

[\*291] In view of the foregoing, I find it unnecessary to rely on [Insurance Code section 790.09](#). Because I find it unnecessary, I would not do so.

Unlike the majority, I cannot discern in [Insurance Code section 790.09](#) what they have impliedly discovered, namely, an "*intent* to preserve existing rights and remedies for unlawful business practices in the insurance industry." (Maj. opn., *ante*, at p. 266, italics added.) The provision declares: "No order to cease and desist issued under" the Unfair Insurance Practices Act "directed to any person or subsequent administrative or judicial proceeding to enforce the same shall in any way relieve or absolve such person from any administrative action against the license or certificate of such person, civil liability or criminal penalty under the laws of this State arising

out of the methods, acts or practices found unfair or deceptive." The provision merely imposes a bar against defensive collateral estoppel--stating only that an administrative cease-and-desist [\*\*\*\*70] order issued against a person on a finding that he has engaged in unfair or deceptive conduct does not "relieve or absolve" him from any administrative action, civil liability, or criminal penalty arising out of the conduct in question. The proximate source of Insurance Code section 790.09 is section 8(d) of the Model Unfair Trade Practices Act: "No order of the Commissioner under this Act or order of a court to enforce the same shall in any way *relieve or absolve* any person affected by such order from any liability under any other laws of this state." (Italics added.) The ultimate source of Insurance Code section 790.09 is section 5 of the Federal Trade Commission Act, section 45(e) of title 15 of the United States Code: "No order of the Commission or judgment of court to enforce the same shall in anywise *relieve or absolve* any person, partnership, or corporation from any liability under the Antitrust Acts." (Italics added.) That provision, in fact, merely imposes a bar against defensive collateral estoppel. (See, e.g., State of N.C. v. Chas. Pfizer & Co., Inc. (4th Cir. 1976) 537 F.2d 67, 74; United States v. Chas. Pfizer & Co. (S.D.N.Y. 1962) 205 F. Supp. 94, [\*\*\*71] 96-97.)

I hasten to add that, although I cannot discern in Insurance Code section 790.09 an "intent to preserve existing rights and remedies for unlawful business practices in the insurance industry" (maj. opn., *ante*, at p. 266, italics added), I nevertheless find therein an *assumption* that such "existing rights and remedies" are indeed "preserved." The provision imposes a bar against defensive collateral estoppel that is broad, extending beyond administrative proceedings to civil and criminal actions. Administrative proceedings belong to the regime of direct regulation set up by the Unfair Insurance Practices Act. Civil and criminal actions, in contrast, belong to the regime of "indirect regulation" allowed under otherwise applicable law. The provision [\*292] recognizes the survival of those actions. It thereby presupposes the perduration of that law.

### III

With all that said, I concur in the judgment, and also generally concur in the majority opinion.

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## **ABC Internat. Traders, Inc. v. Matsushita Electric Corp.**

Supreme Court of California

February 27, 1997, Decided

No. S051417.

### **Reporter**

14 Cal. 4th 1247 \*; 931 P.2d 290 \*\*; 61 Cal. Rptr. 2d 112 \*\*\*; 1997 Cal. LEXIS 405 \*\*\*\*; 97 Cal. Daily Op. Service 1430; 97 Daily Journal DAR 2105; 1997-1 Trade Cas. (CCH) P71,736

ABC INTERNATIONAL TRADERS, INC., Plaintiff and Appellant, v. MATSUSHITA ELECTRIC CORPORATION OF AMERICA, Defendant and Respondent.

**Prior History:** [\*\*\*\*1] Superior Court of Los Angeles County, No. BC 098609. Eric E. Younger, Judge.

**Disposition:** The judgment of the Court of Appeal is reversed.

## **Core Terms**

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discounts, sellers, purchasers, retailers, competitors, buyers, chains, unfair practice, restitution, injunction, destroy the competition, price discrimination, wholesalers, allowance, antitrust, horizontal, vertical, distributors, prices, secondary, unearned, secret, unfair competition, purposes, locality discrimination, competitive injury, fair trade, Robinson-Patman Act, discriminatory, monopoly

## **LexisNexis® Headnotes**

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Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

Civil Procedure > Appeals > Standards of Review

### **HN1[] Amendment of Pleadings, Leave of Court**

For purposes of an appeal of the dismissal of an action without leave to amend, an appellate court takes the properly pleaded material allegations of plaintiff's complaint as true; the appellate court's only task on review is to determine whether the complaint states a cause of action.

Torts > Business Torts > Unfair Business Practices > General Overview

### **HN2[] Business Torts, Unfair Business Practices**

See [Cal. Bus. & Prof. Code § 17045](#).

Governments > Legislation > Interpretation

Torts > Business Torts > Unfair Business Practices > General Overview

### **HN3** Legislation, Interpretation

On its face, [Cal. Bus. & Prof. Code § 17045](#) is aimed at preventing a distributor from discriminating between customers. The statute is focused patently on discrimination among purchasers; therefore, it is reasonable to assume the legislative purposes include protecting purchasers, such as wholesalers and retailers, against the competitive injury resulting from discrimination by those higher up the marketing chain.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Torts > Business Torts > Unfair Business Practices > General Overview

### **HN4** Robinson-Patman Act, Claims

[Cal. Bus. & Prof. Code § 17046](#) makes it unlawful to use any threat, intimidation, or boycott, to effectuate any violation of the Unfair Practices Act (UPA), Cal. Bus. & Prof. Code [§ 17000 et seq.](#) [Cal. Bus. & Prof. Code § 17047](#) makes it illegal to solicit the same. Similarly, [Cal. Bus. & Prof. Code § 17048](#) makes it unlawful to participate or collude in violating the UPA.

Governments > Legislation > Interpretation

Torts > Business Torts > Unfair Business Practices > General Overview

### **HN5** Legislation, Interpretation

In light of the legislative mandate under that a court construe section [Cal. Bus. & Prof. Code § 17045](#) liberally so that its beneficial purposes may be subserved, a court must, in the absence of clear evidence of a contrary legislative intent, interpret the statute to protect against competitive injury in the secondary, as well as primary, lines of commerce. [Cal. Bus. & Prof. Code § 17002](#).

Governments > Legislation > Statutory Remedies & Rights

Torts > Business Torts > Unfair Business Practices > General Overview

### **HN6** Legislation, Statutory Remedies & Rights

An action to enjoin a violation of or recover damages under the Unfair Practices Act, [Cal. Bus. & Prof. Code § 17000 et seq.](#) may be brought by any person or trade association. [Cal. Bus. & Prof. Code § 17070](#).

Antitrust & Trade Law > Robinson-Patman Act > Claims

Torts > Business Torts > Unfair Business Practices > General Overview

14 Cal. 4th 1247, \*1247 931 P.2d 290, \*\*290 61 Cal. Rptr. 2d 112, \*\*\*112 1997 Cal. LEXIS 405, \*\*\*\*1

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Governments > Legislation > Interpretation

### **HN7** [down] Robinson-Patman Act, Claims

Cal. Bus. & Prof. Code § 17045 by its terms requires a plaintiff to prove not only injury to a competitor, but, in addition, a tendency to destroy competition. Thus, whatever may be the federal law or enforcement pattern, § 17045 applies only when the discriminatory rebate, discount or allowance has a tendency to destroy competition generally. For purposes of § 17045, competition is competition, whether among retailers, wholesalers or producers.

Governments > Legislation > Interpretation

### **HN8** [down] Legislation, Interpretation

It is not for a court to determine whether or not the policy of a statute is economically sound or beneficial. That is a matter solely for the legislature.

Governments > Legislation > Statutory Remedies & Rights

Torts > Business Torts > Unfair Business Practices > General Overview

### **HN9** [down] Legislation, Statutory Remedies & Rights

See Cal. Bus. & Prof. Code § 17203.

Governments > Legislation > Statutory Remedies & Rights

Torts > Business Torts > Unfair Business Practices > General Overview

### **HN10** [down] Legislation, Statutory Remedies & Rights

Nothing in the actual language of Cal. Bus. & Prof. Code § 17203 indicates the availability of restitution is contingent on the issuance of an injunction. The statute contains no language of condition linking restitution and injunctive relief. On its face, § 17203 authorizes injunctive relief to prevent unfair competition, and/or restitution (i.e. disgorgement) of money or property wrongfully obtained.

## **Headnotes/Summary**

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### **Summary**

#### **CALIFORNIA OFFICIAL REPORTS SUMMARY**

A wholesale distributor of telephone equipment and other electronic products brought an action against a manufacturer of electronic products and two other competing wholesale distributors for violations of the Unfair Practices Act (UPA) Bus. & Prof. Code, § 17000 et seq., alleging that the manufacturer was providing an unearned, secret 5 percent discount to the two other distributors (a practice prohibited by Bus. & Prof. Code, § 17045), and for violations of the unfair competition law (Bus. & Prof. Code, § 17203). The trial court sustained the manufacturer's demurrer to both causes of action without leave to amend, and dismissed plaintiff's complaint

against the manufacturer. (Superior Court of Los Angeles County, No. BC098609, Eric E. Younger, Judge.) The Court of Appeal, Second Dist., Div. Two, No. B087534, affirmed. As the the UPA cause of action, the Court of Appeal held that the elements of a violation of [Bus. & Prof. Code, § 17045](#), were not met, because the complaint did not allege any injury to the manufacturer's competitors or any tendency to destroy competition among electronics producers. As to the second cause of action, the court held the complaint was deficient because it sought restitution and disgorgement without injunctive relief.

The Supreme Court reversed the judgment of the Court of Appeal. As to the UPA cause of action, the court held that the class of "competitors" and the "competition" protected under [Bus. & Prof. Code, § 17045](#), is not restricted to competitors of the person allowing an unearned discount (the "primary" line of commerce), as opposed to competitors of the person receiving it (the "secondary" line of commerce). The statutory language contains no such restriction. Furthermore, [Bus. & Prof. Code, § 17045](#), is aimed at preventing a distributor from discriminating between customers; hence the legislative purposes include protecting purchasers, such as wholesalers and retailers, against the competitive injury resulting from discrimination by those higher up the marketing chain. Furthermore, the language, context, purposes, and history of [Bus. & Prof. Code, § 17045](#), all point to the conclusion its protection extends to competitors of the purchasers receiving the discount. The court also held the trial court erred when it dismissed the cause of action on demurrer for violations of the unfair competition law ([Bus. & Prof. Code, § 17203](#)). Although plaintiff prayed for restitution, and not for an injunction against future unfair competition, nothing in the actual language of [Bus. & Prof. Code, § 17203](#), indicates the availability of restitution is contingent on the issuance of an injunction. In the absence of such statutory restriction, a court of equity retains the full range of its inherent powers in order to accomplish complete justice between the parties, restoring if necessary the status quo ante as nearly as may be achieved. An order for restitution, therefore, was within the court's power. (Opinion by Werdegar, J., with George, C. J., Kennard, Baxter, and Chin, JJ., concurring. Concurring opinion by Mosk, J., and dissenting opinion by Brown, J.)

## **Headnotes**

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

#### **Appellate Review § 128—Scope of Review—Rulings on Demurrsers.**

--For purposes of an appeal of a trial court's dismissal of an action after the court sustains a defendant's demurrer without leave to amend, the reviewing court takes the properly pleaded material allegations of the complaint as true; the only task of the reviewing court is to determine whether the complaint states a cause of action.

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

#### **Unfair Competition § 3—Unfair Trade Practices Act—Seller Providing Unearned Discounts to Purchaser—Competitive Injury to Wholesale Purchaser.**

--In an action brought by a wholesale distributor of electronic products against a manufacturer of electronic products and two other competitive wholesale distributors for violations of the Unfair Practices Act (UPA) [Bus. & Prof. Code, § 17000 et seq.](#), alleging that the manufacturer was providing an unearned, secret 5 percent discount to the two other distributors (a practice prohibited by [Bus. & Prof. Code, § 17045](#)), the trial court erred when it sustained the manufacturer's demurrer without leave to amend and dismissed the complaint. The class of "competitors" and the "competition" protected under [Bus. & Prof. Code, § 17045](#), is not restricted to competitors of the person allowing an unearned discount--the "primary" line of commerce--as opposed to competitors of the person receiving it--the "secondary" line. The statutory language contains no such restriction. Furthermore, [Bus. & Prof. Code, § 17045](#), is aimed at preventing a distributor from discriminating between customers; hence the legislative purposes include protecting purchasers, such as wholesalers and retailers, against the competitive injury resulting from discrimination by those higher up the marketing chain.

[See 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 592]

### CA(3) [ ] (3)

**Unfair Competition § 3—Unfair Trade Practices Act—Seller Providing Unearned Discounts—Legislative Intent—Competitive Injury to Purchaser.**

--The language, context, purposes, and history of [Bus. & Prof. Code, § 17045](#), which prohibits a seller from secretly allowing a purchaser special unearned discounts, all point to the conclusion its protection extends to competitors of the purchasers receiving the discount, i.e., the "secondary" line of commerce. While [Bus. & Prof. Code, § 17045](#), itself does not focus directly on the purchaser's acts in obtaining a discriminatory price or other preference, the immediately following sections of the Unfair Practices Act (UPA) ([Bus. & Prof. Code, § 17000 et seq.](#)) do ([Bus. & Prof. Code, §§ 17046, 17047, 17048](#)). Thus, the Legislature was concerned with the wrongful receipt, as well as the payment, of discriminatory prices, and, inferentially, with the injurious effect such wrongful receipt would have on the recipient's competitors. The UPA is a legislative attempt to regulate business as a whole by prohibiting practices that the Legislature has determined constitute unfair trade practices. Offense against this policy, is no less clear when it produces the evil in respect of the line of commerce in which the purchaser is engaged than when it produces the evil in respect of the line of commerce in which the seller is engaged. Hence, a retailer or wholesaler, or a trade organization representing such a class of merchants, clearly has standing to sue a producer for offering secret rebates or discounts to some members of the group but not to others.

### CA(4a) [ ] (4a) CA(4b) [ ] (4b)

**Unfair Competition § 3—Unfair Trade Practices Act—Seller Providing Unearned Discounts to Purchasers—Legislative History—Competitive Injury to Purchaser.**

--The historical evidence strongly suggests the statute later codified as [Bus. & Prof. Code, § 17045](#) (prohibiting the practice of providing unearned, secret discounts to purchasers), was aimed primarily at protecting against competitive injury among buyers of goods, rather than sellers. The statute's prohibitions on secret discriminatory prices and rebates appear to have been intended mainly to restrain the quickly growing chain stores from certain well-documented abuses of their buying power, abuses that, together with other factors, were thought to have a highly destructive effect on wholesale and retail competition in the food industry and other trades. A primary concern in the enactment of the Unfair Practices Act (UPA) ([Bus. & Prof. Code, § 17000 et seq.](#)), of which [Bus. & Prof. Code, § 17045](#), is a part, was the protection of smaller, independent retailers, especially grocers, against unfair competitive practices of the large chain stores. The competitive injury involved was to the disfavored buyers, and the tendency to destroy competition was in the line of commerce practiced by the favored buyer. Furthermore, the protection of fair and honest competition in the secondary line of commerce does not necessarily impede retail competition, but may well benefit the ultimate consumer.

### CA(5) [ ] (5)

**Statutes § 20—Construction—Judicial Function.**

--It is not for the courts to determine whether or not the policy of a statute is economically sound or beneficial. That is a matter solely for the Legislature.

### CA(6) [ ] (6)

**Unfair Competition § 3—Unfair Trade Practices Act—Locality Discrimination.**

--The locality discrimination prohibition of the Unfair Practices Act (UPA) ([Bus. & Prof. Code, § 17000 et seq.](#)), while somewhat broadened by a 1931 amendment, retained a necessary element of geographic price difference; what was fundamentally prohibited was discrimination between locations, rather than between purchasers as such. Hence, locality discrimination cannot be proven where two locations are owned by competing buyers, but only where they are owned by the same seller ([Bus. & Prof. Code, §§ 17031, 17040](#)).

#### [CA\(7\)](#) [ ] (7)

##### **Unfair Competition § 3—Unfair Trade Practices Act—Seller Providing Unearned Discounts to Purchasers—Applicability to Advertising Allowances.**

--[Bus. & Prof. Code, § 17045](#), which prohibits the practice of providing unearned, secret discounts to purchasers, does not apply to advertising allowances allegedly granted to a competing retailer, where the allowances are neither secret nor discriminatory, being available to all purchasers buying on like terms and conditions.

#### [CA\(8\)](#) [ ] (8)

##### **Unfair Competition § 3—Unfair Trade Practices Act—Comparison Between Provisions Prohibiting Unearned Discounts and Locality Discrimination.**

--Both the section of the Unfair Practices Act (UPA) ([Bus. & Prof. Code, § 17000 et seq.](#)) that prohibits a seller's provision of unearned, secret discounts to select purchasers ([Bus. & Prof. Code, § 17045](#)) and the provisions that prohibit locality discrimination ([Bus. & Prof. Code, §§ 17031, 17040](#)) are designed to foster competition and prevent monopoly conditions, but the particular threats to competition they are principally intended to meet are fundamentally different. The threat to competition caused by locality discrimination is typically to primary line competition: locality discrimination is an anticompetitive abuse engaged in by chain retailers as sellers, to the injury of competing sellers. In contrast, the solicitation and extortion of secret rebates, unearned discounts, and other discriminatory allowances was an anticompetitive abuse historically engaged in by chains as buyers, to the injury of competing buyers, i.e. the independent retailers and wholesalers. The difference in primary application between these provisions is reflected in their language. While neither of the provisions dealing with locality discrimination ([Bus. & Prof. Code, §§ 17031, 17040](#)) refers to individual purchasers, but rather require different prices at different locations, [Bus. & Prof. Code, § 17045](#), is patently concerned with preventing a distributor from discriminating between customers.

#### [CA\(9\)](#) [ ] (9)

##### **Unfair Competition § 8—Actions—Availability of Restitution Absent Request for Injunction.**

--In an action brought by a wholesale distributor of electronic products against a manufacturer of electronic products and two other competitive wholesale distributors for violations of the unfair competition law ([Bus. & Prof. Code, § 17203](#)), the trial court erred when it dismissed the cause of action on demurrer. Although plaintiff prayed for restitution, and not for an injunction against future unfair competition, nothing in the actual language of [Bus. & Prof. Code, § 17203](#), indicates the availability of restitution is contingent on the issuance of an injunction. In the absence of such statutory restriction, a court of equity retains the full range of its inherent powers in order to accomplish complete justice between the parties, restoring if necessary the status quo ante as nearly as may be achieved. An order for restitution, therefore, was within the court's power.

**Counsel:** Blecher & Collins, Maxwell M. Blecher, John E. Andrews and James Robert Noblin for Plaintiff and Appellant.

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David B. Bloom, James E. Adler, Golenbock, Eiseman, Assor & Bell and Martin S. Hyman for Defendant and Respondent.

**Judges:** Opinion by Werdegar, J., with George, C. J., Kennard, Baxter, and Chin, JJ., concurring. Concurring opinion by Mosk, J., and dissenting opinion by Brown, J.

**Opinion by:** WERDEGAR

## Opinion

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[\*1252] [\*\*291] [\*\*\*113] WERDEGAR, J.

*Business and Professions Code section 17045*,<sup>1</sup> part of California's Unfair Practices Act (hereafter the UPA; see § 17000), prohibits a seller from secretly allowing a purchaser special "unearned discounts" that injure "a competitor" and tend to destroy [\*\*292] [\*\*\*114] "competition." The question [\*\*\*\*2] before us is whether the competition referred to is limited to competition among sellers of the particular good or service, or includes economic competition among buyers as well. More concretely, does a disfavored buyer adequately plead a cause of action against a seller for violation of *section 17045* by alleging the seller's secret discrimination injured the buyer and tended to destroy competition among buyers, or must the disfavored buyer allege injury to one or more of the seller's competitors and a tendency to destroy competition among sellers? Upon an examination of the statutory language, context, purposes and history, we conclude a cause of action may be pled by alleging competitive injury among buyers.

This case also calls upon us to interpret another section of the *Business and Professions Code, section 17203*, one of several statutes that together are sometimes referred to as the "unfair competition [\*\*\*\*3] law." (§ 17200-17209; see, e.g., *Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 209 [197 Cal. Rptr. 783, 673 P.2d 660]*.) The question presented is whether a plaintiff may, under *section 17203*, seek restitution of money lost by the plaintiff or gained by the defendant as a result of the defendant's acts of unfair competition, without also seeking an injunction against future acts of unfair competition. We will hold injunctive relief is not a prerequisite to restitution under *section 17203*.

### FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff ABC International Traders, Inc. (ABC) is a wholesale distributor of telephone equipment and other electronic products. ABC's second [\*1253] amended complaint names as defendants Matsushita Electric Corporation of America (MECA), Procom Supply Corporation (Procom), and Tele-Com Office Products Corporation (Tele-Com). MECA produces electronic products under the brand name Panasonic. Procom and Tele-Com are wholesale distributors of electronics, in competition with ABC.

The case comes to us following ABC's appeal of the trial court's dismissal of the action against MECA after the court sustained MECA's [\*\*\*\*4] demurrer without leave to *HN1* amend. *CA(1)* (1) For purposes of such an appeal, we take the properly pleaded material allegations of ABC's complaint as true; our only task on review is to determine whether the complaint states a cause of action. ( *Garcia v. Superior Court (1990) 50 Cal. 3d 728, 732 [268 Cal. Rptr. 779, 789 P.2d 960]*.)

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<sup>1</sup> Unless otherwise specified, all statutory references are to the Business and Professions Code.

The complaint sets forth two causes of action as to all defendants. The first is for violation of the UPA, "and in particular Sections 17045-17048." ABC alleges that in 1989 it suspected, but had no direct information to confirm, MECA was providing Procom and Tele-Com a 5 percent discount on Panasonic products, a discount not provided to ABC. In October 1991, MECA stopped selling to ABC altogether. In September 1992, ABC learned from employees of Procom that MECA had "for years" been giving Procom and Tele-Com a 5 percent discount from the price charged to other wholesalers.

ABC alleges the 5 percent discount was unearned, in that the recipients' wholesale marketing services were identical to those performed by ABC and others, and was secret, in that neither MECA nor any recipient of the discount confirmed its existence to ABC or to the market generally. ABC [\*\*\*\*5] alleges damages in the amount of the lost discount plus lost profits from reduced sales of Panasonic products. It also charges that the discriminatory discount "tended to destroy competition" among electronics wholesalers, in that the favored wholesalers were in turn able to offer retailers lower prices than those offered by the disfavored wholesalers.

In its second cause of action, ABC alleged the above acts also constituted violations of the unfair competition law. Pursuant to [section 17203](#), ABC sought restitution of all moneys ABC lost and disgorgement of all profits defendants received as a result of their acts of unfair competition.

The trial court granted MECA's demurrer on both causes of action without leave to amend. The Court of Appeal affirmed. As to the first cause of action, the court held the elements of a [section 17045](#) violation were not met, because ABC did not allege any [\*\*293] [\*\*\*115] injury to MECA's competitors or any [\*1254] tendency to destroy competition among electronics *producers*. The court believed our decision in [Harris v. Capitol Records etc. Corp. \(1966\) 64 Cal. 2d 454 \[50 Cal. Rptr. 539, 413 P.2d 139\]](#), which reached a similar result [\*\*\*\*6] in an action brought under other provisions of the UPA, compelled that conclusion. On the second cause of action, the Court of Appeal held the complaint deficient "because it sought restitution and disgorgement without injunctive relief." For reasons explained below, we conclude the Court of Appeal erred in both these respects.

## I. Competitive Injury Under [Section 17045](#)

### A. Statutory Language and Context

**HN2**[] [Section 17045](#) provides: "The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is unlawful."

**CA(2)**[] (2) MECA contends the class of "competitors" and the "competition" protected under [section 17045](#) is restricted to competitors of the person allowing an unearned discount--sometimes called the "primary" line of commerce--as opposed to competitors of the person receiving it--the "secondary" line. As is immediately apparent, however, the statutory language contains no such [\*\*\*\*7] express restriction. Indeed, to the extent any inference can be drawn from the law's wording, it is to the contrary. **HN3**[] On its face, [section 17045](#) is "aimed at preventing a distributor from discriminating between customers." ([Chicago Title Ins. Co. v. Great Western Financial Corp. \(1968\) 69 Cal. 2d 305, 323 \[70 Cal. Rptr. 849, 444 P.2d 481\]](#)) The statute being focused patently on discrimination among purchasers, one might reasonably assume the legislative purposes included protecting purchasers, such as wholesalers and retailers, against the competitive injury resulting from discrimination by those higher up the marketing chain. Judicial and academic writers concerning themselves specifically with [section 17045](#) have, in fact, so assumed. (See [Diesel Electric Sales & Service, Inc. v. Marco Marine San Diego, Inc. \(1993\) 16 Cal. App. 4th 202, 213-214 \[20 Cal. Rptr. 2d 62\]](#); McCarthy, *Whatever Happened to the Small Businessman? The California Unfair Practices Act (1968)* 2 U.S.F. L.Rev. 165, 181-182.)

**CA(3)**[] (3) MECA contends the intent to protect only against competitive injury in the primary line can be discerned from the Legislature's *omission* of certain language contained in [\*\*\*\*8] federal price discrimination statutes. Section 2 [\*1255] of the federal Clayton Act of 1914 forbids certain types of price discrimination in interstate commerce "where the effect of such discrimination may be substantially to lessen competition or tend to

create a monopoly in any line of commerce." ([15 U.S.C. § 13\(a\)](#); see [Van Camp & Sons v. Am. Can Co. \(1929\) 278 U.S. 245, 252-253 \[49 S. Ct. 112, 113, 73 L. Ed. 311, 60 A.L.R. 1060\]](#)) [section 2 of Clayton Act includes lessened competition in secondary line].) In the Robinson-Patman Act of 1936, Congress amended this section of the Clayton Act, inter alia, by additionally prohibiting discrimination the effect of which is "to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." ([15 U.S.C. § 13\(a\)](#); see [F.T.C. v. Anheuser-Busch, Inc. \(1960\) 363 U.S. 536, 542-545 \[80 S. Ct. 1267, 2170-1272, 4 L. Ed. 2d 1385\]](#)) [added language, like original Clayton Act language, includes injury in either primary or secondary line].) The Robinson-Patman Act also made it unlawful "knowingly to induce or receive a discrimination [\*\*\*\*9] in price which is prohibited by this section." ([15 U.S.C. § 13\(f\)](#)). MECA argues that [section 17045](#), by contrast, focuses on the acts of sellers, rather than buyers, and contains no specific reference to competition in the secondary line.

MECA's argument ignores the statutory context of [section 17045](#). While [section 17045](#) itself does not focus directly on the purchaser's acts in obtaining a discriminatory price or other preference, the immediately following sections of the UPA do. [HN4](#)[] [Section 17046](#) makes it unlawful to "use any threat, [\*\*294] [\*\*\*116] intimidation, or boycott, to effectuate any violation" of the UPA. [Section 17047](#) makes it illegal to "solicit" the same. Similarly, [section 17048](#) makes it unlawful to "participate or collude" in violating the UPA. It thus appears the Legislature, like Congress in enacting section 2(f) of the Robinson-Patman Act ([15 U.S.C. § 13\(f\)](#)), was concerned with the wrongful receipt, as well as the payment, of discriminatory prices, and, inferentially, with the injurious effect such wrongful receipt would have on the recipient's competitors.

[Section 17045](#), to be sure, does not contain an explicit reference to secondary line competitive injury like the [\*\*\*\*10] quoted language of the Clayton and Robinson-Patman Acts. Our interpretive task would be easier if it did. But the absence of a specific reference does not, in this context, constitute an implied restriction. The statute requires injury to a "competitor," and a tendency to destroy "competition," without any further inclusive or restrictive language delineating the scope of those terms. As we have seen, [section 17045](#)'s evident concern with discrimination between competing purchasers suggests its intended protection extends to such competition. That the language used is somewhat less explicit than that of federal price discrimination [\*1256] laws does not persuade us we should read into the statute a restriction contrary to its apparent intent.<sup>2</sup>

#### [\*\*\*\*11] B. *Statutory Purposes and Historical Background*

Our conclusion is strengthened when we consider the purposes and history of the UPA in general and [section 17045](#) in particular.

The declared purposes of the UPA are "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." ([§ 17001](#).) In upholding the law against an early constitutional challenge, this court described it as a legislative attempt "to regulate business as a whole by prohibiting practices which the legislature has determined constitute unfair trade practices." ([Wholesale T. Dealers v. National etc. Co. \(1938\) 11 Cal. 2d 634, 643 \[82 P.2d 3, 118 A.L.R. 486\]](#); see also [Max Factor & Co. v. Kunsman \(1936\) 5 Cal. 2d 446, 478 \[55 P.2d 177\]](#) (dis. opn. of Shenk, J.) [UPA "appears to be a painstaking endeavor by the legislature to combat the abuses which the business interests have deemed unfair practices in the competitive field."].) The Legislature thus, as a Court of Appeal has remarked, [\*\*\*\*12] "set itself no small goal." ([Paramount Gen. Hosp. Co. v. National Medical Enterprises, Inc. \(1974\) 42 Cal. App. 3d 496, 500](#)

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<sup>2</sup> Needless to say, we repudiate the dissent's suggestion we have "perverse[ly]" attempted to "introduce[] into the statute an ambiguity that is not present if the words are taken to mean what they say." (Dis. opn., post, at p. 1272.) In our view, the text of [section 17045](#) is not so much ambiguous as simply silent on the question before us; it neither restricts "competition" to the primary line, nor expressly extends to competition in the secondary line. The dissent, like MECA, relies heavily on a supposed implication arising from [section 17045](#)'s reference to the prohibited acts of sellers, but, as we have seen, any such implication dissolves when the statutory context--especially [sections 17046, 17047](#) and [17048](#)--is considered. In any event, the dissent's inferential method of interpretation hardly justifies its claim of unique fidelity to the plain statutory text.

[[117 Cal. Rptr. 42](#).]) That it might have a better chance of success, the Legislature specifically directed that the UPA's provisions "shall be liberally construed that its beneficial purposes may be subserved." ([§ 17002](#).)

[Section 17045](#) seeks to foster "fair and honest competition" ([§ 17001](#)) by prohibiting certain "dishonest, deceptive . . . and discriminatory practices" (*ibid.*), including the secret allowance of an unearned discount where such allowance injures a competitor and tends to destroy competition. We think it clear [section 17045](#) would more fully serve the UPA's purposes if its protections were to extend to the secondary line. Business competition among buyers of a product is competition, no less than that among sellers. A [[\\*1257](#)] deceptive practice that tends to destroy competition is no less repugnant to the policy of the UPA because the competitive injury occurs among wholesalers or retailers, rather [[\\*\\*295](#)] [[\\*\\*\\*117](#)] than among producers. As the United States Supreme Court explained in holding the Clayton Act's anti-price-discrimination [[\\*\\*\\*\\*13](#)] provision applicable to secondary line injury, "[t]he fundamental policy of the legislation is that, in respect of persons engaged in the same line of . . . commerce, competition is desirable and that whatever substantially lessens it or tends to create a monopoly in such line of commerce is an evil. Offense against this policy, by a discrimination in prices exacted by the seller from different purchasers of similar goods, is no less clear when it produces the evil in respect of the line of commerce in which they are engaged than when it produces the evil in respect of the line of commerce in which the seller is engaged." ([Van Camp & Sons v. Am. Can Co., supra, 278 U.S. at p. 254 \[49 S. Ct. at p. 114\]](#).) [HN5](#)↑ In light of the legislative mandate that we construe [section 17045](#) "liberally . . . that its beneficial purposes may be subserved" ([§ 17002](#)), we must, in the absence of clear evidence of a contrary legislative intent, interpret the statute to protect against competitive injury in the secondary, as well as primary, lines of commerce.

[HN6](#)↑ In further aid of the UPA's effective enforcement, moreover, its enactors provided that an action to enjoin a violation or recover damages [[\\*\\*\\*\\*14](#)] may be brought by "[a]ny person or trade association." ([§ 17070](#).) Thus the law "denounces unfair competition and so-called piratical trade transactions, and was designed to afford full relief against such abuses on behalf of anyone aggrieved." ([Max Factor & Co. v. Kunsman, supra, 5 Cal. 2d at p. 478](#) (dis. opn. of Shenk, J.), italics added; see also Grether, *Experience in California with Fair Trade Legislation Restricting Price Cutting* (1936) 24 Cal.L.Rev. 640, 647 (hereafter Grether) [broad standing provision later codified as [section 17070](#) was designed to allow trade groups to "police" competition in their various trades].) Hence, a retailer or wholesaler, or a trade organization representing such a class of merchants, clearly has standing to sue a producer for offering secret rebates or discounts to some members of the group but not to others. Yet, under MECA's interpretation of [section 17045](#), such plaintiffs may not rely on their own injury, or on the destruction of competition among themselves, but must instead, or in addition, plead and prove injury at the producer's level.<sup>3</sup> Such a construction would work to frustrate, rather than further, the UPA's goal [[\\*\\*\\*\\*15](#)] of furthering competition at all levels of trade.

[[\\*1258](#)] [CA\(4a\)](#)↑ (4a) Turning to the UPA's historical background, we find additional confirmation for our conclusion.<sup>4</sup> As will be seen below, the historical evidence strongly suggests the statute later codified as [section 17045](#) was aimed primarily at protecting against competitive injury among buyers of goods, rather than sellers. More specifically, the statute's prohibitions on secret discriminatory prices and rebates appear to have been intended mainly to restrain the quickly growing chain stores from certain well-documented abuses of their buying power, abuses that, together with other factors, were thought to have a highly destructive effect on wholesale and retail competition in the food industry and other trades.

[[\\*\\*\\*\\*16](#)] The UPA came into being piecemeal. Although a prohibition on locality discrimination (now [§ 17040](#)) was first enacted in 1913, two other major substantive provisions, the prohibitions on secret rebates and unearned discounts ([§ 17045](#)) and on sales below cost ([§ 17043](#)), were not added until 1933. (Stats. 1913, ch. 276, § 1, p.

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<sup>3</sup> MECA concedes ABC had standing to bring this action, but maintains ABC is nonetheless required to plead and prove injury to one of MECA's competitors.

<sup>4</sup> The parties have not provided, and our own research has not discovered, any direct legislative history relating to the enactment of [section 17045](#)'s predecessor. Of necessity we rely on broader evidence of the legal and economic concerns motivating the law.

508; Stats. 1933, ch. 261, § 1, p. 793; Stats. 1933, ch. 504, § 1, p. 1280.) In 1935, the entire law was repealed and reenacted as a whole, supplemented and given its present name. (Stats. 1935, ch. 477, § 1, pp. 1546-1551.) In 1941 it was codified in the Business and Professions Code with the basic structure it has today. (Stats. 1941, ch. 526, § 1, pp. 1839-1846.) The pertinent historical background, then, is that of the early to middle 1930's.

[\*\*296] [\*\*\*118] The chain store problem "became important in the 1920's [and] resulted in political action that culminated in the 1930's." (Edwards, *The Price Discrimination Law* (1959) p. 10 (hereafter Edwards).) Between 1919 and 1927, retail sales by grocery chains almost quadrupled; those by drug, candy and variety chains more than doubled. (*Id. at p. 9.*) While lawmakers had earlier been concerned primarily [\*\*\*\*17] with geographic discrimination used to obtain a local monopoly, new problems came to the fore during the 1920's as the chains grew in size, integrated wholesale and retail functions, and gained extraordinary purchasing power. (*Id. at pp. 8-9.*) The perceived importance of the chain store problem grew with the coming of the Depression, which "added to the economic distress of independents and intensified their fear and hatred of the chains, whose price appeal was sharpened by the slash in consumer income." (Palamountain, *The Politics of Distribution* (1955) p. 160 (hereafter Palamountain).)

In 1926, the Federal Trade Commission (FTC) began an investigation of the chain stores; the investigation produced numerous interim reports and a [\*1259] final report issued in December 1934. (Edwards, *supra*, at p. 10.) The FTC found a pattern of "special discounts and allowances" granted to chains in preference to independent wholesalers and retailers. (FTC, Final Rep. on Chain-Store Investigation, Sen. Doc. No. 4, 74th Cong., 1st Sess., p. 60 (1935).) Grocery manufacturers reported selling to chain stores at a discount from the price charged other customers. In many cases the discount [\*\*\*\*18] was purportedly for volume buying, but "the quantity purchased ha[d] no relation to the difference in price," the discount actually being only the result of hard bargaining by the chain purchaser. (*Id. at p. 61.*) Some manufacturers, in grocery and other industries, regularly granted chains a discount of up to 10 percent, with other distributors allowed only a much lower discount. For example, one manufacturer gave buyers a "confidential rebate" at year's end, "the rate to wholesalers being 2 percent, to chains generally it was 5 percent, but to two particular chains, it amounted to 10 percent." (*Id. at p. 62.*) In addition, a large number of manufacturers in the grocery, drug, tobacco and candy industries reported that the chain purchasers, through bargaining, had obtained preferential "promotional allowances," which in some cases were "not used for that purpose [advertising] at all" and bore "no direct relation to the volume of sales." (*Id. at p. 61.*) Similarly, the chains demanded and were granted special allowances for brokerage. (*Id. at p. 62.*)

As in the case just noted, of a manufacturer whose year-end rebates to buyers were kept "confidential," preferential [\*\*\*\*19] rebates and unearned discounts were typically not disclosed publicly or to the trade generally. To the contrary, these discounts--or their unearned character--were frequently kept secret so that the buyer's competitors would not demand the same treatment. (See Fulda, *Food Distribution in the United States: The Struggle Between Independents and Chains* (1951) 99 U.Pa. L.Rev. 1051, 1086 (hereafter Fulda) [unearned advertising allowance constitutes "an indirect secret rebate"]; *id. at pp. 1130-1131* [New York Great Atlantic & Pacific Tea Company's (A & P's) use of illusory quantity discounts as disguised preference]; *id. at pp. 1132-1133* [examples of A & P's efforts to keep its unique price concessions secret].)

Depression conditions, moreover, gave chains greater relative buying power; "[c]onsequently, the difference between the prices charged chains and those charged smaller distributors apparently widened, and the attention of independents was increasingly focused on discounts." (Palamountain, *supra*, p. 192.) The resulting "secret rebates" and other discriminatory allowances were not insignificant in size; in the best known case, that of the A & P chain, they [\*\*\*\*20] totaled more than \$ 8 million in the single year 1934. ( *New York Great Atl. & Pac. Tea Co. v. Grosjean* (1937) 301 U.S. 412, 421 [57 S. Ct. 772, 775, 81 L. Ed. 1193, 112 A.L.R. 293].) "The leverage which [\*1260] accomplished this was the enormous purchasing power of the company." (*Ibid.*)

The perceived impact of such deceptive and discriminatory practices on the chains' competitors--the independent retailers and wholesalers--was the primary evil targeted in the Robinson-Patman Act. "It is . . . too [\*\*297] [\*\*\*119] well known to require extensive exposition . . . that the 1936 Robinson-Patman amendments to the Clayton Act were motivated principally by congressional concern over the impact upon secondary-line competition

of the burgeoning of mammoth purchasers, notably chain stores." (*F.T.C. v. Anheuser-Busch, Inc., supra, 363 U.S. at pp. 543-544 [80 S. Ct. at p. 1271]*, fn. omitted.) The problem was perceived to have both economic and, more broadly, social aspects. Economically, price discrimination in favor of chains added to their cost advantage over competing retailers, helping them to undersell the independents and ultimately drive them from the field, thereby [\*\*\*\*21] tending to create monopoly conditions. (FTC, Final Rep. on the Chain-Store Investigation, *supra*, Sen. Doc. No. 4, 74th Cong., 1st Sess., at p. 64; see also Rowe, *The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective* (1957) 57 Colum. L.Rev. 1059, 1062 [while chain stores grew in the 1920's and 1930's, independent retailers went out of business at an average rate of 10 percent per year].) Socially, it was feared the result of chain store domination would be the loss of an endangered middle class, the "prosperous bourgeois class [that] has been considered one of the mainstays of our civilization." (Comment (1933) 22 Cal.L.Rev. 86, 101.)<sup>5</sup>

[\*\*\*\*22] The pressure for remedial legislation was not confined to Washington. In California, a fair trade law, authorizing retail price maintenance agreements [\*1261] with respect to trademarked products, had been passed in 1931 and strengthened in 1933. (Stats. 1931, ch. 278, p. 583; Stats. 1933, ch. 260, § 1, p. 793, repealed Stats. 1975, ch. 402, § 1, p. 878.) In part because much of the grocery trade dealt in unbranded goods, however, the law was of limited usefulness in that industry. (Fulda, *supra*, 99 U.Pa. L.Rev. at p. 1117.) The independent grocers therefore led the political fight for the UPA, which was opposed by the grocery chains. (Grether, *supra*, 24 Cal.L.Rev. at pp. 647-648; see also Fulda, *supra*, 99 U.Pa. L.Rev. at pp. 1117-1118, fn. 288 [quoting an officer of the California Retail Grocers and Merchants Association as saying the UPA "is the finest law ever enacted on the Statute books of any state, as far as our industry is concerned"].)

This history teaches that a primary concern in the enactment of the UPA was the protection of smaller, independent retailers, especially grocers, against unfair competitive practices of the large chain stores. As a contemporary [\*\*\*\*23] commentator explained, the prohibitions added in 1933 on secret rebates and unearned discounts (now [section 17045](#)) and below-cost sales (now [section 17043](#)) "are designed to protect the retailer whose more powerful neighbor is attempting to drive him out of business." (Comment, *supra*, 22 Cal.L.Rev. at p. 102; see also *G.H.I.I. v. MTS, Inc. (1983) 147 Cal. App. 3d 256, 271 [195 Cal. Rptr. 211, 41 A.L.R.4th 653]* [UPA closely parallels, and is based upon same policies as, Robinson-Patman Act]; *Uneedus v. California Shoppers, Inc. (1978) 86 Cal. App. 3d 932, 937 [150 Cal. Rptr. 596]* [same].) More specifically, the provision that became [section 17045](#) was almost certainly designed to prohibit and protect against the practice of granting to chains [\*\*298] [\*\*\*120] and other large distributors, as a result of their much greater bargaining power, secret rebates, unearned discounts and other unearned allowances not granted to smaller, independent merchants. These practices had been thoroughly investigated and were widely known, and were believed to have highly destructive effects on competition at the wholesale and retail levels in a variety of industries. The competitive injury [\*\*\*\*24] involved was to the disfavored buyers, and the tendency to destroy competition was in the line of commerce practiced by the favored buyer.<sup>6</sup>

<sup>5</sup> Representative Wright Patman, introducing his 1935 bill in the House of Representatives, described both aspects of the chain store problem in characteristically vivid language: "In the field of merchandise distribution a Goliath stands against divided forces plying a powerful weapon with a skillful hand against the vulnerable weaknesses of his opponents. [P] The Goliath is the huge chain stores sapping the civic life of local communities with an absentee overlordship, draining off their earnings to his coffers, and reducing their independent business men to employees or to idleness. [P] His weapon is huge buying power, by the manipulation of which he threatens manufacturers and others with financial stringency or even bankruptcy if they refuse him the prices and terms he demands. His opponents are not only these manufacturers, not only the independent competitors whom he seeks to eliminate, but the consuming public, whom he hopes then to have at his mercy." (Remarks of Rep. Wright Patman introducing H.R. No. 8442, 74th Cong., 1st Sess., 79 Cong. Rec. 9077 (June 11, 1935) reprinted in 4 Kintner, *The Legislative History of the Federal Antitrust Laws and Related Statutes* (1980) p. 2927 (hereafter Kintner).) Elsewhere Representative Patman emphasized that the chains were enriching themselves at the expense of independent merchants not through fair and open competition but through "secret rebates" and "special discounts" not available to the independents. (House Debate on H.R. No. 8442, 74th Cong., 2d Sess., 80 Cong. Rec. 8102 (May 27, 1936) reprinted in 4 Kintner, *supra*, at p. 3268.)

<sup>6</sup> By 1938, there were a large number of state unfair practices acts, commonly prohibiting unjustified price discrimination as well as sales below cost. A commentator at that time identified an important purpose of the anti-discrimination provisions as "the

[\*\*\*\*25] Thus, the background of the UPA's prohibition on unearned discounts, codified as [section 17045](#), confirms our view the statute was intended [\*1262] primarily to protect against competitive injury in the secondary line of commerce, i.e. at the level of the discount's recipient. In the present case, ABC alleged just such injury and tendency to destroy competition.

MECA accuses ABC of construing [section 17045](#) "as though it were designed to protect individual dealers from price competition at the expense of consumers." Such an interpretation would assertedly be inconsistent with the statutory purpose, as MECA characterizes it, of "insuring the continued existence of vigorously competitive markets." While some commentators, MECA notes, have criticized aspects of the Robinson-Patman Act or its enforcement as anticompetitive and therefore in conflict with other antitrust laws, the California Legislature, MECA argues, avoided such conflicts in policy by "limiting the [UPA's] scope entirely to pro-competitive regulation of primary-line competition."

For three reasons, we find MECA's policy arguments unpersuasive. First, the interpretive question in this case does not concern protection [\*\*\*\*26] of individual competitors versus competition generally. [HN7](#) By its terms, [section 17045](#) requires the plaintiff to prove not only injury to a competitor, but, *in addition*, a tendency "to destroy competition." (Cf. Fulda, *supra*, 99 U.Pa. L.Rev. at p. 1109 [*disjunctive* language of Robinson-Patman Act section 2(a), [15 United States Code section 13\(a\)](#), has been interpreted as including discrimination that causes injury only to a particular competitor].) Thus, whatever may be the federal law or enforcement pattern, [section 17045](#) applies only when the discriminatory rebate, discount or allowance has a tendency to destroy competition *generally*. The only question here is whether "competition" includes business competition at the level of the favored purchaser, as well as at the level of the seller. For reasons already discussed, we conclude that, for purposes of [section 17045](#), competition is competition, whether among retailers, wholesalers or producers.

Second, MECA's view of the statutory purposes is unjustifiably narrow. [Section 17045](#), and the UPA as a whole, reflect a Legislative concern not only with the maintenance of competition, but with the maintenance of "fair [\*\*\*\*27] and honest competition." ([§ 17001](#), *italics added*; see also [State v. Langley, supra, 84 P.2d at p. 772](#) [The aim of the Wyoming unfair practices act "is to maintain fair competition, but to prevent unfair and ruinous competition."].) [\*1263] Our law attempts to foster such competition through the prohibition of certain "unfair, dishonest, deceptive, destructive, fraudulent and discriminatory [\*\*299] [\*\*\*121] practices" ([§ 17001](#)), including the solicitation and allowance of secret discriminatory discounts and rebates ([§ 17045](#), [17047](#)). As long ago as 1903, a leading commercial court observed that "[w]hile public policy demands a healthy competition, it abhors favoritism, secret rebates, and unfair dealing . . ." ( [John D. Park & Sons Co. v. National W. Druggists' Ass'n \(1903\) 175 N.Y. 1 \[67 N.E. 136, 139\]](#)). [Section 17045](#) reflects the same policy viewpoint.

Finally, to the extent MECA's arguments go to the *wisdom* of protecting secondary line competition, rather than to the legislative intent, they are irrelevant to our interpretive task. [CA\(5\)](#) (5) As this court said 59 years ago, in rejecting a constitutional challenge to the UPA, [HN8](#) "[i]t is not for the courts, except [\*\*\*\*28] within the limits herein set forth, to determine whether or not the policy of a statute is economically sound or beneficial. That is a matter solely for the legislature." ( [Wholesale T. Dealers v. National etc. Co., supra, 11 Cal. 2d at pp. 646-647](#).) [CA\(4b\)](#) (4b) MECA has not shown, to the degree of certainty required to exclude the possibility of a contrary legislative view, that the protection of fair and honest competition in the secondary line necessarily impedes retail competition and inures to the detriment of the ultimate consumer. It has been argued, with at least equal

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prevention of discriminatory sales by manufacturers to customers with unusually strong bargaining power who can force large price concessions." (Comment, *Prohibiting Price Discrimination and Sales Below Cost: The State Unfair Practices Acts* (1938) 32 Ill. L.Rev. 816, 819-820, fn. omitted; see also Dewell & Gittenger, *The Washington Antitrust Laws* (1961) 36 Wash. L.Rev. 239, 277 [Washington's "secret rebate" statute, worded similarly to [section 17045](#), was designed to prohibit similar types of business conduct as the federal Robinson-Patman Act]; [Ideal Plumbing Co. v. Benco \(8th Cir. 1976\) 529 F.2d 972, 978, fn. 7 \[42 A.L.R.Fed. 266\]](#) [same as to Arkansas statute, enacted in 1937, whose prohibitory language is identical to that of [section 17045](#)]; [Jauquet Lumber v. Kolbe & Kolbe Millwork \(1991\) 164 Wis.2d 689 \[476 N.W.2d 305, 309\]](#) [Wisconsin statute worded almost identically to [section 17045](#) "was designed to accomplish the same goals" as Robinson-Patman Act]; [State v. Langley \(1938\) 53 Wyo. 332 \[84 P.2d 767, 774\]](#) [Wyoming unfair practices act "probably intended mainly for their [independent merchants'] benefit."].)

persuasiveness, that the chain stores' solicitation and receipt of secret favoritism from producers hurt consumers in two ways: In the short term, it was believed, the producers recouped the losses in sales to chains by charging higher prices to the independent wholesalers and retailers, who passed them on to consumers; in the long term, the secret rebates helped chains move toward monopoly or dominance in some markets, allowing them ultimately to raise consumer prices. (FTC, Final Rep. on the Chain-Store Investigation, *supra*, Sen. Doc. No. 4, 74th Cong., 1st Sess., at p. 64; Fulda, *supra*, 99 U.Pa. L.Rev. [\*\*\*\*29] at pp. 1105-1106.) Some have thought these concerns exaggerated (see, e.g., Edwards, *supra*, p. 10, fn. 19 [reporting dispute over FTC's conclusion that price discrimination in favor of chains contributed substantially to chains' ability to undersell independent retailers]), but where the truth lies in such economic debates is not for us to say.

#### C. Prior Judicial Interpretation: *Harris v. Capitol Records etc. Corp.*

MECA, like the Court of Appeal, relies principally on certain language in our decision in *Harris v. Capitol Records etc. Corp.*, *supra*, 64 Cal. 2d 454 (hereafter *Harris*). Read in context of the issues actually presented in that case, however, *Harris* neither binds us precedentially to MECA's position nor persuades us to adopt it. [\*1264]

In *Harris*, a phonograph record retailer sued three record distributors, alleging they had given a competing retailer, a former "rack-jobber" who had opened his own retail store across the street from plaintiff's, larger dealer discounts than those allowed the plaintiff. The plaintiff contended the differential discounts constituted "locality discrimination" as defined in *section 17031* and prohibited [\*\*\*\*30] in *section 17040*. (*Harris, supra*, 64 Cal. 2d at pp. 456-457).<sup>7</sup> This court affirmed summary judgment for the defendants.

[\*\*\*\*31] **CA(6)[↑] (6)** We held, first, that the UPA's locality discrimination prohibition, while somewhat broadened by a 1931 amendment, retained a necessary element of *geographic* price difference; what was fundamentally prohibited was discrimination between locations, rather [\*\*300] [\*\*\*122] than between purchasers as such. (*Harris, supra*, 64 Cal. 2d at pp. 458-460.) In particular, the defining language of *section 17031* ("selling . . . at a lower price . . . in one location . . . than in another") implied that a seller, to violate *section 17040*, "must have at least two different places of business and must sell at a lower price *in* one than *in* the other." (64 Cal. 2d at p. 460.) Locality discrimination could therefore not be proven in *Harris*, as the two locations involved were owned by the competing buyers, not by any of the sellers. (*Ibid.*) Apparently as an alternative ground of decision, we went on to agree with the defendants' argument that "*section 17040* is intended to apply only to competition on the same 'level' as the person allegedly creating the locality discrimination." (*Ibid.*)

**CA(7)[↑] (7)** The above summarized discussion in *Harris* was addressed solely to the claim the defendants [\*\*\*\*32] had committed locality discrimination, as defined in *section 17031* and prohibited in *section 17040*. Although the plaintiff apparently did not claim the defendants had also violated *section 17045*, we briefly addressed that possibility later in the decision. We held *section 17045* did not apply to advertising allowances allegedly granted to the competing retailer, because the allowances were neither secret nor discriminatory, being available to all purchasers buying on like terms and conditions. (*Harris, supra*, 64 Cal. 2d at p. 463.)

[\*1265] MECA does not rely on this portion of *Harris*, in which we directly addressed *section 17045*, but on an earlier parenthetical mention of the statute in our discussion of locality discrimination. The cited passage is as follows: "Throughout the Act the Legislature has manifested its intent to discourage practices which injure the

<sup>7</sup> *Section 17040* provides: "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. [P] Nothing in this section prohibits the meeting in good faith of a competitive price."

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

seller's competitors ([§ 17040](#), [17043](#), [17045](#), [17071](#)) and thereby tend to create the monopolies condemned by [section 17001](#) [citation]. Equally apparent is the Legislature's concern to allow the seller to meet in good faith the prices of his competitors ([§ 17040](#), [17050](#)), thereby fostering the competition [\*\*\*\*33] promoted by [section 17001](#). Together these constitute the 'horizontal' concept of price regulation, one of the fundamental characteristics of this legislation." ([Harris, supra, 64 Cal. 2d at p. 461.](#))

The issue under discussion in this part of *Harris* was whether the differential discount offered by a record company to one of two retailers--record stores located across the street from one another--constituted locality discrimination within the meaning of [sections 17031](#) and [17040](#). Not surprisingly, we held it did not. Neither our discussion of locality discrimination as a whole, nor the above quoted inclusion of [section 17045](#) in a parenthetical dictum, can reasonably be read as *holding* that a disfavored buyer alleging a violation of [section 17045](#) must plead and prove competitive injury in the primary line of commerce. This is especially so in light of the later passage, already discussed, in which we specifically focused on [section 17045](#) and held it inapplicable for reasons unrelated to the fact the injuries alleged by the *Harris* plaintiff were to the buyer's competitors, rather than the seller's. ([64 Cal. 2d at p. 463.](#)) Thus, the *Harris* decision has no *binding* [\*\*\*\*34] precedential effect on the current case.<sup>8</sup>

**CA(8)[↑]** (8) Nor does the *Harris* court's analysis of [section 17040](#) persuade us to MECA's interpretation of [section 17045](#). In our view, both sections of the UPA are designed to foster competition and prevent monopoly conditions, but the particular threats to competition they are principally intended [\*\*\*\*35] to meet are fundamentally different. As we observed in *Harris*, the threat to competition caused by locality discrimination was typically to primary [\*\*301] [\*\*\*123] line competition. A "large retail chain," we explained, could "lower its prices at a [\*1266] store in one area, constituting a severable market, until the competition from smaller, local businesses in that community had been eliminated, concurrently offsetting the losses it thus suffered by charging higher prices in its other areas of operation. After the demise of competitors, the chain outlet would then realize monopoly profits, and the process of attrition would be repeated elsewhere." ([Harris, supra, 64 Cal. 2d at p. 458.](#)) Locality discrimination was an anticompetitive abuse engaged in by chain retailers as *sellers*, to the injury of competing *sellers*. As we have seen earlier, however (see *ante*, pt. I.B.), the solicitation and extortion of secret rebates, unearned discounts and other discriminatory allowances was an anticompetitive abuse historically engaged in by the chains as *buyers*, to the injury of competing *buyers*, i.e. the independent retailers and wholesalers. That the Legislature [\*\*\*\*36] may have intended [section 17040](#) to protect mainly against injury in the primary line, therefore, does not detract from our earlier conclusion that the protections of [section 17045](#) extend to injury in the secondary line.<sup>9</sup>

<sup>8</sup> In support of its interpretation, MECA also cites [Plotkin v. Tanner's Vacuums \(1975\) 53 Cal. App. 3d 454 \[125 Cal. Rptr. 697\]](#), and [Carlock v. Pillsbury Co. \(D.Minn. 1989\) 719 F. Supp. 791](#). *Plotkin* did not involve unearned discounts or any form of discriminatory pricing, and discussed only [sections 17040](#) and [17043](#). The discussion in *Carlock* concerned only [section 17040](#). Similarly, the dissenting opinion's reliance on [Beam v. Monsanto Co., Inc. \(1976\) 259 Ark. 253 \[532 S.W.2d 175, 181-182\]](#) (dis. opn., post, at p. 1279, fn. 2) is misplaced, as that decision concerned only a locality discrimination prohibition modeled on [sections 17031](#) and [17040](#).

<sup>9</sup> For the proposition that the UPA operates "horizontally" rather than "vertically," we cited, in *Harris*, three law review articles, two of which MECA cites for the same proposition. None specifically addresses the question before us. The principal authority relied upon, Professor Ewald Grether, appears to have meant, in distinguishing between the "horizontal" UPA and the "vertical" Fair Trade Law, merely that under the UPA "action . . . need not wait upon the initiative of manufacturers or distributors at the apex of the distributive pyramid, but may arise at any level." (Grether, *supra*, 24 Cal.L.Rev. at p. 686.) One should also note that Professor Grether, in the cited article, focused on the historical background and prospects for enforcement of the UPA and Fair Trade Law, and disavowed any intent to engage in "[i]nterpretation of the law, technically speaking." ( *Id. at p. 641.*) The reference to "the horizontal concept of trade regulation" in Cupp, *The Unfair Practices Act (1936)* 10 So.Cal.L.Rev. 18, is brief and nonspecific. The final academic passage quoted in [Harris, supra, 64 Cal. 2d at pages 461-462](#), deals specifically with primary versus secondary line injury, but was concerned only with the locality discrimination provisions, which, of course, were also the only provisions at issue in this part of *Harris*. (Birmingham, *Legal Aspects of Petroleum Marketing Under Federal and California Laws* (1960) [7 UCLA L.Rev. 161, 246-247.](#)) None of the cited passages persuades us to MECA's view of [section 17045](#).

[\*\*\*\*37] The difference in principal application between [section 17045](#) and the locality discrimination prohibition in [sections 17040](#) and [17031](#) is reflected in their language. Neither [section 17040](#) nor [section 17031](#) refers to individual purchasers. Locality discrimination, as defined in [section 17031](#), requires different prices at different "locations." Thus "the smallest geographic unit [[section 17031](#)] envisages is the individual store or outlet, not the individual purchaser regardless of location." (*Harris, supra*, 64 Cal. 2d at p. 460.) [Sections 17031](#) and [17040](#) are tailored to address the problem of a distributor, typically a retailer, selling out of many locations, who might use geographical price discrimination as a predatory practice against its own competitors.

[Section 17045](#), in contrast, forbids discrimination in favor of "certain purchasers" at the expense of other "purchasers." As discussed earlier (pt. [\*1267] I.A., ante), the section is patently concerned with "preventing a distributor from discriminating between customers." (*Chicago Title Ins. Co. v. Great Western Financial Corp., supra*, 69 Cal. 2d at p. 323.) Moreover, [section 17045](#), unlike the locality [\*\*\*\*38] discrimination provisions, applies only to "secret" rebates and discounts. A retail seller, needing to attract buyers in large number, typically advertises any available discounts and rebates widely, rather than keeping them secret. In contrast, a producer from whom a large retailer has extracted special concessions might well prefer to keep such concessions secret. [Section 17045](#) is thus tailored to address the problem of a manufacturer or other producer who is forced or induced to give preferential prices to one or more individual purchasers, typically retailers. This practice, of course, is likely to be injurious to the disfavored *buyers'* business position and may tend to destroy competition among such *buyers*.

The dissent imagines that our reading of [section 17045](#) originates in a "desire to do [\*\*302] [\*\*\*124] good, be universally fair, and make everybody happy." (Dis. opn., *post*, at p. 1272.) While we need not go so far as to disclaim all interest in fairness and human happiness, our goal in this case has been narrower and simpler: we have attempted to discover the legislative intent by examining the statutory language, the stated purposes of the law and the historical [\*\*\*\*39] background of its enactment. If we have mistaken that intent, or if the Legislature determines today's economic conditions require a different regulatory scheme, the remedy lies with that body "on the other side of Tenth Street." (*Osborn v. Hertz Corp.* (1988) 205 Cal. App. 3d 703, 711 [252 Cal. Rptr. 613].)

Reading beyond the dissenting opinion's hyperbolic rhetoric, its main argument seems to be that "interbrand competition" is the sole proper end of antitrust legislation, that "vertical restrictions" on trade are *per se* unobjectionable, and that fair and open competition among wholesalers and retailers could not, therefore, possibly be considered worthy of legislative protection. In response, it is perhaps sufficient to observe that *none* of these precepts are reflected in the language, stated purposes, or history of the UPA. [Section 17045](#) requires proof of injury to, and a tendency to destroy, "competition," not "interbrand competition." Whether economists, professors of law or our dissenting colleague believe today that the use of secret, discriminatory rebates and discounts is an efficient "vertical restriction," is immaterial, because it is clear that in 1933 the [\*\*\*\*40] California Legislature considered such hidden discrimination to be a "dishonest, deceptive, . . . and discriminatory practice" destructive of "fair and honest competition." ([§ 17001](#)) Finally, whatever the current economic orthodoxy may be, the historical background we have rehearsed above belies the dissent's assumptions. During the period [\*1268] of [section 17045](#)'s enactment, the chain stores' receipt of secret rebates, unearned discounts and allowances was widely understood as a threat to vigorous and fair competition at the retail and wholesale levels, and the potential loss of independent merchants engaged in such competition was regarded as an economic and social problem requiring legislative redress.

In summary, the language, context, purposes and history of [section 17045](#) all point to the conclusion its protection extends to competition in the secondary line. The Court of Appeal therefore erred in affirming the order sustaining MECA's demurrer to ABC's first cause of action and the subsequent dismissal.<sup>10</sup>

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<sup>10</sup> In its brief, MECA also contends certain allegations in ABC's current and superseded complaints contradict and "negate" ABC's necessary allegations of competitive injury (at any level) and secrecy. The issues thus raised were not among those specified in the petition for review or the answer, and are not fairly included in them. (See Cal. Rules of Court, rule 29.3(c).) We decline to expand the scope of review.

[\*\*\*\*41] II. Restitution Under [Section 17203](#)

**CA(9)[<sup>↑</sup>] (9) HN9[<sup>↑</sup>]** [Section 17203](#) provides, in pertinent part: "Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments . . . as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." <sup>11</sup> MECA contends restitution is available as relief under [section 17203](#) only when ancillary to an injunction. The Court of Appeal agreed, holding ABC's cause of action under [section 17203](#) was properly dismissed on demurrer because no prayer was made for an injunction against future unfair competition.

[\*\*\*\*42] Nothing in the actual language of [section 17203](#) indicates the availability of restitution is contingent on the issuance of an injunction. The statute contains, as ABC notes, no language of condition linking injunctive and restitutionary relief. On its face, [section 17203](#) appears to authorize "injunctive relief to prevent [unfair competition], and/or restitution" [\[\\*\\*303\]](#) [\[\\*\\*\\*125\]](#) (i.e. disgorgement) of money or property wrongfully obtained." ([State Farm Fire & Casualty Co. v. Superior Court \(1996\) 45 Cal. App. 4th 1093, 1102 \[53 Cal. Rptr. 2d 229\]](#), italics added.)

The appellate court below did not discuss the statutory language, relying instead on three prior cases: [People v. Superior Court \(Jayhill\) \(1973\) 9 Cal. 3d 283 \[107 Cal. Rptr. 192, 507 P.2d 1400, 55 A.L.R.3d 191\]](#) (hereafter *Jayhill*), [Fletcher v. Security Pacific National Bank \(1979\) 23 Cal. 3d 442 \[153 Cal. Rptr. 28, 591 P.2d 51\]](#) (hereafter *Fletcher*), and [People v. Thomas Shelton Powers, M.D., Inc. \(1992\) 2 Cal. App. 4th 330 \[3 Cal. Rptr. 2d 34\]](#) (hereafter *Powers*). MECA relies on the same cases.<sup>12</sup> None of those decisions, however, holds--or even states in dictum--that [\*\*\*\*43] restitution or disgorgement under [section 17203](#) is contingent on injunctive relief.

[\*\*\*\*44] In *Jayhill*, this court considered the availability of restitution under section 17535, which, in language similar to that of 17203, sets out remedies for fraudulent advertising. At the time the complaint was filed, section 17535 provided only that violations could be enjoined, making no reference to restitution. ([9 Cal. 3d at p. 286](#).) We observed, however, that the statute did not purport to *restrict* a court's equitable powers, and concluded that, in the absence of such restriction, a court of equity retained the "full range of its inherent powers in order to accomplish complete justice between the parties, restoring if necessary the *status quo ante* as nearly as may be achieved." (*Ibid.*) An order for restitution, therefore, was within the court's power. Although in *Jayhill* an injunction had been sought and allowed, and we therefore described restitution as "a form of ancillary relief" (*ibid.*), we did not hold or state that a court would lack the power to issue a restitutionary order under section 17535 if no injunction were also sought.

<sup>11</sup> [Section 17200](#) defines "unfair competition," for purposes of the code chapter that includes [section 17203](#), to include any unlawful business act or practice. In its second cause of action, ABC alleged MECA's violation of [section 17045](#) constituted unfair competition within this definition.

**HN10[<sup>↑</sup>]**

<sup>12</sup> MECA also cites and provides the court with selected staff analyses, reports and letters accompanying the 1976 amendment of [section 17203](#) by which the explicit authorization for restitutionary relief was added. None of them discuss the question before us, although the language of some reveals the authors' *assumptions* that restitution would be ancillary to an injunction. Whatever value these materials might have provided in resolving the present question evaporates upon examination of other reports, analyses and letters cited and provided by an amicus curiae supporting ABC's position--materials that, in some cases, reflect the opposite assumption as to the independence of restitution from injunctive relief, and in other cases neutrally describe the proposed amendments without making any such assumption. Neither set of legislative materials indicates the Legislature actually considered and resolved the question before us. (See [California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist. \(1997\) 14 Cal. 4th 627, 648 \[59 Cal. Rptr. 2d 671, 927 P.2d 1175\]](#) ["we hesitate to accord much weight to an anonymous staff report that was merely summarizing the effect of a proposed bill"].)

In *Fletcher*, this court again construed section 17535. Although we again described restitution as "a form of ancillary [\*\*\*\*45] relief in such an injunctive action" ([23 Cal. 3d at p. 454](#)), we did not hold or assert that restitution was permitted *only* as ancillary relief. The question under discussion, moreover, was not whether restitution is available as an independent remedy, but whether it is available in a class action without proof that each individual plaintiff lacked knowledge of the fraudulent nature of the practice when he [\*1270] or she did business with the defendant. ([Id. at pp. 449-454](#).) We held the lack of such proof was not fatal to certification of the class; section 17535, we explained, "authorizes a trial court to order restitution in the absence of proof of lack of knowledge in order to deter future violations of the unfair trade practice statute and to foreclose retention by the violator of its ill-gotten gains." ([Fletcher, supra, 23 Cal. 3d at p. 449](#).)

Finally, in *Powers*, the Court of Appeal held an order for disgorgement or restitution of illegal profits was permitted under [section 17203](#), despite the lack of specifically identifiable victims who lost money as a result of the defendant's unfair business practice (sale of designated moderate-income housing units [\*\*\*\*46] at illegally high prices). ([2 Cal. App. 4th at pp. 339-344](#).) As an injunction had also been sought and granted in that case, the appellate court described the order for disgorgement or restitution as "a form of relief ancillary to an injunction" ([id. at p. 341](#)), but nothing in the opinion [\[\\*\\*304\] \[\\*\\*\\*126\]](#) states or suggests restitution under [section 17203](#) is restricted to such a circumstance. Rather, the *Powers* court, like this court in *Fletcher*, stressed the independent deterrent value of restitutionary orders: "[T]he laws against unfair business practices were drafted in large part to prevent a wrongdoer from retaining the benefits of its illegal acts. That purpose would be frustrated if a party were entitled to retain its profits simply because it is difficult to specify the victim." ([Powers, supra, 2 Cal. App. 4th at pp. 341-342](#).) Simply stated, "the necessity for deterring future acts require[s] that the wrongdoer be prevented from retaining the illegal profits." ([Id. at p. 343](#).)

*Fletcher*, *Jayhill* and *Powers* provide insufficient reason to read a restriction on relief into the statute. Indeed, ABC and the Attorney General, appearing as an [\*\*\*\*47] amicus curiae, argue that the deterrent policy expressed in *Fletcher* and *Powers* supports their interpretation of [section 17203](#). We agree; it is unlikely the Legislature, in providing courts with broad equitable powers to remedy violations under [section 17203](#), intended those powers be limited in an illogical, unfair and counterproductive manner. As the Attorney General explains, "[o]ften, no logical connection exists between an order of restitution or disgorgement of past illicit gains and an injunction addressing future conduct. Sometimes, a court may find that an injunction is moot as a practical matter, for example because of the age, illness, disability or even death of the defendant. In other circumstances, a court may find that an injunction is unwise or impractical because of the difficulty of enforcement, for example when the defendant is located out of state. Occasionally, a court is disinclined to issue an injunction because of the technical expertise needed for proper enforcement . . . . In other situations, a court may find that an injunction may not be the most appropriate remedy to redress unfair practices committed only during a brief and unique [\*\*\*\*48] circumstance involving a [\*1271] change in business circumstance, such as the acquisition or spin off of another company. In all of these cases, however, the offender is not entitled to keep the fruits of its unfair, deceptive, or unlawful conduct. The defendant's victims may be entitled to restitution, and the court may also conclude that deterrence is more effectively accomplished through restitution than through an injunction of little practical significance." MECA's interpretation of [section 17203](#) would frustrate the deterrent purposes of restitution by allowing a defendant who successfully opposed an injunction to retain its illicit profit.

For the above reasons, we conclude [section 17203](#) authorizes a trial court to order restitution of money lost through acts of unfair competition, as defined in [section 17200](#), whether or not the court also enjoins future violations.<sup>13</sup> The Court of Appeal erred in concluding otherwise.

#### [\*\*\*\*49] DISPOSITION

<sup>13</sup> In light of our conclusion, we need not address the question whether ABC should have been permitted to amend its complaint to seek an injunction. Nor do we address MECA's contention ABC has "disguised" a claim for damages as one for restitution. To the extent MECA's unelaborated assertion can be understood, it appears to dispute ABC's ability to prove MECA illegally enriched itself at ABC's expense, rather than the sufficiency of the complaint to state a cause of action.

The judgment of the Court of Appeal is reversed.

George, C. J., Kennard, J., Baxter, J., and Chin, J., concurred.

**Concur by:** MOSK

## Concur

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### MOSK, J.

I concur in the opinion of the court prepared by Justice Werdegar. It addresses all the questions presented in this cause, and answers them correctly. Of course, issues remain for resolution in the future. On its face, or only slightly underneath, [Business and Professions Code section 17045](#) requires unfair competition, injury to a competitor, and a tendency to destroy competition. It implicitly defines "unfair competition" as secret discrimination by a seller between or among its buyers. It similarly defines "injury to a competitor" as harm to a competitor of either the seller or a favored buyer. By contrast, it does not define a "tendency to [\*\*305] [\*\*\*127] destroy competition." Whether the phrase should be understood so as to further "[c]onsumer welfare," which is "a principal, if not the sole, goal of antitrust laws" ( [Cianci v. Superior Court \(1985\) 40 Cal. 3d 903, 918 \[221 Cal. Rptr. 575, 710 P.2d 375\]](#)), and to prevent "output restriction," which is "one of their principal targets" ([State of California ex rel. \[\\*\\*\\*\\*50\] Van de Kamp v. Texaco, Inc. \(1988\) 46 Cal. 3d 1147, 1183 \[252 Cal. Rptr. 221, 762 P.2d 385\]](#) (conc. and dis. opn. of Mosk, J.))--as it apparently should be--is a question for another day. [\*1272]

**Dissent by:** BROWN

## Dissent

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### BROWN, J.,

Dissenting.--The declared purpose of the Unfair Practices Act is to "safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition." ([Bus. & Prof. Code, § 17001](#).) In pursuit of that goal, the act prohibits the "secret payment or allowance of rebates, refunds, commissions, or unearned discounts . . . to the injury of a competitor and where such payment or allowance tends to destroy competition . . ." ([Bus. & Prof. Code, § 17045](#); hereafter all undesignated statutory references are to the Business and Professions Code.) Given the ordinary rules of English usage, this prohibition is implicated only by competitive injury to a competitor of the one prohibited. Such a result is abhorrent to the majority. It suggests that some victims of commercial discrimination might have no remedy under the act. The quixotic desire to do good, be universally fair, and make everybody happy is understandable. Indeed, [\*\*\*51] the majority's zeal is more than a little endearing. There is only one problem with this approach. We are a court.

As a court, we are constrained to work with the tools available and to play by the rules. When the task is statutory construction, our inquiry begins with the words of the statute. It ends there if the words are sufficient. The majority's insistence on "interpreting" the unambiguous language of [section 17045](#) prompts me to repeat Justice Frankfurter's tongue-in-cheek advice for a court with an overactive lawmaking gland: "[W]hen the legislative history is doubtful," he wrote, "go to the statute." ( [Greenwood v. United States \(1956\) 350 U.S. 366, 374 \[76 S. Ct. 410, 414-415, 100 L. Ed. 412\]](#).)

Here, of course, lacking even the guidance a legislative history of [section 17045](#) would furnish, there is all the more reason for a cautious fidelity to the text of the statute. Undaunted, the majority creates doubt where none exists and, marshaling a patchwork of secondary comments that provide no clear evidence of what the Legislature had in mind in 1933, jettisons the settled understanding of the statute more than half a century after it was passed. By reading the [\*\*\*52] language of [section 17045](#) as referring to competitors of those who receive prohibited price

discounts, the majority introduces into the statute an ambiguity that is not present if the words are taken to mean what they say. To use rules of statutory construction to *create* ambiguity is perverse. The sole justification of the canonical apparatus is to remove doubt, ambiguity, or uncertainty where they exist.

Apart from a couple of exceptions that only serve to prove the rule, in the more than 60 years that the price discrimination provision of the Unfair Practices Act has been on the books, neither the Legislature, this court, the antitrust bar nor the business community has regarded it as applying to [\*1273] so-called "vertical" price discrimination. Indeed, the decision which until today had been regarded as the definitive opinion on the scope of the act reached the *opposite* conclusion. ( *Harris v. Capitol Records etc. Corp. (1966) 64 Cal. 2d 454 /50 Cal. Rptr. 539, 413 P.2d 139* ) (hereafter *Harris*.) In a striking reversal of settled law--notable as much for its retrospective reinterpretation as for its result--the majority abandons that orthodox view [\*\*\*\*53] and strikes out along a path that is not only contrary to the language of the statute itself, but one whose underlying view of economics has been repeatedly repudiated by national authorities on antitrust policy as "giv[ing] artificial protection to the individual competitor" (Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy* (1952) 50 Mich. L.Rev. 1139, 1201 (hereafter Oppenheim)); "unleavened by economic understanding" and "safeguard[ing] not competition, but competitors" (Adelman, *Effective* [\*\*306] [\*\*\*128] *Competition and the Antitrust Laws* (1948) 61 Harv. L.Rev. 1289, 1328, 1335); and as "antithetical to antitrust policy and unnecessary for antitrust enforcement" (Rowe, *Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman* (1951) 60 Yale L.J. 929, 974, fn. omitted); indeed, the United States Supreme Court has described the interpretation espoused by the majority as promoting "a price uniformity and rigidity in open conflict with the purposes" of the antitrust laws. ( *Automatic Canteen Co. v. F.T.C. (1953) 346 U.S. 61, 63 /73 S. Ct. 1017, 1019, 97 L. Ed. 1454* ).

The majority reaches its [\*\*\*\*54] conclusion by ignoring a bedrock rule of statutory interpretation: Where there is no ambiguity, there is nothing to "interpret"--the statute means what it says. Once free of the inconvenient impediments presented by a straightforward text, the majority indulges in an extravagant bout of post hoc judicial lawmaking. Long after the events that provoked *section 17045* have passed from memory, the majority imbues the statute with a sweeping scope that is not only unwarranted by its language, but protectionist and anticompetitive in effect.

This case involves competition among distributors of the *same* product, competition that cannot conceivably have any significant effect on the touchstones of antitrust policy--interbrand competition, the structure of competitive markets, and the ultimate economic welfare of the California consumer. With the utmost respect for the views of my colleagues, I fear today's decision will not only eliminate price discounts as a means of enhancing competition; it will encourage precisely the kind of vexatious and costly litigation which serves only to burden the economy.

#### [\*1274] I. THE TEXT OF [SECTION 17045](#)

On its face, the language of *section 17045* [\*\*\*\*55] indicates a legislative concern with the business practices of *sellers*, rather than *purchasers*. The operative language condemns the "*allowance* of . . . discounts . . . to certain *purchasers* . . . not *extended* to all *purchasers* purchasing upon like terms and conditions . . . ." (Italics added.) These words evince a concern on the part of the drafters of *section 17045* with the conduct of the party *allowing* or *extending* a discount or rebate, that is, with *sellers*. For the prohibition applies only to them and not, at least by the statute's express terms, to those who *receive* the price discount--*purchasers*. That conclusion, read in light of the act's overriding purpose of enhancing competition, suggests it is anticompetitive conduct with respect to *other* sellers that triggers a violation of the statute, a reading that tends to confirm its horizontal focus. Moreover, the statute condemns only those price discounts resulting in an "injury . . . to . . . competition." Although it may be possible to read this language as directed at injury to competitors of *the buyer*, such a reading is a stretch. The more natural sense of the text, given the several references [\*\*\*\*56] to the conduct of *sellers* and the absence of a *buyer* referent, is that *section 17045* is directed at injuries to competitors of the party "extending" or "allowing" the discount or allowance; again, other sellers.

Thus, a seller who grants a price discount to less than all of its customers commits an unlawful act, provided the discount injures a competitor *and* tends to destroy competition. Neither of these two qualifying phrases suggests to

me (or, I imagine, to the ordinary reader) that the use of these words was meant to refer to "competitors" of the *purchaser* to whom the discount was given, or to "destroying competition" among *purchasers* from the seller. A more natural sense of the words is that they refer to competitors of the party granting the price discount--the one referred to earlier in the sentence --*sellers* who "pay," "allow," or "extend" the prohibited discount.

The majority reasons that because [section 17045](#) is "focused patently on discrimination among purchasers," it is reasonable to assume that the Legislature had their interests in mind in enacting the prohibition on price discrimination. (Maj. opn., *ante*, at p. 1254.) Yes and no. Purchasers are mentioned, [\*\*\*\*57] as they would have to be in any statute whose subject [\*\*\*129] is a bilateral transaction, but only because [\*\*307] purchasers are essential to *any* sale, discriminatory or not. Beyond that, however, there is no basis in the statutory language itself to warrant the conclusion that a prohibition on *granting* [\*1275] a price discount was intended for the protection of those purchasers not receiving it.

The majority also reasons that [section 17045](#) contains no "express restriction" to horizontal injury. (Maj. opn., *ante*, at p. 1254.) Granted, the statute does not affirmatively state that competitive injury to buyers is *insufficient* to plead a cause of action, but it would be both odd and unnecessary if it went out of its way to do so. Conceding that the language of [section 17045](#) "does not contain an explicit reference to secondary line competitive injury like the . . . language of the Clayton and Robinson-Patman Acts," the majority declares that "the absence of a specific reference does not . . . constitute an implied restriction." (Maj. opn., *ante*, at p. 1255.) This is said to be so because the statute "requires injury to a 'competitor,' and a tendency to destroy 'competition,' [\*\*\*\*58] without any further inclusive or restrictive language delineating the scope of those terms." (*Ibid.*, italics in original.)

In the context of another statute, one not focused so "patently" on the conduct of those who "pay," "allow," or "extend" discounts, such reasoning might persuade. But here, the language of the statute *does* contain a "specific reference" which, in context, *does* "constitute an implied restriction." That reference is to those who make the payments, allow the rebates, or extend the privileges made unlawful; in a word, *sellers*. The statute's "evident concern with discrimination between competing purchasers," the majority concludes, "suggests its intended protection extends to such competition." (Maj. opn., *ante*, at p. 1255.) But what "evident concern," apparent on the surface of the statute, does the majority have in mind? A disinterested reader of the text, I suggest, would come away with a clear impression, not of an "evident concern" with purchasers, but with those who "grant," "pay," or "allow" discounts and *their* competitors. It strikes this reader as improbable to conclude that the words "competition" and "competitor" refer, not to [\*\*\*\*59] competitors of the price-cutting seller, which may suffer commercial injury as a result of such a practice, but to competitors of the *purchaser*. Sellers, of course, do not compete with buyers but with other sellers, *their* "competitors," and it is to them that the statute evidently refers.

Had the Legislature intended the statute to apply to competitors of purchasers receiving prohibited discounts, it would have been easy enough to insert language in [section 17045](#) making that point clear. Indeed, three years after [section 17045](#) was passed, Congress passed the Robinson-Patman Act, outlawing price discounts on goods in interstate commerce. That legislation, however, left no doubt whatever that *its* prohibition applied to those who received, as well as those who granted, discounts. How did Congress express [\*1276] such a "bilateral" prohibition? Quite simply. By making unlawful price differences which injure competition "with any person who grants or . . . receives" their benefit. ([15 U.S.C. § 13\(a\)](#), italics added.)

## II

### *Harris v. Capitol Records*

Some 30 years ago, Justice Mosk, writing for a unanimous court in [Harris, supra, 64 Cal. 2d 454](#), described [\*\*\*\*60] the Unfair Practices Act--including [section 17045](#)--as intended to proscribe only *horizontal* price discrimination, that is, differences in the price a seller charges buyers, the effect of which is to impair competition with other *sellers*. He wrote that "[t]hroughout the Act the Legislature has manifested its intent to discourage practices which injure the *seller's* competitors ([§ 17040, 17043, 17045, 17071](#)) and thereby tend to create the monopolies condemned by [section 17001](#) . . . Together these constitute the 'horizontal' concept of price regulation, one of the fundamental characteristics of this legislation. In his exhaustive study entitled *Experience in California*

*With Fair Trade Legislation Restricting Price Cutting* (1936) 24 Cal.L.Rev. 640, 686, Professor Ewald T. Grether explained: 'Whereas the Fair Trade [\*\*308] [\*\*\*130] Law has to do with *vertical* price relations, the Unfair Practices Act operates *horizontally*.' (Italics in original.) And in Cupp, *The Unfair Practices Act* (1936) . . . 10 So.Cal.L.Rev. 18, the author said that 'The act may be said to be the consummation of years of effort by businessmen to carry out the horizontal concept of trade [\*\*\*\*61] regulation.' More recently, it has been pointed out that . . . the Unfair Practices Act 'protects only first-line competition against predatory price cutting on an area basis and does not make illegal price discriminations which only injure second or third-line competition at the buyer level or lower. . . . [A] seller can lawfully discriminate in favor of one of his purchasers for the purpose of enabling that purchaser to meet his competition, so long as there is no intent on the part of the seller to prevent or destroy the competition of other sellers at his level.' (Birmingham, *Legal Aspects of Petroleum Marketing Under Federal and California Law[s]* (1960) [7 U.C.L.A. L.Rev. 161, 246-247.](#))" ([Harris, supra, 64 Cal. 2d at pp. 461-462](#), first italics added.)

From the context in which these statements appear, it is clear that Justice Mosk was speaking of the Unfair Practices Act as a whole ("Throughout the Act"), characterizing it as fundamentally "horizontal" in effect. ([Harris, supra, 64 Cal. 2d at p. 461](#).) I cannot subscribe to the majority's dismissal of those statements in [Harris, supra, 64 Cal. 2d 454](#), as standing for something other than what [\*\*\*\*62] their ordinary meaning conveys. Not only Justice Mosk's [\*1277] statement, but also the authorities he relied on in support of it, make an unqualified case for a horizontal interpretation of the Unfair Practices Act as a whole, including [section 17045](#). The article by Professor Ewald T. Grether, for example, discusses the near concurrent rise of state fair trade statutes, companion legislation to the national outbreak of unfair competition laws in the 1930's. "The Unfair Practices Act," Grether concluded, "represented the culmination of legislation begun in 1913. . . . The core of this act was a provision"--now [section 17040](#)--"declaring it unlawful to discriminate between different sections, communities, cities or between different locations in the state by selling at a lower rate . . . 'with the intent to destroy the competition of any regular established dealer.' " (Grether, *Experience in California With Fair Trade Legislation Restricting Price Cutting* (1936) 24 Cal.L.Rev. 640, 645, italics omitted (hereafter Grether).)

As Grether's comments indicate, a consistent theme--restraints on *horizontal* price discrimination--runs through the act from its origin in 1913 to 1935, [\*\*\*\*63] the year in which its major provisions were consolidated. As the Sherman and Clayton Acts were aimed at structural reforms of the economy by promoting horizontal competition, so state antitrust legislation--including California's act of 1913--was aimed at thwarting the growth of monopolies and business combinations that had a restraining effect on competition among sellers. Like the federal antitrust acts of the same era, these state antitrust statutes were aimed at prohibiting so-called locality or area price discrimination, the paradigmatic condition for the rise of cartels. (See, e.g., 3 Kintner, *Federal Antitrust Law* (1984) § 19.1, pp. 42-50 & accompanying fns. (hereafter Kintner).) As the majority points out, the act of 1931, popularly named the "Anti-Discrimination Act" (Stats. 1931, ch. 617, pp. 1333-1335), was aimed primarily at these "large scale distributors, especially chain store systems." (Grether, *supra*, 24 Cal.L.Rev. at p. 645.) It carried forward the proscription on geographic price discrimination of the original 1913 act and coupled to it, in amendments adopted in 1933, two significant additions--the prohibition on "secret rebates" (now [§ 17045](#)), and a provision [\*\*\*\*64] prohibiting sales below cost (now [§ 17043](#)). (Stats. 1933, chs. 261, 504, pp. 793, 1280-1281; see Wilson, *California Unfair Practices Act and Fair Trade Act* (1941) 27 ABA J. 249.) Throughout this series of amendments, however, there is nothing to indicate that the legislation lost its original horizontal focus. In particular, there is no convincing basis in the text of [section 17045](#) to indicate that the Legislature had adopted the vertical prohibitions on price discrimination that were soon to appear in section 2(a) of the federal Robinson-Patman Act. Parallel events suggest the contrary.

[\*\*309] [\*\*\*131] Almost concurrently with the consolidation of what is now the Unfair Practices Act, the Legislature enacted the "Fair Trade Act" (Stats. 1931, ch. [\*1278] 278, p. 583; Stats. 1933, ch. 260, p. 793), legislation that was expressly vertical in orientation.<sup>1</sup> The product of pressure by the same retailers and

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<sup>1</sup> Prior to its repeal in 1975 (Stats. 1975, ch. 402, p. 878), section 1 of the Fair Trade Act declared legal contract terms for the sale of "commodit[ies]" by which the buyer agreed not to resell "except at the price stipulated by the vendor," and authorized

distributors threatened by the chains who pushed for the Unfair Practices Act, the fair trade movement had been popularized by the National Industrial Recovery Act (Act of June 16, 1933, ch. 90, 48 Stat. 195), Depression-era legislation authorizing the establishment and self-policing [\*\*\*\*65] of "codes of competition" designed to prohibit "unfair competitive practices." Fair trade legislation, which swept the states in the 1930's, was not antitrust legislation in the classic mold of the Sherman, Clayton and Federal Trade Commission Acts of the monopoly era. It was directed at providing relief to distributors and small retailers, squeezed more than ever by a weak economy and the highly competitive chains. Rather than seeking to promote a structurally competitive *market*, fair trade and similar legislation was aimed at relieving the pressure on the individual competitor--permitting floors to be set on prices, for example, and authorizing resale price maintenance--thus in a sense *restraining* competition. (See, e.g., Rowe, *Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman*, *supra*, 60 Yale L.J. at p. 1067; Oppenheim, *supra*, 50 Mich. L.Rev. at pp. 1198-1202.)

[\*\*\*\*66] As Grether summarized the situation in 1936, "[I]t is . . . essential to note that these statutes [i.e., the Unfair Competition and Fair Trade Acts] were promulgated during depression years. Both the vigor of the demands and the weakness of opposition were decidedly tempered by the condition of the glutted market. The impact upon the legislature showed itself not only in the fair trade acts, but in a great number of measures aimed at economic control. Apparently, legislators had accepted the proposition that price cutting in the distributive trades engenders a series of repercussions that react harmfully upon primary producers." (Grether, *supra*, 24 Cal.L.Rev. at p. 648, fn. omitted.) Contrasting the California fair trade and unfair practices legislation, Grether pointed to the differing orientation and scope of the two trade regulation acts: Although it applied vertically, the Fair Trade Act reached only a select group of commodities--those that were tradeor brand-marked. The "horizontal procedure under the Unfair Practices Act," Grether wrote, "may develop possibilities for wider, perhaps, even general application, in [\*1279] contrast to the relatively limited possibilities [\*\*\*\*67] of the Fair Trade Act. The strength of the Unfair Practices Act is that action under it need not wait upon the initiative of manufacturers or distributors at the apex of the distributive pyramid but may arise at any level, and that it is not limited merely to trade-marked, identified goods." (Grether, *supra*, 24 Cal.L.Rev. at p. 686.)

The majority dismisses these comments as of marginal value in reaching an understanding of the scope of the act. (Maj. opn., *ante*, at pp. 1265-1266.) I disagree. It was not until 1936 that congressional passage of the Robinson-Patman Act, validating vertical restraints by extending prohibitions on discriminatory pricing to those granting or receiving discounts, or customers of either, set the stage for a rush of similar state statutes. (See Kintner, *supra*, § 19.1, pp. 47-50.) Although some of these state acts were modeled on the "vertical" Robinson-Patman Act, others, enacted earlier in the decade, including our own act, carried forward the original horizontal antidiscrimination model. (See Comment, *Prohibiting Price Discrimination and Sales Below Cost: The State Unfair Practice Acts* (1938) 32 Ill. L.Rev. 816; 819-820, [\*\*\*132] fn. 5; see [\*\*\*\*68] also *Harris, supra*, 64 Cal. 2d at p. 459, fn. 5 [\*\*310] ["By contrast [to the Unfair Practices Act], as of 1938 seven states specifically prohibited discrimination between purchasers as well as between localities."]; McAllister, *Price Control by Law in the United States: A Survey* (1937) 4 Law & Contemp. Probs. 273, 298 (hereafter McAllister) ["The [California] Unfair Practices Act is directed at the horizontal level of prices and, unlike the Fair Trade Act, it applies to all goods. . . . Another provision outlaws price discrimination 'with the intent to destroy . . . or to prevent the competition of any person' but this precursor of the Clayton and Robinson-Patman Acts has long been familiar in state anti-trust laws."].)<sup>2</sup>

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buyers to require their buyers "to agree that [they] will not, in turn, resell except at the price stipulated by such vendor or by such vendee." (Stats. 1931, ch. 278, § 1, p. 583.) As Grether pointed out, "The vertical nature of the rights under the [Fair Trade] [A]ct are clearly indicated by Section 2: 'This act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.' " (Grether, *supra*, 24 Cal.L.Rev. at p. 641.)

<sup>2</sup> Opinions from other jurisdictions with unfair competition statutes of the same provenance as the California act follow the horizontal interpretation we adopted in *Harris, supra*, 64 Cal. 2d 454, often relying on our opinion. In *Beam v. Monsanto Co., Inc. (1976) 259 Ark. 253 /532 S.W.2d 175, 181-182*, for example, the Arkansas Supreme Court wrote that "It is apparent that the [Unfair Practices Act] is intended to foster competition for the primary benefit of the general public by protecting dealers . . . from unfair competition by large dealers. . . . Appellants' argument for 'vertical competition' would broaden the Act to not only protect dealers . . . from unfair competition by other dealers, but would also protect buyers from competition by [other] business buyers who use and purchase the same . . . product for use in their . . . businesses." (See also *Carlcock v. Pillsbury (D.Minn. 1989) 719*

[\*\*\*\*69] It is possible that the available extrastatutory materials Justice Mosk relied on in [\*Harris, supra, 64 Cal. 2d 454\*](#), are simply too equivocal to establish [\*\*1280] satisfactorily the Legislature's intent, one way or the other. If so, our response ought to be a refusal to extend the act beyond the horizontal view, one that is supported by the words of [\*section 17045\*](#), is consistent with the act's purpose of enhancing competition, and is congruent with the ruling horizontal orthodoxy of the day--precisely the view reflected in *Harris* itself. If that cautious view turns out to be mistaken, Justice Mosk prescribed the appropriate remedy in *Harris*: "Plaintiff complains that this [horizontal] construction of the Act will allow a predatory company 'to vertically feed on those beneath it.' Such arguments should be addressed to the Legislature, which alone is equipped to determine the gravity of the economic evil here alleged, and to take such steps as it deems appropriate." ([\*Harris, supra, 64 Cal. 2d at p. 462\*](#), fn. omitted.)

### III. VERTICAL RESTRAINTS ON PRICE COMPETITION

It is worth pointing out just how far from the contemporary antitrust mainstream the [\*\*311] [\*\*\*\*70] [\*\*\*133] majority's construction of California's Unfair Practices Act strays. (See, e.g., [\*Continental T.V., Inc. v. GTE Sylvania Inc. \(1977\) 433 U.S. 36, 54 \[97 S. Ct. 2549, 2559-2560, 53 L. Ed. 2d 568\]\*](#) ["Vertical restrictions reduce intrabrand competition by limiting the number of sellers of a particular product competing for the business of a given group of buyers. . . . [P] [Such] restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products."]; Bork, *Vertical Restraints: Schwinn Overruled* (1977) Sup. Ct. Rev. 171; [\*1281] Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality* (1981) 48 U.Chi. L.Rev. 6; 8 Areeda, [\*Antitrust Law\*](#) (1989) § 1609e, pp. 139-143.) Whatever its business motivation, the alleged price differential at issue in this case reflects an implicit preference for two distributors of the same brand of telephone over a third. I find it difficult to comprehend how a discount offered to some but fewer than all distributors of the same product can even affect, much less "tend to destroy" the only kind of competition that matters to the consumer--competition [\*\*\*\*71] among brands.

If the net economic effect on the retail buyer of telephones of a price differential between intrabrand competitors is nil, how can competition in any sense that justifies "trundling out the great machinery of antitrust enforcement" ([\*Valley Liquors, Inc. v. Renfield Importers, Ltd. \(7th Cir. 1982\) 678 F.2d 742, 745\*](#)) have been affected by the allegedly discriminatory price involved here? It seems evident that competition among manufacturers of telephones and related consumer electronic goods is robust, and that nothing respondent does in its dealings with distributors of its own products is likely to affect significantly that hard economic fact. The lesson in all of this is one that belies the majority's tautology that "competition is competition." (Maj. opn., *ante*, at p. 1262.) For antitrust purposes at least, it is not necessarily so. (See, e.g., [\*Valley Liquors, Inc. v. Renfield Importers, Ltd., supra, 678 F.2d at p. 745\*](#) ["We reject the casual equation of intrabrand price competition with interbrand competition. . . . The plaintiff in a

[\*F. Supp. 791, 849\*](#) [applying *Harris* to state-based unfair practices claim]; [\*USA Petroleum Co. v. Atlantic Richfield Co. \(C.D.Cal. 1983\) 577 F. Supp. 1296, 1307\*](#) [distinguishing *Harris* in a "true" horizontal case]; [\*Chapiewsky v. G. Heilemann Brewing Co. \(D.Wis. 1968\) 297 F. Supp. 33, 41\*](#) [following *Harris*]; [\*William Ingliss, etc. v. I.T.T. Continental Baking Co. \(9th Cir. 1982\) 668 F.2d 1014\*](#) & [\*William Inglis & Sons v. Continental Baking \(9th Cir. 1991\) 942 F.2d 1332\*](#) [relying on *Harris* as to state law claims]; [\*Burge v. Pulaski County Special Sch. Dist. \(1981\) 272 Ark. 67 \[612 S.W.2d 108\]\*](#) [Arkansas Unfair Practices Act applies only horizontally]; [\*Rose v. Vulcan Materials Co. \(1973\) 282 N.C. 643 \[194 S.E.2d 521, 67 A.L.R.3d 1\]\*](#) [same].)

This account of the scope of unfair practice provisions of other states differs, it is apparent, from the majority's evaluation. (Maj. opn., *ante*, at p. 1261, fn. 6.) The Eighth Circuit Court of Appeals' gloss on the Arkansas act, cited by the majority, merely declares, without analysis or discussion, that it was passed in 1937 shortly after the Robinson-Patman Act, "and was obviously designed to prohibit similar types of business conduct." ([\*Ideal Plumbing Co. v. Benco, Inc. \(8th Cir. 1976\) 529 F.2d 972, 978, fn. 7 \[42 A.L.R.Fed. 266\]\*](#).) I am persuaded by the contrary reasoning and result of the Arkansas cases cited above interpreting that state's statute as "horizontal." The opinion of the Wyoming Supreme Court in [\*State v. Langley \(1938\) 53 Wyo. 332 \[84 P.2d 767\]\*](#), also cited by the majority, involved a criminal prosecution under a statute prohibiting sales below cost; although a provision of the statute contains language similar to [\*section 17001\*](#), the opinion is too obscure to stand for much, other than the statement that the provision prohibiting such sales "was probably intended mainly for" the independent merchant. ([\*84 P.2d at p. 774\*](#).) The price discrimination provision of the Wisconsin act, also cited by the majority, is almost identical to [\*section 17045\*](#), and at least one Wisconsin appellate court has construed it as applying vertically. ([\*Jauquet Lumber v. Kolbe & Kolbe Millwork \(1991\) 164 Wis.2d 689 \[476 N.W.2d 305, 309\]\*](#).) As noted, however, the Arkansas statute, also modeled on the California provision (see McAllister, *supra*, 4 Law & Contemp. Probs. at p. 298, fn. 141), has received a contrary construction.

restricted distribution case must show that the restriction he is complaining of was unreasonable because, weighing [\*\*\*\*72] effects on both intrabrand and interbrand competition, it made consumers worse off."); Bork, *Vertical Restraints: Schwinn Overruled*, *supra*, Sup. Ct. Rev. at p. 172 ("The Court's *Sylvania* opinion not only counted efficiencies in favor of a challenged business practice but did so in a sophisticated way, perceiving that the elimination or mitigation of competition among a manufacturer's dealers was essential to the achievement of certain distributional efficiencies.").) In this very case, the majority imposes a ban on vertical, intrabrand price differences as a legitimate business method, an interpretation that may not only hobble structural competition, but may also fuel claims of California's "unfriendly" regulatory and legal climate. On the basis of what appears to be some misplaced principle of distributive equality, the majority today virtually rules out vertical price differences as a method of enhancing competition.

The conclusion that there is no sound basis in the text of the statute or relevant materials for the idea that in enacting the Unfair Practices Act the Legislature anticipated the vertical, secondary line innovations introduced [\*1282] three [\*\*\*\*73] years later in the Robinson-Patman Act, is reinforced by these views of national authorities on antitrust and trade regulation policies. If vertical restrictions on price discrimination are both anticompetitive in effect and protectionist in intent, then the Legislature's explicit declaration in [section 17001](#) of an intention to "foster competition" is thwarted by the majority's innovative gloss on [section 17045](#). We ought to be especially reluctant to engraft onto the statute so dramatic and counterproductive a policy innovation, doubly so in the absence of a clear legislative directive.

## Conclusion

There is a lesson in the half-century-plus of legislative inactivity since [section 17045](#) was enacted; unfortunately, it is one lost on the majority. Today's result is not only bad law, it is demonstrably bad policy and even worse economics. Why? Because the fundamental aim of antitrust legislation is to protect the [\*312] [\*\*\*134] competitive process. Protecting the individual business from the benefits of competition will cost the California consumer in the form of higher prices; it will cost the state as a whole in a flood of wasteful price discrimination litigation unrelated to the [\*\*\*\*74] only goal [section 17045](#) was meant to protect--a competitive market.

For that constituency whose interests alone justify legislative intervention in market-pricing forces--the California consumer--price competition, including discounts, is an unmixed good. It lowers prices and maximizes buying power. Yet the majority condemns it, rewriting the act in the process, to import a construction that is not only bad economics but questionable policy as well. For object lessons we need look no further than the national experience with the heavily criticized Robinson-Patman Act. Confronted with a text that fails to support the majority's construction, and the likelihood of anticompetitive consequences, we ought to pause to consider whether we do more harm than good.

I dissent.



## Pacific Gas & Electric Co. v. County of Stanislaus

Supreme Court of California

December 4, 1997, Decided

No. S047749.

### **Reporter**

16 Cal. 4th 1143 \*; 947 P.2d 291 \*\*; 69 Cal. Rptr. 2d 329 \*\*\*; 1997 Cal. LEXIS 7903 \*\*\*\*; 97 Cal. Daily Op. Service 9090; 97 Daily Journal DAR 14669; 1997-2 Trade Cas. (CCH) P71,996

PACIFIC GAS AND ELECTRIC COMPANY, Plaintiff and Appellant, v. COUNTY OF STANISLAUS et al., Defendants and Respondents.

**Prior History:** [\*\*\*\*1] Superior Court of Stanislaus County. Stanislaus County Super. Ct. No. 303786. John G. Whiteside, Judge.

**Disposition:** The judgment of the Court of Appeal is affirmed.

## **Core Terms**

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Cartwright Act, attorney general, district attorney, political subdivision, subdivision, antitrust, state attorney general, antitrust action, civil action, proceedings, public agency, authorizes, powers, entities, antitrust violation, violations, bring an action, multicounty, italics, class action, lawsuit, federal court, effects, anti trust law, suits, government entity, contends, appears, board of supervisors, legislative history

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > Divestiture

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

### **HN1** [down arrow] **Civil Actions, Divestiture**

The Legislature enacted the Cartwright Act (Act), Cal. Bus. & Prof. Code § 16700 et seq., in 1907. The Act generally outlaws any combinations or agreements which restrain trade or competition or which fix or control prices (Antitrust and Trade Reg. Law Section of the State Bar of Cal., Cal. Antitrust Law (1991) and declares that, with certain exceptions, every trust is unlawful, against public policy and void.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Antitrust & Trade Law > Public Enforcement > US Department of Justice Actions > Investigations

Criminal Law & Procedure > Counsel > Prosecutors

## **HN2** Regulated Practices, Price Fixing & Restraints of Trade

Cal. Bus. & Prof. Code § 16754, permits the state Attorney General or the district attorney of any county to initiate either civil or criminal proceedings for violation of the state Cartwright Act; the action may be brought in the superior court of any county in which any portion of the offense was committed, where any of the defendants reside or where any corporate defendant does business. This section further provides that if a county's district attorney brings an antitrust action, the state Attorney General shall have all of the powers set forth in Cal. Gov't Code § 12550; the latter provision gives the Attorney General direct supervision over any district attorney pursuing an investigation or prosecution of violations of law of which the superior court has jurisdiction, and it allows the Attorney General to assist in or to take full charge of such investigations and prosecutions.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

## **HN3** Regulated Practices, Price Fixing & Restraints of Trade

Cal. Bus. & Prof. Code § 16760 authorizes the Attorney General and district attorneys to bring *parens patriae* actions on behalf of state residents injured by violations of the state Cartwright Act. Thus, subdivision (a) of § 16760 permits the Attorney General to bring a civil action in the name of the people of the State of California, as *parens patriae* on behalf of natural persons residing in the state for treble damages arising from violations of the Cartwright Act. And, under subdivision (g), such an action may also be brought by the district attorney of any county on behalf of the residents of the county whenever it appears that the activities giving rise to such prosecution or the effects of such activities occur primarily within such county.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

## **HN4** Regulated Practices, Price Fixing & Restraints of Trade

Cal. Bus. & Prof. Code § 16750(a) provides that any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by the Cartwright Act may sue for treble damages, interest, attorneys' fees, and injunctive relief. Under subdivision (b) of § 16750, the State of California and any of its political subdivisions and public agencies is deemed a person.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

## **HN5** Regulated Practices, Price Fixing & Restraints of Trade

Under Section 16750 (b) the State of California and any of its political subdivisions and public agencies is deemed a "person".

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

## **HN6** Regulated Practices, Price Fixing & Restraints of Trade

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Section 16750 (c) authorizes the state Attorney General to bring an action on behalf of the state or of any of its political subdivisions or public agencies to recover the damages provided for by this section, or by any comparable provision of federal law. Before doing so, however, the Attorney General must give the entity in question written notice of intent to bring the action on the entity's behalf. The entity then has 30 days to decide whether to divest the Attorney General of such authority.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

### **HN7** **Regulated Practices, Price Fixing & Restraints of Trade**

Cal. Bus. & Prof. Code § 16750(d) provides that when the state brings an antitrust action in which the Attorney General is the class representative of political subdivisions, public agencies, or citizens of the state, the state shall retain attorney fees awarded in the action.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Antitrust & Trade Law > Public Enforcement > US Department of Justice Actions > General Overview

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

### **HN8** **Regulated Practices, Price Fixing & Restraints of Trade**

Under Cal. Bus. & Prof. Code § 16750(e) when the state Attorney General brings a federal or a state antitrust action, the Attorney General may enter into contracts with others who have brought similar actions to share common expenses or to otherwise cooperate in pursuing the matter. And the Attorney General may either render legal services to, or obtain legal services from, any department or agency of the United States, of this state or any other state or any department or agency thereof, any county, city, public corporation or public district of this state or of any other state, that has brought or intends to bring a similar action, or their duly authorized legal representatives. Section 16750 (h) grants the same authority to district attorneys.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

### **HN9** **Regulated Practices, Price Fixing & Restraints of Trade**

Section 16750 (g) allows the district attorney of any county to prosecute any action on behalf of such county or any city or public agency or political subdivision located wholly within such county which the Attorney General is authorized to bring pursuant to subdivision (c) of this section, whenever it appears that the activities giving rise to such prosecution or the effects of such activities occur primarily within such county. Before bringing such an action, the district attorney must give a 30-day written notice to the state Attorney General. The notice must include a report setting forth the facts giving rise to the action as well as a copy of the proposed complaint. Before settling any

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such action, the district attorney must give the Attorney General a copy of, and a memorandum explaining, the proposed settlement agreement.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

#### **HN10**[] **Regulated Practices, Price Fixing & Restraints of Trade**

*Cal. Bus. & Prof. Code § 16750 (i)* provides that in any action brought under subdivision (g), the district attorney may represent any political subdivision located within his or her county directly. Before doing so, however, the district attorney must give such entities written notice and an opportunity to withdraw from the action. And in any action brought under subdivision (g) in which the county, through the district attorney, is the class representative of political subdivisions located within such county, the district attorney shall retain attorney fees awarded in the action.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

#### **HN11**[] **Regulated Practices, Price Fixing & Restraints of Trade**

*Cal. Bus. & Prof. Code § 16750(a)* provides that any person injured by a violation of the state Cartwright Act may bring a civil action. Subdivision (b) defines "person" as including the state and any of its political subdivisions and public agencies.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Governments > Legislation > Interpretation

Governments > Legislation > General Overview

#### **HN12**[] **Regulated Practices, Price Fixing & Restraints of Trade**

The goal of statutory construction is to ascertain and effectuate the intent of the Legislature. Ordinarily, the words of the statute provide the most reliable indication of legislative intent. When the statutory language is ambiguous, the court may examine the context in which the language appears, adopting the construction that best harmonizes the statute internally and with related statutes. Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent.

Governments > Local Governments > Claims By & Against

Governments > State & Territorial Governments > General Overview

#### **HN13**[] **Local Governments, Claims By & Against**

The California Constitution authorizes the Legislature to enact legislation specifying the powers of counties. The Legislature shall provide for county powers. *Cal. Const., art. XI, § 1, subd. (b)*. Thus, under California law, counties may sue or be sued only if so authorized by the Legislature: The county is merely a political subdivision of state government, exercising only the powers of the state, granted by the state .

Governments > Local Governments > Claims By & Against

## [HN14](#) [L] Local Governments, Claims By & Against

The Legislature, has declared that counties have corporate powers, [Cal. Gov't Code § 23000](#), and that those powers include the right to sue and be sued, [Cal. Gov't Code § 23004, \(a\)](#). Thus, unless specifically limited by some other legislative provision, a county enjoys the same powers as any other corporate entity in seeking damages for injuries suffered.

## Headnotes/Summary

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### Summary

#### CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court sustained without leave to amend a county's demurrer to a complaint by a public utility seeking to prohibit the county from expending funds ([Code Civ. Proc., § 526a](#)) in a federal antitrust class action against the utility in which the county was a named plaintiff. (Superior Court of Stanislaus County, No. 303786, John G. Whiteside, Judge.) The Court of Appeal, Fifth Dist., No. F021776, affirmed.

The Supreme Court affirmed. The court held that the plain language of [Bus. & Prof. Code, § 16750, subds. \(a\)](#) and [\(b\)](#), which governs the right to recover treble damages by any person injured in violation of the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)), permits counties and other governmental entities with the capacity to sue to bring and prosecute Cartwright Act antitrust actions on an equal footing with any other "person." The statute does not limit the county to the filing of a multicounty class action antitrust suit only if the county is represented by the Attorney General. The court further held that the county had the capacity in its federal lawsuit to allege violations of federal antitrust laws. The capacity to bring an action under federal law is governed by the state in which the district court where the action was brought is located, in this case California ([Fed. Rules Civ. Proc., rule 17\(b\)](#)). Although [Cal. Const., art. XI, § 1, subd. \(b\)](#), does not give counties the inherent power to sue, it provides that counties may sue or be sued if authorized by the Legislature. The state Legislature has declared that counties have corporate powers, including the right to sue and be sued ([Gov. Code, §§ 23000, 23004, subd. \(a\)](#)). Thus, a county enjoys the same powers as any other corporate entity in seeking damages for injuries suffered. (Opinion by Kennard, J., with George, C. J., Mosk and Werdegar, JJ., Bamattre-Manoukian, J., \* and Buckley, J., + concurring. Dissenting opinion by Brown, J.)

### Headnotes

#### [CA\(1a\)](#) [L] (1a) [CA\(1b\)](#) [L] (1b)

#### Monopolies and Restraints of Trade § 10—Under Cartwright Act—Remedies of Individuals—Right of County to Bring Class Action Without Authority of Attorney General: Counties [§ 17](#)—Actions.

--The trial court properly sustained without leave to amend a county's demurrer to a complaint by a public utility seeking to prohibit the county from expending funds ([Code Civ. Proc., § 526a](#)), in a federal antitrust class action against the utility in which the county was a named plaintiff. The plain language of [Bus. & Prof. Code, § 16750, subds. \(a\)](#) and [\(b\)](#), permits counties and other governmental entities with the capacity to sue to bring and prosecute

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\* Associate Justice of the Court of Appeal, Sixth District, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).

+ Associate Justice of the Court of Appeal, Fifth District, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).

antitrust actions under the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)) on an equal footing with any other "person." The statute does not limit the county to filing a multicounty class action antitrust suit only if the county is represented by the Attorney General. Amendments in 1961 and 1977 to [Bus. & Prof. Code, § 16750](#), were not enacted to abrogate the rights of local entities to bring actions under the Cartwright Act on their own behalf. Counties that have been injured by pricefixing (as this county alleged) or other activities that violate the Cartwright Act are no different from other persons or businesses that have been injured by such conduct.

[See 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 585.]

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

### **Statutes § 29—Construction—Language—Legislative Intent.**

--The goal of statutory construction is to ascertain and effectuate the intent of the Legislature. Ordinarily, the words of the statute provide the most reliable indication of legislative intent. When the statutory language is ambiguous, the court may examine the context in which the language appears, adopting the construction that best harmonizes the statute internally and with related statutes. Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent.

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

### **Monopolies and Restraints of Trade § 5—Actions—By Counties—Capacity to Bring Action Under Federal Law: Counties [§ 17](#)—Actions.**

--The trial court properly sustained without leave to amend a county's demurrer to a complaint by a public utility seeking to prohibit the county from expending funds ([Code Civ. Proc., § 526a](#)), in a class action alleging violation of federal antitrust laws against the public utility in which the county was a named plaintiff. The capacity to bring an action under federal law is governed by the state in which the district court where the action was brought is located, in this case California ([Fed. Rules Civ. Proc., rule 17\(b\)](#)). Although [Cal. Const., art. XI, § 1, subd. \(b\)](#), does not give counties the inherent power to sue, it provides that counties may sue or be sued if authorized by the Legislature. The state Legislature has declared that counties have corporate powers, including the right to sue and be sued ([Gov. Code, §§ 23000, 23004, subd. \(a\)](#)). Thus, a county enjoys the same powers as any other corporate entity in seeking damages for injuries suffered.

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Michael H. Krausnick, County Counsel, and Andrew N. Eshoo, Deputy County Counsel, for Defendants and Respondents.

**Judges:** Opinion by Kennard, J., with George, C. J., Mosk and Werdegar, JJ., Bamattre-Manoukian, J., \* and Buckley, J., \*\* concurring. Dissenting opinion by Brown, J. [\*\*\*\*2]

\* Associate Justice of the Court of Appeal, Sixth District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

\*\* Associate Justice of the Court of Appeal, Fifth District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

**Opinion by:** KENNARD

## Opinion

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[\*1145] [\*\*293] [\*\*\*331] KENNARD, J.

In this case, a California county brought a class action in the federal court, alleging that a utility company had violated state and federal antitrust laws by illegal price-fixing that had substantially increased the county's costs for natural gas. The utility company then initiated this lawsuit in the state court challenging the county's power to bring the federal action, contending that only the state Attorney General may bring antitrust actions on a county's behalf when, as here, the alleged illegal activities and injuries occurred primarily outside the county. We conclude that the county was entitled to bring the action.

I

On December 3, 1993, Stanislaus County and Mary Grogan, a residential consumer of natural gas, brought a class action in the United States District [\*1146] Court for the Eastern District of California "on behalf of themselves, and all entities and persons similarly situated." Named as defendants were the Pacific Gas and Electric Company (hereafter PG&E) and the Pacific Gas Transmission Company (hereafter PGT), a wholly owned subsidiary of PG&E. The complaint alleged that PG&E and PGT [\*\*\*\*3] had conspired with a number of producers and distributors to fix the price of natural gas imported into California from western Canada. Counts I, II, and III alleged violations of federal law under the Sherman Antitrust Act ([15 U.S.C. § 1](#)), the Wilson Tariff Act ([15 U.S.C. § 8 et seq.](#)), and the Clayton Act ([15 U.S.C. § 15](#)). Counts IV and V alleged violations of California law under the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#))<sup>1</sup> and the Unfair Practices Act (§ 17000 et seq.). The complaint also alleged that the "relevant geographic market" in which the injured consumers were located was "Central and Northern California."

Representing Stanislaus County in its action in federal court were county counsel and retained outside counsel.

While the federal lawsuit was pending, PG&E brought, in the Superior Court of Stanislaus County, this taxpayers' action for injunctive and declaratory relief, [\*\*\*\*4] naming as defendants the County of Stanislaus, the Stanislaus County Board of Supervisors (both collectively and individually), and the Stanislaus County Auditor/Controller. (For convenience, defendants are hereafter collectively referred to as the County.) PG&E alleged that by bringing the federal class action, the County had exceeded the powers vested in it by law, and that the federal class action therefore constituted an illegal expenditure of public funds. PG&E's complaint sought an order enjoining the County from expending public funds to pursue the federal action ([Code Civ. Proc., § 526a](#)) and a declaration that the County's expenditure of such funds was illegal.

The County demurred to the complaint. The trial court sustained the demurrer without leave to amend, ruling that the County had the power to bring its federal antitrust action and that PG&E's complaint for injunctive and declaratory relief failed to state facts sufficient to constitute a cause of action.<sup>2</sup> PG&E appealed from the resulting judgment of dismissal.

[\*\*\*\*5] The Court of Appeal affirmed. Citing subdivisions (a) and (b) of [section 16750](#), it held that the County could bring a class action alleging antitrust [\*1147] violations of the state Cartwright Act. The court did not address PG&E's claim that the County lacked the power to bring a class action alleging federal antitrust violations, even

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<sup>1</sup> Unless otherwise stated, all subsequent statutory references are to the Business and Professions Code.

<sup>2</sup> In the trial court, the County challenged the propriety of PG&E's use of a taxpayers' action as a method of challenging the County's power to bring its antitrust action in federal court, but the County does not do so here. We express no views on the propriety of using a taxpayers' action for this purpose.

16 Cal. 4th 1143, \*1147 947 P.2d 291, \*\*293 69 Cal. Rptr. 2d 329, \*\*\*331 1997 Cal. LEXIS 7903, \*\*\*\*5

though PG&E [\*\*294] E [\*\*\*332] had raised this claim both in its opening brief and in a timely petition for rehearing.

<sup>3</sup> We granted PG&E's petition for review to address both claims.<sup>4</sup>

[\*\*\*\*6] II

**CA(1a)[]** (1a) PG&E contends that the County lacked the authority, in its lawsuit in federal court, to allege a cause of action under the state Cartwright Act, because the asserted violations and injuries occurred primarily *outside* the county boundaries. PG&E does not dispute that consumers injured by violations of the state Cartwright Act may generally bring class actions under the act. It asserts, however, that when, as here, the injured consumer is not an individual but a county, and the violation and injury occur primarily beyond the county's boundaries, only the state Attorney General has the authority to sue on a county's behalf for violations of the Cartwright Act.<sup>5</sup> Before addressing this complex issue, we give a brief overview of the relevant provisions of the statutory scheme involved here.

**HN1[]** Our Legislature enacted the Cartwright Act in 1907. The act "generally [\*\*\*\*7] outlaws any combinations or agreements which restrain trade or competition or which fix or control prices" (Antitrust and Trade Reg. Law Section of the State Bar of Cal., Cal. Antitrust Law (1991) p. 4), and declares that, with certain exceptions, "every trust is unlawful, against public policy and void" (§ 16726).

[\*1148] The Cartwright Act may be enforced by a criminal proceeding, by an action for corporate dissolution or for revocation of license, or by a civil action for injunctive relief and treble damages as involved here. To determine whether in this case the County has the authority to bring such a civil action, we must consider these provisions of the act: [sections 16750, 16754](#), and [16760](#).

**HN2[]** [Section 16754](#) permits the state Attorney General or the district attorney of any county to initiate either civil or criminal proceedings for violation of the state Cartwright Act; the action may be brought in the superior court of any county in which any portion of the offense was committed, where any of the defendants reside or where any corporate defendant does business. This section further provides that if a county's district attorney brings an antitrust action, the state Attorney [\*\*\*\*8] General "shall have all of the powers set forth in [section 12550 of the Government Code](#)"; the latter provision gives the Attorney General "direct supervision" over any district attorney pursuing an "investigation or prosecution of violations of law of which the superior court has jurisdiction," and it allows the Attorney General to assist in or to "take full charge" of such investigations and prosecutions.

<sup>3</sup> The trial court's written ruling and the Court of Appeal's opinion do not address whether the County had the capacity to allege, in its federal lawsuit, its cause of action for unfair competition under the Unfair Practices Act (§ 17000 et seq.). Neither PG&E's petition for review nor the briefs of the parties in this court mention the matter. Accordingly, we do not consider the propriety of the County's cause of action for unfair competition.

<sup>4</sup> On January 16, 1996, shortly after we granted review of this matter, the federal district court dismissed the County's class action for reasons unrelated to the issues in this case. On appeal, the United States Court of Appeals for the Ninth Circuit upheld the dismissal. ( [County of Stanislaus v. Pacific Gas and Elec. Co. \(9th Cir. 1997\) 114 F.3d 858](#).) Neither party has argued that the dismissal has rendered this case moot. Although PG&E's cause of action seeking injunctive relief appears moot, a live controversy may remain regarding its request for declaratory relief. (See [Van Atta v. Scott \(1980\) 27 Cal. 3d 424, 449-450 \[166 Cal. Rptr. 149, 613 P.2d 210\]; Stanson v. Mott \(1976\) 17 Cal. 3d 206, 223 \[130 Cal. Rptr. 697, 551 P.2d 1\]](#).) Moreover, because PG&E's assertion that the County lacks the power to bring its antitrust action is an issue of substantial public interest that is likely to recur, we may reach the merits of the appeal even if the allegedly illegal action has been completed. ( [John A. v. San Bernardino City Unified School Dist. \(1982\) 33 Cal. 3d 301, 307 \[33 Cal. 3d 301, 187 Cal. Rptr. 472, 654 P.2d 242\]; Cota v. County of Los Angeles \(1980\) 105 Cal. App. 3d 282, 289 \[164 Cal. Rptr. 323\].](#))

<sup>5</sup> In part IV. below, we address PG&E's additional claim that the County also lacked the power to bring an action under federal antitrust law.

**HN3** [↑] Section 16760 authorizes the Attorney General and district attorneys to bring *parens patriae* actions on behalf of state residents injured by violations of the state Cartwright [\*\*295] [\*\*\*333] Act.<sup>6</sup> Thus, subdivision (a) of section 16760 permits the Attorney General to bring "a civil action in the name of the people of the State of California, as parens patriae on behalf of natural persons residing in the state" for treble damages arising from violations of the Cartwright Act. And, under subdivision (g), such an action may also be brought by the district attorney of any county on behalf of the residents of the county "whenever it appears that the activities giving rise to such prosecution or the effects of such activities occur primarily within such county."

[\*\*\*9] The third section addressing standing to bring a civil action for treble damages is section 16750. This is the provision on which the Court of Appeal in this case relied in concluding that the County is authorized to bring an antitrust claim against PG&E. We therefore review it in detail.

**HN4** [↑] Section 16750, subdivision (a) provides: "Any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful" by the Cartwright Act may sue for treble damages, interest, attorneys' fees, and injunctive relief. (Italics added.) **HN5** [↑]

[\*1149] Under subdivision (b) of section 16750, the State of California "and any of its political subdivisions and public agencies" is deemed a "person."

**HN6** [↑] Subdivision (c) of section 16750 authorizes the state Attorney General to bring "an action on behalf of the state or of any of its political subdivisions or public agencies to recover the damages provided for by this section, or by any comparable provision of federal law . . ." Before doing so, however, the Attorney General must give the entity in question written notice of intent to bring the action on the entity's behalf. The entity then has 30 days to decide [\*\*\*10] whether to divest the Attorney General of such authority.

**HN7** [↑] Subdivision (d) of section 16750 provides that when the state brings an antitrust action "in which the Attorney General is the class representative of political subdivisions, public agencies, or citizens of the state," the state "shall retain" attorney fees awarded in the action.

**HN8** [↑] Under subdivision (e) of section 16750, when the state Attorney General brings a federal or a state antitrust action, the Attorney General may enter into contracts with others who have brought similar actions to share common expenses or to otherwise cooperate in pursuing the matter. And the Attorney General may either render legal services to, or obtain legal services from, "any department or agency of the United States, of this state or any other state or any department or agency thereof, any county, city, public corporation or public district of this state or of any other state, that has brought or intends to bring a similar action . . . , or their duly authorized legal representatives . . ." (Subdivision (h) of section 16750 grants the same authority to district attorneys.)

**HN9** [↑] Subdivision (g) of section 16750 allows "[t]he district attorney [\*\*\*11] of any county" to "prosecute any action on behalf of such county or any city or public agency or political subdivision located wholly *within* such county which the Attorney General is authorized to bring pursuant to subdivision (c) of this section, whenever it appears that the activities giving rise to such prosecution or the effects of such activities occur primarily within such county." (Italics added.) Before bringing such an action, the district attorney must give a 30-day written notice to the state Attorney General. The notice must include a report setting forth the facts giving rise to the action as well as a copy of the proposed complaint. Before settling any such action, the district attorney must give the Attorney General a copy of, and a memorandum explaining, the proposed settlement agreement.

**HN10** [↑] Subdivision (i) of section 16750 provides that in any action brought under subdivision (g), the district attorney may "represent any political subdivision [\*1150] located within his or [\*\*\*334] her [\*\*296] county directly." Before doing so, however, the district attorney must give such entities written notice and an opportunity to

<sup>6</sup> " 'Parens patriae,' literally 'parent of the country,' refers traditionally to [the] role of [the] state as sovereign and guardian of persons under legal disability [P] . . . [P] State attorney generals [*sic*] have *parens patriae* authority to bring actions on behalf of state residents for anti-trust offenses and to recover on their behalf." (Black's Law Dic. (6th ed. 1990) p. 1114, col. 1.)

withdraw from the action. And in any action brought [\*\*\*\*12] under subdivision (g) "in which the county, through the district attorney, is the class representative of political subdivisions located within such county," the district attorney "shall retain" attorney fees awarded in the action.

The remaining portions of [section 16750-subdivisions \(f\)](#) and [\(i\)](#)-concern the disposition of funds awarded to the state Attorney General in actions for violation of the state Cartwright Act and the Hart-Scott-Rodino Antitrust Improvements Act of 1976. They are irrelevant here.

### III

PG&E contends that the County is not entitled, in its antitrust suit in federal court, to allege antitrust violations under the state Cartwright Act. PG&E does not appear to dispute the County's *capacity* to sue, that is, that the County is an appropriate *party* to a class action lawsuit under the Cartwright Act. PG&E insists, however, that only the state Attorney General could bring a lawsuit on the County's behalf, and that the County lacked the authority to bring its own action. We disagree.

[HN11](#) [↑] [Subdivision \(a\) of section 16750](#) provides that "any person" injured by a violation of the state Cartwright Act may bring a civil action. Subdivision (b) defines "person" [\*\*\*\*13] as including the state and "any of its political subdivisions and public agencies." Therefore Stanislaus County, a political subdivision of the State of California ([Gov. Code, § 23000](#)) with the right to "[s]ue and be sued" (*id.*, [§ 23004, subd. \(a\)](#)), is a "person" entitled to bring a civil action for a violation of the Cartwright Act. The County is governed by a board of supervisors. Unless otherwise specified by law, a county may act only through its board of supervisors (*id.*, § 23005), which "shall direct and control the conduct of litigation in which the county . . . is a party" (*id.*, [§ 25203](#)). Thus, subdivisions (a) and (b) of [section 16750](#) authorize the County, under the direction of its board of supervisors, to bring an antitrust action under the Cartwright Act.

PG&E acknowledges that when read in isolation, subdivisions (a) and (b) of [section 16750](#) "might arguably" support the County's claim that it was authorized to bring an action under the Cartwright Act. But PG&E contends that the express language of the remainder of [section 16750](#) denies the County such authority. According to PG&E, [section 16750](#) permits a county to bring a multicounty antitrust class [\*\*\*\*14] action only if (1) the state Attorney General brings the action on behalf of the county ([§ 16750, subd. \(c\)](#)) or (2) [\*1151] the district attorney of a county brings the antitrust action, when the alleged improper conduct or its effects occurred primarily *within* the county ([§ 16750, subd. \(g\)](#)). PG&E points out that here the County's antitrust class action in federal court alleging that PG&E had violated the Cartwright Act was brought by neither the state Attorney General nor the County's district attorney (as we mentioned earlier, the action was brought by county counsel, with the assistance of outside counsel), and the County's federal lawsuit did not allege that the improper conduct or injuries occurred primarily *within* its borders. Therefore, PG&E argues, subdivisions (c) and (g) of [section 16750](#) preclude the County from bringing its state antitrust class action in federal court.

We disagree. Subdivisions (c) and (g) of [section 16750](#) do not expressly limit the County's authority to bring an antitrust action under the state Cartwright Act. Subdivision (c) authorizes the state Attorney General to sue on behalf of political subdivisions in the state; subdivision (g) [\*\*\*\*15] authorizes a district attorney to sue on behalf of political subdivisions within the district attorney's county. Neither subdivision limits the power of counties or other political subdivisions to sue on their own behalf for injuries resulting from violations of the Cartwright Act.

PG&E nevertheless insists that [subdivision \(g\) of section 16750](#) directly limits the County's power to sue under the state Cartwright Act. It does not; what it does is to limit the power of the *district attorney*. The district attorney is a "public prosecutor" ([Gov. Code, § 26500](#)), an elected official who [\*297] [\*\*\*335] "shall initiate and conduct on behalf of the people all prosecutions for public offenses" (*ibid.*), subject to the "direct supervision" of the state Attorney General ([Cal. Const., art. V, § 13](#)). The County is governed by a board of supervisors, a separate and distinct body of elected officials which is prohibited from interfering with the investigative and prosecutorial functions of the district attorney. ([Gov. Code, § 25303](#)) In civil suits a county is ordinarily represented not by the district attorney but by county counsel (*id.*, § 26529 [County counsel "shall defend or prosecute [\*\*\*\*16] all civil actions and proceedings in which the county or any of its officers is concerned or is a party in his or her official capacity."]);

when the board of supervisors deems it appropriate, county counsel may be assisted by outside counsel (*id.*, § 25203).

Subdivisions (c) and (g) of [section 16750](#) give the state Attorney General the authority to bring state antitrust actions on behalf of the state's political subdivisions; they also give district attorneys comparable authority to bring state antitrust actions on behalf of political subdivisions within their respective counties. But neither subdivision (c) nor [subdivision \(g\) of section \[\\*1152\] 16750](#) divests a county or other local public entity of authority it otherwise possesses--under subdivisions (a) and (b) of the same section--to bring an action on its own behalf. Rather, subdivisions (c) and (g) simply establish *additional* avenues for pursuing Cartwright Act claims.

PG&E argues, however, that even if [section 16750](#) does not expressly prohibit the County from filing a class action lawsuit for antitrust violations under the state Cartwright Act when both the alleged illegal acts and their effects occur primarily [\*\*\*\*17] *outside* the County's boundaries, to permit the County to do so would be inconsistent with the overall purpose of [section 16750](#) and its companion sections, as reflected in their legislative history.

[CA\(2\)\[↑\]](#) (2) [HN12\[↑\]](#) The goal of statutory construction is to ascertain and effectuate the intent of the Legislature. ([Hsu v. Abbara \(1995\) 9 Cal. 4th 863, 871 \[39 Cal. Rptr. 2d 824, 891 P.2d 804\].](#)) Ordinarily, the words of the statute provide the most reliable indication of legislative intent. (*Ibid.*) When the statutory language is ambiguous, the court may examine the context in which the language appears, adopting the construction that best harmonizes the statute internally and with related statutes. (*Ibid.*; [Woods v. Young \(1991\) 53 Cal. 3d 315, 323 \[279 Cal. Rptr. 613, 807 P.2d 455\].](#)) "Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent." ("[California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist. \(1997\) 14 Cal. 4th 627, 659 \[59 Cal. Rptr. 2d 671, 927 P.2d 1175\].](#)")

[CA\(1b\)\[↑\]](#) (1b) We have already concluded that the most reliable indication of legislative intent--the [\*\*\*\*18] words of [section 16750](#)--do not support PG&E's proposed construction. Although we find little if any ambiguity in the statutory language, we nonetheless review the legislative history of [section 16750](#) and related provisions to determine whether the Legislature may have intended some restriction, not manifest in the statutory language, on a county's authority to bring a Cartwright Act suit on its own behalf.

Through its enactment of [section 16750](#), the Legislature created a civil remedy for antitrust violations. As originally enacted in 1941, the section simply provided that "any person" injured by a violation of the Cartwright Act could bring a civil action for twice the actual damages (increased to treble damages in 1959); it did not state whether government entities were covered by its provisions. (Stats. 1941, ch. 526, § 1, p. 1834; Stats. 1959, ch. 2078, § 1, p. 4811.)

Thereafter, in 1961, the Legislature amended [section 16750](#) to clarify that government entities could bring civil actions under the Cartwright Act. [\*1153] (Stats. 1961, ch. 1023, § 1, p. 2705.) The original 1941 section was renumbered as subdivision (a). Added were subdivisions (b) ("[t]he State and any [\*\*\*\*19] of its political subdivisions and public agencies shall be deemed a person . . .") and (c) (providing that the Attorney General could bring an action on behalf of the state and its political subdivisions, so long as such subdivisions were given notice and an opportunity to withdraw). The Legislature gave these reasons for the amendment: "Subdivision (b) is added to [[section 16750](#)] for the purpose of clarification [\*\*298] [\*\*\*336] only and is not to be construed or interpreted as an indication that the State or any of its political subdivisions or public agencies is not a person within the meaning of [Section 16750](#) as originally enacted . . . The Legislature hereby further declares that at the time of the original enactment of [Section 16750](#), and at all times since, it intended that the State, its political subdivisions and public agencies be included within the meaning of the word 'person.' " (Stats. 1961, ch. 1023, § 2, p. 2706.)

When the Legislature amended [section 16750](#) in 1961, it also amended a companion provision, [section 16754](#). Originally, [section 16754](#) had provided that violators of the Cartwright Act could be ordered to forfeit \$ 50 for every day on which the antitrust violation [\*\*\*\*20] continued, and it had authorized the state Attorney General and the district attorney of any county to bring an action for recovery of the forfeiture. (Stats. 1941, ch. 526, § 1, p. 1834.) The 1961 amendment empowered the Attorney General, or a district attorney "on the order of the Attorney

General," to bring civil actions or criminal proceedings for violations of the state Cartwright Act. (Stats. 1961, ch. 757, [§ 1](#), p. 2013.)

In 1969, the Legislature again amended [section 16750](#) to add a provision (originally labeled subdivision (d) but now subdivision (e)) permitting the Attorney General to enter into contracts and cooperate with private parties and other government entities bringing antitrust actions. (Stats. 1969, ch. 1234, [§ 1](#), p. 2395.) In 1972, the Legislature added subdivisions (d) (permitting the state to retain attorney fees when the Attorney General is the class representative) and (f) (regulating the disbursement of funds awarded the Attorney General in actions under the Cartwright Act). (Stats. 1972, ch. 1140, [§ 1](#), p. 2207.)

In 1977, the Legislature once again amended [section 16750](#), adding subdivisions (g), (h), and (i) (granting district attorneys the power to [\*\*\*21] bring civil actions under the Cartwright Act, and establishing rules governing the exercise of that power), and subdivision (j) (concerning the Hart-Scott-Rodino Antitrust Improvements Act of 1976). (Stats. 1977, ch. 540, [§ 1](#), p. 1741.) Simultaneously, the Legislature amended [section 16754](#) to delete the restriction that district attorneys could bring civil or criminal actions under [\*1154] the Cartwright Act only "on the order of the Attorney General," and replace it with the current language authorizing the district attorney to bring such actions "subject to the notice requirements of [subdivision \(g\) of section 16750](#)." (Stats. 1977, ch. 540, § 3, p. 1744.) At the same time, the Legislature enacted [section 16760](#), authorizing the state Attorney General and the district attorney of any county to bring *parens patriae* actions (Stats. 1977, ch. 543, [§ 1](#), p. 1747), and section 16759, granting district attorneys subpoena powers comparable to those of the Attorney General for the purpose of investigating potential antitrust violations (Stats. 1977, ch. 542, [§ 1](#), p. 1746).

In arguing that the legislative history supports their construction of [section 16750](#), PG&E and its amici [\*\*\*22] curiae allies focus primarily on two statutory revisions: the 1961 legislation that added subdivision (b) to [section 16750](#) and simultaneously amended [section 16754](#), and the 1977 legislation that added subdivisions (g) through (j) to [section 16750](#) and simultaneously added and revised other provisions of the Cartwright Act. We first consider the 1961 legislation.

The state Attorney General, who has filed an amicus curiae brief on behalf of PG&E, points out that in 1961, when the Legislature amended [section 16750](#) of the Cartwright Act to provide that "[t]he state and any of its political subdivisions and public agencies shall be deemed a person . . ." (Stats. 1961, ch. 1023, [§ 1](#), p. 2706), it also amended another provision, [section 16754](#), to provide that "[t]he Attorney General, or the district attorney of any county on order of the Attorney General, shall institute civil actions or criminal proceedings for violation of this chapter" (Stats. 1961, ch. 757, [§ 1](#), p. 2013). The Attorney General argues that because the amendments to [sections 16750](#) and [16754](#) were enacted at the same time, they must be read together. When this is done, the Attorney General contends, these two amendments [\*\*\*23] permit only the Attorney General, or a district attorney on order of the Attorney General, to bring treble-damage antitrust actions on behalf of the state, or its political subdivisions [\*\*299] [\*\*\*337] and public agencies. Thus, under the Attorney General's construction of these 1961 amendments, a county, city, or other political subdivision could never sue on its own behalf under the Cartwright Act.

We find the Attorney General's argument unpersuasive. The 1961 amendments to [sections 16750](#) and [16754](#) of the Cartwright Act authorize the state Attorney General and the district attorney of any county to bring criminal and civil actions for antitrust violations. But they also clarify that counties, cities, and other political subdivisions have the power to sue. There is nothing in the legislative history leading to the adoption of the 1961 amendments to suggest that they were enacted to bar counties, cities, and other [\*1155] political subdivisions from suing for injuries resulting from antitrust violations under the Cartwright Act.

This conclusion is reinforced by the statement of purpose that the Legislature included with its 1961 amendment to [section 16750](#). As previously noted, [\*\*\*24] the Legislature explained that in adding subdivision (b) to the section, to provide that the state and any of its political subdivisions "shall be deemed a person," the Legislature sought to clarify that when it originally enacted [section 16750](#), it intended "that the State, its political subdivisions and public agencies be included within the meaning of the word 'person.'" (Stats. 1961, ch. 1023, [§ 1](#), p. 2706.) Thus, the

1961 amendments were enacted to remove any doubts concerning the power of local government to bring antitrust actions under the Cartwright Act; they were not enacted to abrogate the rights of local entities to bring such actions on their own behalf.

Next, PG&E and its amici curiae allies argue that the 1977 amendments to [section 16750](#) limit the County's power to bring antitrust actions. In that year, the Legislature added several subdivisions, most significantly subdivision (g), to [section 16750](#). As explained earlier, subdivision (g) authorizes the district attorney of any county to "(prosecute) any action on behalf of such county or any city or public agency or political subdivision located wholly within such county which the Attorney General is authorized to [\*\*\*\*25] bring pursuant to subdivision (c) . . . whenever it appears that the activities giving rise to such prosecution or the effects of such activities occur primarily within such county." At the same time, the Legislature amended [section 16754](#) to provide that district attorneys could bring civil and criminal actions under the Cartwright Act "subject to the notice requirements of [subdivision \(g\) of section 16750](#)." (Stats. 1977, ch. 540, § 3, p. 1744.)

PG&E asserts that to construe subdivisions (a) (all "persons" may sue for violation of the Cartwright Act) and (b) (political subdivisions are "persons") of [section 16750](#) as permitting counties to bring actions for violations of the Cartwright Act would "render subdivision (g) [of [section 16750](#)] meaningless." PG&E contends that the Legislature added subdivision (g) to [section 16750](#) because "all concerned . . . perceived the need for statutory amendment before counties could pursue antitrust action." Responding to this need, PG&E argues, the Legislature made "a carefully circumscribed grant of authority" to district attorneys. If counties, cities, and other political subdivisions were already entitled to file suit under the Cartwright Act, [\*\*\*\*26] PG&E contends, there would have been no need for the Legislature to enact subdivision (g).

We disagree. Subdivisions (a) and (b) of [section 16750](#) authorize counties to bring antitrust actions under the Cartwright Act; they do not, however, [\*1156] authorize a *district attorney* to bring such actions on behalf of the counties, cities and other political subdivisions within the district attorney's county. Thus, if [subdivision \(g\) of section 16750](#) did not exist, a district attorney of a county would be unable to bring civil actions for antitrust violations of the state Cartwright Act on behalf of these entities. (See generally, [Safer v. Superior Court \(1975\) 15 Cal. 3d 230, 235-237 \[124 Cal. Rptr. 174, 540 P.2d 141\]](#).) Therefore, subdivision (g), which authorizes the district attorney to bring such actions, is not rendered meaningless by our conclusion that counties have the power, under subdivisions (a) and (b), to bring an antitrust action under the Cartwright Act.

There is nothing in the legislative history of the 1977 revisions to support PG&E's assertion that those amendments were motivated [\*\*300] [\*\*\*338] by a legislative concern that counties, cities, and other political [\*\*\*\*27] subdivisions lacked the authority to bring antitrust actions under the Cartwright Act. Rather, the legislative history demonstrates a legislative concern to strengthen the *district attorney's* authority in the antitrust arena. A Senate Judiciary Committee report on a portion of the legislation stated: "This is part of a package of bills before the committee . . . which were introduced at the request of the L.A. County District Attorney. The bills are intended to strengthen a *district attorney's* ability to prosecute anti-trust and restraint of trade violations." (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1158 (1977-1978 Reg. Sess.) pp. 1-2, italics added.) Similarly, an analysis by the Assembly Judiciary Committee stated: "Under existing law, the Attorney General can bring an action on behalf of the state or any of its political subdivisions to recover damages under the state antitrust laws. This bill grants comparable authority to local *district attorneys*." (Assem. Com. on Judiciary, bill digest prepared for May 5, 1977, hearing (1977-1978 Reg. Sess.) p. 1, italics added.)<sup>7</sup>

[\*\*\*28] Also, to hold, as urged by PG&E and its amici curiae allies, that counties, cities, and other political subdivisions lack the power to bring their own civil actions for injuries resulting from antitrust violations under the

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<sup>7</sup> For similar reasons, we reject PG&E's assertion that the Legislature's intent to deny counties the right to file suit on their own behalf is shown by its rejection in 1975 of Assembly Bill No. 1624, a bill proposing to increase the power of district attorneys to bring antitrust actions that was similar to the amendments to [section 16750](#) that the Legislature later enacted in 1977. This proposed legislation concerned the power of district attorneys to bring antitrust actions, not the power of counties, cities, and other political subdivisions to file suit on their own behalf.

Cartwright Act would be inconsistent with [subdivision \(e\) of section 16750](#). As discussed previously, subdivision (e) provides that when the state Attorney General brings a civil action alleging federal or state antitrust violations, he or she may pool legal resources with "any county, city, public corporation or [\*1157] public district of this state . . . that has brought or intends to bring a similar action . . ." Thus, this provision of [section 16750](#) recognizes that not only the Attorney General and local district attorneys, but also "any county, city, public corporation or public district of this state" may bring a civil action under the Cartwright Act.

According to PG&E and its amici curiae allies, to construe [section 16750](#) as permitting counties to file class action antitrust suits on behalf of themselves and others similarly situated would produce "anomalous, irrational, and absurd results." They foresee the initiation of duplicative antitrust lawsuits [\*\*\*\*29] by cities, counties, and other political subdivisions, thereby placing "multi-county business at constant risk of being called upon to defend expensive and burdensome antitrust investigations and lawsuits in far-flung corners of the state." But multicounty businesses already face this risk, for they may be sued by any or all of their *private* customers in "far-flung corners of the state." Our holding merely places injured *government* consumers on an equal footing with *private consumers* to obtain redress for violations of California's antitrust laws. Counties that have been injured by price-fixing (as alleged here) or other activities that violate the Cartwright Act are no different from other persons or businesses that have been injured by such conduct. Contrary to PG&E's argument, it is not "anomalous, irrational, and absurd" to conclude that the Legislature intended to give them the same power to sue that it gave to all other consumers injured by a company's antitrust violations.

The dissent, relying on federal cases construing federal laws and laws of other states, bases its conclusion that counties lack the authority to bring actions under the Cartwright Act on the [\*\*\*\*30] "presumption" that "[u]nless the contrary appears affirmatively by statute, the Attorney General has exclusive authority to institute Cartwright Act antitrust proceedings on behalf of all government entities." (Dis. opn., *post*, at p. 1161, original italics.) This presumption is inconsistent with California law, which explicitly provides that a county's board of supervisors, not the state Attorney General, directs and controls litigation in which a county is a party ([Gov. Code, § 25203](#)), and that county counsel, not [\*\*301] [\*\*\*339] the state Attorney General, ordinarily represents counties in civil actions (*id.*, § 26529). The dissent makes no effort to reconcile its presumption with these statutes, and indeed does not even acknowledge their existence. Although the dissent accuses the majority of "reading subdivisions (a) and (b) of [section 16750](#) as 'stand alone' provisions unrelated to the rest of the statute" (dis. opn., *post*, at p. 1163), it is [\*1158] actually the dissent that treats [section 16750](#) as a "stand alone" provision, ignoring the other relevant sections mentioned above.<sup>8</sup>

[\*\*\*31] IV

[CA\(3\)\[↑\]](#) (3) PG&E contends that even if the County may bring an antitrust action under the state Cartwright Act, it lacked the capacity in its federal lawsuit to allege violations of *federal* antitrust laws. The capacity to bring an action under federal law, PG&E points out, is governed by the law of the state in which the district court where the action was brought is located. ([Fed. Rules Civ. Proc., rule 17\(b\)](#), 28 U.S.C. [with certain exceptions not relevant here, "capacity to sue or be sued shall be determined by the law of the state in which the district court is held . . . ."]; *Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n. (9th Cir. 1993) 997 F.2d 581, 584*.) The County brought its federal antitrust action in the district court for the Eastern District of California. Accordingly, California law governs the County's capacity to allege violations of federal antitrust laws in its federal lawsuit.

PG&E argues that under the California Constitution, counties do not have the inherent power to sue; rather, the Constitution has vested the Legislature with the power to determine the circumstances in which counties may sue and be sued. According to PG&E, the Legislature has [\*\*\*32] not granted counties authority to bring federal

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<sup>8</sup> The dissent also cites [D'Amico v. Board of Medical Examiners \(1974\) 11 Cal. 3d 1 \[112 Cal. Rptr. 786, 520 P.2d 10\]](#), which explains that the state Attorney General has broad common law powers to file civil actions in proceedings involving the interests of the state. D'Amico says nothing, however, relevant to the issue in this case: whether the Attorney General has the *exclusive* power to bring an action under the Cartwright Act on behalf of a county.

antitrust actions. Although we agree with PG&E that the state Constitution does not give counties the inherent power to sue, we conclude that the Legislature has given them the power to do so, as we explain below.

**HN13** [↑] The California Constitution authorizes the Legislature to enact legislation specifying the powers of counties. (*Cal. Const., art. XI, § 1, subd. (b)*) ["The Legislature shall provide for county powers . . . ."].) Thus, under California law, counties may sue or be sued only if so authorized by the Legislature: "The county is merely a political subdivision of state government, exercising only the powers of the state, granted by the state . . . ." (*County of Marin v. Superior Court* (1960) 53 Cal. 2d 633, 638 [2 Cal. Rptr. 758, 349 P.2d 526].)

**HN14** [↑] The Legislature, however, has declared that counties have "corporate powers" (*Gov. Code, § 23000*) and that those powers include the right to [\*1159] "[s]ue and be sued" (*Gov. Code, § 23004, subd. (a)*). Thus, unless specifically limited by some other legislative provision, a county enjoys the same powers as any other corporate entity in seeking damages for injuries suffered.

[\*\*\*\*33] PG&E argues that *Government Code section 23004* is inapplicable because it does not, by itself, create any cause of action. The County, however, has not initiated a complaint under *Government Code section 23004*; instead, it has brought a federal antitrust suit. *Section 23004* merely confers on a county the capacity to bring such an action.

PG&E's amici curiae allies argue that even if *Government Code section 23004* could be construed as investing the County with the *capacity* to sue for violation of federal antitrust laws, the state Cartwright Act gives the state Attorney General the exclusive *authority* to bring such actions on the County's behalf. We disagree. Although the Cartwright Act permits the Attorney General to bring an action on a county's behalf asserting violations of federal antitrust laws (see *§ 16750, subd. (c)* [Attorney General may sue on behalf of the political subdivisions of the state for a violation of the Cartwright \*\*\*302 \*\*\*340 Act or "any comparable provision of federal law"]), it does not prohibit a county from bringing such an action.

For the reasons given above, we conclude that the state Cartwright Act does not prohibit a county from bringing [\*\*\*\*34] an action in federal court for violations of federal *antitrust law*.

The judgment of the Court of Appeal is affirmed.

George, C. J., Mosk, J., Werdegar, J., Bamattre-Manoukian, J., \* and Buckley, J., \*\* concurred.

**Dissent by:** BROWN

## Dissent

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**BROWN, J.,**

Dissenting.--Read against the background of historical practice, the language of *Business and Professions Code section 16750 (section 16750)* outlines a sensible scheme to rationalize the filing of antitrust proceedings on behalf of California's state government. Legally speaking, that government includes not only the state itself but its many political subdivisions--statewide agencies, counties, cities, an even greater [\*\*\*\*35] number of school districts, and many other lesser units. The statute appears designed to implement an antitrust enforcement policy with the following features: [\*1160] First, it *reaffirms* the "capacity" of the state to bring Cartwright Act antitrust claims,

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\* Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

\*\* Associate Justice, Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

explicitly granting political subdivisions a cause of action. Second, it confers on the Attorney General *exclusive* authority to institute such suits. Third, it provides an exception to that authority in the limited class of cases where the effects of an antitrust defendant's conduct "occur primarily within [one] county." And last, even in *that* limited circumstance, it requires the local district attorney to obtain presuit approval and permits the Attorney General to take charge of the litigation when the public interest makes it advisable to do so.

I

The language and history of [section 16750](#) not only belie the majority's construction, but demonstrate that in the amendments of 1961 and 1977, the Legislature was seeking to codify an orderly, rational decisional structure for filing multicounty antitrust claims on behalf of California governments. The division of authority settled on sensibly centralized decisionmaking [\*\*\*\*36] at the highest level of public lawyering. As one court has written, reflecting on a similar context involving federal antitrust claims by a state's political subdivisions: "Justice and judicial economy is best served by having the largest governmental unit sue on behalf of all its parts rather than having multiple suits brought by various political subdivisions within the State." ( [State of Illinois v. Associated Milk Producers, Inc. \(N.D.Ill. 1972\) 351 F. Supp. 436, 440](#); see also [Nash Cty. Bd. of Ed. v. Biltmore Co. \(4th Cir. 1981\) 640 F.2d 484, 496](#) (Nash County); [State of Illinois v. Harper & Row Publishers, Inc. \(N.D.Ill. 1969\) 301 F. Supp. 484, 495](#) /6 A.L.R.Fed. 1<sub>j</sub>)

Relying on our opinion in [D'Amico v. Board of Medical Examiners \(1974\) 11 Cal. 3d 1](#) /112 Cal. Rptr. 786, 520 P.2d 10<sub>j</sub> (D'Amico), the federal Court of Appeals for the Fifth Circuit has provided a nutshell description of the powers of the nation's state attorneys general. In [State of Fla. ex rel. Shevin v. Exxon Corp. \(5th Cir. 1976\) 526 F.2d 266](#), that court wrote "the attorneys general of our states have enjoyed a significant degree of autonomy. Their duties and powers typically [\*\*\*\*37] are not exhaustively defined by either constitution or statute but include all those exercised at common law. There is and has been no doubt that the legislature may deprive the attorney general of specific powers; but in the absence of such legislative action, he typically may exercise all such authority as the public interest requires." ( *Id. at p. 268*, fn. omitted; see also *Nash County, supra*, 640 F.2d at p. 494 ["At common law, an attorney general, in the absence of some restriction on his powers by statute or constitution, has complete authority as the representative of the State or any of its political subdivisions 'to recover damages . . . . [\*\*303] [\*\*\*\*341] alleged to have been sustained . . . ' even though those subdivisions may not have [\*1161] 'affirmatively authorized suit.' " (Italics added.); [In re Armored Car Antitrust Litigation \(5th Cir. 1981\) 645 F.2d 488, 492](#).) Given the extensive historical common law powers of the office of Attorney General in the United States and in California, we ought to begin with a presumption: *Unless the contrary appears affirmatively by statute, the Attorney General has exclusive authority to institute Cartwright [\*\*\*\*38] Act antitrust proceedings on behalf of all government entities.*

In other words, in sorting out who within state government has authority to represent whom in judicial proceedings, the starting point is not the assumption that counties possess authority to institute Cartwright Act suits in their own right. Instead, courts should start with the inherent authority of the Attorney General to represent all state entities. The next question is whether that authority has been withdrawn or transferred elsewhere. Has the Legislature affirmatively authorized Stanislaus County to institute the antitrust suit out of which this case arises? The majority has no difficulty arriving at the wrong answer to that question. It looks to the text of [subdivision \(a\) of section 16750](#), a provision that says in substance, "Any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by [the Cartwright Act] may sue . . . ." Because subdivision (b) of the statute declares the "state and any of its political subdivisions and public agencies shall be deemed a person within the meaning of" (italics added) [section 16750](#), the majority concludes the County [\*\*\*\*39] of Stanislaus is "a person" injured in its "business or property" by Pacific Gas and Electric Company's (PG&E) conduct. Therefore, it "may sue."

But the majority's syllogism is doubly flawed. First, it overlooks a settled distinction of public law. Although a public entity may have "capacity" or "standing to sue," it does not follow from that alone that the Legislature has granted it *authority* to institute litigation by counsel of its choosing. (See, e.g., [Museum Boutique Intercontinental, Ltd. v. Picasso \(S.D.N.Y. 1995\) 886 F. Supp. 1155, 1159](#) ["'[C]apacity' and 'authority' are distinct concepts. See generally Black's Law Dictionary 803, 121 (5th Ed.1979) (defining 'capacity' as the ability of a particular . . . entity to use . . .

the courts . . . and 'authority' as the permission or right to exercise power."); *Brown v. Ortho Diagnostic Systems, Inc. (E.D.Va. 1994) 868 F. Supp. 168, 170* ["[T]he question presented here is not who can sue or be sued, but rather who can represent whom in federal court."]; 6A Wright et al., Federal Practice and Procedure (1990) § 1562, p. 454 ["A grant of capacity to a governmental corporation only means that it may sue [\*\*\*\*40] or be sued in its own name, as opposed to that of the government . . ."].)

Second, *subdivision (b) of section 16750* does not declare that "the state and any of its political subdivisions . . . shall be deemed [persons]." Its [\*1162] grammar is more subtle. The statute declares that for Cartwright Act purposes, these entities "shall be deemed a person." (*§ 16750, subd. (b)*, italics added.) In other words, the state, its constituent agencies, the counties, all the political entities making up California's scheme of government *together* comprise "a" jural person for Cartwright Act purposes. The drafter's choice of words is suggestive. It reinforces the view that what the Legislature intended when it added subdivisions (b) and (c) to *section 16750* in 1961 was the creation of both a single "unitary public plaintiff" (as the Attorney General put it at oral argument) and the preservation of a kind of statutory pyramid that confers on the state's chief legal officer the exclusive authority to say "yea" or "nay" to proposed multicounty Cartwright Act litigation, from the most sprawling county to the smallest water district.

## II

The majority accepts the proposition [\*\*\*\*41] that the county has the *capacity* to file this action. (See maj. opn., *ante*, at p. 1150.) Yet it rejects PG&E's corollary argument that *section 16750* grants the county nothing *more* than a cause of action for injuries resulting from business conduct proscribed by the Cartwright [\*\*304] [\*\*\*342] Act. Read as a whole, PG&E argues, *section 16750* not only does *not* authorize counties to commence such proceedings, it confers that power solely on the Attorney General. I agree.

Like many other American jurisdictions, the California Constitution recognizes the Attorney General as the government's highest legal official. (*Cal. Const., art. V, § 13* ["[T]he Attorney General shall be the chief law officer of the State."].) "As such he possesses not only extensive statutory powers but also broad powers derived from the common law relative to the protection of the public interest. [Citations.] . . . '[I]n the absence of any legislative restriction, [he] has the power to file any civil action or proceeding directly involving the rights and interests of the state . . . .' [Citation.]" (*D'Amico, supra, 11 Cal. 3d at pp. 14-15*, italics added.) In deciding [\*\*\*\*42] who is entitled to bring suit on behalf of the state and its subdivisions, courts thus *start* with the presumption that the government officer authorized to represent the state and subordinate elements of government is the Attorney General. They then look for some affirmative indication that the Legislature has made a contrary designation.

At the federal level, the conclusion we reached in *D'Amico, supra, 11 Cal. 3d 1*, is imposed by statute, reflecting a kind of nationwide template that has been around since the formative years of the republic. *Section 516 of title 28 of the United States Code* provides: "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is [\*1163] reserved to officers of the Department of Justice, under the direction of the Attorney General." The federal Court of Appeals for the Fifth Circuit has said of *section 516* that it means "when an agency is given *specific authorization* to proceed without the assistance or supervision of the Attorney General it may do so." ( *I.C.C. v. Southern Ry. Co. (5th Cir. 1976) \*\*\*\*431 543 F.2d 534, 538*, italics added.) Absent specific authorization, and given the Attorney General's "plenary power and supervision over all government litigation," federal agencies *lack* the authority to proceed *without* Department of Justice approval and representation. ( *Id. at p. 535*.) This principle of representational authority, the Fifth Circuit went on to say, "not only centralizes responsibility for the conduct of public litigation but enables the President, through the Attorney General, to supervise the various policies of the executive branch." ( *Id. at p. 536*; see also *The Confiscation Cases (1868) 74 U.S. (7 Wall.) 454, 458 [19 L. Ed. 196]*.)

Yet according to the majority's logic, not just the Attorney General is authorized to file multicounty Cartwright Act suits. *All* of the state's 58 counties, *all* of its 470-plus cities, *all* of the 4,500 school districts, and *all* of the many less-well-known agencies and subunits of the state's political organization are authorized by *section 16750, subdivision (b)* to file such suits as well. Finally, California's 58 district attorneys, whose authority, as the majority

acknowledges, is limited by statute [\*\*\*\*44] to cases in which the asserted antitrust injury is "local," must also be counted among those who may institute suit. Conflating "capacity" and "authority," and reading subdivisions (a) and (b) as if the rest of section 16750 did not exist, the majority concludes the amendments of 1961 and 1977 were not intended to rationalize enforcement of multicounty antitrust claims on behalf of government entities by concentrating them in a central authority. They were meant, the majority concludes, to achieve the *opposite* result: enlarging the class of government entities authorized to file multicounty antitrust suits.

### III

We do not need unpronounceable Latin phrases ("*expressio unius est exclusio alterius*"), string citations, or Sutherland on Statutory Construction to know a statute made up of parts ought to be read as a whole, integrating its subdivisions so that each has meaning, the statute in its entirety makes sense and is faithful to the apparent legislative purpose. The majority nevertheless insists on reading subdivisions (a) and (b) of section 16750 as "stand alone" provisions unrelated to the rest of the statute. The result [\*\*305] [\*\*\*343] is what often happens when parts of [\*\*\*\*45] a statute are read in isolation--some are robbed of all meaning, while the content of others is distorted.

Originally enacted in 1907, section 16750 of the Cartwright Act underwent a major legislative overhaul in 1961. (Stats. 1961, ch. 1023, § 1, pp. [\*1164] 2705-2706.) In that year, the Legislature added what is now subdivision (b), providing that the state and its political subdivisions are "a person" within the meaning of subdivision (a), the provision that confers a cause of action for damages on those injured by certain kinds of proscribed business conduct. (Stats. 1961, ch. 1023, § 1, p. 2706, italics added.) As the Legislature described subdivision (b) at the time it was enacted, it was "added to . . . section 16750 for the purpose of clarification only and is not to be construed or interpreted as an indication that the State or any of its political subdivisions or public agencies is not a person within the meaning of Section 16750 as originally enacted . . . . The Legislature hereby further declares that at the time of the original enactment of Section 16750, and at all times since, it intended that the State, its political subdivisions and public agencies [\*\*\*46] be included within the meaning of the word 'person.' " (Stats. 1961, ch. 1023, § 2, p. 2706.)

Also in 1961, the Legislature amended another Cartwright Act statute, section 16754, to authorize county district attorneys to file civil or criminal antitrust proceedings alleging violations "on the order of the Attorney General." (Stats. 1961, ch. 757, § 1, p. 2013.) In 1977, however, after the Attorney General had expressed concern that the decentralization of authority to file such proceedings effected by the 1961 amendment would hobble his office's control over antitrust litigation on behalf of the government, the Legislature again amended section 16750. The compromise it settled on is reflected in subdivision (g) as it reads today. That provision limits the authority of county district attorneys to file Cartwright Act proceedings to cases in which "it appears that the activities giving rise to [the proceeding] or the effects of such activities occur primarily within such county." (§ 16750, subd. (g), added by Stats. 1977, ch. 540, § 1, p. 1743, italics added.)

What could have been the Legislature's motive in enacting subdivision (g) of section 16750 if, as the majority [\*\*\*\*47] concludes, counties and other subdivisions *already had* the authority to file Cartwright Act proceedings? We can hardly suppose the Legislature labored over this dense, reticulated scheme to add yet *another* layer to the host of government lawyers who, under the majority's reading, were already authorized to file Cartwright Act suits. On the other hand, if as I believe, only the Attorney General was (and is) authorized to institute such proceedings, the addition of subdivision (g) is eminently sensible. Leaving intact the Attorney General's central command over multicounty Cartwright Act government claims litigation, the 1977 amendment sensibly parceled out to county district attorneys the authority to institute suit where the effects of the proscribed business conduct are *local*. (§ 16750, subd. (g).) And as a check on the possibility of litigative improvidence, subdivision (g) requires district attorneys contemplating such suits to [\*1165] file with the Attorney General an advance copy of the proposed complaint "together with a confidential memorandum and report explaining the facts giving rise to the proposed prosecution and supporting the filing of the new complaint." [\*\*\*48] (*Ibid.*) Finally, the 1977 amendment provides that if the Attorney General deems it "in the public interest," he "may take full charge of any such investigation or prosecution . . ." (*Ibid.*)

I am at a loss to imagine what these restraints were intended to accomplish if they do not manifest a legislative intention to insure a continuation of central control over the filing of multicounty Cartwright Act and related antitrust proceedings. Of a similar scheme enacted by another state Legislature, the federal Fourth Circuit Court of Appeals has written: "[C]ommon sense dictates that when an alleged wrong affects governmental units on a state-wide basis, the state should seek redress on their behalf as well as on its own rather than parcelling out the actions among local agencies. However, to ease the administrative burden on the Attorney General's office, when a single local [government entity] is wronged, that unit should individually **[\*\*306]** **[\*\*\*344]** pursue the remedy . . . . This is the scheme, we believe, that the North Carolina Legislature had in mind when it adopted [the statute at issue]."*(Nash County, supra,* 640 F.2d at p. 496, fn. omitted.) That, I suggest, **[\*\*\*\*49]** is this case.

## Conclusion

We ought to give more thought to the potential impact of today's ruling --on California as an organized scheme of government, on the state's relation to its constituent political departments, on those who pay taxes and do business here. The result reached by the majority is a crazy quilt of overlapping, conflicting authority to file multicounty antitrust litigation willy-nilly, one likely to generate needless intergovernmental conflict and conclude prematurely some public antitrust claims on res judicata grounds. It amounts to a judge-drawn scheme especially inadvisable in antitrust litigation. In the entire domain of public regulatory law, the field of antitrust, with its "rule of reason" standards, sophisticated economic analysis, and often fine line between restraining predatory practices and stifling beneficial economic competition, seems the *least* likely candidate for the fractured and diffused litigative authority upheld by the majority.

Antitrust litigation brought by the Attorney General is more likely to be taken seriously by a targeted defendant. Not only does that office have greater investigative resources, expertise and staying power, **[\*\*\*\*50]** but the fact that the state's highest legal office has placed its imprimatur on the pleadings--implicitly representing the complaint as reflecting that office's considered views of the public interest--adds heft to allegations of antitrust misconduct. **[\*1166]** These observations, of course, have lost their force now that the majority's view has become the law of California. In their place, we are apt to be treated to a horse race of multicounty Cartwright Act suits brought by any number of political subdivisions, a spectacle that will not only undermine the weight accorded centrally vetted antitrust filings, but one likely to generate confusion in several areas--issue preclusion, collateral estoppel, and the practicability of effective settlements among them.

Nor should we lose sight of the fact that the check on the filing of ill-conceived antitrust litigation that follows from the Attorney General's centralized control over the decision to initiate suit strengthens the government's hand by promoting a thorough presuit scrutiny. The unspoken proposition underlying the majority's conclusion seems to be that the economic interests of the counties have a dignity equal to that of **[\*\*\*\*51]** the state. If so, the argument might run, counties must have an equal right to decide for themselves whether to file Cartwright Act proceedings. Suppose the Attorney General declines to institute suit to challenge business practices that two or more counties believe harm their economic interests. What then? Are these units of government to be left without an antitrust remedy?

The answer may sometimes be "yes." But that is not quite the catastrophe the majority evidently apprehends. "Counties under the scheme of California government are 'mere subdivisions of the State.' (*Cal. Const., art XI, § 1.*)" (*Byers v. Board of Supervisors* (1968) *262 Cal. App. 2d 148, 155 [68 Cal. Rptr. 549]*; see also *Hicks v. Board of Supervisors* (1977) *69 Cal. App. 3d 228, 242 [138 Cal. Rptr. 101]*.) Joined to that contingent legal status is the practical reality: If government is to protect the economic security of its constituent parts *and* act with the deliberative fairness California's citizens are entitled to expect, someone must be in charge. The alternative fractures the unitary system of government contemplated by our Constitution and, to borrow a still powerful metaphor from the ancient **[\*\*\*\*52]** world, drives a wedge between the state's head and its constituent body. (Plato, *The Republic*.) Because, unlike the majority, I do not believe the counties' capacity to sue must inevitably trump the broader community interest in cooperation, I dissent.



## Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.

Supreme Court of California

April 8, 1999, Decided

No. S066735.

### **Reporter**

20 Cal. 4th 163 \*; 973 P.2d 527 \*\*; 83 Cal. Rptr. 2d 548 \*\*\*; 1999 Cal. LEXIS 1656 \*\*\*\*; 99 Daily Journal DAR 3360; 99 Cal. Daily Op. Service 2576; 1999-1 Trade Cas. (CCH) P72,495

CEL-TECH COMMUNICATIONS, INC., et al., Plaintiffs and Appellants, v. LOS ANGELES CELLULAR TELEPHONE COMPANY, Defendant and Respondent.

**Prior History:** [\*\*\*\*1] Superior Court of Los Angeles County. Super. Ct. No. VC015535. C. Robert Simpson, Jr., Judge.

**Disposition:** The judgment of the Court of Appeal is affirmed. The unfair competition law cause of action shall be retried consistently with the legal principles stated in this opinion.

## **Core Terms**

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below-cost, sales, unfair competition, prices, competitors, Cellular, unfair, anti trust law, consumers, cellular service, unfair practice, destroy the competition, compete, cellular telephone, seller, predatory, injure a competitor, deceptive, courts, profits, practices, court of appeals, cellular phone, violations, telephone, selling, retail, business practice, loss leader, cause of action

## **LexisNexis® Headnotes**

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

### **HN1** **Regulated Practices, Trade Practices & Unfair Competition**

To violate [Cal. Bus. & Prof. Code §§ 17043, 17044](#), which prohibit below-cost sales and loss leaders, a company must act with the purpose or desire of injuring competitors or destroying competition.

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

### **HN2** **Regulated Practices, Trade Practices & Unfair Competition**

[Cal. Bus. & Prof. Code § 17043](#) provides that it is unlawful for any person engaged in business within the 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.

Torts > Intentional Torts > Defenses > Intent

### **HN3** **Defenses, Intent**

"Intent," in the law of torts, denotes not only those results the actor desires, but also those consequences which he knows are substantially certain to result from his conduct.

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

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

### **HN4** **Regulated Practices, Trade Practices & Unfair Competition**

Cal. Bus. & Prof. Code § 17044 provides that it is unlawful for any person engaged in business within the state to sell or use any article or product as a "loss leader" as defined in Cal. Bus. & Prof. Code § 17030. Section 17030, in turn, defines "loss leader" as any article or product sold at less than cost: (a) where the purpose is to induce, promote or encourage the purchase of other merchandise; or (b) where the effect is a tendency or capacity to mislead or deceive purchasers or prospective purchasers; or (c) where the effect is to divert trade from or otherwise injure competitors. On its face, this language does not appear to require any culpable mental state when subdivision (c) applies.

Governments > Legislation > Interpretation

### **HN5** **Legislation, Interpretation**

Legislative inaction is often not a convincing reason to refuse to change a statutory interpretation.

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

### **HN6** **Regulated Practices, Trade Practices & Unfair Competition**

The California unfair competition law's scope is broad. Unlike the California Unfair Practices Act, it does not proscribe specific practices. Rather, it defines "unfair competition" to include "any unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. Its coverage is sweeping, embracing anything that can properly be called a business practice and that at the same time is forbidden by law. It governs "anti-competitive business practices" as well as injuries to consumers, and has as a major purpose the preservation of fair business competition. By proscribing any unlawful business practice, § 17200 borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable.

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

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Advertising > Elements of False Advertising

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

### **HN7** **Regulated Practices, Trade Practices & Unfair Competition**

See [Cal. Bus. & Prof. Code § 17200](#).

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

#### [HN8](#) **Regulated Practices, Trade Practices & Unfair Competition**

A plaintiff may not "plead around" an absolute bar to relief simply by recasting the cause of action as one for unfair competition. The rule does not, however, prohibit an action under the unfair competition law merely because some other statute on the subject does not, itself, provide for the action or prohibit the challenged conduct.

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

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Murder > General Overview

#### [HN9](#) **Regulated Practices, Trade Practices & Unfair Competition**

To forestall an action under the unfair competition law, [Cal. Bus. & Prof. Code § 17200 et seq.](#), another provision must actually "bar" the action or clearly permit the conduct.

Constitutional Law > The Judiciary > Jurisdiction > General Overview

#### [HN10](#) **The Judiciary, Jurisdiction**

The appellate courts have neither the power nor the duty to determine the wisdom of any economic policy; that function rests solely with the legislature.

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

#### [HN11](#) **Regulated Practices, Trade Practices & Unfair Competition**

An unfair business practice occurs when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. The court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim.

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

#### [HN12](#) **Regulated Practices, Trade Practices & Unfair Competition**

Antitrust laws were enacted for the protection of competition, not competitors.

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

#### [HN13](#) **Regulated Practices, Trade Practices & Unfair Competition**

Injury to a competitor is not equivalent to injury to competition; only the latter is the proper focus of antitrust laws.

## Headnotes/Summary

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### Summary

#### CALIFORNIA OFFICIAL REPORTS SUMMARY

Sellers of cellular telephones brought an action against a company that sold cellular telephones below cost to gain subscribers for its cellular service. Plaintiffs alleged several causes of action, including violations of the Unfair Practices Act ([Bus. & Prof. Code, § 17000 et seq.](#)) and the unfair competition law ([Bus. & Prof. Code, § 17200 et seq.](#)). The trial court found that there was no violation of the Unfair Practices Act because defendant intended merely to compete with a third party, not to harm plaintiffs. It thus ruled that the action under the unfair competition law necessarily failed along with the other causes of action. (Superior Court of Los Angeles County, No. VC015535, C. Robert Simpson, Jr., Judge.) The Court of Appeal, Second Dist., Div. Three, No. B094578, reversed as to the cause of action under the unfair competition law and affirmed the judgment as to the other causes of action. Although the Court of Appeal found that defendant proved it did not have injurious intent and therefore did not violate the Unfair Practices Act, it further found that defendant's actions might nevertheless have violated the unfair competition law and remanded the matter for retrial on that cause of action.

The Supreme Court affirmed the judgment of the Court of Appeal, including the remand for retrial of the unfair competition law cause of action. With regard to the cause of action under the Unfair Practices Act, the court held that plaintiffs failed to show defendant violated [Bus. & Prof. Code, § 17043](#) (sales below cost "for the purpose of injuring competitors or destroying competition"), since plaintiffs did not establish defendant acted with the necessary culpable mental state. Upon finding that defendant's purpose was only to compete with a third party rather than to injure plaintiffs, the lower courts were correct in concluding defendant did not violate [Bus. & Prof. Code, § 17043](#). Plaintiffs' action under [Bus. & Prof. Code, § 17044](#), failed for the same reason. The court further held that the trial court erred in concluding that plaintiffs' unfair competition law cause of action necessarily failed when causes of action under the Unfair Practices Act failed. If defendant's below-cost sales did not come within either the safe harbor of [Bus. & Prof. Code, § 17026.1](#) (cellular services providers may sell cellular phones below cost as good faith endeavor to meet legal market prices of competitors), nor the direct prohibitions of [Bus. & Prof. Code, §§ 17043](#) and [17044](#), defendant's conduct could nonetheless be considered unfair under the unfair competition law. Thus, it was necessary to remand to determine if defendant's conduct was in fact unfair under the unfair competition law--i.e., conduct that threatens an incipient violation of an [antitrust law](#), or that violates the policy or spirit of one of those laws because its effects are comparable to a violation of the law, or that otherwise significantly threatens or harms competition. (Opinion by Chin, J., with George, C. J., Mosk and Brown, JJ., and Dibiaso, J., \* concurring. Concurring and dissenting opinion by Kennard, J. (see p. 191). Concurring and dissenting opinion by Baxter, J. (see p. 206).)

### Headnotes

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

##### Unfair Competition § 3—Unfair Practices Act—Below-cost Sales and Loss Leaders—Necessary Culpable Mental State.

--In an action under the Unfair Practices Act by sellers of cellular telephones against a company that sold cellular telephones below cost to gain subscribers for its cellular service, plaintiffs failed to show defendant violated [Bus. & Prof. Code, § 17043](#) (sales below cost "for the purpose of injuring competitors or destroying competition"), since plaintiffs did not establish defendant acted with the necessary culpable mental state. [Bus. & Prof. Code, § 17043](#),

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\* Associate Justice of the Court of Appeal, Fifth District, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).

uses the word "purpose," not "intent" or "knowledge." An action is not purposive with respect to a result unless the actor consciously desired to cause such a result. Upon finding that defendant's purpose was only to compete with a third party rather than to injure plaintiffs, the court was correct in concluding defendant did not violate [Bus. & Prof. Code, § 17043](#). It is not sufficient to show defendant's knowledge that injuring competitors or destroying competition would result. Plaintiffs' action under [Bus. & Prof. Code, § 17044](#) (loss leaders), failed for the same reason--they did not prove defendant acted with the necessary purpose. Although on its face, the language of [Bus. & Prof. Code, § 17044, subd. \(c\)](#), which prohibits use of loss leaders, does not appear to require any culpable mental state, courts have unanimously interpreted the statute as containing the same mental state requirement as [Bus. & Prof. Code, § 17043](#), i.e., the purpose to injure competitors or to destroy competition.

[See 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 591 et seq.]

#### [CA\(2\)](#) [blue down arrow] (2)

##### **Unfair Competition § 4—Unfair Competition Law—Scope.**

--The scope of the unfair competition law ([Bus. & Prof. Code, § 17200 et seq.](#)), is broad. Unlike the Unfair Practices Act ([Bus. & Prof. Code, § 17000](#)), the unfair competition law does not proscribe specific practices. Rather, it defines "unfair competition" to include any unlawful, unfair or fraudulent business act or practice ([Bus. & Prof. Code, § 17200](#)). Its coverage is sweeping, embracing anything that can properly be called a business practice and that at the same time is forbidden by law. It governs anticompetitive business practices as well as injuries to consumers, and it has as a major purpose the preservation of fair business competition. By proscribing "any unlawful" business practice, [Bus. & Prof. Code, § 17200](#), borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable. Additionally, the statutory language referring to "any unlawful, unfair or fraudulent" practice makes clear that a practice may be deemed unfair even if not specifically proscribed by some other law. Because [Bus. & Prof. Code, § 17200](#), is written in the disjunctive, it establishes three varieties of unfair competition--acts or practices that are unlawful, or unfair, or fraudulent. The Legislature intended by this sweeping language to permit tribunals to enjoin ongoing wrongful business conduct in whatever context this activity might occur.

#### [CA\(3\)](#) [blue down arrow] (3)

##### **Unfair Competition § 4—Unfair Competition Law—Scope—As Limited by Specific Legislation.**

--Although the scope of the unfair competition law ([Bus. & Prof. Code, § 17200 et seq.](#)) is sweeping, it is not unlimited. A plaintiff may not bring an action under the unfair competition law if other specific legislation bars it. However, the other provision must actually bar the action and not merely fail to allow it. In other words, courts may not use the unfair competition law to condemn conduct the Legislature permits. Conversely, the Legislature's mere failure to prohibit conduct does not prevent a court from finding it unfair.

#### [CA\(4\)](#) [blue down arrow] (4)

##### **Unfair Competition § 4—Unfair Competition Law—Determination of What Conduct Is "Unfair."**

--If no statute provides a safe harbor for conduct challenged under the unfair competition law ([Bus. & Prof. Code, § 17200 et seq.](#)), a court must determine whether the conduct is unfair within the meaning of that law. In doing so, courts may not apply purely subjective notions of fairness, but rather may turn for guidance to unfair competition jurisprudence arising under the parallel section 5 of the Federal Trade Commission Act ([15 U.S.C. § 45\(a\)](#)). Ultimately, any finding of unfairness to competitors under [Bus. & Prof. Code, § 17200](#), must be tethered to some legislatively declared policy or proof of some actual or threatened effect on competition, resulting in adoption of the

following test. In a challenge to a direct competitor's "unfair" act or practice under [§ 17200](#), the word "unfair" in that section means conduct that threatens an incipient violation of an [antitrust law](#), or that violates the policy or spirit of one of those laws because its effects are comparable to a violation of the law, or that otherwise significantly threatens or harms competition.

#### [CA\(5a\)](#) [ ] (5a) [CA\(5b\)](#) [ ] (5b)

##### **Unfair Competition § 4—Unfair Competition Law—Determination of What Conduct Is "Unfair"—Below-cost Sales of Cellular Phones to Gain Subscribers for Cellular Service.**

--In an action by sellers of cellular telephones against a company that sold cellular telephones below cost to gain subscribers for its cellular service, the trial court erred in concluding that plaintiffs' unfair competition law cause of action ([Bus. & Prof. Code, § 17200 et seq.](#)) necessarily failed when causes of action under the Unfair Practices Act failed. In determining if defendant's conduct was unfair under the unfair competition law, it was first necessary to determine if the Legislature provided a "safe harbor" for defendant's conduct. If defendant's below-cost sales did not come within either the safe harbor of [Bus. & Prof. Code, § 17026.1](#) (cellular services providers may sell cellular phones below cost as good faith endeavor to meet legal market prices of competitors), nor the direct prohibitions of [Bus. & Prof. Code, §§ 17043](#) and [17044](#) (below-cost sales and loss leaders), defendant's conduct could nonetheless be considered unfair under the unfair competition law. Thus, it was necessary to determine if defendant's conduct was in fact unfair under the unfair competition law--i.e., conduct that threatens an incipient violation of an [antitrust law](#), or whose effects are comparable to a violation of the law, or that otherwise significantly threatens or harms competition. The trial court was required to determine this issue, and given defendant's government-protected position in the Los Angeles area duopoly cellular service market, the fairness of its below-cost sales of cellular equipment required careful scrutiny at trial.

#### [CA\(6\)](#) [ ] (6)

##### **Unfair Competition § 4—Acts Constituting Unfair Competition—Low Prices.**

--Courts must be particularly cautious in evaluating claims that a competitor's prices are too low. Pricing practices are not unfair merely because a competitor may not be able to compete against them. Low prices often benefit consumers and may be the very essence of competition. Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. Courts must not prohibit vigorous competition nor render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such result, for it is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition.

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Gibson, Dunn & Crutcher, Robert C. Bonner, Rex S. Heinke, Mark Erich Weber, Joel [\*\*\*\*2] S. Sanders, Kathleen M. Vanderziel and Theodore J. Boutrous for Defendant and Respondent.

20 Cal. 4th 163, \*163 973 P.2d 527, \*\*527 83 Cal. Rptr. 2d 548, \*\*\*548 1999 Cal. LEXIS 1656, \*\*\*\*2

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Wright & Talisman, Michael B. Day and Margaret A. Rostker for Cellular Carriers Association of California as Amicus Curiae on behalf of Defendant and Respondent.

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Fred J. Hiestand for the Association for California Tort Reform as Amicus Curiae on behalf of Defendant and Respondent.

Howard, Rice, Nemerovski, Canady, Falk & Rabkin, Jerome B. Falk, Jr., Pauline E. Calande; [\*\*\*\*3] Sheppard, Mullin, Richter & Hampton, Gary L. Halling and Thomas D. Nevins for the Hearst Corporation and San Francisco Newspaper Printing Company as Amici Curiae.

Peter Arth, Jr.; Mark Fogelman; and Fred Harris for the Public Utilities Commission of the State of California as Amicus Curiae.

**Judges:** Opinion by Chin, J., with George, C. J., Mosk and Brown, JJ., and Dibiaso, J., \* concurring. Concurring and dissenting opinion by Kennard, J. see p. 191. Concurring and dissenting opinion by Baxter, J. see p. 206.

**Opinion by:** CHIN

## Opinion

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[\*168] [\*\*532] [\*\*\*553] CHIN, J.

Defendant Los Angeles Cellular Telephone Company (L.A. Cellular) sells cellular telephones and services. Cellular telephones are sold on the open market. As to wholesale sales of cellular services, however, L.A. Cellular has a government-protected "duopoly" status with one other company. In an effort to gain new subscribers for its services and increase overall profits, L.A. Cellular sold telephones below cost. It lost money on telephone [\*\*\*\*4] sales but made up for those losses with its increased sales of services. Plaintiffs are companies that sell cellular telephones but may not sell services. These companies claim that, because they are not allowed to sell services, they cannot fairly compete with L.A. Cellular's strategy of selling telephones below cost and recouping the losses with profits on the sales of services. The action requires us to interpret California's Unfair [\*169] Practices Act ([Bus. & Prof. Code, § 17000 et seq.](#))<sup>1</sup> and unfair competition law ([§ 17200 et seq.](#)).<sup>2</sup>

We conclude that [HN1](#) to violate [sections 17043](#) [\*\*\*\*5] and [17044](#), part of the Unfair Practices Act, which prohibit below-cost sales and loss leaders, a company must act with the purpose, i.e., the desire, of injuring competitors or destroying competition. We also conclude that, even if L.A. Cellular's actions lacked the purpose

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\* Associate Justice of the Court of Appeal, Fifth District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

<sup>1</sup> All further statutory citations are to the Business and Professions Code unless otherwise indicated.

<sup>2</sup> The Legislature has given [section 17200 et seq.](#) no official name. Accordingly, we are now using the label "unfair competition law." ([Stop Youth Addiction, Inc. v. Lucky Stores, Inc. \(1998\) 17 Cal. 4th 553, 558, fn. 2](#) [[71 Cal. Rptr. 2d 731, 950 P.2d 1086](#)].)

necessary to violate the Unfair Practices Act, they might be deemed unfair under the unfair competition law. We therefore agree with the Court of Appeal's conclusions and affirm its judgment.

## I. FACTUAL AND PROCEDURAL HISTORY

At the time relevant to this action,<sup>3</sup> the federal government licensed two companies to provide cellular telephone service in the Los Angeles area: L.A. Cellular and AirTouch Cellular. In addition to cellular service, L.A. Cellular sells cellular telephones. Plaintiffs Cel-Tech Communications, Inc., Comtech, Inc., Cellular Service, Inc., and Nutek, Inc., sell cellular telephones. The Court of Appeal opinion described L.A. Cellular's activities challenged in this action. "The high price of cellular telephones was the primary obstacle to L.A. Cellular's obtaining new subscribers for its service. Sales of cellular telephones are very price sensitive and a purchase of cellular equipment is [\*\*\*\*6] usually accompanied by a service activation or subscription to cellular service. Consequently, in the early 1990's, L.A. Cellular formulated a strategy of selling cellular telephones [\*\*\*54] below cost in order to increase the number of subscribers to its cellular telephone service. L.A. Cellular estimated that each service activation was worth \$ 1,500 to it. Thus, L.A. Cellular's multimillion-dollar losses on cellular [\*\*533] telephone equipment sales were easily offset by its profits on cellular service."

Plaintiffs sued L.A. Cellular, [\*\*\*\*7] alleging that its below-cost telephone sales practice harmed them. It alleged several causes of action including, as relevant here, that L.A. Cellular violated the Unfair Practices Act and the unfair competition law. The action under the Unfair Practices Act alleged [\*170] L.A. Cellular had unlawfully engaged in below-cost sales ([§ 17043](#)) and used loss leaders ([§ 17044](#)). The matter was tried before the court. At the end of plaintiffs' case-in-chief, and before the defense presented evidence, the court granted L.A. Cellular's motion for judgment under [Code of Civil Procedure section 631.8](#). It issued an extensive statement of decision. On the cause of action under the Unfair Practices Act, the court found that L.A. Cellular did engage in below-cost sales and used loss leaders, and that it thereby harmed plaintiffs. It found, however, that L.A. Cellular did not violate the Unfair Practices Act because it intended merely to compete with AirTouch Cellular, not to harm the plaintiffs. It also ruled that the action under the unfair competition law necessarily failed along with the other causes of action. Plaintiffs appealed.

The Court of Appeal reversed [\*\*\*\*8] as to the cause of action under the unfair competition law and affirmed the judgment as to the other causes of action. It held that L.A. Cellular proved it did not have an "injurious intent," and hence its actions did not violate [sections 17043](#) and [17044](#) of the Unfair Practices Act. It also held that L.A. Cellular's actions might nevertheless have violated the unfair competition law and remanded the matter for retrial on that cause of action. Plaintiffs petitioned for review of the holding regarding the Unfair Practices Act, and L.A. Cellular petitioned for review of the holding regarding the unfair competition law. We granted both petitions.

## II. DISCUSSION

Preliminarily, we note that some amici curiae have suggested that this action might infringe on the regulatory authority of the Public Utilities Commission (PUC). (See generally, [San Diego Gas & Electric Co. v. Superior Court \(1996\) 13 Cal. 4th 893, 918 \[55 Cal. Rptr. 2d 724, 920 P.2d 669\]](#); [Farmers Ins. Exchange v. Superior Court \(1992\) 2 Cal. 4th 377, 390-392 \[6 Cal. Rptr. 2d 487, 826 P.2d 730\]](#).) The Court of Appeal invited the PUC to file an amicus curiae brief addressing this question. [\*\*\*\*9] That brief concludes that it is unlikely this action will interfere with the PUC's regulatory responsibilities. Having considered the matter ourselves, we agree.

In 1995, the PUC issued an order largely rescinding prior prohibitions on the practice of "bundling," i.e., "packaging cellular telephone equipment with cellular service and discounting the price of the package." (*Re Regulation of Cellular Radiotelephone Utilities*, *supra*, 59 Cal.P.U.C.2d at p. 196.) The PUC expressed concern that cellular equipment dealers "will be unable to continue to profitably compete if bundling is permitted because of below-cost

<sup>3</sup>The situation may have changed somewhat in the meantime. "Competition in the cellular service market, which now consists of two regulated facilities-based carriers in each cellular market, will be expanded in many areas with the entry of an unregulated system . . ." (*Re Regulation of Cellular Radiotelephone Utilities* (1995) 59 Cal.P.U.C.2d 192, 203.) This opinion concerns only the facts reflected in the record and not possible recent developments.

equipment sales . . . ." (*Id.* at p. 206.) Despite this concern, it chose to [**\*171**] permit bundling, but stressed that "California, similar to the other states, has laws which restrict the practice of below-cost pricing (e.g., [Bus. & Prof.] Code [§ 17043](#)). Any bundling approval on our part must not violate or encourage any violation of below-cost pricing laws. California's prohibitions against below-cost pricing must be incorporated in any bundling authority that we may grant." (*Id.* at p. 205.) [**\*\*\*\*10**] Because of these laws, the PUC said, "there is no basis to assume that below-cost pricing of equipment of the sort prohibited by [[Business and Professions Code section](#) 17043] will occur." (*Id.* at p. 206.) Its order expressly permits bundling only if providers "conform to all applicable California and federal consumer protection and below-cost pricing laws." (*Id.* at p. 214.)

More recently, the PUC noted that the "court, not the [PUC], has jurisdiction to determine violations of antitrust laws," and that "[i]f an entity violates below-cost pricing law . . . , it is subject to the usual consequences [**\*\*\*555**] for such violations. We note that while we would, of course, review a below-cost allegation brought before us in an appropriate proceeding, we are certainly not the primary enforcer of below-cost pricing law." (*Investigation on the Commission's Own* [**\*\*534**] *Motion Into the Regulation of Cellular Radiotelephone Utilities* (1997) Cal.P.U.C. Dec. No. 97-02-053, pp. 18, 39 [1997 WL 129412].)

We conclude that we may decide this action without infringing on the PUC's authority.<sup>4</sup>

#### [**\*\*\*\*11**] A. Plaintiffs' Petition (Unfair Practices Act)

Plaintiffs alleged defendant violated the Unfair Practices Act in two ways: (1) by selling below cost in violation of [section 17043](#), and (2) by using loss leaders in violation of [section 17044](#). Neither the trial court nor the Court of Appeal found any violation of either section because plaintiffs did not establish defendant acted with the necessary culpable mental state. Plaintiffs argue that the courts below misconstrued [section 17043](#)'s mental state requirement, and that [section 17044](#) does not require a culpable mental state.

##### 1. Below-cost Sales ([§ 17043](#))

**HN2** [↑] [Section 17043](#) provides: "It is unlawful for any person engaged in business within this State to sell any article or product at less than the cost [**\*172**] thereof to such vendor, or to give away any article or product, *for the purpose of injuring competitors or destroying competition.*" (Italics added.) The Court of Appeal held that this provision requires "a specific intent to injure competitors or destroy competition." (Original italics.) It found that because L.A. Cellular's "intent was simply to compete with AirTouch for subscribers, and that the harm [**\*\*\*\*12**] to plaintiffs was unintended," it did not violate [section 17043](#).

##### [CA\(1\)](#) [↑] (1)

Plaintiffs contend the defendant need not *desire* to injure competitors or destroy competition to violate [section 17043](#); instead, "plaintiffs need only show the defendant believed or knew that harm was substantially certain to result, or that the manifest probability of harm was very great." California courts have not decided this precise question. The cases describing [section 17043](#)'s mental state requirement have generally repeated the statutory language or loosely used the word "intent" without defining it. (E.g., [Wholesale T. Dealers v. National etc. Co. \(1938\) 11 Cal. 2d 634, 643 \[82 P.2d 3, 118 A.L.R. 486\]](#) [quoting the statutory language]; *id.* at p. 658 [referring to the "intent" requirement].) No case has expressly considered whether the statute requires the desire to injure competitors or destroy competition or only knowledge that the injury or destruction will occur.

In some other contexts, courts have interpreted an intent requirement as plaintiffs urge. We have said that **HN3** [↑] "'intent,' in the law of torts, denotes not only those results the actor desires, but also [**\*\*\*\*13**] those consequences

<sup>4</sup> In its amicus curiae brief, the PUC did express one "caveat": that a judicial decision prohibiting bundling would interfere with its jurisdiction. We need not decide this point, for the question of bundling is not before us. Like the Court of Appeal, we express no opinion regarding bundling.

which he knows are substantially certain to result from his conduct." ([Schroeder v. Auto Driveaway Co. \(1974\) 11 Cal. 3d 908, 922 \[114 Cal. Rptr. 622, 523 P.2d 662\]](#)) Schroeder quoted Justice Oliver Wendell Holmes: " 'If the manifest probability of harm is very great, and the harm follows, we say that it is done maliciously or intentionally; if not so great, but still considerable, we say that the harm is done negligently; if there is no apparent danger, we call it mischance.' (Holmes, *Privilege, Malice and Intent* (1894) 8 Harv.L.Rev. 1.)" ([Id. at p. 922, fn. 10](#); see also [Estate of Kramme \(1978\) 20 Cal. 3d 567, 572-573 \[143 Cal. Rptr. 542, 573 P.2d 1369\]](#)) ["While the word 'intentionally' has been variously defined depending on the context and intent of the Legislature [citation], this section specifies that a particular result, rather than a particular act, must have been intended. For a result to be caused 'intentionally,' the actor must either desire the result or know, to a substantial certainty, that the result will occur. [Citations.]" (Fn. omitted.)].)

[\*\*\*556] If [section 17043](#) used the [\*\*\*\*14] word "intent" to describe the necessary mental state, plaintiffs' position might have merit. [Section 17043](#), however, does not say "intent"; it says "purpose." "Intent" might be ambiguous; "purpose" is not.

[\*173] [\*\*535] "Purpose" has a precise meaning. As an illustration, we may turn to the Model Penal Code. In that code, the American Law Institute drafters defined four distinct culpable mental states. None of the definitions uses the ambiguous word "intent." The code's two highest mental states are to act "purposely" and to act "knowingly." (Model Pen. Code, § 2.02(1).) Persons act "purposely" with respect to a result if it is their "conscious object" to cause that result. (Model Pen. Code, § 2.02(2)(a)(i).) Persons act "knowingly" with respect to a result if they are "practically certain" their conduct will cause that result. (Model Pen. Code, § 2.02(2)(b)(ii).) The comment to the code explains the difference between purpose and knowledge. "In defining the kinds of culpability, the Code draws a narrow distinction between acting purposely and knowingly, one of the elements of ambiguity in legal usage [\*\*\*\*15] of the term 'intent.'<sup>5</sup> Knowledge that the requisite external circumstances exist is a common element in both conceptions. But action is not purposive with respect to the nature or result of the actor's conduct unless it was his conscious object to perform an action of that nature or to cause such a result." (Model Pen. Code & Commentaries, com. 2 to § 2.02, p. 233, fn. omitted, italics added.) "The essence of the narrow distinction between these two culpability levels is the presence or absence of a *positive* desire to cause the result; purpose requires a culpability beyond the knowledge of a result's near certainty." (Robinson & Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond* (1983) [35 Stan.L.Rev. 681, 694](#), original italics.)

[\*\*\*\*16] We discuss the Model Penal Code and commentaries only because they focus on the difference between purpose and knowledge, the ambiguity of the word "intent," and the precise meaning of the word "purpose." Because the Model Penal Code was drafted after the Unfair Practices Act, the Legislature could not have considered the code in enacting the act. California has not adopted the Model Penal Code. But the American Law Institute did not modify the meaning of the word "purpose" or invent the ambiguity in the word "intent." Its discussion is instructive as to the correct interpretation of the word "purpose."

Plaintiffs cite for support the first Restatement of Torts, which was published near the time the Legislature enacted the Unfair Practices Act. That Restatement, however, also reflects the difference between purpose and knowledge, while recognizing that often knowledge alone is sufficient for [\*174] tort liability. Plaintiffs quote the first *Restatement of Torts* section 870: "A person who does any tortious act for the purpose of causing harm to another or to his things or to the pecuniary interests of another is liable to the other for such harm if it results . . . ." They further [\*\*\*\*17] cite language in comment e to that section: "In many situations, an act done with the belief or knowledge that a result will happen has the same consequences as an act done for the purpose of causing the result." (*Rest., Torts*, § 870, com. e, p. 410.) That language states that a knowing act can cause harm as well as a purposeful act, but it clearly distinguishes between purpose and knowledge. The next sentence of that comment draws the same distinction: "Thus one who deceives another, knowing that a third person will be deceived by the

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<sup>5</sup> The Model Penal Code itself resolves the ambiguity by defining " 'intentionally' or 'with intent' " as meaning "purposely." (Model Pen. Code, § 1.13(12).) Some of the states that have adopted that code's distinction between purpose and knowledge have used the word "intentionally" instead of "purposely" but have defined it to mean "conscious objective." (Model Pen. Code & Commentaries, com. 2 to § 2.02, p. 235, fn. 11.)

misrepresentation, is liable to the third person as he would be if he acted for the purpose of deceiving the third person [citation]." (*Ibid.*) The same comment goes on to discuss when knowing but not purposeful acts might be insufficient to create tort liability.

Thus, the drafters of the first Restatement of Torts also understood the difference between purpose and knowledge, while they [\*\*\*557] believed that often knowledge alone may be sufficient for liability. That understanding is reflected even more clearly elsewhere. Section 13 of that Restatement, defining battery, requires an "intention[al]" act. Comment d to that section defines [\*\*\*\*18] an act as intentional if it is "done for the purpose of causing the [\*\*536] contact or apprehension or with knowledge on the part of the actor that such contact or apprehension is substantially certain to be produced." (*Rest., Torts, § 13, com. d*, p. 29, italics added.) Although the Restatement defines intent broadly as including both purpose and knowledge, it recognizes the narrow meaning of the word "purpose." The Restatement Second of Torts rewrote section 870 to refer to "intentionally" causing an injury, which is defined as including knowledge. (*Rest.2d Torts, § 870, com. b*, p. 280; see also *id.* at § 8 A, p. 15.) But comment b to section 870 also says, "In some cases in which the claim may be entirely novel the court may decide to limit the liability to the situation in which the defendant acted for the purpose of producing the harm involved." (*Rest.2d Torts, § 870, com. b*, p. 280.) Again, the Restatement shows an awareness of the precise meaning of the word "purpose."

We do not doubt that an actor who knows but does not desire that an act will cause a result might be deemed to intend that result, or that this intent or knowledge might be sufficient [\*\*\*19] for some forms of tort liability. But these circumstances do not change the meaning of the word "purpose." We are interpreting a statute. Section 17043 uses the word "purpose," not "intent," not "knowledge." We therefore conclude that to violate section 17043, a [\*175] company must act with the purpose, i.e., the desire, of injuring competitors or destroying competition. As plaintiffs do not contend they have shown that L.A. Cellular acted with that purpose, the lower courts were correct in finding it did not violate that section.

## 2. Loss Leaders (§ 17044)

**HN4**  Section 17044 provides: "It is unlawful for any person engaged in business within this State to sell or use any article or product as a 'loss leader' as defined in Section 17030 of this chapter." Section 17030, in turn, defines "Loss leader" as "any article or product sold at less than cost: [P] (a) Where the purpose is to induce, promote or encourage the purchase of other merchandise; or [P] (b) Where the effect is a tendency or capacity to mislead or deceive purchasers or prospective purchasers; or [P] (c) Where the effect is to divert trade from or otherwise injure competitors." On its face, this language [\*\*\*20] does not appear to require any culpable mental state when subdivision (c) applies. Plaintiffs argue that section 17044 prohibits use of loss leaders any time the effect is to divert trade from or otherwise injure competitors, and that they need not show defendant had any particular mental state.

Whatever merit the argument might have in the abstract, we are not deciding a question of first impression. Beginning in 1952, California courts have interpreted section 17044 as containing the same mental state requirement as section 17043. "While section 17044 of the act provides that the practice of using any article or product as a 'loss leader' is included among the prohibitions of the chapter, we conclude it was the intent of the Legislature to make it unlawful to sell articles below cost for the purpose of injuring competitors or destroying competition and that to be unlawful, 'loss leader' sales must be made for that purpose." ( *Ellis v. Dallas (1952) 113 Cal. App. 2d 234, 239 [248 P.2d 63].* )

This holding was reaffirmed in Dooley's Hardware Mart v. Food Giant Markets, Inc. (1971) 21 Cal. App. 3d 513 [98 Cal. Rptr. 543]. There the plaintiff, like [\*\*\*21] plaintiffs here, argued that section 17044 does not have an "intent" requirement "because there is no mention of it in either section 17044 or section 17030, the two sections directly and immediately applicable." ( *Dooley's Hardware Mart v. Food Giant Markets, Inc., supra, 21 Cal. App. 3d at p. 516.* ) They further argued that a 1953 amendment to section [\*176] 17044 changed the result of *Ellis v. Dallas,*

supra, 113 Cal. App. 2d 234.<sup>6</sup> The court disagreed: "We [\*\*\*558] have examined the 1953 rewrite of the section and [\*\*537] cannot find any basis for attributing the change in meaning urged by [plaintiff]. Furthermore we have also examined the legislative history of the 1953 bill ([Sen. Bill No.] 881) and found that it was enacted in exactly the same form as it was introduced. Finally, both sections 17071 and 17071.5, creating rebuttable presumptions of the requisite wrongful intent, apply expressly, without excepting section 17044, to all actions brought under the Act. The latter of these sections was enacted in 1961, some nine years after the *Ellis* decision. (Stats. 1961, ch. 1347, § 1, p. 3125.) It seems clear to us that [\*\*\*\*22] the *Ellis* decision is still the governing law on this point in view of the failure of the Legislature to nullify by appropriate amendment the *Ellis* interpretation of section 17044 (see *Bishop v. City of San Jose* [(1969)] 1 Cal. 3d 56, 65 [81 Cal. Rptr. 465, 460 P.2d 137]) and that therefore, notwithstanding the absence of any language to this effect in either section 17044 or section 17030, intent to injure competitors or to destroy competition is required for violation of section 17044. In other words for competition to be unfair under the Act, the person engaging in the challenged practice must possess an intent to injure his competitors or destroy his competition. (See § 17001.)" (*Dooley's Hardware Mart v. Food Giant Markets, Inc.*, supra, 21 Cal. App. 3d at pp. 516-517, original italics, fn. omitted.)

[\*\*\*23] Two subsequent appellate court decisions have reiterated that sections 17043 and 17044 contain identical "intent" requirements, although without independent analysis. ( *Western Union Financial Services, Inc. v. First Data Corp.* (1993) 20 Cal. App. 4th 1530, 1540, fn. 10 [25 Cal. Rptr. 2d 341]; *Hladek v. City of Merced* (1977) 69 Cal. App. 3d 585, 591 [138 Cal. Rptr. 194].)

Decisions from this court are inconclusive but tend to support the conclusion that both sections require the same mental state. Plaintiffs rely on the early decision of *People v. Pay Less Drug Store* (1944) 25 Cal. 2d 108 [153 P.2d 9]. In that case, the trial court found that the defendants had sold certain "items below cost for the purpose of destroying the business of competitors . . . . The court also found that the defendants had sold certain articles as 'loss leaders.' " (*Id. at p. 112.*) We noted that "Section 3 of the Unfair Practices Act makes it unlawful to sell any article or product at less than cost as defined, for the purpose of injuring competitors or destroying competition," and that the "section also prohibits the sale of 'loss [\*\*\*24] leaders,' as [\*177] defined." (*Ibid.*) After discussing at length several contentions not relevant here, we disposed summarily of one contention using language plaintiffs cite: "The defendants contend that the provision defining 'loss leader' is indefinite in that it appears not to require the intent to injure competitors or destroy competition in all cases. Inasmuch as the judgment enjoined sales of articles as 'loss leaders' only when they diverted trade from or otherwise injured competitors, the defendants are not in a position to complain." (*Id. at p. 117.*) We read this language as only stating that the defendants before the court, who *had* acted purposely, were not in a position to complain about the statute's apparent lack of a mental requirement in other cases. Because the defendants had acted purposely, there was no need to decide the important issue presented here, involving defendants that do not act purposely.

A more recent decision also does not consider this question in detail, but supports the holding of *Ellis v. Dallas*, supra, 113 Cal. App. 2d 234. In *Tri-Q, Inc. v. Sta-Hi Corp.* (1965) 63 Cal. 2d 199, 203 [45 Cal. Rptr. 878, 404 P.2d 486], [\*\*\*25] we adopted a portion of the Court of Appeal opinion, including that portion relevant here. In that case, the plaintiff claimed the defendant had violated sections 17043 and 17044. (*Tri-Q, Inc. v. Sta-Hi Corp.*, supra, 63 Cal. 2d at p. 203.) The trial court found the defendant had not sold its product at less than cost. The opinion upheld that factual finding but then said: [\*\*\*559] "But even had the trial court found that the product had been sold below cost, there would still be the issue of whether the seller had so acted 'for the purpose of injuring competitors or destroying competition.' ("Bus. & Prof. Code, § 17043; . . . *Ellis v. Dallas*, supra, 113 Cal. App. 2d 234, 239.)" (*Id. at p. 207.*) The opinion noted that the [\*\*538] trial court found, on sufficient evidence, that the defendant had no injurious intent, and, therefore, "it does not appear to be probable that a result more favorable to the plaintiff Tri-Q, Inc., would have been reached by the trial court even if it had found that such prices were less than the actual cost

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<sup>6</sup> As originally enacted in 1941, section 17044 provided, "The practice of using any article or product as a 'loss leader' is included among the prohibitions of this chapter." (Stats. 1941, ch. 526, § 1, p. 1842.) The section was amended in 1953 to read as it now does. (Stats. 1953, ch. 334, § 1, p. 1601.) Section 17030 was enacted in 1941 with section 17044 and has not been amended since. (Stats. 1941, ch. 526, § 1, p. 1841.)

of the product." (*Id. at p. 209.*) This language apparently applied to [\*\*\*\*26] both the sections 17044 and 17043 claims.

Although we did not expressly discuss whether section 17044 requires the same mental state as section 17043, this language in *Tri-Q, Inc. v. Sta-Hi Corp., supra, 63 Cal. 2d 199*, and our citation to the very page of *Ellis* that decided the question ( *Ellis v. Dallas, supra, 113 Cal. App. 2d at p. 239*), shows we at least assumed both sections require the same mental state.

Plaintiffs argue the appellate court decisions were wrongly decided and we should overrule them. They also argue that *Tri-Q, Inc. v. Sta-Hi Corp., supra, 63 Cal. 2d 199*, did not clearly decide the question. Additionally, they [\*178] note that we adopted the Court of Appeal opinion in that case, and claim that had the opinion decided this issue, it would merely have been another of the "erroneous court of appeal decisions" we should overrule. We disagree with the latter point. We expressly "adopt[ed]" the Court of Appeal opinion "as our opinion," which we do occasionally. (*Id. at p. 203*; e.g., *Arriaga v. County of Alameda* (1995) 9 Cal. 4th 1055, 1059 [40 Cal. Rptr. 2d 116, 892 P.2d 150].) [\*\*\*\*27] The fact that we adopted a Court of Appeal opinion rather than drafted our own does not reduce its precedential value. When we "adopt" an opinion in this fashion, we do, indeed, make it "our opinion." We agree, however, that *Tri-Q, Inc. v. Sta-Hi Corp., supra, 63 Cal. 2d 199*, did not itself definitively resolve this question. We considered it only by implication and did not expressly discuss it. The opinion does, however, support the unbroken line of appellate court decisions that did decide the question.

We thus see that, for almost half a century, California courts have unanimously interpreted section 17044 to require the same mental state as section 17043. Although we have never explicitly considered the question, we assumed that interpretation was correct in a decision that is itself over three decades old. During that time, the Legislature has amended California's statutes regulating competition numerous times, sometimes to overrule judicial interpretations. (See *Stop Youth Addiction, Inc. v. Lucky Stores, Inc., supra, 17 Cal. 4th at pp. 569-570*.) But it has left this rule intact. HN5 Legislative inaction is often not a convincing reason [\*\*\*\*28] to refuse to change a statutory interpretation. (E.g., *Ventura County Deputy Sheriffs' Assn. v. Board of Retirement* (1997) 16 Cal. 4th 483, 506 [66 Cal. Rptr. 2d 304, 940 P.2d 891].) Under the circumstances here, however, including the longevity of the rule and the unanimity of the decisions stating it, we believe it is up to the Legislature to change it if it is to be changed. In *Dooley's Hardware Mart v. Food Giant Markets, Inc., supra, 21 Cal. App. 3d at pages 516-517*, the court reaffirmed the holding of *Ellis v. Dallas, supra, 113 Cal. App. 2d 234*, partly because of legislative inaction in the intervening two decades. That rationale is even stronger today, yet another quarter of a century later. Section 17044 has a long-settled meaning. We should not at this late date find it requires no culpable mental state after 50 years of contrary judicial interpretation. We decline plaintiffs' request to overrule that interpretation.

Accordingly, the lower courts were correct that plaintiffs' action under section 17044 fails for the same reason their action under section 17043 fails--they did not prove defendant acted with the [\*\*\*\*29] necessary purpose.

#### [\*\*\*560] B. Defendant's Petition (Unfair Competition Law)

The Court of Appeal held that even though, when L.A. Cellular sold telephones below cost, it lacked the purpose necessary to violate the Unfair [\*179] Practices Act, its acts might nevertheless be deemed unfair under the unfair competition law. L.A. Cellular [\*\*539] argues that its conduct "is both governed by and lawful under the express provisions of the Unfair Practices Act," and that what is lawful under that act cannot violate the unfair competition law. Plaintiffs counter that L.A. Cellular's actions were not unfair "simply because it was selling below cost. Rather, what made L.A. Cellular's actions unfair in this instance was that it subsidized massive sales below cost with duopoly profits that it knew were by law unavailable to its competitors."

#### 1. General Principles

The purpose of the Unfair Practices Act 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 [\*\*\*\*30] prevented." (§ 17001.) It prohibits specific "practices which the legislature has determined constitute unfair trade practices." (

Wholesale T. Dealers v. National etc. Co., supra, 11 Cal. 2d at p. 643.) The prohibitions against purposeful below-cost sales and loss leaders (§ 17043, 17044) are two examples. The consequences of violating the Unfair Practices Act can be quite severe. A prevailing plaintiff may receive treble damages and attorney fees. (§ 17082.) The act even provides criminal sanctions. Any person who violates the act is guilty of a misdemeanor punishable by up to a \$ 1,000 fine and six months' imprisonment. (§ 17100.) This severity might explain why the Legislature applied these sanctions to below-cost sales and loss leaders only when done with the *purpose* of injuring competitors or destroying competition.<sup>7</sup>

[\*\*\*\*31] The unfair competition law is independent of the Unfair Practices Act and other laws. Its remedies are "cumulative . . . to the remedies or penalties available under all other laws of this state" (§ 17205), but its sanctions are less severe than those of the Unfair Practices Act. Prevailing plaintiffs are generally limited to injunctive relief and restitution. (§ 17203; see ABC Internat. Traders, Inc. v. Matsushita Electric Corp. (1997) 14 Cal. 4th 1247, 1268 [61 Cal. Rptr. 2d 112, 931 P.2d 290].) Plaintiffs may not receive damages, much less *treble* damages, or attorney fees. ( Bank of the West v. Superior Court (1992) 2 Cal. 4th 1254, 1266 [10 Cal. Rptr. 2d 538, 833 P.2d 545]; Consumers Union of United States, Inc. v. Fisher Development, Inc. (1989) 208 Cal. App. 3d 1433, 1443 [257 Cal. Rptr. 151].) The law provides for civil penalties (e.g., § 17206) but contains no criminal provisions.

#### [\*180] CA(2) [↑] (2)

In contrast to its limited remedies, HN6 [↑] the unfair competition law's scope is broad. Unlike the Unfair Practices Act, it does not proscribe specific practices. Rather, as relevant here, it defines "unfair competition" to include [\*\*\*\*32] "any unlawful, unfair or fraudulent business act or practice." (§ 17200.)<sup>8</sup> Its coverage is "sweeping, embracing" "anything that can properly be called a business practice and that at the same time is forbidden by law." ' " ( Rubin v. Green (1993) 4 Cal. 4th 1187, 1200 [17 Cal. Rptr. 2d 828, 847 P.2d 1044], quoting Barquis v. Merchants Collection Assn. (1972) 7 Cal. 3d 94, 113 [101 Cal. Rptr. 745, 496 P.2d 817].) It governs "anti-competitive business practices" as well as injuries to consumers, and has as a major purpose "the preservation of fair business [\*\*\*561] competition." ( Barquis v. Merchants Collection Assn., supra, 7 Cal. 3d at p. 110; see also People v. McKale (1979) 25 Cal. 3d 626, 631-632 [159 Cal. Rptr. 811, 602 P.2d 731]; People ex rel. Mosk v. National Research Co. of Cal. (1962) 201 Cal. App. 2d 765, 771 [20 Cal. Rptr. 516].) By proscribing "any unlawful" business practice, "section 17200 'borrows' violations [\*\*540] of other laws and treats them as unlawful practices" that the unfair competition law makes independently actionable. ( State Farm Fire & Casualty Co. v. Superior Court (1996) 45 Cal. App. 4th 1093, 1103 [53 Cal. Rptr. 2d 229], [\*\*\*\*33] citing Farmers Ins. Exchange v. Superior Court, supra, 2 Cal. 4th at p. 383.)

However, the law does more than just borrow. The statutory language referring to "any unlawful, unfair or fraudulent" practice (italics added) makes clear that a practice may be deemed unfair even if not specifically proscribed by some other law. "Because Business and Professions Code section 17200 is written in the disjunctive, it establishes three varieties of unfair competition--acts or practices which are unlawful, or unfair, or fraudulent. 'In other words, a practice is prohibited as "unfair" [\*\*\*\*34] or "deceptive" even if not "unlawful" and vice versa.' " ( Podolsky v. First Healthcare Corp. (1996) 50 Cal. App. 4th 632, 647 [58 Cal. Rptr. 2d 89], quoting State Farm Fire & Casualty Co. v. Superior Court, supra, 45 Cal. App. 4th at p. 1102.) The case of Motors, Inc. v. Times Mirror Co. (1980) 102 Cal. App. 3d 735 [162 Cal. Rptr. 543] is an example of the unfair competition law's independent force. There, the plaintiff challenged a newspaper's two-tiered advertising rate structure. The Court of Appeal held that the plaintiff stated a valid cause of action under the unfair competition law even though the Unfair Practices Act did not

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<sup>7</sup> Justice Baxter would essentially read the word "purpose" out of section 17043 and subject L.A. Cellular to potential treble damages, attorney fees, and even criminal sanctions for nonpurposeful conduct despite the statutory language. We decline to do so.

<sup>8</sup> In its entirety, section 17200 provides: HN7 [↑] "As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code [which involves advertising]."

itself prohibit the pricing policy at issue. (*Motors, Inc. v. Times Mirror Co., supra, 102 Cal. App. 3d at p. 741* [citing [**\*181**] § 17042, which states that nothing in the Unfair Practices Act "prohibits" certain price differentials].)

The unfair competition law, which has lesser sanctions than the Unfair Practices Act, has a broader scope for a reason. "[T]he Legislature . . . intended by this sweeping language to permit tribunals to enjoin on-going wrongful business [**\*\*\*\*35**] conduct in whatever context such activity might occur. Indeed, . . . the section was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable 'new schemes which the fertility of man's invention would contrive.' " (*American Philatelic Soc. v. Claibourne (1935) 3 Cal. 2d 689, 698 [46 P.2d 135]*.) As the *Claibourne* court observed: 'When a scheme is evolved which on its face violates the fundamental rules of honesty and fair dealing, a court of equity is not impotent to frustrate its consummation because the scheme is an original one. . . .' (*3 Cal. 2d at pp. 698-699* . . .; accord, *FTC v. The Sperry & Hutchinson Co. (1972) 405 U.S. 233, 240 [31 L. Ed. 2d 170, 177, 92 S. Ct. 898]*.) With respect to 'unlawful' or 'unfair' business practices, [former] section 3369 [today *section 17200*] specifically grants our courts that power. [P] In permitting the restraining of all 'unfair' business practices, [former] section 3369 [today *section 17200*] undeniably establishes only a wide standard to guide courts of equity; as noted above, given the creative nature of the scheming [**\*\*\*\*36**] mind, the Legislature evidently concluded that a less inclusive standard would not be adequate." (*Barquis v. Merchants Collection Assn., supra, 7 Cal. 3d at pp. 111-112*, fn. omitted.) "[I]t would be impossible to draft in advance detailed plans and specifications of all acts and conduct to be prohibited [citations], since unfair or fraudulent business practices may run the gamut of human ingenuity and chicanery." (*People ex rel. Mosk v. National Research Co. of Cal., supra, 201 Cal. App. 2d at p. 772*.)<sup>9</sup>

[**\*\*\*\*37**] [**\*182**] [**\*\*541**] [**\*\*\*\*562**] **CA(3)**  (3)

Although the unfair competition law's scope is sweeping, it is not unlimited. Courts may not simply impose their own notions of the day as to what is fair or unfair. Specific legislation may limit the judiciary's power to declare conduct unfair. If the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination. When specific legislation provides a "safe harbor," plaintiffs may not use the general unfair competition law to assault that harbor.

*Rubin v. Green, supra, 4 Cal. 4th 1187*, illustrates this principle. In that case, the plaintiff relied on the unfair competition law to pursue an action that the litigation privilege of Civil Code section 47, subdivision (b), otherwise

<sup>9</sup> Apparently taking her cue from the brief of amicus curiae American Council of Life Insurance, Justice Kennard asserts the unfair competition law did nothing more than codify the common law. (Conc. & dis. opn. of Kennard, J., post, at p. 194.) (Even L.A. Cellular does not make such a sweeping argument.) She relies primarily on *International etc. Workers v. Landowitz (1942) 20 Cal. 2d 418 [126 P.2d 609]*. (Conc. & dis. opn. of Kennard, J., post, at pp. 194, 196, 197, 200.) That decision does, indeed, contain some language supporting her position. However, in *Barquis v. Merchants Collection Assn., supra, 7 Cal. 3d at page 109*, we unanimously concluded "that 'unfair competition' as used in the section cannot be equated with the common law definition of 'unfair competition,' but instead specifies that, for the purposes of its provisions, unfair competition 'shall mean and include *unlawful, unfair* or fraudulent business practice . . . .' (Italics added.)" Regarding the language Justice Kennard cites, we stated, "Although the *Landowitz* opinion does contain some language which may be read to limit [Civil Code former] section 3369 [the original unfair competition law] to common law 'unfair competition,' subsequent cases . . . have not confined the section so narrowly; in view of the factual context of *Landowitz*, such language was not crucial to the decision." (*Id. at pp. 111-112, fn. 12*; see also *Rubin v. Green, supra, 4 Cal. 4th at p. 1200* ["to state a claim under the act one need not plead and prove the elements of a tort"]; *Bank of the West v. Superior Court, supra, 2 Cal. 4th at p. 1264* ["the statutory definition of 'unfair competition' 'cannot be equated with the common law definition . . . .' "]; *Motors, Inc. v. Times Mirror Co., supra, 102 Cal. App. 3d 735* [discussed in the text].)

A year after the decision in *People ex rel. Mosk v. National Research Co. of Cal., supra, 210 Cal. App. 2d 765*, again about three months after the decision in *Barquis v. Merchants Collection Assn., supra, 7 Cal. 3d 94*, and on occasion since, the Legislature amended the unfair competition law. On these occasions, rather than overrule these cases or *Motors, Inc. v. Times Mirror Co., supra, 102 Cal. App. 3d 735*, the Legislature expanded the law's coverage. (Stats. 1963, ch. 1606, § 1, p. 3184; Stats. 1972, ch. 1084, § 1, pp. 2020-2021; see *Stop Youth Addiction, Inc. v. Lucky Stores, Inc., supra, 17 Cal. 4th at pp. 569-570*.)

prohibited. We "rejected the claim that a plaintiff may, in effect, 'plead around' absolute barriers to relief by relabeling the nature of the action as one brought under the unfair competition statute." (*Rubin v. Green, supra, 4 Cal. 4th at p. 1201*) A bar against an action "may not be circumvented by recasting the action as [\*\*\*\*38] one under *Business and Professions Code section 17200*." (*Id. at p. 1202*) We found "the conduct of defendants alleged in the complaint" came "within the scope of [Civil Code] section 47(b)," and thus was "absolutely immune from civil tort liability . . . To permit the same . . . acts to be the subject of an injunctive relief proceeding brought by this same plaintiff under the unfair competition statute undermines that immunity. If the policies underlying section 47(b) are sufficiently strong to support an absolute privilege, the resulting immunity should not evaporate merely because the plaintiff discovers a conveniently different label for pleading what is in substance an identical grievance arising from identical conduct as that protected by section 47(b)." (*Id. at pp. 1202-1203*.)

**HN8** A plaintiff may thus not "plead around" an "absolute bar to relief" simply "by recasting the cause of action as one for unfair competition." (*Manufacturers Life Ins. Co. v. Superior Court (1995) 10 Cal. 4th 257, 283 [41 Cal. Rptr. 2d 220, 895 P.2d 56]*) The rule does not, however, prohibit an action [\*\*\*\*39] under the unfair competition law merely because some other statute [\*183] on the subject does not, itself, provide for the action or prohibit the challenged conduct. **HN9** To forestall an action under the unfair competition law, another provision must actually "bar" the action or clearly permit the conduct. There is a difference between (1) not making an activity unlawful, and (2) making that activity [\*\*\*563] lawful. For example, *Penal Code section 211*, which defines robbery, does not make murder unlawful. Most assuredly, however, that section does not also make murder lawful. Acts that the Legislature has determined to be lawful may not form the basis for an action under the unfair competition law, but acts may, if otherwise unfair, be challenged under the unfair competition law [\*\*542] even if the Legislature failed to proscribe them in some other provision.

This conclusion is consistent with the overall pattern of the Unfair Practices Act and the unfair competition law. As discussed above, the Unfair Practices Act condemns specific conduct. The unfair competition law is less specific, because the Legislature cannot anticipate all possible forms in [\*\*\*\*40] which unfairness might occur. If, in the Unfair Practices Act (or some other provision), the Legislature considered certain activity in certain circumstances and determined it to be lawful, courts may not override that determination under the guise of the unfair competition law. However, if the Legislature did not consider that activity in those circumstances, the failure to proscribe it in a specific provision does not prevent a judicial determination that it is unfair under the unfair competition law.

L.A. Cellular argues that the decision of *Motors, Inc. v. Times Mirror Co., supra, 102 Cal. App. 3d 735*, and the Court of Appeal decision in this case are inconsistent with another Court of Appeal decision, *Hobby Industry Assn. of America, Inc. v. Younger (1980) 101 Cal. App. 3d 358 [161 Cal. Rptr. 601]* (*Hobby Industry*). We believe, however, that these cases can be mutually reconciled, and that all are consistent with the general framework of the unfair competition laws. *Hobby Industry* involved the Fair Packaging and Labeling Act (§ 12601 et seq.), which generally provides immunity to wholesalers and retailers. (*Hobby Industry, supra, 101 Cal. App. 3d at p. 369*.) [\*\*\*\*41] The Attorney General argued that, despite this immunity, "suits may be brought against [wholesalers and retailers] under the unfair competition statutes . . ." (*Ibid.*) The court disagreed, finding "nothing in *section 17200 et seq.* which reimposes the liability on wholesalers and retailers which is expressly excluded by section 12602. . . . Although the Supreme Court has construed the orbit of the unfair competition statutes expansively (*People v. McKale (1979) 25 Cal. 3d 626, 631-632 [159 Cal. Rptr. 811, 602 P.2d 731]*, and *Barquis v. Merchants Collection Assn. (1972) 7 Cal. 3d 94, 111-113 [101 Cal. Rptr. 745, 496 P.2d 817]*), it cannot be said that this [\*184] embracing purview also encompasses business practices which the Legislature has expressly declared to be lawful in other legislation. (See *Barquis, supra, 7 Cal. 3d 94, 111, fn. 12*.)" (*Id. at pp. 369-370*.) We express no opinion on whether the specific holdings of *Motors, Inc. v. Times Mirror Co., supra, 102 Cal. App. 3d 735*, and *Hobby Industry, supra, 101 Cal. App. 3d 358*, were correct. However, we agree with *Motors, Inc* [\*\*\*\*42] ., that a court may find certain activities unfair under the unfair competition law even though the Unfair Practices Act does not prohibit them. We also agree with *Hobby Industry* that the unfair competition law does not permit an action that another statute expressly precludes.

We thus conclude that a plaintiff may not bring an action under the unfair competition law if some other provision bars it. That other provision must actually bar it, however, and not merely fail to allow it. In other words, courts may

not use the unfair competition law to condemn actions the Legislature permits. Conversely, the Legislature's mere failure to prohibit an activity does not prevent a court from finding it unfair. Plaintiffs may not "plead around" a "safe harbor," but the safety must be more than the absence of danger.<sup>10</sup>

[\*\*\*\*43] [\*\*\*564] **CA(4)[↑]** (4) If no statute provides a safe harbor, a court must determine whether the challenged conduct is unfair within the meaning of the unfair competition law. In doing so, courts may not apply purely subjective notions of fairness. **HN10[↑]** "The appellate courts have 'neither the power nor the duty to [\*\*543] determine the wisdom of any economic policy; that function rests solely with the legislature. . . .' (" Max Factor & Co. v. Kunsman (1936) 5 Cal. 2d 446, 454 [55 P.2d 177] .)" (Wolfe v. State Farm Fire & Casualty Ins. Co. (1996) 46 Cal. App. 4th 554, 562 [53 Cal. Rptr. 2d 878].) This court has not yet defined "unfair" under this law. A few Courts of Appeal have attempted a definition. (E.g., People v. Casa Blanca Convalescent Homes, Inc. (1984) 159 Cal. App. 3d 509, 530 [206 Cal. Rptr. 164, 53 A.L.R.4th 661] HN11[↑] "[A]n 'unfair' business practice occurs when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers."); State Farm Fire & Casualty Co. v. Superior Court, supra, 45 Cal. App. 4th at p. 1104 ["'the [\*\*\*\*44] court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim'"].)

[\*185] We believe these definitions are too amorphous and provide too little guidance to courts and businesses. Vague references to "public policy," for example, provide little real guidance. "'[P]ublic policy' as a concept is notoriously resistant to precise definition, and . . . courts should venture into this area, if at all, with great care and due deference to the judgment of the legislative branch, 'lest they mistake their own predilections for public policy which deserves recognition at law.' (" Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1095 [4 Cal. Rptr. 2d 874, 824 P.2d 680].) These concerns led us to hold that to establish the tort of wrongful discharge in violation of public policy, the public policy triggering the violation must be tethered to a constitutional or statutory provision (*ibid.*) or a regulation carrying out statutory policy (Green v. Ralee Engineering Co. (1998) 19 Cal. 4th 66, 90 [78 Cal. Rptr. 2d 16, 960 P.2d 1046]).

L.A. Cellular and supporting amici curiae emphasize the need for [\*\*\*\*45] California businesses to know, to a reasonable certainty, what conduct California law prohibits and what it permits. We sympathize with this concern. An undefined standard of what is "unfair" fails to give businesses adequate guidelines as to what conduct may be challenged and thus enjoined and may sanction arbitrary or unpredictable decisions about what is fair or unfair. In some cases, it may even lead to the enjoining of *procompetitive* conduct and thereby undermine consumer protection, the primary purpose of the antitrust laws. "Because ours is a culture firmly wedded to the social rewards of commercial contests, the law usually takes care to draw lines of legal liability in a way that maximizes areas of competition free of legal penalties." (Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal. 4th 376, 392 [45 Cal. Rptr. 2d 436, 902 P.2d 740].) Courts must be careful not to make economic decisions or prevent rigorous, but fair, competitive strategies that all companies are free to meet or counter with their own strategies. Companies that cannot compete with others that are more capable or efficient may lawfully fail.

Accordingly, we believe we [\*\*\*\*46] must devise a more precise test for determining what is unfair under the unfair competition law. To do so, we may turn for guidance to the jurisprudence arising under the "parallel" (Barquis v. Merchants Collection Assn., supra, 7 Cal. 3d at p. 110) section 5 of the Federal Trade Commission Act (15 U.S.C. § 45(a)) (section 5). "In view of the similarity of language and obvious identity of purpose of the two statutes, decisions of the federal court on the subject are more than ordinarily persuasive." (People ex rel. Mosk v. National Research Co. of Cal., supra, 201 Cal. App. 2d at p. 773; see also Bank of the West v. Superior Court, supra, 2 Cal. 4th at pp. 1263-1264.) Admittedly, the two statutes are enforced in [\*186] significantly different ways. California has no administrative agency equivalent to the Federal Trade Commission (FTC), and private citizens have no right

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<sup>10</sup> L.A. Cellular also relies on Perdue v. Crocker National Bank (1985) 38 Cal. 3d 913 [216 Cal. Rptr. 345, 702 P.2d 503] and Blank v. Kirwan (1985) 39 Cal. 3d 311 [216 Cal. Rptr. 718, 703 P.2d 58]. Those cases have no bearing on this issue. We held in each that the plaintiff's allegations--entirely different from the allegations here--did not state a cause of action under the unfair competition law or some other law. In neither case did we suggest an action under the unfair competition law is precluded merely because some other statute does not provide for that action.

to seek personal [\*\*\*565] enforcement of section 5 in lieu of FTC action. Nevertheless, California courts remain the ultimate arbiters of the meaning and scope of the unfair competition law, just as the federal courts are [\*\*\*\*47] the ultimate arbiters of the meaning and scope of section 5 and the FTC's authority under it. As the issue before us in this case arises out of a claim of unfair competition between direct competitors, the relevant jurisprudence would be [\*\*544] that arising under section 5's prohibition against "unfair methods of competition."<sup>11</sup>

[\*\*\*\*48] The United States Supreme Court has stressed that the [HN12](#)[<sup>12</sup>] "antitrust laws . . . were enacted for "the protection of *competition*, not *competitors*." ' ' ( *Cargill, Inc. v. Monfort of Colorado, Inc.* (1986) 479 U.S. 104, 115 [107 S. Ct. 484, 491-492, 93 L. Ed. 2d 427], original italics.) They "do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws." ( *Id.* at p. 116 [107 S. Ct. at p. 492].) [HN13](#)[<sup>13</sup>] Injury to a competitor is not equivalent to injury to competition; only the latter is the proper focus of antitrust laws. (See *Atlantic Richfield Co. v. USA Petroleum Co.* (1990) 495 U.S. 328, 344 [110 S. Ct. 1884, 1894-1895, 109 L. Ed. 2d 333]; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* (1977) 429 U.S. 477, 488-489 [97 S. Ct. 690, 697-698, 50 L. Ed. 2d 701]; § 17001 [the purpose of the antitrust law is "to foster and encourage competition" by prohibiting "practices by which fair and honest competition is destroyed or prevented"].) The high court has also found unfair practices that [\*\*\*\*49] "conflict with the basic policies of [some other laws] even though such practices may not actually violate these laws" or amount to "trade restraints in their incipiency." ( *FTC v. Brown Shoe Co.* (1966) 384 U.S. 316, 321, 322 [86 S. Ct. 1501, 1504, 16 L. Ed. 2d 587], fn. omitted.)

These principles convince us that, to guide courts and the business community adequately and to promote consumer protection, we must require that any finding of unfairness to competitors under [section 17200](#) be tethered to some legislatively declared policy or proof of some actual or threatened [\*187] impact on competition. We thus adopt the following test: When a plaintiff who claims to have suffered injury from a direct competitor's "unfair" act or practice invokes [section 17200](#), the word "unfair" in that section means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.<sup>12</sup>

#### [\*\*\*\*50] 2. Application to This Case

##### [CA\(5a\)](#)[<sup>14</sup>] (5a)

Applying these principles to this case is a two-step process. First, we must determine whether the Legislature has provided a safe harbor for L.A. Cellular's conduct. Second, if it has not, we must determine whether that conduct is unfair as we have just defined it.

<sup>11</sup> Section 5 contains two prohibitions: one against "unfair methods of competition" and the other against "unfair or deceptive acts or practices." The former generally governs injuries to competitors, the latter injuries to consumers as well as competitors. ( *Barquis v. Merchants Collection Assn.*, *supra*, 7 Cal. 3d at pp. 109-110.) Our notice of federal law under section 5 means only that federal cases interpreting the prohibition against "unfair methods of competition" may assist us in determining whether a particular challenged act or practice is unfair under the test we adopt. We do not deem the federal cases controlling or determinative, merely persuasive.

<sup>12</sup> This case involves an action by a competitor alleging anticompetitive practices. Our discussion and this test are limited to that context. Nothing we say relates to actions by consumers or by competitors alleging other kinds of violations of the unfair competition law such as "fraudulent" or "unlawful" business practices or "unfair, deceptive, untrue or misleading advertising." We also express no view on the application of federal cases such as *FTC v. Sperry & Hutchinson Co.* (1972) 405 U.S. 233 [92 S. Ct. 898, 31 L. Ed. 2d 170] that involve injury to consumers and therefore do not relate to actions like this one.

Contrary to Justice Kennard's concurring and dissenting opinion, this test is not unduly uncertain. A body of law interpreting section 5 already exists. (See, e.g., Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act* (1980) 21 B.C. L.Rev. 227.)

L.A. Cellular argues that [sections 17043](#) and [17044](#) provide a safe harbor for all below-cost sales when the seller lacks the [\*\*\*566] purpose of injuring competitors or destroying competition. We disagree. Although the Legislature limited the sanctions of treble damages, attorney fee awards, and criminal charges to *purposeful* below-cost sales, nothing in [section 17043](#) or [17044](#) makes all other below-cost sales lawful, including those that have the effect, although not the purpose, of destroying competition. The Unfair Practices Act neither outlaws nor affirmatively [\*\*545] permits all nonpurposeful below-cost sales. Accordingly, it does not preclude a court from deeming nonpurposeful conduct unfair under the unfair competition law.

This conclusion becomes clear when we consider another provision of the Unfair Practices Act that we believe does provide a safe harbor. [Section I\\*\\*\\*\\*511 17026.1, subdivision \(a\)\(2\)](#), enacted in 1992 and operative in 1994, provides: "Consistent with the provisions of subdivision (d) of Section 17050, providers of cellular services *shall be permitted* to sell cellular telephones below cost, provided that sales below cost are a good faith endeavor to meet the legal market prices of competitors in the same locality or trade area." (Italics [\*188] added.) Section 17050, subdivision (d), enacted in 1941, provides that the Unfair Practices Act's prohibitions against sales below cost and loss leaders do not apply to any sale made "[i]n an endeavor made in good faith to meet the legal prices of a competitor selling the same article or product, in the same locality or trade area and in the ordinary channels of trade." The italicized language of [section 17026.1](#) shows the Legislature affirmatively permitted, i.e., made lawful, these good faith sales. If [sections 17043](#) and [17044](#) had provided a safe harbor for *all* nonpurposeful below-cost sales, [section 17026.1, subdivision \(a\)\(2\)](#), would have been unnecessary.

L.A. Cellular argues, however, that because [sections 17043](#) and [17044](#) deal with the same *subject* as this case--below-cost [\*\*\*52] sales--and do not proscribe the conduct here, courts may not find it unfair. We are not persuaded. The practice challenged here resembles in some respects that condemned in [sections 17043](#) and [17044](#), but differs in other ways. L.A. Cellular did not act with the purpose of injuring competitors or destroying competition. But it is a "duopolist," employing an overall strategy that might not be available to its nonduopolist competitors. As explained below, this circumstance is critical. The Legislature undoubtedly did not consider below-cost sales in this context. This may be one of the myriad unanticipated ways in which unfair competition may occur. The Legislature could not have anticipated this precise situation any more than it could "draft in advance detailed plans and specifications of all acts and conduct to be prohibited." ([People ex rel. Mosk v. National Research Co. of Cal., supra, 201 Cal. App. 2d at p. 772](#).) The originality of this practice does not place it beyond the reach of the unfair competition law.

We thus conclude that (1) good faith sales that [section 17026.1](#) permits may not be deemed unfair under the unfair competition law; (2) below-cost [\*\*\*53] sales and loss leaders under [sections 17043](#) and [17044](#), the purpose of which is to injure competitors and destroy competition, are subject to the sanctions of the Unfair Practices Act; and (3) sales that come within neither the safe harbor of [section 17026.1](#) nor the prohibitions of [sections 17043](#) and [17044](#) may be considered unfair under the independent provisions of the unfair competition law as we have defined it. Accordingly, we agree with the Court of Appeal that the trial court erred in concluding that the unfair competition law cause of action necessarily failed when the other causes of action failed. Permitting this action under the unfair competition law does not allow plaintiffs to "plead around" an absolute bar of some other provision.

We now turn to the question whether the below-cost sales of this case are unfair under the test we have just stated. Because the trial court granted [\*189] judgment for L.A. Cellular before it presented any evidence, and the parties did not litigate the case with the particular test in mind, we cannot yet give a definitive answer. But we agree with the Court of Appeal that plaintiffs might be able to show the sales were unfair under this [\*\*\*54] test. Pricing practices that have the *effect* of harming competition may be unfair even if done without the purpose necessary to violate the Unfair Practices Act.

[\*\*\*567] [CA\(6\)↑](#) (6) Courts must be particularly cautious in evaluating claims that a competitor's prices are too low. Pricing practices are not unfair merely because a competitor may not be able to compete against them. Low prices often benefit consumers and may be the very essence of competition. "Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten [\*\*546] competition." ( [Atlantic Richfield Co. v. USA Petroleum Co., supra, 495 U.S. at p. 340 \[110 S. Ct. at p.](#)

[1892].) Courts must not prohibit "vigorous competition" nor "render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result, for '[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition.' " (Cargill, Inc. v. Monfort of Colorado, Inc., supra, 479 U.S. at p. 116 [107 S. Ct. at p. 492].)

#### CA(5b) [↑] (5b)

The [\*\*\*\*55] conduct challenged here, however, might be unfair. The PUC has indicated that the "cellular equipment market" is supposed to be openly "competitive," in contrast to the "cellular service market," which is not. (*Re Regulation of Cellular Radiotelephone Utilities, supra*, 59 Cal.P.U.C.2d at pp. 203, 206.) Indeed, it expressed concern that, if it permitted bundling, below-cost pricing by service providers might destroy competition for providing equipment. It permitted bundling only because it believed that "cellular dealers operate in a reasonably competitive market that will continue to exist even if bundling is authorized." (*Id. at p. 206.*)

The trial court will have to determine whether the challenged strategy met the test of unfairness we have articulated. This case has an unusual circumstance that might bring it within the unfair competition law's coverage: L.A. Cellular's position as a wholesale duopolist. On remand, the court might find that L.A. Cellular used this legally privileged status in violation of section 17200. "[F]air and honest competition" (§ 17001) in equipment sales might not be possible when a legally privileged company sells [\*\*\*\*56] equipment below cost as a strategy to increase profits on service sales that are prohibited to its equipment competitors.

Allowing a company to sell telephones at a loss to increase profits on service sales, and to recoup its losses with those profits, might threaten the [\*190] ability of any company not permitted to sell services to compete in telephone sales. As the Court of Appeal explained, "It is L.A. Cellular's privileged status as one of two holders of a lucrative government-licensed duopoly which enabled L.A. Cellular to subsidize massive losses on below-cost sales of cellular equipment with its duopoly profits on cellular service, profits which by law were unavailable to its competitors. In this regard, the PUC itself has recognized 'the discounts on cellular equipment are supported by the high profits on cellular service, *profits which are in turn made possible by the duopoly market structure. . . .*'" (*Re Regulation of Cellular Radiotelephone Utilities* (1995) 59 Cal.P.U.C.2d 192, 205, italics added [by the Court of Appeal].) Given L.A. Cellular's government-protected position in the duopoly service market, the fairness of its below-cost sales [\*\*\*\*57] of cellular equipment requires careful scrutiny."

L.A. Cellular's desire to make telephone purchases attractive to consumers in order to increase its service sales may be legitimate. If its pricing strategy is found unfair as we have defined it, it might still seek to gain customers in other ways, but it may not destroy the competitiveness of the telephone market. Accordingly, we agree with the Court of Appeal that this action must be remanded for retrial on the unfair competition law cause of action. Because we have stated the applicable test for the first time, we think plaintiffs should be allowed to present additional evidence to meet that test if they choose. Defendant may also, of course, present a defense. (Pinsker v. Pacific Coast Soc. of Orthodontists (1969) 1 Cal. 3d 160, 167 [81 Cal. Rptr. 623, 460 P.2d 495].)<sup>13</sup>

[\*\*\*\*58] [\*\*\*568] As we have noted, section 17026.1, which permits the sale of telephones below cost in "a good faith endeavor to meet the *legal* market prices of competitors in the same locality or trade area" (italics added), provides a safe harbor for those good faith sales. In light of its ruling on the Unfair Practices [\*\*547] Act cause of action, the trial court expressly did not "reach[]" the question "whether L.A. Cellular in setting its prices in this manner fell within" this provision. It will have to do so on remand in determining whether L.A. Cellular violated the unfair competition law and, if it determines L.A. Cellular did, in fashioning a remedy. The court must not limit L.A. Cellular's actions in such a way as to make it unable to compete with its service rival. Section 17026.1, however,

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<sup>13</sup> Justices Kennard and Baxter have differing interpretations of the facts. The trial court concluded that, because L.A. Cellular did not violate the Unfair Practices Act, it did not violate the unfair competition law; therefore, it never considered the facts in light of the test we have stated. We think it best for the trial court to do so on remand in the first instance. We also express no opinion on the correct remedy should the trial court find L.A. Cellular violated the unfair competition law.

refers to a competitor's "legal" [\*191] prices. The trial court should bear in mind that the two duopolists may compete against each other directly for sales of services, and they should not be allowed to engage in unfair, and hence *illegal*, below-cost equipment sales together any more than either may separately. ( [Page v. Bakersfield Uniform etc. Co. \(1966\) 239 Cal. App. 2d 762, 770-771 \[49 Cal. Rptr. 46\]](#); [\*\*\*\*59] [People v. Gordon \(1951\) 105 Cal. App. 2d 711, 724 \[234 P.2d 287\]](#).)

In its briefing in this court, L.A. Cellular assures us that it "and AirTouch compete vigorously in the service market . . ." The court on remand should do nothing to hamper this competition for services. As the Court of Appeal noted, the PUC "has expressed a preference for 'healthy and direct [price] competition for cellular service' . . ." (Quoting *Re Regulation of Cellular Radiotelephone Utilities, supra*, 59 Cal.P.U.C.2d at p. 205.)

### III. CONCLUSION

The judgment of the Court of Appeal is affirmed. The unfair competition law cause of action shall be retried consistently with the legal principles stated in this opinion.

George, C. J., Mosk, J. Brown, J., and Dibiaso, J., \* concurred.

**Concur by:** KENNARD (In Part); [\*\*\*\*60] BAXTER (In Part)

**Dissent by:** KENNARD (In Part); BAXTER (In Part)

### Dissent

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KENNARD, J.,

Concurring and Dissenting.--Plaintiffs, a group of cellular telephone and cellular service retailers, sued defendant Los Angeles Cellular Telephone Company. (L.A. Cellular), alleging that defendant's practice of selling cellular telephones below cost violated the unfair competition law ([Bus. & Prof. Code, § 17200 et seq.](#)), the Unfair Practices Act ([Bus. & Prof. Code, § 17043, 17044](#)), and, not at issue before this court, the Cartwright Act **antitrust law** ([Bus. & Prof. Code, § 16720 et seq.](#)). I concur in the majority opinion to the extent it concludes that defendant's conduct does not violate the Unfair Practices Act. I also agree that defendant's compliance with the Unfair Practices Act does not immunize its conduct from scrutiny under the unfair competition law.

I disagree, however, with the majority's novel and unsupported conclusion that under the unfair competition law, an "unfair . . . business act or practice" is one that threatens an "incipient violation" of "an **antitrust** [\*\*\*\*61] **law**," one that violates the "policy or spirit" of an **antitrust law**, or one that "significantly threatens or harms competition"--conduct that collectively might be described as falling within the penumbra of **antitrust law**. The [\*192] purpose of **antitrust law** is to prevent monopoly power or agreements restraining trade from destroying the consumer benefits provided by competition. The purpose of the legal prohibitions against *unfair business acts and practices*, by contrast, is to prevent deceptive conduct that injures a particular competitor. By recasting the statutory prohibition of unfair business acts and practices as an extension of **antitrust law**, the majority misinterprets the history and purpose of the unfair competition law. Moreover, the vagueness inherent in the majority's formulation of its standard will magnify the uncertainty that businesses face in trying to comply with the unfair competition law.

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[Section 17200 of the Business and Professions Code](#), part of the unfair competition [\*\*\*569] law, defines "unfair competition" AS FOLLOWS: "As used in this chapter, unfair competition shall mean and include any unlawful,

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\* Associate Justice of the Court of Appeal, Fifth District, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).

unfair [\*\*\*\*62] or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions [\*\*548] Code [addressing various forms of false advertising]." Because here defendant's below-cost sales are not unlawful (the trial court held they did not violate state **antitrust law** or the Unfair Practices Act), are not fraudulent or deceptive, and are not advertising, the issue presented is whether they are an "unfair . . . business act or practice."

#### A. Common Law Unfair Competition

Unfair competition originated as a common law tort. At common law, before the enactment of any statutory prohibition against unfair competition, "unfair competition" had a stable and relatively narrow meaning that focused on business practices that harmed competitors by deceiving customers. (Dunston v. Los Angeles Van etc. Co. (1913) 165 Cal. 89, 94 [131 P. 115] ["relief in such cases really rests upon the deceit or fraud which the later comer into the business field is practicing upon the earlier comer and upon the public".]) Originally, it was the [\*\*\*\*63] deceptive "passing off" of one's goods or services as those of another, commonly accomplished by appropriating the trade name of another. "The fundamental principle underlying this entire branch of the law is, that no man has the right to sell his goods as the goods of a rival trader." (Weinstock, Lubin & Co. v. Marks (1895) 109 Cal. 529, 539 [42 P. 142]; see also Lutz v. Western Iron & Metal Co. (1923) 190 Cal. 554, 561 [213 P. 962]; Banzhaf v. Chase (1907) 150 Cal. 180, 183 [88 P. 704]; Pierce v. Guittard (1885) 68 Cal. 68, 71-72 [8 P. 645].)

[\*193] Even though the tort has been extended to situations other than classic "passing off," deceptive conduct has remained at the heart of unfair competition.<sup>1</sup> As we said in Weinstock, Lubin & Co. v. Marks, supra, 109 Cal. 529, 541, the principles of unfair competition "apply to all cases where fraud is practiced by one in securing the trade of a rival dealer; and these ways are as many and as various as the ingenuity of the dishonest schemer can invent." (See also Schechter Corp. v. United States (1935) 295 U.S. 495, 531-532 [55 S. Ct. 837, 843-844, 79 L. Ed. 1570, 97 A.L.R. 974]) [\*\*\*\*64] ["'Unfair competition,' as known to the common law, is a limited concept. . . . Unfairness in competition has been predicated of acts which lie outside the ordinary course of business and are tainted by fraud, or coercion, or conduct otherwise prohibited by law." (Fn. omitted.)].) For example, in American Philatelic Soc. v. Claibourne (1935) 3 Cal. 2d 689 [46 P.2d 135], the defendant was a stamp dealer with a stock of a stamp rare in perforated form but common in unperforated form. The defendant's stock was in the unperforated form; he perforated the stamps and offered them for sale to other dealers, disclosing that the perforations were unofficial but suggesting that they could be resold to collectors as genuine. Even though the [\*\*\*570] defendant's sales to other dealers were not deceptive, this court had no trouble concluding that his sales were ultimately grounded in the deception of the collectors who were the end purchasers and that this injured the plaintiffs, dealers and collectors of genuine stamps: "[T]he conduct of [defendant] in offering for sale these privately perforated [\*\*549] stamps will inevitably result in severe pecuniary injury [\*\*\*\*65] to the [plaintiffs], and the gaining by [defendant] of an advantage arising out of, in the final analysis, duplicity and dishonesty." (Id. at p. 696.)

<sup>1</sup> In the prestatutory period, the one use of the term "unfair competition" in the common law that developed outside the area of consumer deception was trade secret misappropriation. (Scavengers' P. Assn. v. Serv-U-Garbage Co. (1933) 218 Cal. 568 [24 P.2d 489]; Pasadena Ice Co. v. Reeder (1929) 206 Cal. 697, 703 [275 P. 944, 276 P. 995]; New Method Laundry Co. v. MacCann (1916) 174 Cal. 26, 30 [161 P. 990].) Economically, however, there is a strong similarity between the deceptive misappropriation of a trade name and the form of trade secret misappropriation most common in this court's cases of that period, namely, use of a competitor's customer lists. This becomes apparent when one considers that for a transaction to occur it is not enough for a business to offer a desirable product at a competitive price. Every business also faces the problem, and expense, of searching out customers to inform them of its product and to persuade them to purchase it. In a trade name misappropriation case, the plaintiff has done so by incurring the cost of establishing a valuable trade name that serves as an efficient vehicle for disseminating information about its product to its customers. In a customer list misappropriation case, the plaintiff has done so by identifying individual customers and their needs, incurring the cost of acquiring that information. In both trade name and customer list misappropriation cases, the defendant is able to reduce its search costs incurred in obtaining new customers by free-riding on the investments of the plaintiff in searching out customers. It may have been an intuitive recognition of this similarity that led courts of the prestatutory period to extend the rubric of unfair competition to trade secret misappropriation.

[\*\*\*\*66] [\*194] B. *Statutory Unfair Competition*

Our Legislature first recognized unfair competition in 1933 when it amended Civil Code former [section 3369](#) (hereafter [section 3369](#)), which had addressed the availability of injunctive relief in general. The 1933 amendment had three aspects: It authorized injunctions in cases of "unfair competition"; it authorized the Attorney General, district attorneys, and private persons to seek such injunctions; and it defined "unfair competition" as any "unfair or fraudulent business practice and unfair, untrue or misleading advertising and any act denounced by [Penal Code sections 654a, 654b or 654c](#)." (Stats. 1933, ch. 953, § 1, p. 2482.)

In amending [section 3369](#) in 1933, the Legislature provided statutory authorization of injunctive relief for unfair competition and broad standing to seek that remedy; there is no evidence, however, that the Legislature in addition intended to expand the meaning of unfair business practices beyond the type of deceptive practices recognized at common law.

This court concluded as much when, not long after [section 3369](#)'s amendment, it had occasion to consider the meaning of "unfair or [\*\*\*\*67] fraudulent business practice" and concluded the term was limited to common law unfair competition. As we explained in [International etc. Workers v. Landowitz \(1942\) 20 Cal. 2d 418 \[126 P.2d 609\]](#) (hereafter *Landowitz*): "[T]he statutory definition of 'unfair competition' thus incorporated in [Civil Code, § 3369](#), is not essentially different from that which has historically furnished the basis for equity injunctions against unfair competition." (*Id. at p. 422*.) We concluded that, because of the potential vagueness of the term "unfair competition" outside its traditional common law definition, [section 3369](#) did not authorize injunctive relief against other business practices that might be termed unfair, even those which were violations of other business regulation statutes.

We said: "The phrase 'unfair competition' when carried beyond its traditional scope in equitable actions, however, does not have a fixed meaning in the absence of statutory definition. Courts of equity, therefore, are loath to enjoin conduct on that ground in the absence of specific authorization therefor. . . . [Civil Code, section 3369](#) [\*\*\*\*68] , contains no broader a definition of the term 'unfair competition' than existed at common law and in itself furnishes no basis for an injunction against the violation of the penal ordinance [regulating competition] involved in this case." (*Landowitz, supra, 20 Cal. 2d 418, 422*, italics added.)

Subsequent decisions have continued to view the unfair competition law's prohibition of any unfair business practice as a prohibition against deceptive [\*195] conduct. (See, e.g., [Bank of the West v. Superior Court \(1992\) 2 Cal. 4th 1254, 1267 \[10 Cal. Rptr. 2d 538, 833 P.2d 545\]](#) [under the unfair competition law, "one need only show that 'members of the public are likely to be deceived' "]; [Schwartz v. Slenderella Systems of Calif. \(1954\) 43 Cal. 2d 107 \[271 P.2d 857\]](#); [Don Alvarado Co. v. Porganan \(1962\) 203 Cal. App. 2d 377 \[21 Cal. Rptr. 495\]](#); [People ex rel. Mosk v. National Research Co. of Cal. \(1962\) 201 Cal. App. 2d 765, 772 \[20 Cal. Rptr. 516\]](#) ["What constitutes 'unfair competition' or 'unfair or fraudulent business practice' under any given set of circumstances is a question [\*\*\*\*69] of fact [citation], the essential test being whether the public is likely to be deceived [citation]."]; [Wood v. Peffer \(1942\) 55 Cal. App. 2d 116, 123-124 \[130 P.2d 220\]](#).)

In 1963, the Legislature again amended [section 3369](#) to add "unlawful" business practices to the list of proscribed conduct. In doing so, it expanded the definition of unfair competition with respect to conduct violating statutory prohibitions, for now any business [\*\*\*571] practice that violated an independent statutory duty was an instance of unfair competition that could be enjoined even if the underlying statute did not specifically authorize injunctive relief. ([Barquis v. Merchants Collection Assn. \(1972\) 7 Cal. 3d 94, 112-113 \[101 Cal. Rptr. 745, 496 P.2d 817\]](#) [[section 3369](#) extended [\*\*550] to " 'anything that can properly be called a business practice and that at the same time is forbidden by law' "].) For those business practices that were not statutory violations, however, the Legislature made no change to the definition of "unfair . . . business practice," implicitly accepting our interpretation in [Landowitz, supra, 20 Cal. 2d 418](#). (See [\*\*\*\*70] [People v. Ledesma \(1997\) 16 Cal. 4th 90, 100-101 \[65 Cal. Rptr. 2d 610, 939 P.2d 1310\]](#).) In 1977 the Legislature reenacted, without substantive change, the unfair competition portion of [section 3369](#) as [Business and Professions Code sections 17200, 17201, 17202, 17203](#), and [17204](#). (Stats. 1977, ch. 299, § 1, p. 1202.) In 1992, the Legislature expanded the scope of the unfair competition law to include unfair

business *acts* as well as *practices*; the operative language now reads in full: "As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code." ([Bus. & Prof. Code, § 17200](#).) This change also did not alter the meaning of "unfair . . . business practice" but merely extended it to include single instances of conduct.

Thus, the term "unfair . . . business act or practice" continues to mean deceptive conduct that injures consumers and competitors. Because [\*\*\*\*71] there is no allegation of deceptive conduct by defendant here, the trial court's [\*196] judgment for defendant on plaintiffs' unfair competition law cause of action was proper.

## II

The majority nevertheless holds to the contrary that the term "unfair . . . business act or practice" does not at all encompass common law unfair competition or even deceptive conduct in general. Rather, the majority creates out of whole cloth a new and amorphous definition of unfair business act or practice: conduct that threatens an "incipient violation" of "an antitrust law," that violates the "policy or spirit" of an antitrust law, or that "significantly threatens or harms competition." (Maj. opn., *ante*, at pp. 186-187.) Because none of this conduct amounts to an actual violation of antitrust law, I shall refer to these forms of conduct as penumbral antitrust threats. The majority never identifies what body of antitrust law it supposes the Legislature intended to incorporate in [section 3369](#): Federal antitrust law? State antitrust law? Some amalgamation of the two?

Until today, no case has held or even suggested that the unfair competition law's prohibition of "any unfair . . . business [\*\*\*\*72] act or practice" was a prohibition of penumbral antitrust threats, or that it was not a prohibition of deceptive conduct that harms competitors. Without citing any evidence of legislative intent, the majority insists nonetheless that its definition of unfair business practices is correct because in its view [section 3369](#) as amended by our Legislature in 1933 was intended to "parallel" section 5 of the Federal Trade Commission Act ([15 U.S.C. § 45](#); hereafter the FTC Act), the federal statute that created the Federal Trade Commission (hereafter FTC). (Maj. opn., *ante*, at p. 185.) Section 5 of the FTC Act as enacted in 1914 originally prohibited "unfair methods of competition" (38 Stat. 719). In 1938, Congress amended section 5 to include "unfair or deceptive acts or practices" in order to expand the FTC's jurisdiction to encompass deceptive and unfair conduct that injured consumers without harming competitors. (The Wheeler-Lea Act of 1938, 52 Statutes at Large 111; see also [FTC v. Sperry & Hutchinson Co. \(1972\) 405 U.S. 233, 244 \[92 S. Ct. 898, 905, 31 L. Ed. 2d 170\]](#).) The FTC's jurisdiction under section 5 extends both to antitrust threats [\*\*\*\*73] to competition and to deceptive business practices that injure competitors or consumers. ([FTC v. Sperry & Hutchinson Co., supra, 405 U.S. 233, 239-246](#) & fn. 5 [[92 S. Ct. 898, 903-906](#)].) There is not a shred of evidence, however, that California's [section 3369](#) is patterned [\*\*\*572] after section 5 of the FTC Act, and in [Landowitz, supra, 20 Cal. 2d 418](#), we reached the quite different conclusion that [section 3369](#)'s prohibition of any "unfair . . . [\*197] business practice" was intended [\*\*551] to incorporate common law unfair competition.<sup>2</sup>

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<sup>2</sup> In looking to section 5 of the FTC Act, the majority may have been misled by this court's previous statement that the unfair competition law had "its origin as one of the so-called 'little FTC Acts' of the 1930's, enacted by many states in the wake of amendments to the Federal Trade Commission Act [i.e., the Wheeler-Lea Act of 1938, 52 Statutes at Large 111, which added the phrase 'unfair or deceptive acts or practices' to the 'unfair methods of competition' prohibited by section 5 of the FTC Act] enlarging the commission's regulatory jurisdiction to include unfair business practices that harmed, not merely the interests of business competitors, but of the general public as well." ([Rubin v. Green \(1993\) 4 Cal. 4th 1187, 1200 \[17 Cal. Rptr. 2d 828, 847 P.2d 1044\]](#).)

Contrary to the assertion in [Rubin v. Green, supra, 4 Cal. 4th 1187, 1200](#), there were no "little FTC Acts" of the 1930's. The term "little FTC Act" instead denotes a group of state statutes enacted in the 1960's and 1970's; these statutes, promoted by the FTC among others, were meant to complement the deceptive practices jurisdiction of the FTC, not its antitrust jurisdiction, and they address deceptive trade practices, not antitrust threats to competition. (See, e.g., Karns, *State Regulation of Deceptive Trade Practices Under "Little FTC Acts": Should Federal Standards Control?* (1990) 94 Dick. L.Rev. 373, 373-376; Bailey & Pertschuk, *The Law of Deception: The Past as Prologue* (1984) [33 Am. U. L.Rev. 849, 861](#) fn. 63 [authored by two FTC commissioners]; Comment, *Consumer Protection: The Practical Effectiveness of State Deceptive Trade Practices Legislation*

[\*\*\*\*74] The majority's reliance on this court's statement in *Barquis v. Merchants Collection Assn., supra, 7 Cal. 3d 94, 110*, characterizing the unfair competition law's prohibition of any "unlawful [or] unfair . . . business practice" and section 5 of the FTC Act as "parallel broad proscription[s]" is misplaced. The parallelism to which *Barquis* referred was the fact that section 5 of the FTC Act and our unfair competition law both protect consumers as [\*198] well as competitors, not that both prohibited penumbral antitrust threats. (See *7 Cal. 3d at pp. 109-110*.)

Nothing in *Barquis v. Merchants Collection Assn., supra, 7 Cal. 3d 94*, even hinted that unfair business practices, however broad a concept, were to be equated with penumbral antitrust threats. To the extent *Barquis* might be read to suggest that the term "unfair . . . business practice" has an amorphous meaning extending in some undefined fashion beyond deceptive conduct, that suggestion is entirely dictum, for the issue decided in that case was whether the business practice in question was *unlawful*, not whether it was *unfair*. The suggestion is also unsound.

[\*\*\*\*75] Not only is it contrary to the historical development of the unfair competition law explained above, but it is based on *Barquis*'s misquotation of the unfair competition law. In substituting the word "deceptive" for the [\*\*\*573] word "fraudulent," *Barquis* suggested that unfair practices were a category distinct from deceptive practices. (Compare *section 3369* [prohibiting any "unlawful, unfair or fraudulent business practice"] with *Barquis, supra, 1\*\*5521 at p. 111* [quoting *section 3369* as prohibiting any " 'unlawful, unfair or deceptive business practice' " (italics omitted)].) <sup>3</sup>

[\*\*\*\*76] Moreover, the majority misunderstands the term "unfair methods of competition" in section 5 of the FTC Act to mean only penumbral antitrust threats. (See maj. opn., *ante*, at p. 186, fn. 11; *id. at p. 187*.) As interpreted by the FTC and the federal courts, that phrase covers not only the penumbral antitrust threats the majority focuses on

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(1984) *59 Tul. L.Rev. 427, 428*; Note, *Toward Greater Equality in Business Transactions: A Proposal to Extend the Little FTC Acts to Small Businesses* (1983) *96 Harv. L.Rev. 1621, 1621-1624*; Lovett, *State Deceptive Trade Practice Legislation* (1972) *46 Tul. L.Rev. 724, 730*, fn. 14.)

California has such a "little FTC Act" incorporating verbatim the language of section 5 of the FTC Act, but it is not *Business and Professions Code section 17200 et seq.*, the unfair competition law, and it does not prohibit penumbral antitrust threats. Rather, it is *Civil Code sections 1750- 1784*, the Consumers Legal Remedies Act, which was enacted in 1970. The act lists certain prohibited "unfair methods of competition and unfair or deceptive acts or practices" (the language of section 5 of the FTC Act), beginning with "passing off," and it provides various remedies to injured consumers. ( *Civ. Code, § 1770*; see also Reed, *Legislating for the Consumer: An Insider's Analysis of the Consumers Legal Remedies Act* (1971) 2 Pacific L.J. 1.)

In addition to misunderstanding the term "little FTC Act," *Rubin v. Green, supra, 4 Cal. 4th 1187, 1200*, mixes up its chronology; because *section 3369* was enacted in 1933, five years before the 1938 amendment expanding the FTC's jurisdiction, it obviously was not enacted in the "wake" of that amendment. The sole authority *Rubin* cites on this point, *Bank of the West v. Superior Court, supra, 2 Cal. 4th 1254, 1264*, is equally confused: "A host of so-called 'little FTC Acts' followed [the 1938 amendment of the FTC Act] including California's Unfair Business Practices Act. (*§ 17200 et seq.*; see also Civ. Code, former *§ 3369*)." It is worth noting that in each of these cases the question of the historical origins of the unfair competition law was not at issue and was not dispositive of any issue. Each decision discussed the point only in passing by way of background.

<sup>3</sup>The majority also misunderstands the significance of *Barquis*'s statement that "*section 3369* indicates that 'unfair competition' as used in the section cannot be equated with the common law definition of 'unfair competition,' but instead specifies that, for the purposes of its provisions, unfair competition 'shall mean and include *unlawful, unfair or fraudulent business practice . . . .*'" (*Barquis v. Merchants Collection Assn., supra, 7 Cal. 3d at p. 109*, italics original; see maj. opn., *ante*, at p. 181, fn. 9.) Our point was that the unfair competition law expanded beyond the limits of common law unfair competition along two dimensions: First, because the unfair competition law provided relief for injury to consumers even absent any showing of injury to a competitor, it "extended to the entire consuming public the protection once afforded only to business competitors." ( *Barquis v. Merchants Collection Assn., supra, 7 Cal. 3d at p. 109*; see also *id. at p. 110* ["the courts, in interpreting the section, have long declared that the provision is at least as equally directed toward 'the right of the *public* to protection from fraud and deceit[,] as toward the preservation of fair business competition" (italics original).]) Second, because the unfair competition law included *unlawful* as well as *unfair* business practices, it prohibited a broader range of conduct than did common law unfair competition. ( *Id. at pp. 112-113*.) Specifically, the unfair competition law prohibited not only the deceptive conduct that was an "unfair . . . business practice" but also, as an "unlawful . . . business practice," "anything that can properly be called a business practice and that at the same time is forbidden by law." ( *Id. at p. 113*.) Nothing in *Barquis* suggested, however, that the term "unfair . . . business practice" meant penumbral antitrust threats, or that it did not mean deceptive conduct.

but also actual violations of the **antitrust law** and in addition acts of unfair competition having nothing to do [\*199] with **antitrust law**, including passing off and other forms of common law unfair competition and consumer deception. (See, e.g., *FTC v. Sperry & Hutchinson Co., supra*, 405 U.S. 233, 243, 244 [92 S. Ct. 898, 904-905] ["unfair competitive practices were not limited to those likely to have anticompetitive consequences after the manner of the antitrust laws"]; *Sears, Roebuck & Co. v. Federal Trade Commission* (7th Cir. 1919) 258 F. 307, 311 [the first FTC enforcement action to be judicially reviewed, a case of deceptive advertising; "The commissioners, representing the government as parens patriae, are to exercise their common sense, as informed by their knowledge of the general [\*\*\*\*77] idea of unfair trade at common law, and stop all those trade practices that have a capacity or a tendency to injure competitors directly or through deception of purchasers . . . ."]; FTC, Ann. Rep. (1935) 67-71 [Listing 27 "unfair methods of competition" PROHIBITED BY THE FTC: "9. Passing off goods or articles for well and favorably known products of competitors through appropriation or simulation of such competitors' trade names, labels, dress of goods, etc. . . ."], quoted in Handler, *Unfair Competition* (1936) 21 Iowa L.Rev. 175, 244-248; Bailey & Pertschuk, *The Law of Deception: The Past as Prologue*, *supra*, 33 Am. U. L.Rev. 849.)

Nor is there any other sound reason for presuming that our Legislature intended section 3369 to incorporate the antitrust portion of section 5 of the FTC Act. In amending section 3369 in 1933 to authorize injunctive relief against "[a]ny person performing or proposing to perform an act of unfair competition," the Legislature was acting in a field already well established by the common law. There is no reason to suppose that, without any express statement, the Legislature implicitly intended to reject the *common law* definition [\*\*\*\*78] of unfair competition and adopt instead **antitrust law** as the definition of unfair competition. The majority offers no [\*\*\*574] explanation why, if the Legislature in 1933 had wished to expand the scope of the antitrust laws to reach penumbral antitrust threats, it would have chosen the roundabout method of using a term--"unfair competition"-- [\*\*553] with an established meaning independent of **antitrust law** and amending a Civil Code provision relating to the general availability of injunctive relief, rather than directly amending California's **antitrust law**, the Cartwright Act, in terms that clearly evidenced its intent to broaden the scope of **antitrust law**. This is especially so if by its reference to "the antitrust laws" the majority includes federal **antitrust law**. It would be most implausible for the Legislature, if it intended to incorporate the entire body of federal **antitrust law**, the law of another sovereign, to seek to do so implicitly simply by using the term "unfair . . . business practice" without any reference to federal law. Given the absence of any evidence that the Legislature intended to vary or reject that common law understanding of unfair business practices [\*\*\*\*79] as practices that harm competitors by deceiving [\*200] customers, the only reasonable conclusion is that the Legislature intended to adopt that understanding. This is the conclusion our court reached in Landowitz, supra, 20 Cal. 2d 418.

### III

In addition to being unfounded, the majority's definition will not solve the problem it identifies: the costs imposed on businesses by a vague and overbroad definition of unfair business practice. I can imagine no greater recipe for confusion and uncertainty than the majority's penumbral antitrust threat standard. It is difficult enough for courts and businesses alike to determine whether a business practice amounts to an *actual* violation of the antitrust laws prohibiting restraint of trade or exclusionary monopolistic conduct. A business seeking to guide its competitive conduct by the majority's standard will be put to the impossible task of deciding whether its conduct, even though not a violation of the antitrust laws, violates the "spirit" of the antitrust laws or is an "incipient" violation of those laws or is a threat to competition. A prominent antitrust treatise has criticized the FTC for enforcing section 5 [\*\*\*\*80] of the FTC Act in cases of incipient antitrust violations or violations of the spirit of the antitrust laws, and it has argued that only actual violations of federal **antitrust law** should be actionable under section 5. (2 Areeda & Hovenkamp, **Antitrust Law** (1995 rev. ed.) P 307, pp. 21-28.) There is no reason or need to import the uncertainty of section 5 into California law.

Even more significantly, the majority ignores two crucial distinctions that make the standard of section 5 of the FTC Act an inappropriate standard for private civil litigation:

First, the interpretation of section 5 that the FTC has developed is an administrative standard, whose enforcement is subject to the informed discretion of an administrative agency with considerable economic expertise and

regulatory experience. When questions arise as to the anticompetitive impact of a particular business practice, the FTC and its professional staff are able to investigate and analyze that practice not only for its impact on the consumers and competitors most immediately affected by the practice but for its potential to disrupt competition in the economy as a whole. The FTC can then use this broad base of data to exercise [\*\*\*\*81] its discretion in determining whether the practice in question truly threatens competition to a degree that justifies the costs of suppressing the practice. By contrast, a court has no similar resources or competence for deciding wide-ranging questions of economic policy. "Unlike the courts, the Commission is not one or a few [\*201] judges acting solely on a record made by plaintiff and defendant. It is an elaborate institution of many lawyers, economists, researchers, and other professionals. Its facilities for gathering facts about a particular respondent and a segment of the economy are vastly superior to those of a court. Its specialized personnel provide a capacity for in-depth probes far beyond that of the courts." (2 Areeda & Hovenkamp, *Antitrust Law*, *supra*, P 307, p. 26.) These justifications for having an administrative agency search out incipient antitrust violations and threats to competition before they have ripened into actual antitrust violations [\*\*575] do not support permitting private plaintiffs to do so in a judicial forum.

Second, if the FTC does find a business's practice to be an incipient antitrust violation or a threat to competition and decides [\*\*\*\*82] that it [\*\*554] should be suppressed, it is limited to awarding only prospective relief in the form of a "cease-and-desist order" instructing the business to modify its future conduct. ([15 U.S.C. § 45](#)) A business subject to an FTC cease-and-desist order does not face any civil or criminal penalties or monetary liability for its past conduct. By contrast, a defendant in an unfair competition law action may face massive restitutionary liability to the plaintiff and to others similarly situated. The majority proposes to use the FTC's section 5 standard to impose retrospective monetary liability for conduct that does not violate any *antitrust law* but that in the opinion of one judge may, if continued, threaten to violate an *antitrust law* in the future. This grossly distorts the purpose of that standard, which was to terminate present conduct not in violation of any law that, if unchecked, would ripen into unlawful anticompetitive conduct, not to impose liability for past lawful conduct.

#### IV

Even if the majority were correct that an "unfair . . . business act or practice" is properly defined as one that threatens an "incipient violation" of the state antitrust [\*\*\*\*83] laws, one that violates the "policy or spirit" of the state antitrust laws, or one that "significantly threatens or harms competition," there is no basis for a retrial here. A defendant's motion for judgment in a bench trial occurs at the close of the plaintiff's case. ([Code Civ. Proc., § 631.8](#)) Its premise is that, even without the presentation of any opposing evidence by the defendant, the plaintiff's evidence is insufficient to prove its claims by a preponderance of the evidence.

Here, to defeat defendant's motion for judgment, it was plaintiffs' burden to present all their evidence on their unfair competition cause of action and to prove by a preponderance of the evidence that defendant's price cutting [\*202] was unfair competition. In addition, both as part of its Unfair Practices Act cause of action and as part of its Cartwright Act antitrust action, plaintiffs presented evidence attempting to prove that defendant's price cutting had injured competition. They failed to prove this.

A plaintiff attempting to show that price cutting is an incipient violation of the antitrust laws, a violation of their policy or spirit, or a substantial threat [\*\*\*\*84] or harm to competition faces a heavy burden. Ordinarily, price cutting is the essence of competition, not a substantial threat to it. Prices are the primary medium through which business entities compete. "Low prices benefit consumers regardless of how those prices are set . . . ." ([Brooke Group Ltd. v. Brown & Williamson Tobacco Corp. \(1993\) 509 U.S. 209, 223 \[113 S. Ct. 2578, 2588, 125 L. Ed. 2d 168\]](#)) Here, the consumer is interested only in the total price of a telephone plus service. As plaintiffs admit in their brief: "What matters to the consumer is the total cost of a telephone and service . . . ." It is not disputed that defendant's price discounting has reduced the total cost of a telephone and service, making the cellular telephone and cellular service more affordable to greater numbers of consumers, thereby increasing consumer welfare.

Price discounting is only a threat to competition in very narrow circumstances, when it becomes "predatory." In predatory pricing, a firm "invests" in below-cost pricing to drive its competitors out of the market, with the

expectation that it will then be able to raise its prices to supracompetitive levels and [\*\*\*\*85] earn monopoly profits to recoup its investment in below-cost sales. ([Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., supra, 509 U.S. 209, 224 \[113 S. Ct. 2578, 2588-2589\]](#); 3 Areeda & Turner, [Antitrust Law](#) (1978) P 711b, p. 151 ["predation in any meaningful sense cannot exist unless there is a temporary sacrifice of net revenues in the expectation of greater future gains".]) Predatory pricing only makes economic sense to the predator if it has a substantial expectation of recouping its costs by raising its prices to "supracompetitive" levels once competitors are eliminated. ([Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., supra, 509 U.S. 209, 224 \[113 S. Ct. 2578, 2588-2589\]](#); 3 Areeda & Turner, [Antitrust](#) [\*\*\*576] [Law](#), *supra*, P 711b, p. 151.) "Without [recoupment], [below-cost] pricing produces lower aggregate prices in the market, and consumer welfare is enhanced." ([Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., supra, 509 U.S. at p. 224 \[113 S. Ct. at p. 2588\]](#).)

For supracompetitive pricing and recoupment to occur, however, the predator must acquire not only market share but [\*\*\*\*86] market power by creating conditions that would prevent new competitors from reentering the market [\*203] once the predator raises prices to supracompetitive levels. ([Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., supra, 509 U.S. at pp. 225-226 \[113 S. Ct. at pp. 2589-2590\]](#); [Matsushita Elec. Industrial Co. v. Zenith Radio \(1986\) 475 U.S. 574, 590-591 \[106 S. Ct. 1348, 1358, 89 L. Ed. 2d 538\]](#)) ["In order to recoup their losses, [predators] must obtain enough market power to set higher than competitive prices, and then must sustain those prices long enough to earn in excess profits what they earlier gave up in below-cost prices."]; 3 Areeda & Turner, [Antitrust Law](#), *supra*, P 711b, pp. 151-152.) Because such barriers to entry rarely exist, "proven cases of predatory pricing have been extremely rare." (3 Areeda & Turner, [Antitrust Law](#), *supra*, P 711b, p. 152.)

As the trial court here found, defendant L.A. Cellular's purpose in making below-cost sales of cellular telephones was not to drive plaintiffs out of the telephone sales business or even to divert business from them but to compete with AirTouch Cellular (the other cellular [\*\*\*\*87] service provider in Los Angeles) for customers in the cellular service market. Thus, defendant did not have a predatory intent to drive competitors out of business.

Nor did defendant's conduct have a predatory effect. Plaintiffs presented no evidence that the exit of these plaintiffs, or all independent telephone hardware sellers, from the cellular telephone market would injure competition by permitting defendant to raise its prices at all, much less raise them to supracompetitive levels. Nor did plaintiffs present evidence of substantial barriers to entry that would preclude others such as consumer electronics retailers from entering the cellular telephone market should defendant raise prices supracompetitively. "[U]nsuccessful predation is in general a boon to consumers. [P] That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed for 'the protection of competition, not competitors.' " ([Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., supra, 509 U.S. 209, 224 \[113 S. Ct. 2578, 2588\]](#), original italics.)

The majority [\*\*\*\*88] speculates nonetheless that plaintiffs might be able to show that defendant harmed competition by its price discounting. (Maj. opn., *ante*, at pp. 187-188.) It rests this theory on the premise that defendant is a duopolist in the cellular service market and that plaintiffs are legally precluded from competing with defendant by selling phones below cost and offsetting those losses with profits from cellular service sales.

The majority's premise is false, as the trial record created by plaintiffs shows. Plaintiffs' economics expert testified that defendant L.A. Cellular [\*204] and its service competitor AirTouch Cellular are required by the California Public Utilities Commission to wholesale cellular airtime to independent resellers at 77 percent of retail cost. Thus, they are not a true duopoly, and others compete with them for the retail sale of cellular service. Some of the plaintiffs are retailers of cellular service, and it appears the rest could be. Plaintiffs offered no evidence that they could not have competed with defendant by selling telephones for similar below-cost prices and recouping their losses through profits on accompanying sales of service. If plaintiffs' [\*\*\*\*89] argument is that the harm to competition rests on defendant's cross-subsidization of telephone sales by service profits that plaintiffs could not have earned, they bore, but did not meet, the burden of showing they could not have earned similar profits.

If on remand the trial court enjoins defendant L.A. Cellular under the unfair competition law from making below-cost sales of its cellular telephones, defendant will then undoubtedly seek to enjoin its service competitor AirTouch Cellular from making similar below-cost telephone sales. The result will [\*\*\*577] be judicially imposed price fixing

of minimum retail prices, establishing the sort of retail price maintenance that the antitrust laws condemn when resulting from agreements among market participants. Price fixing by [\*\*556] litigation will replace price reduction by competition, and the ultimate loser will be the consuming public.

The majority's theory will also subject businesses owning patents and copyrights to unfair competition liability in many instances. Like defendant L.A. Cellular's cellular service license, a patent or copyright for a successful product is a government-granted franchise from which competitors [\*\*\*90] are excluded. A business using revenue from its patents or copyrights to fund operations in another line of business is no different from defendant's use of its cellular service revenues to subsidize sales of cellular telephones. In doing so, the patent or copyright owner would be subsidizing that other line of business with patent or copyright revenue that its competitors in that line of business are legally precluded from earning, just as a cellular service licensee making below-cost telephone sales subsidizes those sales with cellular service profits that its competitors are legally precluded from earning. Thus, in these circumstances patent and copyright owners too will be subject to liability under the majority's theory.

If cross-subsidization between the regulated market for cellular service and the unregulated market for cellular telephones is a problem, there is no need to distort the unfair competition law to address it. There are both state and federal regulatory bodies charged with protecting consumer welfare [\*205] against injurious practices in the cellular marketplace (the Federal Communications Commission and the California Public Utilities Commission). They are [\*\*\*91] far better equipped than a court of equity to determine whether cross-subsidization is causing consumer injury and, if so, what remedy should be imposed. How would a court determine the proper minimum resale price for cellular telephones? The cost of the telephones to defendant? That cost plus some fixed markup? Or the marginal cost of the telephones to defendant plus all the other expenses of selling the telephones? Or the average variable cost? Even telephone sales by a cellular carrier at or above the cost of the telephones themselves may be "subsidized" by service revenues if those revenues are used to pay for the other expenses incurred in making telephone sales (e.g., a newspaper ad by defendant for cellular service may also advertise a cellular phone; subsidization is occurring if these advertising costs, or any overhead or other indirect sales costs, are paid for by cellular service revenue). How would a court take these subsidies into account? The majority provides no answer to these difficult questions.

In sum, I doubt whether price discounting that is not predatory, is not done with the intent to injure competition, does not violate the Unfair Practices Act or other statutes, [\*\*\*92] is not fraudulent, and increases consumer welfare by making more goods or services available to more people at lower prices can ever be an unfair business practice, even under the majority's standard. It certainly is not on the record that plaintiffs have presented.<sup>4</sup>

## Conclusion

The majority's amorphous definition of an "unfair . . . business act or practice" as one that threatens an "incipient violation" of the antitrust laws, one that violates the "policy or spirit" of the antitrust laws, or one that "significantly threatens competition" is at once too narrow and too broad. It is too narrow to the extent that it reduces the prohibition against unfair business practices to nothing more than an appendage of antitrust law. [\*\*\*93] Doing so ignores the distinct history and purpose of the unfair competition law's prohibition of unfair business practices, which was to protect consumers and individual competitors against injuries caused by consumer deception, not to protect or advance competition. Antitrust law, by contrast, is not concerned with protecting individual competitors, nor with preventing acts of deception, [\*\*\*578] but rather with the threats to competition and consumer welfare posed by monopoly power and agreements restraining trade. There is no evidence our Legislature [\*\*557] intended the unfair competition law to be an antitrust law.

[\*206] The majority's definition is too broad to the extent that it encompasses not violations of antitrust law but what might be called "antitrust lite": such vague and dubious metaphysical entities as incipient violations, violations of policies and spirits, and anything that might be characterized as a significant threat or harm to competition. That

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<sup>4</sup> I note that the FTC has taken no reported action anywhere in the United States to oppose the below-cost distribution of cellular telephones by cellular service providers. Apparently, unlike the majority, it sees no significant threat to competition from this widespread practice.

definition will provide no certainty to businesses seeking to know what conduct the unfair competition law prohibits, given the inherent vagueness of the majority's concepts of an "incipient violation" of [\*\*\*\*94] an antitrust law, violations of the "policy or spirit" of an antitrust law, and "significant" threats or harms to competition.

I would instead adhere to our historical understanding that the core of an unfair business practice is conduct that deceives consumers. As there is no allegation or evidence of deceptive conduct by defendant, plaintiffs' unfair competition claim fails.

Even if I were to apply the majority's definition here, however, I would conclude that plaintiffs have failed to show that defendant's price cutting is predatory and harmful to competition. The purpose of competition is to drive prices down. Although the unfair competition law protects competitors, even under the majority's definition it does not protect competitors at the expense of competition. That is, the unfair competition law does not authorize injunctive relief that harms consumer welfare by setting minimum prices that increase the prices consumers pay.

To claim, as the majority does, that the unfair competition law is an antitrust law aimed at maximizing consumer welfare and yet conclude, as the majority also does, that on this record a court could determine that consumer welfare would be enhanced [\*\*\*\*95] by raising the prices of cellular telephones is an exercise in contradiction. Because price discounting is the primary medium of competition, to prohibit it here would elevate the interests of plaintiffs far above those of consumers. Competitors that sell below-cost phones may hurt plaintiffs, but they help consumers by making cellular telephones more affordable.

For the reasons discussed above, I dissent from the majority's analysis of the meaning of unfair business practice under the unfair competition law, and I would affirm the trial court's judgment in favor of defendant L.A. Cellular.

#### **BAXTER, J.,**

Concurring and Dissenting.--I concur in the judgment insofar as it reverses the judgment of the trial court for defendant on the cause of action brought under section 17204 of the Business and Professions Code for [\*207] violation of the unfair competition law (UCL) (§ 17200 et seq.).<sup>1</sup> I dissent insofar as the majority affirm judgment for defendant on the sections 17043, 17044, Unfair Practices Act (UPA) (§ 17000 et seq.), causes of action.

[\*\*\*\*96] While I have several reservations about the majority opinion, my principal concern is that the majority construe the UPA as permitting below-cost sales which injure competitors and/or destroy competition because the intent of the below-cost seller is to compete, but not to cause injury. This construction is inconsistent with the purpose and language of the UPA, in particular sections 17050, subdivision (d), and 17071 under which the statutory presumption of intent or purpose to injure competitors or destroy competition arising on proof of below-cost sales may be rebutted only by proof of a good faith belief that the price of a competitor with which the below-cost sale was to compete was a legal price. Under the majority construction, intent to injure becomes a subjective element of a section 17043 violation, rather than the objective element created by the section 17071 statutory presumption, and the limited exceptions to the ban on below-cost sales created by section 17050 are expanded far beyond those intended by the Legislature.

[\*\*\*579] At the same time as they restrict UPA liability and abrogate an objective standard of intent, the majority expand potential liability under [\*\*\*\*97] the UCL for "unfair" practices, [\*\*558] again importing subjectivity into a law that no longer gives fair warning of conduct that may be deemed unlawful. Another regrettable consequence of the majority approach is an unnecessary divergence between California laws governing anticompetitive conduct and federal antitrust law, in particular a departure from the intent to injure concept that is part of the federal antitrust distinction between "competitive" and "predatory" pricing. The result will create uncertainty in the business community over potential liability for conduct that is permissible under federal law and under the UPA, but may, nonetheless, be deemed "unfair" under the UCL. Both the UPA and the UCL are susceptible to a construction that would largely eliminate that uncertainty and more closely conform to the apparent legislative intent underlying the California law. The majority reject this opportunity to adopt that construction.

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<sup>1</sup> All statutory references are to the Business and Professions Code unless otherwise indicated.

I also have reservations about the majority's conclusion that "purpose" as used in [section 17043](#) has a narrower meaning than "intent." I doubt that the Legislature had this distinction in mind when the UPA was enacted.

[\*208] I

[\*\*\*\*98] *Background*

Plaintiffs include wholesale and retailer sellers of cellular phones, as well as resellers of cellular service who are wholesalers of cellular telephones, two of whom also sell cellular telephones at retail. Defendant Los Angeles Cellular Telephone Company (L.A. Cellular), a cellular service provider, also engages in the wholesale and retail sale of cellular phones. Although L.A. Cellular's principal market is the provision of cellular service, because it has opted to sell cellular phones to its agents and to customers of its cellular service, it is competing in the wholesale and retail markets for sale of cellular phones. Thus plaintiffs are competitors which defendant reasonably should have known might be injured by below-cost sales in either market. Although the record shows that competition in the sale of cellular phones has not been destroyed as a result of defendant's conduct, and sellers continue to enter the market, the record also demonstrates that defendant's conduct did injure plaintiffs, its competitors, who were in business when the below-cost sales complained of in this action occurred.

Plaintiffs' evidence established that as a result of its inability [\*\*\*\*99] to compete with defendant's subsidized below-cost sales,<sup>2</sup> plaintiff Cel-Tech Communications, Inc. (Cel-Tech) was ceasing operations. Plaintiffs Comtech, Inc. and Cellular Service, Inc., the resellers of cellular service, suffered business declines when their equipment sales deteriorated because they could not [\*209] compete with defendant's below-cost sales. All plaintiffs were injured as a result of their inability to compete with those below-cost sales.

[\*\*\*\*100] [\*\*\*\*580] Judgment for defendant was entered pursuant to [Code of Civil Procedure section 631.8](#), supposedly at the close of plaintiffs' [\*\*559] evidence. However, in their case-in-chief, plaintiffs had called an officer of defendant L.A. Cellular as an adverse witness pursuant to [Evidence Code section 776](#)<sup>3</sup> and defendant was allowed to call that person as a defense witness. Thus, the record reflects not only plaintiffs' evidence of below-cost sales of cellular phones by defendant and injury to plaintiffs and to competition in the cellular phone market, but also defendant's explanation of its purpose in doing so. That purpose, the trial court found, was only to compete with its competitor in the cellular service market, AirTouch Cellular (then PacTel). Before it launched its below-cost

<sup>2</sup> "Cost" IS DEFINED IN SECTION 17026: " 'Cost' as applied to production includes the cost of raw materials, labor and all overhead expenses of the producer.

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

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

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

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

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

<sup>3</sup> [Evidence Code section 776, subdivision \(a\)](#): "A party to the record of any civil action, or a person identified with such a party, may be called and examined as if under cross-examination by any adverse party at any time during the presentation of evidence by the party calling the witness."

sales program, L.A. Cellular had been unable to attract new customers for its cellular service because the high prices for cellular phones deterred prospective subscribers. Thus, by its below-cost sales, defendant sought to compete in the cellular service market, not to injure sellers engaged only in equipment sales.

[\*\*\*\*101] Perhaps the most dramatic evidence of the actual injurious effect of L.A. Cellular's below-cost sales, however, was the impact on plaintiff Cel-Tech. That impact on plaintiff Cel-Tech was staggering. Cel-Tech, a privately owned company started by its owner with \$ 4,000 in savings, was clearly a very successful business before defendant launched its below-cost sales campaign, having grown from nothing in 1984 when it started business as a retail seller to \$ 36 million in revenues and \$ 2 million in gross profits by 1992. At that time it was primarily a wholesaler/distributor of cellular phones, and was the largest distributor of cellular phones in Los Angeles and one of the largest in the nation. Based on its volume of sales, Cel-Tech became a distributor for several manufacturers and private label producers of cellular phones, among them Mitsubishi International, Mitsubishi Electric, NEC, OKI, Toshiba, Ericsson/GE, and Pioneer from which it was able to purchase cellular phones at or very near the price charged to carriers. It sold cellular phones to retailers who sold to "end users," and to resellers, including agents of L.A. Cellular and AirTouch. By the end of 1994 it was out of [\*\*\*\*102] the business of cellular phone sales and distribution as both a retailer and distributor and was liquidating its inventory as a direct result of defendant's below-cost sales. It could not compete without selling its phones below cost. [\*210] Not only was it unable to make a profit, it could not even cover its overhead costs.

The trial court found that "L.A. Cellular was doing what it said it was doing, which was keeping a watchful eye on the ads and setting its hardware prices to compete with its major competitor, AirTouch, and to increase its sale of service activations. Those were L.A. Cellular's primary motivations and . . . injury to the plaintiffs was unintended." The Court of Appeal, correctly, disagreed with the trial court's further finding that L.A. Cellular did not know that its conduct would injure plaintiffs. It held, and I agree, that the record contained substantial evidence that the injury to plaintiffs was readily foreseeable.

The Court of Appeal questioned the sufficiency of the evidence to support a conclusion that L.A. Cellular's purpose was only to compete with AirTouch for market share in the cellular service industry. I share that skepticism. My review [\*\*\*\*103] of the record supports plaintiffs' claim that the record is equally susceptible to a conclusion that AirTouch lowered its prices for cellular phones in order to meet the predatory pricing of L.A. Cellular. Regardless of how this question should be resolved, however, the record contains no evidence that if L.A. Cellular acted to meet the prices of AirTouch for cellular phones, it did so with a good faith belief that those prices were legal.

## II. THE "PURPOSE" ELEMENT OF A SECTION 17043 VIOLATION

I agree with the majority that "intent" and "purpose" may have different meanings. "[\*\*581] Intent" may encompass both acts done with [\*\*560] the intent to cause a particular result and those undertaken with knowledge that there is a substantial certainty that the result will follow, while "purpose" encompasses only the former. I do not agree that the Legislature intended that distinction in the UPA, however.

A statute must be construed with regard to the statutory scheme of which it is a part and the court should give meaning to every word if possible, avoiding a construction that will render any part surplusage. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal. 4th 1106, 1118 [81 Cal. Rptr. 2d 471, 969 P.2d 564] [\*\*\*\*104] (*Briggs*); *People v. Comingore* (1977) 20 Cal. 3d 142, 147 [141 Cal. Rptr. 542, 570 P.2d 723].) A court will normally presume that when the Legislature uses different words in the same connection in different parts of a statute that a different meaning was intended. [\*211] (*Briggs, supra, 19 Cal. 4th at p. 1117*) In the UPA, however, the Legislature appears to have used "intent" and "purpose" interchangeably. The enforcement provisions of the law suggest that the distinction drawn by the majority was not intended.

One provision describing conduct proscribed by the UPA uses "intent" to describe the mental element of the offense. Section 17040 prohibits locality discrimination, other than in a good faith effort to meet a competitive price, when the discrimination is "with intent to destroy the competition" of a regularly established dealer in the product, or to prevent competition by a person who intends to become a dealer in the product. Of the other UPA provisions defining offenses, only sections 17043 and 17044 (by incorporation of section 17030) use the term "purpose," the

former to require for violation through below-cost sales a mental element [\*\*\*\*105] of acting with the "purpose of injuring competitors or destroying competition," the latter to require as a "loss leader" element a "purpose . . . to induce, promote or encourage the purchase of other merchandise." ([§ 17030](#).) Absent some reason to believe that the Legislature intended broader applicability of the offense defined in section 17040 than that in [section 17043](#), it is difficult to accept the construction proposed by the majority. Under the majority construction, locality discrimination is an offense if the actor knew or reasonably should have known that the discrimination would injure competitors or destroy competition, but the same actor whose below-cost sales caused identical harm would be liable and subject to an injunction only if the actor's purpose was to injure or destroy competition.

Moreover, the presumptions and evidentiary rules created by the UPA refer to proving the "purpose or intent" of the actor. [Section 17071](#) provides that below-cost sales are "presumptive evidence of the purpose or intent to injure competitors or destroy competition." Section 17071.5 provides that a retailer's limitation of quantity in a below-cost sale creates a "presumption of the purpose [\*\*\*\*106] or intent to injure competitors or destroy competition." Section 17075 permits introduction of evidence of prevailing wages to "prove the intent or purpose" to violate the UPA.

Finally, section 17095 provides: "Any person, who, either as a director, officer or agent of any firm or corporation or as agent of any person, violating the provisions of this chapter, assists or aids, directly or indirectly, in such violation is responsible therefore equally with the person, firm or corporation for which he acts." The UPA provisions authorizing injunctive relief and criminal prosecution against an agent of the offending party then provide that it is sufficient to prove the "unlawful *intent* of the person, firm [\*212] or corporation for which he acts." (§ 17096, 1710l, *italics added*.) Under the majority construction, the principal that makes below-cost sales or uses loss leaders violates the UPA only if acting for the purpose of injuring or destroying competition, but an agent of the principal is liable if the principal acted with knowledge that this was a probable result.

I am at a loss to understand why the Legislature would relieve from UPA liability [\*\*\*\*107] a principal that acted with knowledge or reason to know that below-cost pricing would injure competitors, but impose liability on an agent of the principal on the ground that the principal had such knowledge or had reason to know. Yet this is the result of the distinction [\*\*561] [\*\*\*582] between "purpose" and "intent" drawn by the majority.

On this basis alone I would hold that plaintiffs made a *prima facie* showing of the specific intent element of a [section 17043](#) or [17044](#) violation by presenting evidence that defendant engaged in below-cost sales and used loss leaders in circumstances in which it knew or should have known because of the substantial certainty of the impact of those sales that the below-cost sales would injure competitors and destroy competition. That defendant's purpose was only to compete with AirTouch is irrelevant. The UPA permits price competition. Except in narrowly defined circumstances, however, it does not permit below-cost sales which the actor knows or should know will injure competitors or destroy competition. If a competitor is engaging in unlawful below-cost sales the UPA provides a remedy which will restore competition to the market--an injunction [\*\*\*\*108] against the competitor's unlawful below-cost sales. (§ 17070.)

### III. REBUTTING THE PRESUMPTION OF INJURIOUS INTENT OR PURPOSE

The most disturbing aspect of the majority's construction of the below-cost sales prohibition of the UPA, however, lies in their assumption that below-cost sales do not violate [section 17043](#) if the below-cost seller acts with intent to compete with another seller of the same product and does not have the conscious intent or purpose to injure competitors or destroy competition, regardless of whether the below-cost seller has a good faith belief that the price of the competitor is a legal price. With due respect, this cannot have been the intent of the Legislature. The majority holding in this respect is inconsistent with the legislative purpose underlying the UPA, the statutory presumption of violation the Legislature created, and the limited circumstances in which the Legislature permits the presumption to be rebutted.

The UPA was enacted "to safeguard the public [interest] against the creation or perpetuation of monopolies and to foster and encourage [\*213] competition . . ." (§ 17001.) The Legislature has demonstrated recognition that enforcement [\*\*\*\*109] of the antitrust laws is critical to achieving the purpose of the law. It has done so by permitting private as well as governmental enforcement and by providing for treble damages (§ 17082) as further

encouragement for enforcement. It also directs that the UPA be liberally construed (§ 17002) and, to ensure that violators will not escape liability by claiming lack of intent to injure competition, in section 17071 has created a presumption of intent or purpose to injure competitors or destroy competition, a presumption which arises on a showing of below-cost sales and injury.

As the trial court and Court of Appeal recognized, the Legislature has not placed on a UPA plaintiff the heavy burden of proving the subjective intent or purpose of a competitor who makes below-cost sales. Absent a "smoking gun" memorandum or "e-mail" revealing a below-cost seller's subjective intent to injure competitors or destroy competition, proof of such intent or purpose is well nigh impossible to come by. Instead of demanding this of injured competitors of the below-cost seller, the Legislature has created a presumption of intent or purpose which arises on proof of both below-cost sales and injurious [\*\*\*\*110] effect. It then has defined the circumstances in which those sales do not violate the UPA, shifting the burden to the defendant to establish that one of those circumstances motivated the sales.

Section 17071 creates the presumption: "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." <sup>4</sup>

At the time most sales underlying this action took place, section 17050 defined the circumstances in which below-cost sales are permissible and thereby established the means by which a defendant may rebut the [\*\*562] [\*\*\*583] presumption of injurious purpose or intent: It provides in pertinent part:

[\*\*\*\*111] "The prohibitions of this chapter against locality discrimination, sales below cost, and loss leaders do not apply to any sale made:

- "(a) In closing out in good faith the owner's stock or any part thereof . . . .
- "(b) When the goods are damaged or deteriorated in quality . . . .
- [\*214] "(c) By an officer acting under the orders of any court.

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

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

An additional exception to the ban on below-cost sales, available only to providers of cellular service and operative only as of January 1, 1994, is now found in section 17026.1, subdivision (a)(2). That subdivision authorizes below-cost sales of cellular phones [\*\*\*\*112] by a provider of cellular service competing with another provider of cellular service. Section 17026.1, subdivision (a)(2), provides: "*Consistent with the provisions of subdivision (d) of Section 17050, providers of cellular services shall be permitted to sell cellular telephones below cost, provided that sales below cost are a good faith endeavor to meet the legal market prices of competitors in the same locality or trade area.*" (Italics added.) This express authorization to sell equipment below cost to compete with the legal price of a company competing primarily in the market for cellular service which the Legislature described as being "[c]onsistent with subdivision (d) of Section 17050," confirms that the only competition-based exception to the sections 17043 and 17044 ban on below-cost sales is for sales made to compete with what is believed in good faith

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<sup>4</sup> Section 17071.5 creates a similar presumption when a retailer's limitation of quantity and sale of the item below invoice or replacement cost is established.

to be a legal price of a competitor. The below-cost seller cannot rebut the presumptive intent to injure competitors or destroy competition with evidence that it simply intended to compete, not to injure.

The majority assume without discussion that section 17050 is not the exclusive means by which a defendant may [\*\*\*\*113] rebut the presumption of [section 17071](#) and establish the absence of intent or purpose to injure or destroy competition. They hold that even if a person selling below cost does so for competitive reasons other than a good faith attempt to meet a competitor's legal price, there is no violation of [section 17043](#) absent a purpose to injure competition in the market for the product being sold. That is not the law.

The majority uncritically rely for that assumption, as did the trial court, on a statement in *Dooley's Hardware Mart v. Food Giant Markets, Inc. (1971) [\*215] 21 Cal. App. 3d 513, 518 [98 Cal. Rptr. 543]* (*Dooley's Hardware*), that a UPA defendant may rebut the statutory presumption of intent or purpose to injure competitors or destroy competition "either by evidence tending to bring them within one of the exceptions to the prohibitions contained in the Act or by evidence establishing otherwise that they did not have the requisite wrongful intent." (Italics added, fn. omitted.)

A careful reading of [People v. Pay Less Drug Store \(1944\) 25 Cal. 2d 108, 114 \[153 P.2d 9\]](#) (*Pay Less*), on which the Court of Appeal relied in [\*\*\*\*114] *Dooley's Hardware*, reveals however that this court's statement that nonstatutory bases may exist by which to rebut the presumption that arises from belowcost sales was dictum. The defendants in *Pay Less* conducted a retail grocery business. They admitted below-cost sales of more than 400 items as "loss leaders" but denied intent to injure competitors or destroy competition. They claimed that the sales were made in a good faith effort to meet the legal prices of competitors, and thus relied only on subdivision (d) of section 17050 in their effort to rebut the presumption of injurious purpose or intent. In response to the defendants' claim that the [\*563] [\*584] presumption was unconstitutional, this court addressed the nature of the presumption now codified as [section 17071](#) and the means by which it may be rebutted. "Proof of injurious effect is permitted to be shown with the proof of sales below cost as presumptive or *prima facie* evidence that the requisite intent existed. The obvious and only effect of this provision is to require the defendants to go forward with such proof as would bring them within one of the exceptions or which would negative the *prima facie* showing [\*\*\*\*115] of wrongful intent. They may present facts showing that they were within the express exceptions regardless of actual intent; or they may introduce evidence of another *necessity* not expressly included to show that sales were made in good faith and not for the purpose of injuring competitors or destroying competition." (*Pay Less, supra, 25 Cal. 2d at p. 114*, italics added.)

The court noted that it was unnecessary in the *Pay Less* case to consider what circumstances other than those expressly designated in section 17050 would justify sales below cost and thus negate the *prima facie* showing of unlawful intent since the defendants relied only on the exception found in subdivision (d) of the section. Nothing in *Pay Less* warrants a conclusion that, in stating that there might be circumstances other than those set forth in section 17050 on which below-cost sales could be justified, this court contemplated that price competition alone could justify below-cost sales. To have done so would have read the "good faith" effort to meet a competitor's [\*216] "legal price" out of the statute. Instead, the court referred to another "necessity" to resort to below-cost sales. [\*\*\*\*116] Competition alone cannot create such a necessity.<sup>5</sup>

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<sup>5</sup> [Tri-Q, Inc. v. Sta-Hi Corp. \(1965\) 63 Cal. 2d 199 \[45 Cal. Rptr. 878, 404 P.2d 486\]](#), is not authority for such an exception to the limited circumstances in which section 17050 authorizes below-cost sales. There, under pre-1985 procedures, a single appeal in consolidated cases was before this court on grant of hearing. The discussion of the [section 17071](#) presumption there was in the portion of the vacated Court of Appeal opinion which addressed a UPA cause of action. This court adopted that part of the opinion because neither of the parties raised any issue as to its adequacy in the petition for hearing. ([63 Cal. 2d at p. 203](#).) The first issue addressed was whether the defendant corporation had sold its product below cost. The trial court found and the Court of Appeal agreed that the evidence supported its finding that under applicable accounting practices the product was not sold below cost. Moreover, the corporation did not intend to sell below cost. In that context the opinion states: "That evidence was sufficient to render the presumption embodied in [section 17071 of the Business and Professions Code](#) of little evidentiary value. Consequently, it does not appear to be probable that a result more favorable to the plaintiff Tri-Q, Inc., would have been reached by the trial court even if it had found that such prices were less than the actual cost of the product." ([Id. at p. 209](#).)

[\*\*\*\*117] When construing a statute a court must consider the entire statutory scheme of which it is part and give effect to all parts of the statute, avoiding an interpretation that would render any provision nugatory. ( [People v. Pieters \(1991\) 52 Cal. 3d 894, 898-899 \[276 Cal. Rptr. 918, 802 P.2d 420\]](#); [Lungren v. Deukmejian \(1988\) 45 Cal. 3d 727, 735 \[248 Cal. Rptr. 115, 755 P.2d 299\]](#).) Subdivision (d) of section 17050 provides that below-cost sales do not violate the UPA when they are made in an effort to compete with what the seller in good faith believes is a legal price of a competitor. That legislative limitation on competitive below-cost sales is rendered nugatory by a construction of [section 17043](#) which permits a seller to price its products below its cost to meet any competitor's price regardless of whether there is a good faith belief that the competitor's price is itself legal. The Legislature did not intend that a below-cost seller could avoid the requirement of a good faith belief that the competitor's price was legal by simply proving that it intended only to compete and meant no harm. The majority's contrary conclusion virtually ensures [\*\*\*\*118] the end of meaningful competition in some product areas. As long as a below-cost seller intends no evil, it is free to wreak havoc on the competitive market for the product it sells below cost regardless of its knowledge of the impact of its action on [\*\*564] [\*\*\*585] other sellers of the same or a similar product.

The majority construction of the UPA also creates uncertainty over potential UCL liability, uncertainty that exists only because the majority hold that [\*217] the UPA does not expressly make below-cost sales for the purpose of competition lawful. I cannot agree. Section 17050 does make below-cost sales lawful in the circumstances specified therein. However, properly construed, unless an exception other than described in subdivision (d) of section 17050 is applicable, the UPA permits below-cost sales only when made to meet what is believed in good faith to be a *legal* price of a competitor. If that belief is present the sale is lawful and does not violate either the UPA or UCL. If it is absent the sale is both a violation of the UPA and the UCL.

The legislative limitation on below-cost sales in subdivision (d) of section 17050 to those made in a good faith [\*\*\*\*119] belief that the price with which the seller is competing is legal does not deny the seller a fair opportunity to compete. When a seller is faced with competition from what appear to be unlawful below-cost sales by a competitor, the UPA provides the seller with a remedy other than further injury to any remaining competitors and potential destruction of the remaining market through its own below-cost sales. That remedy is a UPA-authorized injunction (§ 17070) to force the competitor to discontinue unlawful below-cost sales. "Each side must obey the law; the fact that one competing party disregards the statute does not give the other side a legal excuse to do so." ( [Page v. Bakersfield Uniform etc. Co. \(1966\) 239 Cal. App. 2d 762, 770 \[49 Cal. Rptr. 46\]](#).)

The record reflects that in general L.A. Cellular established a wholesale price for cellular phones at 6 percent above its cost,<sup>6</sup> and a retail price at 2 percent higher. It had a "meet comp" (meet competition) policy, however, which sometimes affected the retail price at which it made retail sales and priced phones sold to its agents. In December 1993 the vice-president of sales and marketing for L.A. Cellular [\*\*\*\*120] circulated a memorandum on hardware pricing and promotions to its agents. The memorandum stated that L.A. Cellular planned "to continue the policy of meeting what we believe to be the legal hardware prices of our primary competition(s)." The vice-president of sales and marketing testified that AirTouch (and its agents) was then its primary competitor. L.A. Cellular's guidelines, however, were only to monitor competitors' ads, TV, radio, and print media and to consider dropping its prices to meet prices that were below that at which L.A. Cellular was selling equipment. Its guideline was to match the offers made by AirTouch as closely as possible, although it did not do so in all cases. This witness conceded that AirTouch prices did in some cases seem to be suspiciously low and he did not know what AirTouch's costs were. In many cases, [\*218] however, L.A. Cellular was selling below its cost. At this time "bundling" was not authorized in California, but L.A. Cellular had found a high correlation between sales of equipment and activation.

[\*\*\*\*121] L.A. Cellular's aggressive pricing during 1993 resulted in a 56 percent increase in December 1993 activations over its activations in December 1992, a factor it attributed to having "cornered the market for mass

That dictum in *Tri-Q, Inc. v. Sta-Hi Corp., supra, 63 Cal. 2d 199, 209*, at best stands for the proposition that a good faith belief that a product is not being sold below cost is a defense to a [section 17043](#) action.

<sup>6</sup> Under section 17026, 6 percent is *prima facie* proof of the cost of doing business which must be added to the invoice or replacement cost of an item in establishing whether a product is sold below cost.

marketing of equipment." During that period its price for one cellular phone product dropped from \$ 399 to under \$ 149. The witness conceded, however, that L.A. Cellular's price drop was not simply to compete with AirTouch, but because it wanted to meet the AirTouch competitive reaction to L.A. Cellular's price reductions.

The record is ambiguous with regard to whether defendant had a good faith belief that AirTouch or any sellers of cellular telephones whose price it was attempting to meet with its below-cost sales were selling the equipment below cost or, if so, were nonetheless selling cellular telephones at a legal price. The vice-president of sales and marketing testified that L.A. Cellular's marketing staff watched AirTouch ads and set its [\*\*565] [\*\*\*586] prices accordingly.<sup>7</sup> While they were not comfortable meeting the prices offered in advertisements from some sellers whose affiliation they were not sure of, L.A. Cellular "felt that if AirTouch had a broadly [\*\*\*\*122] advertised price point, that we were reasonably comfortable they were doing it within the law." They did attempt to determine if a competitor's price was legal by talking with the manufacturers of the equipment, but the response from manufacturers with whom L.A. Cellular already had a relationship was "none of your business." They recognized that Motorola, which manufactured cellular phones sold by both L.A. Cellular and AirTouch also provided switching equipment to AirTouch and assumed that moneys might be applied "across those relationships." In the end, however, the belief was simply that the manufacturer probably had a pricing strategy for AirTouch that was similar to that for L.A. Cellular and a feeling that AirTouch would not want to hazard legal exposure by its pricing actions. No similar effort was made to determine the lawfulness of competitor's prices when the West Los Angeles super store policy was followed. If a person came into that store with a competitive ad at a lower price, the salesperson could meet that price with management authorization.

[\*\*\*\*123] [\*219] Thus, the record may support a finding that L.A. Cellular had a good faith belief that when it made below-cost sales to compete with AirTouch it was competing with a legal price. On the other hand, it does not appear to support a finding that all of the below-cost sales were made to compete with what L.A. Cellular believed in good faith was a legal price.

Regardless of whether there is a distinction between the mental elements of purpose and intent, plaintiffs established a *prima facie* violation of [section 17043](#). Their evidence established below-cost sales of cellular phones and injurious effect. Defendant's evidence could not rebut the presumption of intent to injure competitors unless the concededly below-cost sales were made with a good faith belief that the prices of the competitors which defendant endeavored to meet were legal prices. That factual issue is one for the trial court. The judgment for defendant on the UPA causes of action should be set aside and the matter remanded for trial.

#### IV. RECONCILING FEDERAL COMPETITIVE VS. PREDATORY PRICING DOCTRINE WITH THE UPA AND UCL

A "predatory pricing scheme" such as one forbidden under the Sherman Act ([15 U.S.C. § 2](#)) [\*\*\*\*124]<sup>8</sup> generally encompasses (1) below-cost pricing which (2) will drive competitors out of the market or deter others from entering, the ultimate object of which is to enable the predator to recover its losses through higher prices in the monopolistic market created thereby. (*Brooke Group Ltd. v. Brown & Williamson Tobacco Corp. (1993) 509 U.S. 209, 222-224 [113 S. Ct. 2578, 2587-2589, 125 L. Ed. 2d 168]; Matsushita Elec. Industrial Co. v. Zenith Radio (1986) 475 U.S. 574, 584, fn. 8 [106 S. Ct. 1348, 1354-1355, 89 L. Ed. 2d 538].*) The UPA ban on below-cost pricing has the same objective. Establishing a violation under the UPA is less cumbersome, however, as the plaintiff need only prove below-cost pricing and injury to a competitor or to competition. By limiting the circumstances in which below-cost pricing is exempted from the ban of [sections 17043](#) and [17044](#), the UPA assumes that below-cost sales in other

<sup>7</sup> Before it initiated a general practice of below-cost equipment sales in conjunction with sales of cellular service, L.A. Cellular sold equipment below cost at its "super store" in West Los Angeles when asked by a customer to meet the price of another retail seller with an adjacent business because that seller was offering lower prices. When it did so, it had the customer execute a document in which the customer stated that the customer was making the certificate to induce L.A. Cellular to sell the equipment at a price competitive with a named competitor pursuant to section 17050, subdivision (d) and that the *customer* had no reason to believe that the competitor's price was not a lawful price.

<sup>8</sup> Title [15 United States Code section 13a](#) (the Robinson-Patman Act) prohibits, *inter alia*, selling "goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

situations will result in monopolistic control of a market as sellers unable to compete with below-cost sales are driven out. Thus, a UPA plaintiff need not demonstrate that the below-cost [\*\*566] [\*\*\*587] seller anticipates [\*\*\*\*125] recoupment of losses in the monopolistic market, the second prong of the predatory pricing test applied under federal law.

[\*220] The majority construe the UPA as permitting a product to be sold at a price below cost in order to compete with a competitor's price, be that price legal or otherwise, without violating the UPA even if the seller knows that the sales will injure competitors and potentially destroy competition as long as the seller does not subjectively intend harm to the competitors or to competition. They also hold, however, that this conduct may subject the seller to liability under the UCL. The result is that conduct which is "predatory" and thus unlawful under federal antitrust law is permitted under the UPA, although there is no reason to believe that, in enacting [\*\*\*\*126] the UPA proscription of below-cost pricing, the California Legislature intended to afford California consumers less protection than did Congress when comparable federal antitrust legislation was adopted. In fact California law appears to afford greater protection since it protects competitors as well as competition against discriminatory pricing, and permits recovery without the showing required under the second prong of the federal "predatory" pricing test. Moreover, in holding that a seller that believes its conduct is permissible under the UPA may nonetheless be subject to suit under the UCL, the majority create a new arena of uncertainty for the business community. The potential impact of UCL liability is minimized by the majority, but, in fact, a UCL suit exposes a business to substantial risks. (See, e.g., [Stop Youth Addiction, Inc. v. Lucky Stores, Inc. \(1998\) 17 Cal. 4th 553 \[71 Cal. Rptr. 2d 731, 950 P.2d 1086\].](#))

As I have demonstrated above, the UPA and UCL are subject to a construction which would avoid having conduct that is lawful under the UPA deemed "unfair" under the UCL. A construction of the UPA which bans all below-cost pricing except that expressly [\*\*\*\*127] permitted by section 17050, and thus permits below-cost pricing only to meet what is believed to be a competitor's legal price, would better protect consumers and would lessen uncertainty in the business community over the lawfulness of below-cost pricing. A pricing scheme that violated the UPA would necessarily violate the UCL, but would not otherwise constitute an "unfair" business practice.

The construction of the UPA and UCL that I propose would also be consistent with federal prohibitions on predatory pricing, which federal law distinguishes from pricing that is simply competitive. A California business that engaged in below-cost sales only to meet a competitor's legal price would not violate federal antitrust law in so doing. It might do so under the majority's construction of the UPA.

The UPA is, as this court recognized in [Stop Youth Addiction Inc. v. Lucky Stores, Inc., supra, 17 Cal. 4th at page 570](#), "roughly analogous to the federal [\*221] Clayton Act" in its prohibition of below-cost pricing and price discrimination. It should, therefore, be construed accordingly.

In construing either the state or the federal antitrust laws, the court should [\*\*\*\*128] recognize that the overarching purpose of these laws is to protect the consumer, not the competitors of a business whose efficiencies enable it to sell its products at a low price. "Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition." ([Atlantic Richfield Co. v. USA Petroleum Co. \(1990\) 495 U.S. 328, 340 \[110 S. Ct. 1884, 1892, 109 L. Ed. 2d 333\].](#))

Under federal law, a plaintiff alleging a violation need not prove that a competitor intends to injure the plaintiff or destroy competition.<sup>9</sup> The initial burden is only to establish that the price is predatory. To do so, "a [\*\*\*588] plaintiff . . . must prove that the prices complained of are below an appropriate measure of its rival's costs" and "that the competitor had a reasonable prospect, or . . . a dangerous probability, of recouping its investment in below-cost prices. [Citations.] 'For the [\*\*567] investment to be rational, the [predator] must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered.' [Citation.] Recoupment is the ultimate object [\*\*\*\*129] of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is

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<sup>9</sup> The concept of intent to injure has decreased in importance over the past 20 years. (See McCall, *Private Enforcement of Predatory Price Laws Under the California Unlawful Practices Act and the Federal Antitrust Acts* (1997) [28 Pacific L.J. 311, 331](#).)

enhanced. Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers.

"That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors*.' " (*Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., supra, 509 U.S. at pp. 222, 224 [113 S. Ct. at pp. 2587, 2588]*, [\*\*\*\*130] original italics.)

The rationale underlying the federal approach to predatory pricing was explained in *Matsushita Elec. Industrial Co. v. Zenith Radio, supra, 475 U.S. at page 589 [106 S. Ct. at page 1357]*: "[T]he success of [predatory pricing] schemes is inherently uncertain: the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition. Moreover, it is not enough simply to achieve monopoly power, as monopoly [\*222] pricing may breed quick entry by new competitors eager to share in the excess profits. The success of any predatory scheme depends on *maintaining* monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain." "In order to recoup their losses, [predators] must obtain enough market power to set higher than competitive prices, and then must sustain those prices long enough to earn in excess profits what they earlier gave up in below-cost prices." (*Id. at pp. 590-591 [106 S. Ct. at p. 1358]*.)

As explained by authors Areeda and Turner, whose reasoning apparently underlies the current federal approach (see *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., supra, 509 U.S. at pp. 221-222, 225 [113 S. Ct. at pp. 2586-2587, 2589]*), [\*\*\*\*131] rational business behavior seeks to maximize profits. Each competitor in a given market is attempting to attract more business. In most instances, one sale by a business translates to one sale lost by its competitors. It is a benefit to consumers to have such a system because businesses attempt to beat out their competitors by underselling them, thus attracting consumers. In a highly competitive market, prices approach the level of cost. It would be deemed irrational in the short run for business to sell below cost because a business is a profit-seeking entity. Thus, when an item is sold below cost, it is reasonable to presume a motive other than competition on the merits. (See Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act* (1975) 88 Harv. L. Rev. 697.)

L.A. Cellular's conduct might not violate federal **antitrust law**. While it was able to recoup its losses, and clearly anticipated that it would be able to do so, that recoupment was in profits from increased sales of its cellular service, not cellular phones. Moreover, while these plaintiffs were injured by defendant's below-cost sales, competition was not. The record confirms [\*\*\*\*132] that the cellular telephone business in the Los Angeles area continued to grow and new retailers continued to enter the market. Thus, competition continued in both the cellular phone and the cellular service markets. L.A. Cellular did not achieve and the record does not suggest that it intended to achieve or sustain monopoly power in the cellular phone market.

Nonetheless, insofar as the UPA is broader than federal **antitrust law** and does give broader protection to competitors, as does the UCL (*Barquis v. Merchants Collection Assn. (1972) 7 Cal. 3d 94, 109-111 [101 Cal. Rptr. 745, 496 P.2d 817]*), the purpose or intent element of California law may be conformed [\*\*\*589] to federal law by the construction of the UPA suggested above. Recognizing that intent or purpose to injure competitors or destroy competition is presumed whenever a product is intentionally (*Tri-Q, Inc. v. Sta-Hi, [\*223] supra, 63 Cal. 2d at pp. 207-208*) sold below cost, unless section 17050 exempts the sale, would bring California **antitrust law** into conformity [\*\*568] with the first prong of the federal test of predatory pricing. It would also carry out more fully [\*\*\*\*133] the legislative intent of protecting competitors as well as consumers from the impact of below-cost pricing.

Requiring proof of subjective intent to injure competitors, or as the majority do, permitting the presumption of intent or purpose to be rebutted by proving simply lack of such intent, is not appropriate in the competitive business arena. "[C]utting prices in order to increase business often is the very essence of competition." (*Matsushita Elec. Industrial Co. v. Zenith Radio, supra, 475 U.S. at p. 594 [106 S. Ct. at p. 1360]*.)

Any price cut which attracts a consumer who would have gone to another seller, harms the seller that did not make the sale. Evidence that the below-cost seller did not intend to injure is meaningless. To intend to compete through

below-cost sales is, necessarily, to intend to injure a competitor. For this reason the UPA does not require proof of intent to injure, but instead presumes that intent exists for purposes of [section 17043](#) and [17044](#) when a business engages in below-cost selling.

Modern economic theory assumes that a business with prices lower than those of its competitors intends harm to the competitors [\*\*\*\*134] insofar as it is able to attract customers who would otherwise trade with the competitors. Since this behavior stimulates competition it benefits consumers. Therefore, it is inappropriate to import into **antitrust law** the criminal law concept of intent or purpose to cause injury as a state of mind warranting punishment. Subdivision (d) of section 17050 demonstrates that the California Legislature did not intend to do so. **Antitrust law** encourages the state of mind of beating competitors through lower prices because, to a certain point, consumers benefit. It is only when "[a] firm . . . drives out or excludes rivals by selling at unremunerative prices [that it] is not competing on the merits, but engaging in behavior that may properly be called predatory." (Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, *supra*, 88 Harv. L.Rev. at p. 697.)

The UPA draws the predatory price line at average total cost. (§ 17026, 17029.) No article or product may be sold at a lower price unless permitted by section 17050 because intent to injure rather than compete on the merits is presumed when pricing is predatory.

This court should, to the extent [\*\*\*\*135] possible under the language of California antitrust laws and consistent with legislative intent, construe the purpose or [\*224] intent provision of the UPA in conformity with federal law. Uniformity benefits both the business community and the consumers for whose protection these laws were enacted.

For all of the above reasons, I believe that the judgment for defendant on the UPA cause of action should be set aside and the matter remanded to the superior court for trial on both the UPA and UCL causes of action.

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## Aquilar v. Atlantic Richfield Co.

Supreme Court of California

June 14, 2001, Decided

No. S086738.

### **Reporter**

25 Cal. 4th 826 \*; 24 P.3d 493 \*\*; 107 Cal. Rptr. 2d 841 \*\*\*; 2001 Cal. LEXIS 3758 \*\*\*\*; 2001 Cal. Daily Op. Service 4903; 2001 Daily Journal DAR 6007; 2001-1 Trade Cas. (CCH) P73,317

THERESA AGUILAR et al., Plaintiffs and Appellants, v. ATLANTIC RICHFIELD COMPANY et al., Defendants and Appellants.

**Subsequent History:** [\*\*\*\*1] As Modified July 11, 2001. This Modification does not affect the judgment.

Related proceeding at [Gilley v. Atl. Richfield Co., 2005 U.S. App. LEXIS 12983 \(9th Cir. Cal., June 27, 2005\)](#)

**Prior History:** Superior Court of San Diego County. Super. Ct. No. 700810. David J. Danielsen, Judge. Court of Appeal of California, Fourth Appellate District, Division One. D030628.

[Aquilar v. Atlantic Richfield Co., 78 Cal. App. 4th 79, 92 Cal. Rptr. 2d 351, 2000 Cal. App. LEXIS 65 \(Cal. App. 4th Dist., 2000\)](#)

**Disposition:** Affirmed the judgment of the Court of Appeal.

## **Core Terms**

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summary judgment, petroleum company, cause of action, unlawful conspiracy, present evidence, new trial, conspiracy, prima facie, gasoline, superior court, burden of production, material fact, trier of fact, burden of persuasion, Cartwright Act, collusively, reasonable trier of fact, burden of proof, declarations, decisions, petroleum, preponderance of evidence, unfair competition, matter of law, defendants', superior court's order, entitled to judgment, pleadings, pricing, triable issue of material

## **LexisNexis® Headnotes**

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Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

### **[HN1\[\]](#) Summary Judgment, Entitlement as Matter of Law**

The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

## **HN2** **Summary Judgment, Entitlement as Matter of Law**

Under summary judgment law, any party to an action, whether plaintiff or defendant, may move the court for summary judgment in his favor on a cause of action (i.e., claim) or defense, [Cal. Code Civ. Proc. §437c\(a\)](#), a plaintiff contending that there is no defense to the action, a defendant contending that the action has no merit. The trial court must grant the motion if all the papers submitted show that there is no triable issue as to any material fact, that is, there is no issue requiring a trial as to any fact that is necessary under the pleadings and, ultimately, the law, and that the moving party is entitled to a judgment as a matter of law. [Cal. Code Civ. Proc. §437c\(c\)](#).

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Evidence > Types of Evidence > Documentary Evidence > Affidavits

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Evidence > Judicial Notice > General Overview

## **HN3** **Summary Judgment, Opposing Materials**

On a motion for summary judgment, the moving party must support the motion with evidence including affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice must or may be taken. [Cal. Code Civ. Proc. §437c\(b\)](#). Likewise, any adverse party may oppose the motion, and, where appropriate, must present evidence including affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice must or may be taken. An adverse party who chooses to oppose the motion must be allowed a reasonable opportunity to do so. [Cal. Code Civ. Proc. §437c\(h\)](#). In ruling on the motion, the court must consider all of the evidence and all of the inferences reasonably drawn therefrom, [Cal. Code Civ. Proc. §437c\(c\)](#), and must view such evidence and such inferences in the light most favorable to the opposing party.

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

## **HN4** **Summary Judgment, Supporting Materials**

Under federal summary judgment law, which is similar to California's, any party to an action, whether plaintiff or defendant, may move the court for a summary judgment in his favor on a claim (i.e., cause of action) or defense. [Fed. R. Civ. P. 56\(a\)](#) (plaintiff), [Fed. R. Civ. P. 56\(b\)](#) (defendant). The court must render the judgment sought forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, that is, there is no issue requiring a trial

as to any fact that is necessary under the pleadings and, ultimately, the law, and that the moving party is entitled to a judgment as a matter of law. [Fed. R. Civ. P. 56\(c\)](#).

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

## [HN5](#) **Summary Judgment, Supporting Materials**

The moving party may support the motion for summary judgment with evidence in the form of affidavits, [Fed. R. Civ. P. 56\(a\)](#) (plaintiff), [Fed. R. Civ. P. 56\(b\)](#) (defendant), and also with the pleadings, depositions, answers to interrogatories, and admissions on file, [Fed. R. Civ. P. 56\(c\), \(e\)](#). Likewise, any adverse party may oppose the motion with affidavits and also with the pleadings, depositions, answers to interrogatories, and admissions on file. [Rule 56\(c\), \(e\)](#).

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

## [HN6](#) **Discovery, Methods of Discovery**

An adverse party who chooses to oppose the motion for summary judgment must be allowed a reasonable opportunity to do so. [Fed. R. Civ. P. 56\(f\)](#). When the moving party so makes and supports the motion, the opposing party may not rest upon the mere allegations or denials of his pleading, but his response, [Fed. R. Civ. P. 56\(e\)](#), by affidavits or by depositions, answers to interrogatories, or admissions on file, [Fed. R. Civ. P. 56\(c\)](#), must set forth specific facts showing that there is a genuine issue for trial, [rule 56\(e\)](#). In ruling on the motion, the trial court must consider all of the evidence and all of the inferences reasonably drawn therefrom in the light most favorable to the opposing party.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

## [HN7](#) **Summary Judgment, Burdens of Proof**

The Celotex, Anderson, and Matsushita cases operate generally, to the following effect: From commencement to conclusion, the moving party bears the burden of persuasion that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. There is a genuine issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

25 Cal. 4th 826, \*826 24 P.3d 493, \*\*493 107 Cal. Rptr. 2d 841, \*\*\*841 2001 Cal. LEXIS 3758, \*\*\*\*1

Evidence > Burdens of Proof > Allocation

Evidence > Burdens of Proof > Burden Shifting

#### **HN8** Summary Judgment, Burdens of Proof

Under Celotex, Anderson, and Matsushita, initially, the moving party bears a burden of production to make a prima facie showing of the nonexistence of any genuine issue of material fact. If the moving party carries his burden of production, he causes a shift: the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a genuine issue of material fact. How each party may carry his burden of persuasion and or production depends on which would bear what burden of proof at trial.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Evidence > Burdens of Proof > Preponderance of Evidence

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

#### **HN9** Summary Judgment, Evidentiary Considerations

Under Celotex, Anderson, and Matsushita, if a plaintiff who would bear the burden of proof by a preponderance of evidence at trial moves for summary judgment, he must present evidence that would require a reasonable trier of fact to find any underlying material fact more likely than not. By contrast, if a defendant moves for summary judgment against such a plaintiff, he may present evidence that would require such a trier of fact not to find any underlying material fact more likely than not. In the alternative, he may simply point out through argument, he is not required to present evidence, Fed. R. [Civ. 56\(b\)](#), that the plaintiff does not possess, and cannot reasonably obtain, evidence that would allow such a trier of fact to find any underlying material fact more likely than not.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

#### **HN10** Burdens of Proof, Movant Persuasion & Proof

On summary judgment, the moving party's burden is more properly labeled as one of persuasion rather than proof. That is because, in order to carry such burden, he must persuade the court that there is no material fact for a reasonable trier of fact to find, and not prove any such fact to the satisfaction of the court itself as though it were sitting as the trier of fact.

Antitrust & Trade Law > Sherman Act > General Overview

#### **HN11** Antitrust & Trade Law, Sherman Act

25 Cal. 4th 826, \*826 24 P.3d 493, \*\*493 107 Cal. Rptr. 2d 841, \*\*\*841 2001 Cal. LEXIS 3758, \*\*\*\*1

The Matsushita case operates within the specific context of an antitrust action for unlawful conspiracy under provisions including [section 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), which makes a conspiracy among competitors to restrict output and/or raise prices unlawful per se.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

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

Evidence > Burdens of Proof > Allocation

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

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

Evidence > Burdens of Proof > General Overview

## [HN12](#) [💡] Entitlement as Matter of Law, Genuine Disputes

Matsushita's scenario is this: A plaintiff's antitrust claim asserts an unlawful conspiracy on the part of the defendants. The defendants move for summary judgment on the ground that there is no genuine issue of the material fact of the existence of an unlawful conspiracy. At trial, the plaintiff would bear the burden of proof by a preponderance of the evidence on the unlawful conspiracy issue. The defendants carry their burden of production to make a prima facie showing that the unlawful conspiracy issue is not genuine. The plaintiff is then subjected to a burden of production of his own to make a prima facie showing that it is. In order to carry his burden of production, the plaintiff must present evidence that would allow a reasonable trier of fact to find in his favor on the unlawful conspiracy issue by a preponderance of the evidence, that is, to find an unlawful conspiracy more likely than not.

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Evidence > Inferences & Presumptions > Inferences

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Inferences & Presumptions > General Overview

## [HN13](#) [💡] Communications, Sherman Act

According to Matsushita, ambiguous evidence showing conduct that is as consistent with permissible competition by independent actors as with illegal conspiracy by colluding ones is insufficient to make a prima facie showing of a violation of the Sherman Act, [15 U.S.C.S. § 1](#). Similarly insufficient are inferences drawn from ambiguous evidence implying as much: conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy. The court would indeed have to view inferences in the light most favorable to the plaintiff. But [antitrust law](#), including the Sherman Act, limits the range of permissible inferences from ambiguous evidence and, evidently, limits the force of ambiguous evidence itself. Specifically, such law renders ambiguous evidence or inferences insufficient.

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Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

#### **HN14** [ ] Antitrust & Trade Law, Sherman Act

Under Matsushita, in addition to ambiguous evidence or inferences, the plaintiff must present evidence that tends to exclude - although it need not actually exclude - the possibility that the alleged conspirators acted independently rather than collusively. Even though the defendants' state of mind is at issue and a trier of fact might disbelieve their denial of a conspiracy, the plaintiff may not make it to trial by merely asserting that a reasonable trier of fact might, and legally could, disbelieve their denial without offering any concrete evidence from which such a trier of fact could find in his favor. Discredited testimony is not normally considered a sufficient basis for drawing a contrary conclusion.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

#### **HN15** [ ] Antitrust & Trade Law, Sherman Act

Although the United States Supreme Court, before Matsushita, had expressed a belief that courts should grant motions for summary judgment by defendants sparingly in complex antitrust actions for unlawful conspiracy under provisions including [section 1](#) of the Sherman Act, [15 U.S.C.S § 1](#), it has concluded that, after Matsushita, for courts to grant such motions sparingly does not mean seldom if ever. Rather, at appropriate times, courts should indeed grant them and bring matters to an end.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

#### **HN16** [ ] Summary Judgment, Burdens of Proof

In moving for summary judgment, a plaintiff has met his burden of showing that there is no defense to a cause of action if he has proved each element of the cause of action entitling him to judgment on that cause of action. Once the plaintiff has met that burden, the burden shifts to the defendant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The defendant may not rely upon the mere allegations or denials of his pleadings to show that a triable issue of material fact exists but, instead, must set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto. [Cal. Code Civ. Proc. §437c\(o\)\(1\)](#).

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

#### **HN17** [ ] Summary Judgment, Burdens of Proof

In moving for summary judgment, a defendant has met his burden of showing that a cause of action has no merit if he has shown that one or more elements of the cause of action cannot be established, or that there is a complete defense to that cause of action. Once the defendant has met that burden, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff may not rely upon the mere allegations or denials of his pleadings to show that a triable issue of material fact exists

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but, instead, must set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto. [Cal. Code Civ. Proc. §437c\(o\)\(2\)](#).

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

## [HN18](#) **Summary Judgment, Opposing Materials**

From commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. That is because of the general principle that a party who seeks a court's action in his favor bears the burden of persuasion thereon. [Cal. Evid. Code §500](#). There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

## [HN19](#) **Summary Judgment, Burdens of Proof**

The placement and quantum of the burden of proof at trial are crucial for purposes of summary judgment, expressly as to the burden's placement and impliedly as to its quantum.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

## [HN20](#) **Burdens of Proof, Movant Persuasion & Proof**

On a motion for summary judgment, a plaintiff bears the burden of persuasion that each element of the cause of action in question has been proved, and hence that there is no defense thereto. [Cal. Code Civ. Proc. §437c\(o\)\(1\)](#). A defendant bears the burden of persuasion that one or more elements of the cause of action in question cannot be established, or that there is a complete defense thereto. [Cal. Code Civ. Proc. §437c\(o\)\(2\)](#).

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Evidence > Burdens of Proof > Burden Shifting

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Evidence > Burdens of Proof > General Overview

Evidence > Burdens of Proof > Allocation

Evidence > Burdens of Proof > Initial Burden of Persuasion

### **HN21**[ **Summary Judgment, Opposing Materials**

The party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. A burden of production entails only the presentation of evidence. [Cal. Evid. Code §110](#). A burden of persuasion, however, entails the establishment through such evidence of a requisite degree of belief. [Cal. Evid. Code §115](#).

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

### **HN22**[ **Summary Judgment, Opposing Materials**

How the parties moving for, and opposing, summary judgment may each carry their burden of persuasion and or production depends on which would bear what burden of proof at trial.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Evidence > Burdens of Proof > Preponderance of Evidence

### **HN23**[ **Summary Judgment, Evidentiary Considerations**

If a plaintiff who would bear the burden of proof by a preponderance of evidence at trial moves for summary judgment, he must present evidence that would require a reasonable trier of fact to find any underlying material fact more likely than not - otherwise, he would not be entitled to judgment as a matter of law, but would have to present his evidence to a trier of fact. By contrast, if a defendant moves for summary judgment against such a plaintiff, he must present evidence that would require a reasonable trier of fact not to find any underlying material fact more likely than not - otherwise, he would not be entitled to judgment as a matter of law, but would have to present his evidence to a trier of fact.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

### **HN24**[ **Public Enforcement, State Civil Actions**

[Section 1](#) of the Cartwright Act, [Cal. Bus. & Prof. Code §16720 et seq.](#), like the Sherman Act, [15 U.S.C.S. § 1](#), makes a conspiracy among competitors to restrict output and or raise prices unlawful per se without regard to any of its effects.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

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

Evidence > Burdens of Proof > Preponderance of Evidence

Antitrust & Trade Law > Public Enforcement > State Civil Actions

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

Evidence > Burdens of Proof > Allocation

## **HN25**[] Summary Judgment, Burdens of Proof

On defendants' motion for summary judgment, in order to carry a burden of production to make a *prima facie* showing that there is a triable issue of the material fact of the existence of an unlawful conspiracy under the Cartwright Act, [Cal. Bus. & Prof. Code §16720 et seq.](#), a plaintiff, who would bear the burden of proof by a preponderance of evidence at trial, must present evidence that would allow a reasonable trier of fact to find in his favor on the unlawful conspiracy issue by a preponderance of the evidence, that is, to find an unlawful conspiracy more likely than not. Ambiguous evidence or inferences showing or implying conduct that is as consistent with permissible competition by independent actors as with unlawful conspiracy by colluding ones do not allow such a trier of fact so to find. [Antitrust law](#), including the Cartwright Act, compels the result.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

## **HN26**[] Public Enforcement, State Civil Actions

In an action brought under the Cartwright Act, [Cal. Bus. & Prof. Code §16720 et seq.](#), the plaintiff must present evidence that tends to exclude, although it need not actually exclude, the possibility that the alleged conspirators acted independently rather than collusively. Insufficient is a mere assertion that a reasonable trier of fact might disbelieve any denial by the defendants of an unlawful conspiracy. If the defendants are otherwise entitled to a summary judgment, as a general rule summary judgment may not be denied on grounds of credibility or for want of cross-examination. [Cal. Code Civ. Proc. §437c\(e\)](#). In such an action, courts should grant motions for summary judgment by defendants sparingly. But "sparingly" does not mean seldom if ever. Hence, although such motions should be denied when they should, they must be granted when they must.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

## **HN27**[] Summary Judgment, Burdens of Proof

Summary judgment law in California now conforms, largely but not completely, to its federal counterpart as clarified and liberalized in the Celotex, Anderson, and Matsushita cases. For example, summary judgment law in California no longer requires a plaintiff moving for summary judgment to disprove any defense asserted by the defendant as well as prove each element of his own cause of action. In this particular, it now accords with federal law. All that the plaintiff need do is to prove each element of the cause of action. [Cal. Code Civ. Proc. §437c\(o\)\(1\)](#).

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

## **HN28** [blue icon] **Summary Judgment, Burdens of Proof**

Summary judgment law in California no longer requires a defendant moving for summary judgment to conclusively negate an element of the plaintiff's cause of action. This accords with federal law. All that the defendant need do is to show that one or more elements of the cause of action cannot be established by the plaintiff. [Cal. Code Civ. Proc. §437c\(o\)\(2\)](#). In other words, all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action - for example, that the plaintiff cannot prove element X. Although he remains free to do so, the defendant need not himself conclusively negate any such element - for example, himself prove not X.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Evidence > Judicial Notice > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

## **HN29** [blue icon] **Summary Judgment, Evidentiary Considerations**

Summary judgment law in California continues to require a defendant moving for summary judgment to present evidence, and not simply point out through argument, that the plaintiff does not possess, and cannot reasonably obtain, needed evidence. In this particular at least, it still diverges from federal law. For the defendant must support the motion with evidence including affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice must or may be taken. [Cal. Code Civ. Proc. §437c\(b\)](#).

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

## **HN30** [blue icon] **Summary Judgment, Evidentiary Considerations**

The defendant moving for summary judgment may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. The defendant may also present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence - as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing. But the defendant must indeed present "evidence." Whereas, under federal law, pointing out through argument is sufficient, under California law, it is not.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > ... > Pretrial Judgments > Nonsuits > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

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Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

### **HN31**[ **Summary Judgment, Opposing Materials**

If a party moving for summary judgment in any action, including an antitrust action for unlawful conspiracy, would prevail at trial without submission of any issue of material fact to a trier of fact for determination, then he should prevail on summary judgment. In such a case, the trial court should grant the motion and avoid a trial rendered useless by nonsuit or directed verdict or similar device.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

### **HN32**[ **Summary Judgment, Evidentiary Considerations**

The trial court may not grant a defendant's motion for summary judgment based on inferences if contradicted by other inferences or evidence, which raise a triable issue as to any material fact. *Cal. Code Civ. Proc. §437c(c)*. Neither, apparently, may the court grant the defendant's motion based on any evidence from which such inferences are drawn, if so contradicted. That means that, if the court concludes that the plaintiff's evidence or inferences raise a triable issue of material fact, it must conclude its consideration and deny the defendant's motion.

Civil Procedure > ... > Pretrial Judgments > Nonsuits > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

### **HN33**[ **Pretrial Judgments, Nonsuits**

On a motion for summary judgment, even though the trial court may not weigh the plaintiff's evidence or inferences against the defendant's as though it were sitting as the trier of fact, it must nevertheless determine what any evidence or inference could show or imply to a reasonable trier of fact. In so doing, the court does not decide on any finding of its own, but simply decides what finding such a trier of fact could make for itself.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Evidence > Inferences & Presumptions > Inferences

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

### **HN34**[ **Public Enforcement, State Civil Actions**

If the trial court determines that any evidence or inference presented or drawn by the plaintiff indeed shows or implies unlawful conspiracy more likely than permissible competition, it must then deny the defendants' motion for summary judgment, even in the face of contradictory evidence or inference presented or drawn by the defendants, because a reasonable trier of fact could find for the plaintiff. Under such circumstances, the unlawful conspiracy issue is triable - that is, it must be submitted to a trier of fact for determination in favor of either the plaintiff or the defendants, and may not be taken from the trier of fact and resolved by the court itself in the defendants' favor and against the plaintiff.

[Antitrust & Trade Law > Public Enforcement > State Civil Actions](#)

[Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations](#)

[Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview](#)

### **HN35** [ ] **Public Enforcement, State Civil Actions**

In a state antitrust action, if the trial court determines that all of the evidence presented by the plaintiff, and all of the inferences drawn therefrom, show and imply unlawful conspiracy only as likely as permissible competition or even less likely, it must then grant the defendants' motion for summary judgment, even apart from any evidence presented by the defendants or any inferences drawn therefrom, because a reasonable trier of fact could not find for the plaintiff. Under such circumstances, the unlawful conspiracy issue is not triable, that is, it may not be submitted to a trier of fact for determination in favor of either the plaintiff or the defendants, but must be taken from the trier of fact and resolved by the court itself in the defendants' favor and against the plaintiff.

[Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness](#)

[Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview](#)

[Civil Procedure > Judgments > Relief From Judgments > General Overview](#)

[Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials](#)

### **HN36** [ ] **Entitlement as Matter of Law, Appropriateness**

A motion for a new trial is appropriate following an order granting summary judgment. This is so, even though, strictly speaking, summary judgment is a determination that there shall be no trial at all.

[Civil Procedure > ... > Summary Judgment > Appellate Review > Appealability](#)

[Civil Procedure > Judgments > Summary Judgment > General Overview](#)

[Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview](#)

[Civil Procedure > Judgments > Relief From Judgments > General Overview](#)

[Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials](#)

[Civil Procedure > Appeals > Appellate Jurisdiction > General Overview](#)

### [\*\*HN37\*\*](#) [blue icon] Appellate Review, Appealability

An order granting a new trial is appealable. *Cal. Code Civ. Proc.* §904.1(a)(4). To be clear, any order granting a new trial is appealable. There is no exception for an order granting a new trial following an order granting summary judgment. It makes no difference that an order granting a new trial may operate like an order denying summary judgment, which is nonappealable. The fact is, it is, and remains, an order granting a new trial, which is appealable.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

### [\*\*HN38\*\*](#) [blue icon] Standards of Review, Abuse of Discretion

It is true that, as a general matter, orders granting a new trial are examined for abuse of discretion. But it is also true that any determination underlying any order is scrutinized under the test appropriate to such determination.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

### [\*\*HN39\*\*](#) [blue icon] Standards of Review, De Novo Review

An order granting summary judgment is reviewed independently.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

### [\*\*HN40\*\*](#) [blue icon] Standards of Review, De Novo Review

A trial court's determination that in granting defendants' summary judgment, it made an error in law in its reading and application of a judicial opinion is itself scrutinized de novo.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Courts > Judicial Precedent

### [\*\*HN41\*\*](#) [blue icon] Standards of Review, De Novo Review

To adopt a reading of decisional law entails the resolution of a pure question of law, inasmuch as it relates to the selection of a rule. And to make an application of decisional law entails the resolution of a mixed question of law and fact that is predominantly one of law, inasmuch as it requires a critical consideration, in a factual context, of legal principles and their underlying values rather than merely experience with human affairs. The former is scrutinized de novo. So too the latter. There is no discretion to adopt a reading, or make an application, of decisional law that is inconsistent with the law itself. Any such reading or application must necessarily be deemed an abuse.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

#### **HN42** [blue icon] **Summary Judgment, Entitlement as Matter of Law**

Summary judgment is available, and always remains available, even in complex cases.

Evidence > Burdens of Proof > Allocation

Evidence > Inferences & Presumptions > General Overview

Evidence > Burdens of Proof > General Overview

#### **HN43** [blue icon] **Burdens of Proof, Allocation**

As a general rule, the party desiring relief bears the burden of proof by a preponderance of the evidence.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Knowledge

#### **HN44** [blue icon] **Public Enforcement, State Civil Actions**

It is the consensus of opinion of economists and of many of the most important agencies of government that the public interest is served by the gathering and dissemination, in the widest possible manner, of information of the sort identified above because the making available of such information tends to stabilize trade and industry, to produce fairer price levels and to avoid the waste which inevitably attends the unintelligent conduct of economic enterprise. Free competition means a free and open market among both buyers and sellers for the sale and distribution of commodities. Competition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction. To be sure, such information can be misused as a basis for an unlawful conspiracy.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

#### **HN45** [blue icon] **Public Enforcement, State Civil Actions**

Exchange agreements have long been recognized as procompetitive in purpose and effect, enabling or facilitating petroleum companies to compete in product and or geographical and or temporal markets in which they otherwise could not or would not compete as efficiently or at all. Doubtless, exchange agreements can be misused to structure an unlawful conspiracy.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Evidence > ... > Testimony > Expert Witnesses > General Overview

**HN46** [blue download icon] **Public Enforcement, State Civil Actions**

Expert opinion may indeed be useful as a guide to interpreting market facts. But it is simply not a substitute therefor.

## Headnotes/Summary

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### Summary

#### CALIFORNIA OFFICIAL REPORTS SUMMARY

An individual, on behalf of herself and other consumers, filed an action for unlawful conspiracy under the Cartwright Act ([Bus. & Prof. Code, § 16720 et seq.](#)), against nine petroleum companies producing California Air Resources Board (CARB) gasoline for sale to consumers, for allegedly conspiring to restrict the output of CARB gasoline and to raise its price. Each defendant moved for summary judgment. Each defendant presented evidence, including declarations by officers, managers, or similar employees, stating on personal knowledge how the company made its capacity, production, and pricing decisions about CARB gasoline; asserting that it did so independently; and denying that it did so collusively with any of the other defendants. In opposition to the motion, plaintiff presented evidence of the companies' gathering and dissemination of capacity, production, and pricing information through an independently owned and operated information service and otherwise; their use of common consultants; and their execution of exchange agreements. Plaintiff also presented related expert opinion evidence. The trial court granted defendants' motions for summary judgment, but later granted plaintiff's motion for a new trial on the ground that it had misread a federal case. (Superior Court of San Diego County, No. 700810, David J. Danielsen, Judge.) The Court of Appeal, Fourth Dist., Div. One, No. D030628, reversed.

The Supreme Court affirmed the judgment of the Court of Appeal. The court held that after defendants carried their initial burden of production to make a prima facie showing of the absence of any conspiracy, plaintiff failed to carry her shifted burden of production to make a prima facie showing of the presence of an unlawful conspiracy. The evidence that plaintiff did present was at best ambiguous, as were the inferences that she drew therefrom, showing or implying conduct that was at least as consistent with permissible competition by defendants as independent actors, as with unlawful conspiracy by them as colluding ones. Evidence of this sort, and related inferences, were insufficient. Plaintiff was required to present evidence that tended to exclude the possibility that defendants acted independently rather than collusively, and she did not do so. The court held that plaintiff's evidence of defendants' possible motive, opportunity, and means for entry into an unlawful conspiracy did not amount to evidence showing such a conspiracy more likely than not. Such evidence allowed speculation about an unlawful conspiracy, but speculation is not evidence. (Opinion by Mosk, J., with George, C. J., Kennard, Chin, and Brown, JJ., Hollenhorst, J., \* and Kitching, J., + concurring.)

### Headnotes

**CA(1)** [blue download icon] (1)

#### **Summary Judgment [§ 1](#)—Purpose.**

--The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute.

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\* Associate Justice of the Court of Appeal, Fourth Appellate District, Division Two, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).

+ Associate Justice of the Court of Appeal, Second Appellate District, Division Three, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).

**CA(2)** [2]**Summary Judgment § 3—Propriety.**

--Under summary judgment law, any party to an action, whether the plaintiff or the defendant, may move the court for summary judgment on a cause of action or defense, the plaintiff contending that there is no defense to the action, and the defendant contending that the action has no merit. The court must grant the motion if all the papers submitted show that there is no triable issue as to any material fact, that is, there is no issue requiring a trial as to any fact that is necessary under the pleadings and, ultimately, the law, and that the moving party is entitled to a judgment as a matter of law. The moving party must support the motion with evidence, including affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice must or may be taken. Likewise, any adverse party may oppose the motion, and, where appropriate, must present such evidence. An adverse party who chooses to oppose the motion must be allowed a reasonable opportunity to do so. In ruling on the motion, the court must consider all of the evidence and all of the inferences reasonably drawn therefrom, and must view such evidence and such inferences in the light most favorable to the opposing party.

**CA(3)** [3]**Summary Judgment § 11—Affidavits—Sufficiency—Burden of Persuasion.**

--From commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he or she is entitled to judgment as a matter of law. That is because of the general principle that a party who seeks a court's action in his or her favor bears the burden of persuasion thereon. There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. Thus, a plaintiff bears the burden of persuasion that each element of the cause of action in question has been proved, and hence that there is no defense thereto. A defendant bears the burden of persuasion that one or more elements of the cause of action in question cannot be established, or that there is a complete defense thereto.

**CA(4)** [4]**Summary Judgment § 11—Affidavits—Sufficiency—Burden of Production.**

--The party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he or she carries his or her burden of production, the burden of production then shifts to the opposing party to make a prima facie showing that a triable issue of material fact exists. A burden of production entails only the presentation of evidence, while a burden of persuasion entails the establishment, through such evidence, of a requisite degree of belief.

**CA(5)** [5]**Summary Judgment § 19—Hearing and Determination—Burden of Proof.**

--How the parties moving for, and opposing, summary judgment may each carry their burden of persuasion and/or production depends on which party would bear what burden of proof at trial. The placement and quantum of the burden of proof at trial are crucial for purposes of summary judgment. Thus, if a plaintiff who would bear the burden of proof by a preponderance of evidence at trial moves for summary judgment, he or she must present evidence that would require a reasonable trier of fact to find any underlying material fact more likely than not. Otherwise, he

or she would not be entitled to judgment as a matter of law, but would have to present his or her evidence to a trier of fact. By contrast, if a defendant moves for summary judgment against the plaintiff, he or she must present evidence that would require a reasonable trier of fact not to find any underlying material fact more likely than not. Otherwise, he or she would not be entitled to judgment as a matter of law, but would have to present his or her evidence to a trier of fact.

#### CA(6) [ ] (6)

##### **Summary Judgment § 4—Propriety—Antitrust Action for Unlawful Conspiracy.**

--In an antitrust action for unlawful conspiracy under [section 1](#) of the Cartwright Act ([Bus. & Prof. Code, § 16720 et seq.](#)), which makes a conspiracy among competitors to restrict output and/or raise prices unlawful per se without regard to any of its effects, the following principles apply: On the defendants' motion for summary judgment, in order to carry a burden of production to make a prima facie showing that there is a triable issue of the material fact of the existence of an unlawful conspiracy, the plaintiff, who would bear the burden of proof by a preponderance of evidence at trial, must present evidence that would allow a reasonable trier of fact to find in his or her favor on the unlawful conspiracy issue by a preponderance of the evidence, that is, to find an unlawful conspiracy more likely than not. Ambiguous evidence or inferences showing or implying conduct that is as consistent with permissible competition by independent actors as with unlawful conspiracy by colluding ones will not allow the trier of fact so to find. In addition, the plaintiff must present evidence that tends to exclude, although it need not actually exclude, the possibility that the alleged conspirators acted independently rather than collusively. A mere assertion that a reasonable trier of fact might disbelieve the defendants' denial of an unlawful conspiracy is insufficient. If the defendants are otherwise entitled to a summary judgment, as a general rule summary judgment may not be denied on the ground of credibility or for want of cross-examination.

#### CA(7) [ ] (7)

##### **Summary Judgment § 11—Affidavits—Sufficiency—Motion by Defendant.**

--Summary judgment law no longer requires a defendant moving for summary judgment to conclusively negate an element of the plaintiff's cause of action. The defendant need only show that the plaintiff cannot establish one or more elements of the cause of action. The defendant does this by showing that the plaintiff does not possess, and cannot reasonably obtain, needed evidence. The defendant must show that the plaintiff does not possess needed evidence, because otherwise the plaintiff might be able to establish the elements of the cause of action; the defendant must also show that the plaintiff cannot reasonably obtain needed evidence, because the plaintiff must be allowed a reasonable opportunity to oppose the motion. (Disapproving [Sharon v. Arman, Ltd. \(1999\) 21 Cal.4th 1181 \[91 Cal.Rptr.2d 35, 989 P2d 121\]](#), [Calvillo-Silva v. Home Grocery \(1998\) 19 Cal.4th 714 \[80 Cal.Rptr.2d 506, 968 P2d 65\]](#), [Kovatch v. California Casualty Management Co. \(1998\) 65 Cal.App.4th 1256 \[77 Cal.Rptr.2d 217\]](#) to the extent they contain language purportedly requiring a defendant moving for summary judgment to conclusively negate an element of the plaintiff's cause of action.)

#### CA(8) [ ] (8)

##### **Summary Judgment § 11—Affidavits—Sufficiency—Motion by Defendant.**

--Summary judgment law in California requires a defendant moving for summary judgment to present evidence, and not simply to point out, through argument, that the plaintiff does not possess, and cannot reasonably obtain, needed evidence. In this particular, California law diverges from federal law. The defendant must support the motion with evidence, including affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice must or may be taken. The defendant may, but need not, present evidence that

conclusively negates an element of the plaintiff's cause of action. The defendant may also present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence--as through admissions by the plaintiff following extensive discovery to the effect that he or she has discovered nothing. (Disapproving [Hunter v. Pacific Mechanical Corp. \(1995\) 37 Cal.App.4th 1282 \[44 Cal.Rptr.2d 335\]](#) to the extent it purportedly allows a defendant moving for summary judgment simply to point out, through argument, an absence of evidence to support an element of the plaintiff's cause of action.)

#### [CA\(9\)](#) [ ] (9)

##### **Summary Judgment § 3—Propriety—Antitrust Action for Unlawful Conspiracy.**

--California summary judgment law, like its federal counterpart, may be reduced to, and justified by, a single proposition: If a party moving for summary judgment in any action, including an antitrust action for unlawful conspiracy, would prevail at trial without submission of any issue of material fact to a trier of fact, then he or she should prevail on summary judgment. In such a case, the court should grant the motion and avoid a trial rendered useless by nonsuit or directed verdict or similar device.

#### [CA\(10\)](#) [ ] (10)

##### **Summary Judgment § 18—Counteraffidavits—Sufficiency—Antitrust Action for Unlawful Conspiracy.**

--On the defendants' motion for summary judgment in an antitrust action for unlawful conspiracy under the Cartwright Act ( [Bus. & Prof. Code, § 16720 et seq.](#)), the plaintiff must present evidence that tends to exclude the possibility that the defendants acted independently rather than collusively, in order to carry the burden of production to make a prima facie showing that there is a triable issue of the material fact of the existence of an unlawful conspiracy. Ambiguous evidence or inferences showing or implying conduct that is as consistent with permissible competition by independent actors as with unlawful conspiracy by colluding ones will not allow a reasonable trier of fact to find in the plaintiff's favor on the unlawful conspiracy issue by a preponderance of the evidence.

#### [CA\(11\)](#) [ ] (11)

##### **Summary Judgment § 18—Counteraffidavits—Sufficiency—Antitrust Action for Unlawful Conspiracy.**

--On the defendants' motion for summary judgment in an antitrust action for unlawful conspiracy under the Cartwright Act ( [Bus. & Prof. Code, § 16720 et seq.](#)), if the court determines that any evidence or inference presented or drawn by the plaintiff shows or implies unlawful conspiracy more likely than permissible competition, it must then deny the defendants' motion for summary judgment, even in the face of contradictory evidence or inference presented or drawn by the defendants, because a reasonable trier of fact could find for the plaintiff. Under such circumstances, the unlawful conspiracy issue is triable--that is, it must be submitted to a trier of fact for determination in favor of either the plaintiff or the defendants, and may not be taken from the trier of fact and resolved by the court itself in the defendants' favor and against the plaintiff. But if the court determines that all of the evidence presented by the plaintiff, and all of the inferences drawn therefrom, show and imply unlawful conspiracy only as likely as permissible competition or even less likely, it must then grant the defendants' motion for summary judgment, even apart from any evidence presented by the defendants or any inferences drawn therefrom, because a reasonable trier of fact could not find for the plaintiff.

#### [CA\(12\)](#) [ ] (12)

##### **Appellate Review [§ 28](#)—Decisions Appealable—Motion for New Trial—After Summary Judgment.**

--A motion for a new trial is appropriate following an order granting summary judgment, even though, strictly speaking, summary judgment is a determination that there shall be no trial at all. An order granting a new trial is appealable (*Code Civ. Proc.*, § 904.1, *subd. (a)(4)*), and there is no exception for an order granting a new trial following an order granting summary judgment. It makes no difference that an order granting a new trial may operate like an order denying summary judgment, which is nonappealable.

[See 9 Witkin, *Cal. Procedure* (4th ed. 1997) *Appeal*, § 146.]

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

##### **Appellate Review § 145—Scope of Review—Standard—Order for New Trial—After Summary Judgment.**

--On defendants' appeal from an order granting plaintiff's motion for a new trial following entry of summary judgment for defendants in an antitrust action for unlawful conspiracy under the Cartwright Act (*Bus. & Prof. Code, § 16720 et seq.*), the Court of Appeal properly applied the independent standard of review. Although, as a general matter, orders granting a new trial are examined for abuse of discretion, it is also true that any determination underlying any order is scrutinized under the test appropriate to such determination. The sole determination underlying the trial court's order granting a new trial was the asserted erroneousness of its order granting the petroleum companies summary judgment, and an order granting summary judgment is reviewed independently.

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

##### **Monopolies and Restraints of Trade § 7—Under Cartwright Act—Conspiracy to Raise Gasoline Prices—Summary Judgment for Defendants: Unfair Competition § 9—Actions.**

--In an antitrust and unfair competition action for unlawful conspiracy under the Cartwright Act (*Bus. & Prof. Code, § 16720 et seq.*), against nine petroleum companies producing California Air Resources Board (CARB) gasoline for sale to consumers, for allegedly conspiring to restrict the output of CARB gasoline and to raise its price, defendants carried their burden of persuasion to show that there was no triable issue of material fact and that they were entitled to summary judgment as a matter of law. Defendants carried their initial burden of production to make a *prima facie* showing of the absence of any conspiracy through the declarations by their officers, managers, and similar employees--and through material from others, including third parties--that would require a reasonable jury not to find any conspiracy more likely than not. The declarations in question generally stated on personal knowledge how the companies made their capacity, production, and pricing decisions about CARB gasoline. Defendants' evidence showed independence rather than collusion as to their most fundamental strategies with respect to CARB gasoline. For example, at one end of the range, there was one company's altogether active plan, which was to gain an advantage over its competitors by becoming the largest producer of CARB gasoline in the world. At the other end, there was a company's relatively passive stance, which would put it at a disadvantage *vis-a-vis* its competitors in this regard, and would lead it to exit the market completely.

[See 1 Witkin, *Summary of Cal. Law* (9th ed. 1987) *Contracts*, §§ 555, 585.]

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

##### **Monopolies and Restraints of Trade § 7—Under Cartwright Act—Conspiracy to Raise Gasoline Prices—Summary Judgment—Plaintiff's Burden: Unfair Competition § 9—Actions.**

--In an antitrust and unfair competition action for unlawful conspiracy under the Cartwright Act (*Bus. & Prof. Code, § 16720 et seq.*), against nine petroleum companies producing California Air Resources Board (CARB) gasoline for sale to consumers, for allegedly conspiring to restrict the output of CARB gasoline and to raise its price, in which defendants carried their initial burden of production to make a *prima facie* showing of the absence of any

conspiracy, plaintiff did not carry the burden to make a *prima facie* showing of the presence of an unlawful conspiracy. The evidence that plaintiff did present was at best ambiguous, as were the inferences that she drew therefrom, showing or implying conduct that was at least as consistent with permissible competition by defendants as independent actors, as with unlawful conspiracy by them as colluding ones. Evidence of this sort was insufficient. So too were related inferences. Plaintiff had to present evidence that tended to exclude the possibility that the petroleum companies acted independently rather than collusively, and she did not do so.

#### CA(16) [↓] (16)

##### **Monopolies and Restraints of Trade § 7—Under Cartwright Act—Conspiracy to Raise Gasoline Prices—Summary Judgment—Plaintiff's Burden: Unfair Competition § 9—Actions.**

--In an antitrust action for unlawful conspiracy under the Cartwright Act ([Bus. & Prof. Code, § 16720 et seq.](#)), against nine petroleum companies producing California Air Resources Board (CARB) gasoline for sale to consumers, for allegedly conspiring to restrict the output of CARB gasoline and to raise its price, plaintiff's evidence concerning the gathering and dissemination of capacity, production, and pricing information by the petroleum companies with respect to CARB gasoline did not even imply collusive, rather than independent, action. The public interest is served by the gathering and dissemination, in the widest possible manner, of that kind of information, because it tends to stabilize trade and industry, to produce fairer price levels, and to avoid the waste that inevitably attends the unintelligent conduct of economic enterprise. Free competition means a free and open market among both buyers and sellers for the sale and distribution of commodities. Competition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction.

#### CA(17) [↓] (17)

##### **Monopolies and Restraints of Trade § 7—Under Cartwright Act—Conspiracy to Raise Gasoline Prices—Summary Judgment—Plaintiff's Burden: Unfair Competition § 9—Actions.**

--In an antitrust action for unlawful conspiracy under the Cartwright Act ([Bus. & Prof. Code, § 16720 et seq.](#)), against nine petroleum companies producing California Air Resources Board (CARB) gasoline for sale to consumers, for allegedly conspiring to restrict the output of CARB gasoline and to raise its price, plaintiff's evidence concerning the use of common consultants by the petroleum companies did not even imply collusive, rather than independent, action. For decisions of the magnitude and difficulty that the companies each faced with respect to CARB gasoline capacity, production, and pricing, they had available few consultants who possessed the requisite expertise to assure their competence. Hence, practically speaking, they had to utilize the same ones if they were to utilize any. Each company required confidentiality of each consultant. There was no indication that any company got anything less from any consultant. Although common consultants can be misused as a conduit for an unlawful conspiracy, the evidence here did not suggest such misuse.

#### CA(18) [↓] (18)

##### **Monopolies and Restraints of Trade § 7—Under Cartwright Act—Conspiracy to Raise Gasoline Prices—Summary Judgment—Plaintiff's Burden: Unfair Competition § 9—Actions.**

--In an antitrust action for unlawful conspiracy under the Cartwright Act ([Bus. & Prof. Code, § 16720 et seq.](#)), against nine petroleum companies producing California Air Resources Board (CARB) gasoline for sale to consumers, for allegedly conspiring to restrict the output of CARB gasoline and to raise its price, plaintiff's evidence relating to the exchange agreements entered into by the petroleum companies, including any consequent activity, or lack of activity, in the spot market, did not even imply collusive, rather than independent, action. Exchange agreements have long been common in the petroleum industry. More important, exchange agreements have long

been recognized as procompetitive in purpose and effect, enabling or facilitating companies to compete in product and/or geographical and/or temporal markets in which they otherwise could not or would not compete as efficiently or at all.

#### CA(19) [ ] (19)

##### **Monopolies and Restraints of Trade § 7—Under Cartwright Act—Conspiracy to Raise Gasoline Prices—Summary Judgment—Plaintiff's Burden: Unfair Competition § 9—Actions.**

--In an antitrust action for unlawful conspiracy under the Cartwright Act ( [Bus. & Prof. Code, § 16720 et seq.](#)), against nine petroleum companies producing California Air Resources Board (CARB) gasoline for sale to consumers, for allegedly conspiring to restrict the output of CARB gasoline and to raise its price, plaintiff's expert opinion evidence proved to be of no marginal value. Expert opinion may be useful as a guide to interpreting market facts, but it is not a substitute therefor. The expert opinion here was more a substitute than a guide. In effect, it conjectured that there must have been collusive, rather than independent, action. It did so, at bottom, because it discerned interdependent action. But, in an oligopoly, such as existed among defendants, interdependence is altogether consistent with independence and is not necessarily indicative of collusion. In a market like defendants', prices may move generally upward across all of the firms more or less together, rising quickly and falling slowly, and may do so interdependently but nevertheless independently. For collusion, there must be more than interdependence.

#### CA(20) [ ] (20)

##### **Monopolies and Restraints of Trade § 7—Under Cartwright Act—Conspiracy to Raise Gasoline Prices—Summary Judgment—Plaintiff's Burden: Unfair Competition § 9—Actions.**

--In an antitrust action for unlawful conspiracy under the Cartwright Act ( [Bus. & Prof. Code, § 16720 et seq.](#)), against nine petroleum companies producing California Air Resources Board (CARB) gasoline for sale to consumers, for allegedly conspiring to restrict the output of CARB gasoline and to raise its price, plaintiff's evidence of defendants' possible motive, opportunity, and means for entry into an unlawful conspiracy did not amount to evidence showing such a conspiracy more likely than not. Such evidence allowed speculation about an unlawful conspiracy, but speculation is not evidence.

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Howrey & Simon, Howrey Simon Arnold & White, Alan M. Grimaldi, Cheryl O'Connor Murphy, Mark I. Levy, Charles H. Samel, Dale J. Giali, Michael J. McGaughey; Lawrence R. Jerz; Robert E. Fuller and Mark D. Litvak for Defendant and Appellant Texaco Refining and Marketing, Inc.

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Robins, Kaplan, Miller & Ciresi, Ernest I. Reveal III, Susan L. Dunbar, Elliot [\*\*\*\*4] S. Kaplan; and Timothy R. Thomas for Defendant and Appellant Union Oil Company of California.

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Knox, Lemmon & Anapolsky, Thomas S. Knox; Jones, Day, Reavis & Pogue, Donald B. Ayer and Jeffrey A. LeVee for California Retailers Association as Amicus Curiae on behalf of Defendants and Appellants.

**Judges:** Opinion by Mosk, J., with George, C. J., Kennard, Chin, and Brown, JJ., Hollenhorst, J., \* and Kitching, J., \*\* concurring.

**Opinion by:** MOSK

## Opinion

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[\*837] [\*\*501] [\*\*\*851] MOSK, J.

We granted review in this cause to clarify the law that courts must apply [\*\*\*\*5] in ruling on motions for summary judgment, both in actions generally and specifically in antitrust actions for unlawful conspiracy.

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\* Associate Justice of the Court of Appeal, Fourth Appellate District, Division Two, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

\*\* Associate Justice of the Court of Appeal, Second Appellate District, Division Three, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

## I

This is an antitrust action arising from a complaint filed by Theresa Aguilar on behalf of herself and all of the other, by her estimate, 24 million retail consumers of California Air Resources Board, or CARB, gasoline --collectively, Aguilar--against Atlantic Richfield Company, Chevron Corporation, Exxon Corporation, Mobil Oil Corporation, Union Oil Company of California (later succeeded by 76 Products Company), Shell Oil Company, Texaco Refining and Marketing, Inc., Tosco Corporation, and Ultramar Inc.--collectively, the petroleum companies.<sup>1</sup>

[\*\*\*\*6] [\*\*502] In conducting our review, we have scrutinized facts that are many and complex. The motions for summary judgment with which we are concerned produced a voluminous record, which fills more than 18,400 pages. They arose out of extensive discovery, which yielded, according to one tally, more than 100 depositions, 1,500 interrogatories, 135 requests for admissions, 900 requests for the production of documents, and 500,000 pages of documents in response to such requests.

But because our review focuses on the law that courts must apply in ruling on motions for summary judgment in all actions including the present, and [\*838] not on the application of such law in this particular one, we need not state the facts in detail and at length. For our purposes, the following synopsis will suffice.

The Legislature has found and declared that the "petroleum industry is an essential element of the California economy and is therefore of vital importance to the health and welfare of all Californians." ([Pub. Resources Code, § 25350, subd. \(a\)](#).)

[\*\*\*852] In 1991, the California Air Resources Board adopted regulations requiring the sale in this state [\*\*\*\*7] of a new, cleaner burning, but more expensive formulation of gasoline--CARB gasoline--beginning in 1996. In 1991, the state's market for gasoline was oligopolistic, that is, it was served by a few large firms, including as major participants the petroleum companies that figure here. Although the gasoline used in the state was not unique, the state itself was relatively isolated. Each of the petroleum companies faced decisions of substantial magnitude and difficulty with respect to CARB gasoline capacity, production, and pricing. In arriving at its own decisions and then following through, each had to make great capital expenditures, from a low of about \$ 100 million to a high of more than \$ 1 billion. In 1996, the state's market for gasoline was even more oligopolistic, being served by even fewer large firms, including as dominant participants the petroleum companies that figure here. The state itself remained relatively isolated. But now, the gasoline used in the state was unique. The price of CARB gasoline, once introduced, moved generally upward across all of the petroleum companies more or less together, rising quickly and falling slowly. Subsequent state and federal investigations [\*\*\*\*8] expressly or impliedly attributed the generally upward price movement of CARB gasoline to various market forces, including the higher cost of its production, the higher cost of crude oil from which it was produced, higher demand, lower inventories, unplanned production outages, and higher taxes.

## II

On June 7, 1996, on behalf of herself and all other retail consumers of CARB gasoline, Aguilar filed an unverified complaint, with a demand for trial by jury, against the petroleum companies in the Superior Court of San Diego County. In the complaint, as subsequently amended into its operative form, she alleged facts for a primary cause of action for violation of [section 1](#) of the Cartwright Act (Stats. 1907, ch. 530, [§ 1](#), pp. 984-985, as amended, [Bus. & Prof. Code, § 16720 et seq.](#)), which is analogous to [section 1](#) of the Sherman Act (Act of July 2, 1890, ch. 647, [§ 1](#), 26 Stat. 209, as amended, [15 U.S.C. § 1](#)), asserting in substance that the petroleum companies had entered [\*839] into an unlawful conspiracy to restrict the output of CARB gasoline and to raise its price--specifically, a conspiracy among competitors that is unlawful [\*\*\*\*9] per se without regard to any of its effects. She also alleged

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<sup>1</sup> During pendency of a subsequent appeal, Union Oil Company of California entered into a judicially approved settlement with Aguilar, was dismissed from the action with prejudice, was consequently dismissed from the appeal, and, hence, does not make an appearance on review. Even though it did not participate much on appeal and did not participate at all on review, it did indeed participate generally in the events recounted herein, both within court and without. The collective phrase "petroleum companies," which we use throughout for the sake of convenience, should be understood accordingly.

facts for a derivative cause of action for violation of the unfair competition law ([Bus. & Prof. Code, § 17200 et seq.](#)), asserting in substance that the conspiracy in question, even if not unlawful under the Cartwright Act, was unlawful at least under the unfair competition law itself.

The petroleum companies each answered, denying all of the allegations referred to above.

Later, the petroleum companies each moved the superior court for summary judgment. In support, they each presented evidence **[\*\*503]** including declarations by officers or managers or similar employees with responsibility in the premises, generally stating on personal knowledge how the company made its capacity, production, and pricing decisions about CARB gasoline, asserting that it did so independently, and denying that it did so collusively with any of the others. Aguilar opposed the motions. In support, she presented evidence including the companies' gathering and dissemination of capacity, production, and pricing information, through the independently owned and operated Oil Price Information Service, or OPIS, and **[\*\*\*\*10]** otherwise; their use of common consultants; **[\*\*\*853]** and, perhaps most prominently, their execution of exchange agreements--under which, for example, two companies may trade, with or without a price differential, products of the same type in different geographical areas and/or at different times or products of different types in the same geographical area and/or at the same time--including any consequent activity, or lack of activity, in the spot market, where individual wholesale bulk sales and purchases are transacted. She also presented related evidence in the form of opinion by experts.

**[\*\*504]** After a hearing, the superior court issued an order granting the petroleum companies summary judgment. It caused entry thereof. It specified its reasons at length and in detail, filling 24 pages, to the following effect:

The petroleum companies carried their burden of persuasion to show that there was no triable issue of material fact and that they were entitled to judgment as a matter of law.

Particularly, as to Aguilar's Cartwright Act cause of action, which was primary, the petroleum companies carried an initial burden of production to make a prima facie showing of the **[\*\*\*\*11]** absence of any conspiracy through the declarations that they presented from their officers and managers and similar employees in light of [Biljac Associates v. First Interstate Bank \(1990\) 218 \[\\*840\] Cal. App. 3d 1410 \[267 Cal. Rptr. 819\]](#) (hereafter sometimes *Biljac*), which dealt with the force and effect of similar declarations as to a similar cause of action by certain commercial borrowers against certain banks and bank trade associations. Aguilar did not carry a burden of production, which had shifted onto her shoulders, to make a prima facie showing of her own of the presence of an unlawful conspiracy through any of the evidence that she presented, including that of capacity, production, and pricing information, common consultants, or exchange agreements, or her own experts' opinion. "The *only* logical inference which can be drawn" from Aguilar's evidence, even after it has been "examin[ed] . . . in its entirety and without compartmentalization," is that the "actions" of the petroleum companies "were a pro-competitive response to a regulatory requirement which forced members of an oligopoly to restructure their product mix and incur substantial additional **[\*\*\*\*12]** capital expenditures." (Italics added in place of underscoring in original.) Aguilar had "attempted to weave" a "complex, tangled web" of unlawful conspiracy. Her evidence, however, "suggest[ed]" only individual companies "using all available information sources to determine capacity, supply, and pricing decisions which would maximize their own individual profits--without regard to the profits of their competitors"--and did "not support even the inference of" such a conspiracy.

As to Aguilar's unfair competition law cause of action, which was derivative, the petroleum companies, as indicated, carried their initial burden of production to make a prima facie showing of the absence of any conspiracy; Aguilar, as also indicated, did not carry her shifted burden of production to make a prima facie showing of the presence of an unlawful one.

The superior court rendered judgment in accordance with its order granting the petroleum companies summary judgment, and caused entry thereof.

Aguilar moved the superior court for a new trial. In so doing, she challenged its judgment by challenging as erroneous its order granting the petroleum companies summary judgment. Specifically, among her **[\*\*\*\*13]**

grounds for a new trial was a claim that, in granting summary judgment as to her Cartwright Act cause of action, it [\*\*\*854] made an "error in law" in reading and applying *Biljac* as it did.

After a hearing, the superior court issued an order granting a new trial. In so doing, it recognized that Aguilar had challenged its judgment by challenging as erroneous its order granting the petroleum companies summary judgment. It granted a new trial on the sole ground that, in granting summary judgment as to her Cartwright Act cause of action, it did indeed make an "error in law." In specifying its reasons, it stated that it did in fact misread [\*841] and misapply *Biljac* to allow the petroleum companies to carry their initial burden of production to make a *prima facie* showing of the absence of any conspiracy as to her Cartwright Act cause of action by presenting evidence *other than* through declarations by each person responsible within each company for its capacity, production, and pricing decisions about CARB gasoline: it now read and applied *Biljac* to require declarations by each such person. Its order granting a new trial effectively vacated its judgment. Hence, [\*\*\*\*14] it operated like an order denying summary judgment.

The petroleum companies each filed a notice of appeal in the superior court from its order granting a new trial. For her part, Aguilar filed a notice of cross-appeal from the judgment rendered and entered following the order granting the petroleum companies summary judgment.

The petroleum companies' appeals and Aguilar's cross-appeal were docketed in the Court of Appeal for the Fourth Appellate District under the same number, and were assigned as a single matter to Division One.

Aguilar moved the Court of Appeal to dismiss the petroleum companies' appeals. She claimed, *inter alia*, that it had not been presented with any appealable judgment or order over which it could assert jurisdiction. It issued an order denying her motion in summary fashion.

In a unanimous opinion, the Court of Appeal reversed the superior court's order granting a new trial, and remanded the cause to the superior court with directions to issue an order granting the petroleum companies summary judgment and, impliedly, to render judgment accordingly and cause entry thereof.

The Court of Appeal's opinion is lengthy and detailed, even more so than the superior [\*\*\*\*15] court's specification of reasons for its order granting the petroleum companies summary judgment. The opinion proper fills 118 pages, plus seven appendices themselves filling 18 pages.

The Court of Appeal applied the independent standard of review to the superior court's order granting a new trial, which the superior court predicated on the asserted erroneousness of its order granting the petroleum companies summary judgment.

Applying the independent standard of review, the Court of Appeal concluded that the superior court's order granting a new trial was erroneous because it concluded that the superior court's order granting the petroleum companies summary judgment was not.

[\*842] The Court of Appeal concluded that the petroleum companies carried their burden of persuasion to show that there was no triable issue of material fact and that they were entitled to judgment as a matter of law.<sup>2</sup>

[\*\*\*\*16] [\*\*\*855] The Court of Appeal determined that, as to Aguilar's Cartwright Act cause of action, the petroleum companies carried their burden of production to make a *prima facie* showing of the absence of any conspiracy, but Aguilar did not carry her shifted burden of production to make a *prima facie* showing of the presence of an unlawful one, her "evidence" often being less than it was claimed to be. The Court of Appeal accepted the superior court's earlier determination that Aguilar's evidence did "not support even the inference of" an unlawful conspiracy, but only individual, "pro-competitive" "actions." But the Court of Appeal rejected the superior court's later determination that it made an error in law in its reading and application of *Biljac*, finding no support

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<sup>2</sup> The Court of Appeal implied that, in support of its motion for summary judgment, Tosco alone of the petroleum companies did not present, or at least did not rely on, any declaration by any of its officers or managers or similar employees. But, in fact, like all of the others, it did indeed do so.

therein for any requirement that the petroleum companies had to present evidence in the form of declarations by each person responsible within each company [\*\*505] for its capacity, production, and pricing decisions about CARB gasoline.

The Court of Appeal determined that, as to Aguilar's unfair competition law cause of action, the petroleum companies, as indicated, carried their burden of production to make [\*\*\*\*17] a prima facie showing of the absence of any conspiracy, but Aguilar, as also indicated, did not carry her shifted burden of production to make a prima facie showing of the presence of an unlawful one.

Aguilar petitioned for review. We granted her application. We now affirm. <sup>3</sup>

### [\*\*\*\*18] [\*843] III

Our task in this cause is to clarify the law that courts must apply in ruling on motions for summary judgment, both in actions generally and specifically in antitrust actions for unlawful conspiracy.

**CA(1)** [↑] (1) **HN1** [↑] The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. (E.g., *Molko v. Holy Spirit Assn.* (1988) 46 Cal. 3d 1092, 1107 [252 Cal. Rptr. 122, 762 P.2d 46].)

**CA(2)** [↑] (2) **HN2** [↑] Under summary judgment law, any party to an action, whether plaintiff or defendant, "may move" the court "for summary judgment" in his favor on a cause of action (i.e., claim) or defense (*Code Civ. Proc., § 437c, subd. (a)*)--a plaintiff "contend[ing] . . . that there is no defense to the action," a defendant "contend[ing] that the action has no merit" (*ibid.*). The court must "grant[]" the "motion" "if all the papers submitted show" that "there is no triable issue as to any material fact" (*id.*, *§ 437c, subd. (c)*)--that is, there is no issue requiring a trial as to any fact that [\*\*\*\*19] is necessary under the pleadings and, ultimately, [\*\*\*856] the law (see *Riverside County Community Facilities Dist. v. Bainbridge* 17 (1999) 77 Cal. App. 4th 644, 653 [92 Cal. Rptr. 2d 29]; *Kelly v. First Astri Corp.* (1999) 72 Cal. App. 4th 462, 470 [84 Cal. Rptr. 2d 810])--and that the "moving party is entitled to a judgment as a matter of law" (*Code Civ. Proc., § 437c, subd. (c)*). **HN3** [↑] The moving party must "support[]" the "motion" with evidence including "affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice" must or may "be taken." (*Id.*, *§ 437c, subd. (b)*) [\*\*\*857] Likewise, any adverse party may oppose the motion, and, "where appropriate," must present evidence including "affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice" must or may "be taken." (*Ibid.*) An adverse party who chooses to oppose the motion must be allowed a reasonable opportunity to do so. (*Id.*, *§ 437c, subd. (h)*) In ruling on the motion, the court must "consider all of the evidence" and "all" of the "inferences" [\*\*\*\*20] reasonably drawn therefrom (*id.*, *§ 437c, subd. (c)*), and must view such evidence (e.g., *Molko v. Holy Spirit Assn.*, *supra*, 46 Cal. 3d at p. 1107; *Stationers Corp. v. Dun & Bradstreet, Inc.* (1965) 62 Cal. 2d 412, 417 [42 Cal. Rptr. 449, 398 P.2d 785]) and such inferences (see, e.g., *Crouse v. Brabeck, Phleger & Harrison* (1998) 67 Cal. App. 4th 1509, 1520 [80 Cal. Rptr. 2d 94] [review on appeal]; *Ales-Peratis Foods Internat., Inc. v. American*

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<sup>3</sup> Ultramar requests us to take judicial notice of Attorney General of the State of California, Report on Gasoline Pricing in California (May 2000). Aguilar opposes. We nevertheless grant the request. As a "reviewing court" (*Evid. Code, § 459, subd. (a)*), we may take judicial notice of the report of a state executive officer as reflecting an "[o]fficial act[]" (*id.*, *§ 452, subd. (c)*; see Assem. Com. on Judiciary com., reprinted at 29B pt. 1 West's Ann. Evid. Code (1995 ed.) foll. § 452, p. 450). We hereby do so as to the Attorney General's report. Aguilar claims that Ultramar's request amounts to an attempt improperly to augment the record. We would not allow any such attempt to succeed. We consider the Attorney General's report only for background. To the extent that Aguilar moves us to strike, as an improper augmentation of the record, a volume of appendices including the Attorney General's report that Tosco has submitted with its brief in this court, we deny her application, considering the materials therein only for background.

Can Co. (1985) 164 Cal. App. 3d 277, 280, fn. \* [209 Cal. Rptr. 917] [same]), in the light most favorable to the opposing party.

In 1986, the United States Supreme Court handed down a trio of decisions dealing with the law of summary judgment in the federal courts: Matsushita Elec. Industrial Co. v. Zenith Radio (1986) 475 U.S. 574 [106 S. Ct. 1348, 89 L. Ed. 2d 538] (hereafter sometimes *Matsushita*); Anderson v. Liberty Lobby, Inc. (1986) 477 U.S. 242 [106 S. Ct. 2505, 91 L. Ed. 2d 202] (hereafter sometimes *Anderson*); and Celotex Corp. v. Catrett (1986) 477 U.S. 317 [106 S. Ct. 2548, 91 L. Ed. 2d 265] [\*\*\*\*21] (hereafter sometimes *Celotex*).

The purpose of federal summary judgment law, which is identical to the purpose of ours, is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. (Fed. Rules Civ. Proc., rule 56, 28 U.S.C.; Advisory Com. Notes, 1963 amend. to rule 56(e), reprinted at 28 U.S.C.A., Fed. Rules Civ. Proc. (1992) foll. rule 56, p. 298.)

**HN4** Under federal summary judgment law, which is similar to ours, any party to an action, whether plaintiff or defendant, "may . . . move" the court "for a summary judgment in [his] favor" on a claim (i.e., cause of action) or defense. (Fed. Rules Civ. Proc., rule 56(a) [plaintiff], 28 U.S.C.; *id.*, rule 56(b) [defendant].) The court must "render[]" the "judgment sought" "forthwith" "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show" that "there is no genuine issue as to any material fact" (*id.*, rule 56(c))--that is, there is no issue requiring a trial as to any fact that is necessary under the pleadings and, ultimately, the [\*\*\*\*22] law (see Anderson v. Liberty Lobby, Inc., supra, 477 U.S. at pp. 248-249 [106 S. Ct. at pp. 2510-2511])--and that the "moving party is entitled to a judgment as a matter of law" (Fed. Rules Civ. Proc., rule 56(c), 28 U.S.C.). **HN5** The moving party may "support[]" the motion with evidence in the form of "affidavits" (*id.*, rule 56(a) [plaintiff]; *id.*, rule 56(b) [defendant]) and also with the "pleadings, depositions, answers to interrogatories, and admissions on file" (*id.*, rule 56(c); see *id.*, rule 56(e)). Likewise, any "adverse party" may "oppos[e]" the motion with "affidavits" and also with the "pleadings, depositions, answers to interrogatories, and admissions on file." (*Id.*, rule 56(c); see *id.*, rule 56(e)). **HN6** An adverse party who chooses to oppose the motion must be allowed a reasonable opportunity to do so. (See *id.*, rule 56(f).) When the moving party so makes and supports the motion, the opposing party "may not rest upon the mere allegations or denials of" his "pleading," but his "response" (*id.*, rule 56(e)), by "affidavits" (*ibid.*) or by "depositions, answers to interrogatories, [or] admissions on file" (*id.*, rule 56(c)), "must set forth specific facts showing that there is a genuine issue for trial" (*id.*, rule 56(e)). In ruling on the motion, the court must consider all of the evidence and all of the inferences reasonably drawn therefrom (see Matsushita Elec. Industrial Co. v. Zenith Radio, supra, 475 U.S. at p. 587 [106 S. Ct. at p. 1356]), and must view such evidence (e.g., Behrens v. Pelletier (1996) 516 U.S. 299, 309 [116 S. Ct. 834, 840, 133 L. Ed. 2d 773]; [\*845] Adickes v. Kress & Co. (1970) 398 U.S. 144, 157 [90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142]) and such inferences (e.g., Hunt v. Cromartie (1999) 526 U.S. 541, 552 [119 S. Ct. 1545, 1551-1552, 143 L. Ed. 2d 731]; United States v. Diebold, Inc. (1962) 369 U.S. 654, 655 [82 S. Ct. 993, 994, 8 L. Ed. 2d 176] (by the court)), in the light most favorable to the opposing party.

In *Celotex*, *Anderson*, and *Matsushita*, the Supreme Court clarified federal summary judgment law, and liberalized the granting of such motions.

Together, **HN7** *Celotex*, *Anderson*, and *Matsushita* operate generally, to the following effect: [\*\*\*\*24] From commencement to conclusion, the moving party bears the burden of persuasion that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law.<sup>4</sup> There is a genuine issue of material fact if, and

\* Associate Justice of the Court of Appeal, Fourth Appellate District, Division Two, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

<sup>4</sup> **HN10** On summary judgment, the moving party's burden is more properly labeled as one of *persuasion* rather than *proof*. That is because, in order to carry such burden, he must *persuade* the court that there is no material fact for a reasonable trier of fact to find, and not *prove* any such fact to the satisfaction of the court itself as though it were sitting as the trier of fact. (See Anderson v. Liberty Lobby, Inc., supra, 477 U.S. at p. 249 [106 S. Ct. at pp. 2510-2511].)

only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. [HN8](#)[<sup>1</sup>] Initially, [\*\*507] the moving party bears a burden of production to make a *prima facie* showing of the nonexistence of any genuine issue of material fact. If he carries his burden of production, he causes a shift: the opposing party is then subjected to a burden of production of his own to make a *prima facie* showing of the existence of a genuine issue of material fact. How each party may carry his burden of persuasion and/or production depends on *which* would bear *what* burden of proof at trial. Thus, [HN9](#)[<sup>1</sup>] if a plaintiff who would bear the burden of proof by a preponderance of evidence at trial moves for summary judgment, he must present evidence that would require a reasonable trier of fact to find any underlying material fact more likely than not. By contrast, [\*\*\*\*25] if a defendant moves for summary judgment against such a plaintiff, he may present evidence that would require such a trier of fact *not* to find any underlying material fact more likely than not. In the alternative, he may simply point out --he is not required to present evidence (see [Fed. Rules Civ. Proc., rule 56\(b\)](#), 28 U.S.C.)--that the plaintiff does not possess, and cannot reasonably obtain, evidence that would allow such a trier of fact to find any [\*\*\*858] underlying material fact more likely than not.

[\*\*\*\*26] For itself, [HN11](#)[<sup>1</sup>] *Matsushita* operates within the specific context of an antitrust action for unlawful conspiracy under provisions including [section 1](#) of the Sherman Act, which makes a conspiracy among competitors to restrict output and/or raise prices unlawful per se (see, e.g., [U. S. v. Socony-Vacuum Oil Co. \(1940\) 310 U.S. 150, 218 \[60 S. Ct. 811, 841-842, 84 L. Ed. 1129\]](#)). [\*846]

[HN12](#)[<sup>1</sup>] *Matsushita*'s scenario is this: A plaintiff's antitrust claim asserts an unlawful conspiracy on the part of the defendants. The defendants move for summary judgment on the ground that there is no genuine issue of the material fact of the existence of an unlawful conspiracy. At trial, the plaintiff would bear the burden of proof by a preponderance of the evidence on the unlawful-conspiracy issue. The defendants carry their burden of production to make a *prima facie* showing that the unlawful-conspiracy issue is not genuine. The plaintiff is then subjected to a burden of production of his own to make a *prima facie* showing that it is. In order to carry his burden of production, the plaintiff must present evidence that would allow a reasonable trier of fact to find in his favor on [\*\*\*\*27] the unlawful-conspiracy issue by a preponderance of the evidence, that is, to find an unlawful conspiracy more likely than not.

[HN13](#)[<sup>1</sup>] According to *Matsushita*, "ambiguous evidence" showing "conduct" that is "as consistent with permissible competition" by independent actors "as with illegal conspiracy" by colluding ones is insufficient. ( [Matsushita Elec. Industrial Co. v. Zenith Radio, supra, 475 U.S. at p. 588 \[106 S. Ct. at p. 1356\]](#); accord, [id. at p. 597, fn. 21 \[106 S. Ct. at pp. 1361-1362\]](#).) Similarly insufficient are "inference[s]" drawn from ambiguous evidence implying as much: "conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy." ( [Id. at p. 597, fn. 21 \[106 S. Ct. at p. 1362\]](#); accord, [id. at p. 588 \[106 S. Ct. at pp. 1356-1357\]](#).) The court would indeed have to view inferences in the light most favorable to the plaintiff. ( [Id. at p. 587 \[106 S. Ct. at p. 1356\]](#).) "But [antitrust law](#)," including the Sherman Act, "limits the range of permissible inferences from ambiguous evidence" and, [\*\*\*\*28] evidently, limits the force of ambiguous evidence itself. ( [Matsushita Elec. Industrial Co. v. Zenith Radio, supra, 475 U.S. at p. 588 \[106 S. Ct. at p. 1356\]](#).) Specifically, such law renders ambiguous evidence or inferences insufficient. If it did not, it might effectively "chill" "procompetitive conduct" in the world at large, the very thing that it is "designed to protect," by subjecting it to undue costs in the judicial sphere. ( [Id. at pp. 593-594 \[106 S. Ct. at pp. 159-1360\]](#).)

Therefore, [HN14](#)[<sup>1</sup>] concludes *Matsushita*, in addition to ambiguous evidence or inferences, the plaintiff "must present evidence 'that *tends* to exclude' '--although it need not *actually* exclude--' the possibility' that the alleged conspirators acted independently" rather than collusively. ( [Matsushita Elec. Industrial Co. v. Zenith Radio, supra, 475 U.S. at p. 588 \[106 S. Ct. at p. 1356\]](#), italics added.) Even though the defendants' "state of mind is at issue" and a trier of fact "might" [\*\*508] disbelieve" their "denial of a conspiracy," the plaintiff may not make it to trial "by merely asserting" that a reasonable trier of fact "might, [\*\*\*\*29] and legally could, disbelieve" their denial "without offering" [\*847] any concrete evidence from which" such a trier of fact could find in his favor: " '[D]iscredited

testimony is not [normally] considered a sufficient basis for drawing a contrary conclusion.' " ( *Anderson v. Liberty Lobby, Inc., supra, 477 U.S. at pp. 256-257 [106 S. Ct. at p. 2514]*; see *id. at p. 250, fn. 4 [106 S. Ct. at p. 2511]*).)<sup>5</sup>

[\*\*\*\*30] [\*\*\*859] *Matsushita* effectively qualifies decisions such as *Poller v. Columbia Broadcasting* (1962) 368 U.S. 464 [82 S. Ct. 486, 7 L. Ed. 2d 458]. In *Poller*, HN15 the Supreme Court had expressed a belief that courts should grant motions for summary judgment by defendants "sparingly" in complex antitrust actions for unlawful conspiracy under provisions including *section 1* of the Sherman Act. ( *Poller v. Columbia Broadcasting, supra, 368 U.S. at p. 473 [82 S. Ct. at p. 491]*.) But, after *Matsushita*, for courts to grant such motions "sparingly" does not mean "seldom if ever." ( *Anderson v. Liberty Lobby, Inc., supra, 477 U.S. at p. 256 [106 S. Ct. at p. 2514]*.) Rather, at appropriate times, they should indeed grant them and bring matters to an end. (See *id. at p. 255 [106 S. Ct. at pp. 2513-2514]*.)

At the time of *Celotex*, *Anderson*, and *Matsushita*, summary judgment law in this state differed from its federal counterpart in various particulars, and was more restrictive of the granting of such motions as a result. For example, a plaintiff moving for summary judgment had to disprove [\*\*\*\*31] any defense asserted by the defendant as well as prove each element of his own cause of action. (E.g., *Hayward Union etc. School Dist. v. Madrid* (1965) 234 Cal. App. 2d 100, 120 [44 Cal. Rptr. 268].) For his part, a defendant moving for summary judgment had to "conclusively negate"--to quote the potentially misleading phrase--an element of the plaintiff's cause of action. (E.g., *Molko v. Holy Spirit Assn., supra, 46 Cal. 3d at p. 1107*.) To do so, the defendant had to present evidence, and not simply point out that the plaintiff did not possess, and could not reasonably obtain, needed evidence. (See *Code Civ. Proc., § 437c, subd. (b)*, as amended by Stats. 1984, ch. 171, § 1, p. 545.)

In the wake of *Celotex*, *Anderson*, and *Matsushita*, as we recently noted in *Guz v. Bechtel National, Inc.* (2000) 24 Cal. 4th 317, 335, footnote 7 [100 Cal. Rptr. 2d 352, 8 P.3d 1089] (hereafter sometimes *Guz*), summary [\*848] judgment law has been amended, most significantly in 1992 and 1993, through Assembly Bill No. 2616 (1991-1992 Reg. Sess.) and Assembly Bill No. 498 (1993-1994 Reg. [\*\*\*\*32] Sess.), respectively.<sup>6</sup>

The purpose of the 1992 amendment was "to move summary judgment law" in this state "closer" to its "federal" counterpart as clarified in *Celotex*, *Anderson*, and *Matsushita*, in order to liberalize the granting of such motions. (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 498 (1993-1994 Reg. Sess.) as amended June 11, 1993, p. 4.)

<sup>7</sup> The purpose [\*\*\*860] of the 1993 amendment was to move it [\*\*509] even closer. (See Sen. Com. on Judiciary, Analysis of Assem. Bill No. 498 (1993-1994 Reg. Sess.) as amended June 11, 1993, p. 4.)<sup>8</sup> [\*\*\*\*34] [\*\*\*\*33]

<sup>5</sup> All that is stated in the text is true under *Matsushita* for any antitrust claim asserting an unlawful conspiracy under *section 1* of the Sherman Act by any plaintiff. But where the "factual context" of a particular claim shows it to be "implausible" as "simply mak[ing] no economic sense," then the particular plaintiff "must come forward with more persuasive evidence to support [the] claim than would otherwise be necessary." ( *Matsushita Elec. Industrial Co. v. Zenith Radio, supra, 475 U.S. at p. 587 [106 S. Ct. at p. 1356]*.)

<sup>6</sup> Aguilar requests us to take judicial notice of various legislative documents relating to the 1992 amendment. The petroleum companies do not oppose. We grant the request. We must, of course, judicially notice the law of this state. ( *Estate of Joseph (1998) 17 Cal. 4th 203, 210, fn. 1 [70 Cal. Rptr. 2d 619, 949 P.2d 472]*.) We may judicially notice documents relating thereto. (*Ibid.*) We hereby do so.

<sup>7</sup> See Senate Committee on the Judiciary, Analysis of Assembly Bill No. 2616 (1991-1992 Reg. Sess.) as amended August 12, 1992, pages 8-9; Assemblymember Peace, author of Assembly Bill No. 2616 (1991-1992 Reg. Sess.), letter to Governor Wilson, September 3, 1992, page 1; see also *Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal. 4th 287, 301, footnote 4 [24 Cal. Rptr. 2d 467, 861 P.2d 1153]; *Union Bank v. Superior Court* (1995) 31 Cal. App. 4th 573, 581-592 [37 Cal. Rptr. 2d 653]; see generally *Review of Selected 1992 California Legislation* (1993) 24 Pacific L.J. 683, 684-685.

<sup>8</sup> See Assembly Committee on the Judiciary, Analysis of Assembly Bill No. 498 (1993-1994 Reg. Sess.) as amended March 30, 1993, page 2; Senate Committee on the Judiciary, Analysis of Assembly Bill No. 498 (1993-1994 Reg. Sess.) as amended June 29, 1993, page 2; Senate Rules Committee, Office of Senate Floor Analyses, Analysis of Assembly Bill No. 498 (1993-1994

Behind each of these amendments, *Celotex* figured prominently. Albeit less prominently, *Anderson* and *Matsushita* figured as well.<sup>9</sup>

Together, the 1992 and 1993 amendments, which continue in effect to this day, have "changed" summary judgment law "dramatically." (*Saelzler v. Advanced Group* 400 (2001) 25 Cal. 4th 763, 768 [107 Cal. Rptr. 2d 617, 23 P.3d 1143], quoting *Scheiding v. Dinwiddie Construction Co.* (1999) 69 Cal. App. 4th 64, 70 [81 Cal. Rptr. 2d 360]; accord, *Certain Underwriters at Lloyd's of London v. Superior Court* (1997) 56 Cal. App. 4th 952, 959 [65 Cal. Rptr. 2d 821] [speaking specifically of the 1993 amendment]; see, e.g., *Villa v. McFerren* (1995) 35 Cal. App. 4th 733, 752, fn. 8 [41 Cal. Rptr. 2d 719] [referring specifically to the 1992 amendment].) As follows: [\*849] [HN16](#) [↑] [\*\*\*\*35]

In moving for summary judgment, a "plaintiff . . . has met" his "burden of showing that there is no defense to a cause of action if" he "has proved each element of the cause of action entitling" him "to judgment on that cause of action. Once the plaintiff . . . has met that burden, the burden shifts to the defendant . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The defendant . . . may not rely upon the mere allegations or denials" of his "pleadings to show that a triable issue of material fact exists but, instead," must "set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto." (*Code Civ. Proc., § 437c, subd. (o)(1)*.)

Similarly, [HN17](#) [↑] in moving for summary judgment, a "defendant . . . has met" his "burden of showing that a cause of action has no merit if" he "has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a [\*\*\*\*36] triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff . . . may not rely upon the mere allegations or denials" of his "pleadings to show that a triable issue of material fact exists but, instead," must "set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto." (*Code Civ. Proc., § 437c, subd. (o)(2)*.)

In light of the foregoing, we believe that summary judgment law in this state now conforms, largely but not completely, to its federal counterpart as clarified and liberalized in *Celotex*, *Anderson*, [\[\\*\\*\\*861\]](#) and *Matsushita*. The language added by the 1992 and 1993 amendments, which follows the substance of those decisions, supports our view. The legislative history of the bills that would result in those amendments provides confirmation, making plain that they "follow" their "example." (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2616 (1991-1992 Reg. Sess.) as amended Aug. 12, 1992, p. 9.)<sup>10</sup>

[\*\*\*\*37] [\*850] [\[\\*\\*510\]](#) [CA\(3\)](#) [↑] (3) First, and generally, [HN18](#) [↑] from commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact

Reg. Sess.) as amended July 1, 1993, page 2; see also *Union Bank v. Superior Court, supra*, 31 Cal. App. 4th at pages 581-592; see generally *Review of Selected 1993 California Legislation* (1994) 25 Pacific L.J. 472, 473-475.

<sup>9</sup> See, e.g., *Review of Selected 1992 California Legislation, supra*, 24 Pacific L.J. at page 684, footnote 1 (referring to *Anderson* and *Matsushita* as well as *Celotex*); *Review of Selected 1993 California Legislation, supra*, 25 Pacific L.J. at page 473, footnote 1, and page 474, footnote 6 (same).

<sup>10</sup> See Senate Committee on the Judiciary, Analysis of Assembly Bill No. 2616 (1991-1992 Reg. Sess.) as amended August 12, 1992, pages 8-9; Assemblymember Peace, author of Assembly Bill No. 2616 (1991-1992 Reg. Sess.), letter to Governor Wilson, *supra*, page 1; Assembly Committee on the Judiciary, Analysis of Assembly Bill No. 498 (1993-1994 Reg. Sess.) as amended March 30, 1993, page 2; Senate Committee on the Judiciary, Analysis of Assembly Bill No. 498 (1993-1994 Reg. Sess.) as amended June 29, 1993, page 2; Senate Rules Committee, Office of Senate Floor Analyses, Analysis of Assembly Bill No. 498 (1993-1994 Reg. Sess.) as amended July 1, 1993, page 2; see also *Montrose Chemical Corp. v. Superior Court, supra*, 6 Cal. 4th at page 301, footnote 4 (dealing with the 1992 amendment only); *Union Bank v. Superior Court, supra*, 31 Cal. App. 4th at pages 581-592 (dealing with both the 1992 and 1993 amendments); see generally *Review of Selected 1992 California Legislation, supra*, 24 Pacific L.J. at page 684, footnote 1; *Review of Selected 1993 California Legislation, supra*, 25 Pacific L.J. at page 474, footnote 6.

and that he is entitled to judgment as a matter of law.<sup>11</sup> That is because of the general principle that a party who seeks a court's action in his favor bears the burden of persuasion thereon. (See [Evid. Code, § 500](#).) There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.<sup>12</sup> In [Reader's Digest Assn. v. Superior Court \(1984\) 37 Cal. 3d 244, 252 \[208 Cal. Rptr. 137, 690 P.2d 610\]](#) (hereafter sometimes *Reader's Digest*), we held to the effect that [HN19](#)<sup>13</sup> the placement and quantum of the burden of proof at trial were crucial for purposes of summary judgment, expressly as to the burden's placement and impliedly as to its quantum. There is nothing contrary in the language or legislative history of the 1992 and 1993 amendments. Thus, [HN20](#)<sup>14</sup> a plaintiff bears the burden of persuasion that [\*\*\*\*38] "each element of" the "cause of action" in question has been "proved," and hence that "there is no defense" thereto. ( [Code Civ. Proc., § 437c, subd. \(o\)\(1\)](#).) A defendant bears the burden of persuasion that "one or more elements of" the "cause of action" in question "cannot be established," or that "there is a complete defense" thereto. (*Id.*, [§ 437c, subd. \(o\)\(2\)](#).)

[CA\(4\)](#)<sup>15</sup> (4) Second, and generally, [HN21](#)<sup>16</sup> the party moving for summary [\*\*\*\*39] judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima [\*\*\*862] facie showing of the existence of a triable issue of material fact. Although not expressly, the 1992 and 1993 amendments impliedly provide in this regard for a burden of *production*<sup>17</sup> as opposed to a burden of *persuasion*. A burden of production entails only the presentation of "evidence." ( [Evid. Code, § 110](#).) A burden of persuasion, however, entails the "establish[ment]" through such evidence of a "requisite degree of belief." (*Id.*, [§ 115](#).) It would make little, if any, sense to allow for the shifting of a burden of persuasion. For if the moving party carries a burden of persuasion, the opposing party can do nothing other than concede. Further, although not expressly, the 1992 and 1993 amendments [\*851] impliedly provide for a burden of production to make a prima facie showing.<sup>18</sup> A prima facie showing is one that is sufficient to support [\*\*\*\*40] the position of the party in question. (Cf. [Evid. Code, § 602](#) [stating that a "statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption"].) No more is called for.

[CA\(5\)](#)<sup>19</sup> (5) Third, and generally, [HN22](#)<sup>20</sup> how the parties moving for, and opposing, summary judgment may each carry their burden of persuasion and/or production depends on *which* would bear *what* burden of proof at trial. Again, in *Reader's Digest*, we held to [\*\*\*\*41] the effect that the placement and quantum of the burden of proof at trial were crucial for purposes of summary judgment. (*Reader's* [\[\\*511\] Digest Assn. v. Superior Court, supra, 37 Cal. 3d at p. 252](#).) In the legislative history, if not the quoted language, of the 1992 and 1993 amendments, there is support for such a proposition; in neither is there anything contrary.<sup>21</sup> [\*\*\*\*42] Thus, [HN23](#)<sup>22</sup> if a plaintiff who

<sup>11</sup> Again, on summary judgment, the moving party's burden is more properly one of *persuasion* rather than of *proof*, since he must *persuade* the court that there is no material fact for a reasonable trier of fact to find, and not *prove* any such fact to the satisfaction of the court itself as though it were sitting as the trier of fact. (See [Molko v. Holy Spirit Assn., supra, 46 Cal. 3d at p. 1107](#).)

<sup>12</sup> See [Guz v. Bechtel National, Inc., supra, 24 Cal. 4th 317, 372-374](#) (conc. opn. of Chin, J.).

<sup>13</sup> See [Scheiding v. Dinwiddie Construction Co., supra, 69 Cal. App. 4th at page 66](#).

<sup>14</sup> See, e.g., [City of Santa Cruz v. Pacific Gas & Electric Co. \(2000\) 82 Cal. App. 4th 1167, 1175 \[99 Cal. Rptr. 2d 198\]](#); [Pepperell v. Scottsdale Ins. Co. \(1998\) 62 Cal. App. 4th 1045, 1055](#), footnote 7 [[73 Cal. Rptr. 2d 164](#)]; [Allyson v. Department of Transportation \(1997\) 53 Cal. App. 4th 1304, 1317 \[62 Cal. Rptr. 2d 490\]](#).

<sup>15</sup> In [Certain Underwriters at Lloyd's of London v. Superior Court, supra, 56 Cal. App. 4th at page 960](#), the Court of Appeal stated, in dictum, that it would "not read the 1993 amendment . . . as a wholesale adoption" of federal summary judgment law, including the "judicial gloss imposing the burden of proof on summary judgment on the party who bears the burden at trial, without regard to which party moves for summary judgment." We agree that the 1993 amendment did not amount to such a "wholesale adoption." But, for the reasons presented in the text, we disagree with any implication that the parties' burden of persuasion and/or production on summary judgment is not dependent on the burden of proof at trial.

would bear the burden of proof by a preponderance of evidence at trial moves for summary judgment, he must present evidence that would *require* a reasonable trier of fact to find any underlying material fact more likely than not--otherwise, he would not be entitled to judgment as a *matter of law*, but would have to present his evidence to a trier of fact. By contrast, if a defendant moves for summary judgment against such a plaintiff, he must present evidence that would require a reasonable trier of fact *not* to find any underlying material fact more likely than not--otherwise, *he* would not be entitled to judgment as a *matter of law*, but would have to present *his* evidence to a trier of fact.<sup>16</sup>

**CA(6)**<sup>17</sup> (6) Fourth, and specifically as to an antitrust action for unlawful conspiracy [\*\*\*863] under provisions including [HN24](#)<sup>18</sup> section 1 of the Cartwright Act, which, like its Sherman Act analogue, makes a conspiracy among competitors to restrict output and/or raise prices unlawful per se without regard to any of its effects (see, e.g., [Oakland-Alameda County Builders' Exchange v. F. P. Lathrop Constr. Co. \(1971\) 4 Cal. 3d 354, 360-362 \[93 Cal. Rptr. 602, 482 \[\\*852\] P.2d 226\]](#)): [HN25](#)<sup>19</sup> On the defendants' motion for summary judgment, in order to carry a burden of production to make a *prima facie* showing that there is a triable issue of the material fact of the existence of an unlawful conspiracy, a plaintiff, who would bear the burden of proof by a preponderance of evidence at trial, must present evidence that would allow a reasonable trier of fact to find in his favor on the unlawful-conspiracy issue by a preponderance of the evidence, that is, to find an unlawful conspiracy [\*\*\*\*43] more likely than not. Ambiguous evidence or inferences showing or implying conduct that is as consistent with permissible competition by independent actors as with unlawful conspiracy by colluding ones do not allow such a trier of fact so to find. <sup>17</sup> **Antitrust law**, including the Cartwright Act, compels the result. Otherwise, it might effectively chill procompetitive conduct in the world at large, the very thing that it is designed to protect (see [Marin County Bd. of Realtors, Inc. v. Palsson \(1976\) 16 Cal. 3d 920, 935 \[130 Cal. Rptr. 1, 549 P.2d 833\]](#)), by subjecting it to undue costs in the judicial sphere. Therefore, in addition, [HN26](#)<sup>20</sup> the plaintiff must present evidence that tends to exclude, although it need not actually exclude, the possibility that the alleged conspirators acted independently rather than collusively. Insufficient is a mere assertion that a reasonable trier of fact might disbelieve any denial by the defendants of an unlawful conspiracy. [\*\*512] "If" the defendants are "otherwise entitled to a summary judgment," as a general rule "summary judgment" may "not be denied on grounds of credibility or for want of cross-examination . . ." ( [Code Civ. I\\*\\*\\*\\*441 Proc., § 437c, subd. \(e\).](#)) We own that, in [Corwin v. Los Angeles Newspaper Service Bureau, Inc. \(1971\) 4 Cal. 3d 842, 852 \[94 Cal. Rptr. 785, 484 P.2d 953\]](#), we expressed a belief that, in such an action, courts should grant motions for summary judgment by defendants "sparingly." But "sparingly" does *not* mean "seldom if ever." Hence, although such motions should be denied when they should, they must be granted when they must.

[\*\*\*\*45] It follows that [HN27](#)<sup>21</sup> summary judgment law in this state now conforms, largely but not completely, to its federal counterpart as clarified and liberalized in *Celotex*, *Anderson*, and *Matsushita*.

[\*853] [\*\*\*864] For example, summary judgment law in this state no longer requires a plaintiff moving for summary judgment to disprove any defense asserted by the defendant as well as prove each element of his own

<sup>16</sup> See [Leslie G. v. Perry & Associates \(1996\) 43 Cal. App. 4th 472, 482-486 \[50 Cal. Rptr. 2d 785\]](#).

<sup>17</sup> Accord, 2 Areeda and Hovenkamp, **Antitrust Law** (rev. ed. 1995) paragraph 322, pages 63-64 (stating that a "plaintiff alleging a conspiracy among the defendants must persuade the tribunal by a preponderance of the evidence that the conspiracy exists"; as the "party bearing the burden of persuading the tribunal that" a conspiracy "exists," the plaintiff "can prevail only if the reasonable juror can fairly conclude not only that" a conspiracy "might exist but that" a conspiracy "is more probable than not"); 6 Areeda, **Antitrust Law** (1986) paragraph 1423d, page 139 (implying that, when a reasonable trier of fact "cannot say whether" a "conspiratorial or non-conspiratorial explanation is more probable," "summary judgment . . . would have to be given against the party bearing the burden of persuasion" by a preponderance of the evidence). See 2 Areeda and Hovenkamp, **Antitrust Law**, *supra*, paragraph 322, page 70 (stating that, "when the evidence is in equipoise on a matter that a party must establish by a preponderance of the evidence, summary judgment will be granted against that party"); 2 Areeda and Hovenkamp, **Antitrust Law**, *supra*, paragraph 322, page 71 (stating that "equal plausibility means that neither interpretation is more likely than not").

cause of action. In this particular, it now accords with federal law. All that the plaintiff need do is to "prove[] each element of the cause of action." ([Code Civ. Proc., § 437c, subd. \(o\)\(1\)](#).)<sup>18</sup>

[\*\*\*\*46] **CA(7) [↑]** (7) Neither does [HN28\[↑\]](#) summary judgment law in this state any longer require a defendant moving for summary judgment to conclusively negate an element of the plaintiff's cause of action.<sup>19</sup> [\*\*\*\*49] In this particular too, it now accords with federal law. All that the defendant need do is to "show[] that one or more elements of the cause of action . . . cannot be established" by the plaintiff. ([Code Civ. Proc., § 437c, subd. \(o\)\(2\)](#).) In other words, all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action--for example, that the plaintiff cannot prove element X.<sup>20</sup> Although he remains free to do so, the defendant need not himself conclusively negate any such element--for example, himself prove [\*854] *not* X.<sup>21</sup> [\*\*\*\*50] This is in line [\*\*\*865] with the [\*\*513] purpose of the 1992 and 1993 amendments, which was to liberalize the granting of motions for summary judgment. As Justice Chin stated in his concurring opinion in *Guz*, "[g]iven the difficulty of proving a negative, . . . a test" requiring conclusive negation "is often impossibly high." ([Guz v. Bechtel National, Inc., supra, 24 Cal. 4th 317, 373](#) [\*\*\*\*47] (conc. opn. of Chin, J.); accord, [Saelzler v. Advanced Group 400, supra, 25 Cal. 4th at pp. 767-768](#).) The defendant has shown that the plaintiff cannot establish at least one element of the cause of action by showing that the plaintiff does not possess, and cannot reasonably obtain, needed evidence: The defendant must show that the plaintiff *does not* possess needed evidence, because otherwise the plaintiff might be able to establish the elements of the cause of action; the defendant must also show that the plaintiff *cannot reasonably obtain* needed evidence, because the plaintiff must be allowed a reasonable opportunity to oppose the motion ([Code Civ. Proc., § 437c, subd. \(h\)](#)).<sup>22</sup> We recognize that the legislative history

<sup>18</sup> See, e.g., Senate Committee on the Judiciary, Analysis of Assembly Bill No. 2616 (1991-1992 Reg. Sess.) as amended August 12, 1992, pages 8-9; Assemblymember Peace, author of Assembly Bill No. 2616 (1991-1992 Reg. Sess.), letter to Chief Clerk of the Assembly Wilson concerning the legislative intent underlying Assembly Bill No. 2616 (1991-1992 Reg. Sess.), reprinted at 3 Assembly Journal (1993-1994 Reg. Sess.) page 4190.

<sup>19</sup> See, e.g., [Saelzler v. Advanced Group 400, supra, 25 Cal. 4th at pages 767-769](#); [Guz v. Bechtel National, Inc., supra, 24 Cal. 4th 317, 373](#) (conc. opn. of Chin, J.); [Scheiding v. Dinwiddie Construction Co., supra, 69 Cal. App. 4th at page 70](#); [Certain Underwriters at Lloyd's of London v. Superior Court, supra, 56 Cal. App. 4th at page 959](#); [Brantley v. Pisaro \(1996\) 42 Cal. App. 4th 1591, 1595 \[50 Cal. Rptr. 2d 431\]](#); [Union Bank v. Superior Court, supra, 31 Cal. App. 4th at pages 586-587](#), footnote 8.

Language in certain decisions purportedly requiring a defendant moving for summary judgment to conclusively negate an element of the plaintiff's cause of action (see, e.g., [Sharon P. v. Arman, Ltd. \(1999\) 21 Cal. 4th 1181, 1188 \[91 Cal. Rptr. 2d 35, 989 P.2d 121\]](#); [Calvillo-Silva v. Home Grocery \(1998\) 19 Cal. 4th 714, 735-736 \[80 Cal. Rptr. 2d 506, 968 P.2d 65\]](#); [Kovatch v. California Casualty Management Co. \(1998\) 65 Cal. App. 4th 1256, 1266 \[77 Cal. Rptr. 2d 217\]](#)) derives from summary judgment law as it stood prior to the 1992 and 1993 amendments, does not reflect such law as it stands now, and is accordingly disapproved. Similarly, the holding of certain decisions recognizing such a requirement under summary judgment law as it stood prior to the 1992 and 1993 amendments (see, e.g., [Molko v. Holy Spirit Assn., supra, 46 Cal. 3d at p. 1107](#)) is no longer vital inasmuch as such law as it stands now is materially different.

<sup>20</sup> See 216 [Sutter Bay Associates v. County of Sutter \(1997\) 58 Cal. App. 4th 860, 875 \[68 Cal. Rptr. 2d 492\]](#); [Certain Underwriters at Lloyd's of London v. Superior Court, supra, 56 Cal. App. 4th at page 959](#); [Rio Linda Unified School Dist. v. Superior Court \(1997\) 52 Cal. App. 4th 732, 735 \[60 Cal. Rptr. 2d 710\]](#); [Lopez v. Superior Court \(1996\) 45 Cal. App. 4th 705, 713 \[52 Cal. Rptr. 2d 821\]](#); [Leslie G. v. Perry & Associates, supra, 43 Cal. App. 4th at page 482](#); [Brantley v. Pisaro, supra, 42 Cal. App. 4th at page 1595](#); [Hunter v. Pacific Mechanical Corp. \(1995\) 37 Cal. App. 4th 1282, 1288 \[44 Cal. Rptr. 2d 335\]](#). See also [Scheiding v. Dinwiddie Construction Co., supra, 69 Cal. App. 4th at page 78](#).

<sup>21</sup> See [Saelzler v. Advanced Group 400, supra, 25 Cal. 4th at pages 767-769](#); [Guz v. Bechtel National, Inc., supra, 24 Cal. 4th 317, 373-374](#) (conc. opn. of Chin, J.); [Hagen v. Hickenbottom \(1995\) 41 Cal. App. 4th 168, 186 \[48 Cal. Rptr. 2d 197\]](#) (decided under the 1992 amendment, which is identical in pertinent part to the 1993 amendment).

<sup>22</sup> See [Saelzler v. Advanced Group 400, supra, 25 Cal. 4th at pages 767-769](#); [Guz v. Bechtel National, Inc., supra, 24 Cal. 4th 317, 374](#) (conc. opn. of Chin, J.); [Scheiding v. Dinwiddie Construction Co., supra, 69 Cal. App. 4th at pages 69-83](#); [Addy v. Bliss & Glennon \(1996\) 44 Cal. App. 4th 205, 214 \[51 Cal. Rptr. 2d 642\]](#); [Hagen v. Hickenbottom, supra, 41 Cal. App. 4th at page 186](#) (decided under the 1992 amendment, which is identical in pertinent part to the 1993 amendment); see also [Union Bank v.](#)

of the 1992 and 1993 amendments contains certain summaries at least arguably supporting the perdurance of the conclusive negation requirement. But it was the 1992 and 1993 amendments "that [were] enacted, not any" such summary. (*In re Cervera (2001) 24 Cal. 4th 1073, 1079 [103 Cal. Rptr. 2d 762, 16 P.3d 176]*.) It is the former that "must prevail over" the latter, and not the opposite. [\*\*\*\*48] (*Id. at pp. 1079-1080*.) In his concurring opinion in *Guz*, Justice Chin anticipated the conclusion that we here reach. (*Guz v. Bechtel National, Inc., supra, 24 Cal. 4th 317, 373-374* (conc. opn. of Chin, J.).) We therefore embrace it fully.

[\*\*\*\*51] **CA(8)** [8] **HN29** Summary judgment law in this state, however, continues to require a defendant moving for summary judgment to present evidence, and not simply point out<sup>23</sup> [\*\*\*\*53] that the plaintiff does not possess, [\*\*\*866] and cannot reasonably obtain, needed evidence. In this particular at least, it still diverges from [\*855] federal law. For the defendant *must* "support[]" the "motion" with evidence including "affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice" must or may "be taken." (*Code Civ. Proc., § 437c, subd. (b)*.) **HN30** [8] The defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. The defendant may also present evidence that the plaintiff does not possess, and cannot reasonably [\*\*514] obtain, needed evidence--as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing.<sup>24</sup> But, as *Fairbank v. Wunderman Cato Johnson (9th Cir. 2000) 212 F.3d 528* concludes, the defendant *must* indeed present evidence": Whereas, under federal law, "pointing out through argument" [\*\*\*\*52] (*id. at p. 532*) may be sufficient (see generally Schwarzer et al., *Cal. Practice Guide: Federal Civil Procedure Before Trial* (The Rutter Group 2001) PP 14:137 to 14:137.6, pp. 14-32 to 14-33 [setting out the "disagree[ment]" of the "[c]ourts" on the issue]), under state law, it is not.

**CA(9)** [9] To speak broadly, all of the foregoing discussion of summary judgment law in this state, like that of its federal counterpart, may be reduced to, and justified by, a single proposition: **HN31** [8] If a party moving for summary judgment in any action, including an antitrust action for unlawful conspiracy, would prevail at trial without submission of any issue of material fact to a trier of fact for determination, then he should prevail on summary judgment. In such a case, as Justice Chin stated in his concurring opinion in *Guz*, the "court should grant" the motion "and avoid a . . . trial" rendered "useless" by nonsuit or directed verdict or similar device. (*Guz v. Bechtel National, Inc., supra, 24 Cal. 4th 317, 374* (conc. opn. of Chin, J.); see *Saelzler v. Advanced Group 400, supra, 25 Cal. 4th at pp. 768-769*.)<sup>25</sup> [\*\*\*\*54]

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*Superior Court, supra, 31 Cal. App. 4th at pages 576* & 592-593 (concluding that a defendant that moved for summary judgment on certain fraud and fraud-related causes of action carried its initial burden of production by presenting evidence in the form of "factually devoid interrogatory answers" on the part of the plaintiffs that the plaintiffs did not possess, and could not reasonably obtain, needed evidence); *Hunter v. Pacific Mechanical Corp., supra, 37 Cal. App. 4th at pages 1287-1288* (following *Union Bank*).

<sup>23</sup> See *Certain Underwriters at Lloyd's of London v. Superior Court, supra, 56 Cal. App. 4th at pages 956-957; Hagen v. Hickenbottom, supra, 41 Cal. App. 4th at page 186* (decided under the 1992 amendment, which is identical in pertinent part to the 1993 amendment); Assembly member Peace, author of Assembly Bill No. 2616 (1991-1992 Reg. Sess.), letter to Chief Clerk of the Assembly Wilson concerning the legislative intent underlying Assembly Bill No. 2616 (1991-1992 Reg. Sess.), reprinted at 3 Assembly Journal (1993-1994 Reg. Sess.) page 4190.

Language in certain decisions purportedly allowing a defendant moving for summary judgment simply to "point[] out "an absence of evidence to support" an element of the plaintiff's cause of action (e.g., *Hunter v. Pacific Mechanical Corp., supra, 37 Cal. App. 4th at p. 1288*, italics in original) does not reflect summary judgment law as it has ever stood, and is accordingly disapproved.

<sup>24</sup> See *Guz v. Bechtel National, Inc., supra, 24 Cal. 4th 317, 373-374* (conc. opn. of Chin, J.); *Hagen v. Hickenbottom, supra, 41 Cal. App. 4th at page 186* (decided under the 1992 amendment, which is identical in pertinent part to the 1993 amendment).

<sup>25</sup> To the extent that *Barnes v. Blue Haven Pools (1969) 1 Cal. App. 3d 123 [81 Cal. Rptr. 444]*, which was decided under summary judgment law as it stood prior to the 1992 and 1993 amendments, is to the contrary, it is no longer vital inasmuch as such law as it stands now is materially different. (See *Union Bank v. Superior Court, supra, 31 Cal. App. 4th at pp. 576* 591-592.) &

**CA(10)** [↑] (10) Aguilar concedes that, on the defendants' motion for summary judgment in an antitrust action for unlawful conspiracy [\*\*\*\*55] under provisions [\*856] including section 1 of the Cartwright Act, a plaintiff must present evidence that tends to exclude the possibility that the defendants acted independently rather than collusively, in order to carry a burden of production to make a *prima facie* showing that there is a triable issue of the material fact of the existence of an unlawful conspiracy.

Aguilar also concedes that ambiguous evidence or inferences showing or implying conduct that is as consistent with permissible competition by independent actors as with unlawful conspiracy by colluding ones [\*\*\*867] do not allow a reasonable trier of fact to find in the plaintiff's favor on the unlawful-conspiracy issue by a preponderance of the evidence.

But Aguilar claims that the court must consider all of the evidence and all of the inferences drawn therefrom. We agree. (Code Civ. Proc., § 437c, subd. (c).)

Aguilar also claims that the court may not weigh the plaintiff's evidence or inferences against the defendants' as though it were sitting as the trier of fact. We agree here as well. HN32 [↑] The court may not "grant[] the defendants' motion for summary judgment "based on inferences [\*\*\*\*56] . . . , if contradicted by other inferences or evidence, which raise a triable issue as to any material fact." ( Code Civ. Proc., § 437c, subd. (c).) Neither, apparently, may the court grant their motion based on any evidence from which such inferences are drawn, if so contradicted. That means that, if the court concludes that the plaintiff's evidence or inferences raise a triable issue of material fact, it must conclude its consideration and deny the defendants' motion.

But, HN33 [↑] even though the court may not weigh the plaintiff's evidence or inferences against the defendants' as though it were sitting as the trier of fact, it must nevertheless determine what any evidence or inference *could show or imply to a reasonable trier of fact*. Aguilar effectively admits as [\*\*515] much.<sup>26</sup> In so doing, it does not decide on any finding of its own, but simply decides what finding such a trier of fact could make for itself. (Cf. Kidron v. Movie Acquisition Corp. (1995) 40 Cal. App. 4th 1571, 1580-1581 [47 Cal. Rptr. 2d 752] [motion for nonsuit]; Salter v. Keller (1964) 224 Cal. App. 2d 126, 128 [36 Cal. Rptr. 430] [same]. [\*\*\*\*57] )

**CA(11)** [↑] (11) Thus, HN34 [↑] if the court determines that any evidence or inference presented or drawn by the plaintiff indeed shows or implies unlawful conspiracy [\*857] *more likely than* permissible competition, it must then deny the defendants' motion for summary judgment, even in the face of contradictory evidence or inference presented or drawn by the defendants, because a reasonable trier of fact could find for the plaintiff. Under [\*\*\*868] such circumstances, the unlawful-conspiracy issue is triable--that is, it must be submitted to a trier of fact for determination in favor of either the plaintiff or the defendants, and may not be taken from the trier of fact and resolved by the court itself in the defendants' favor and [\*\*\*\*58] against the plaintiff.

But HN35 [↑] if the court determines that all of the evidence presented by the plaintiff, and all of the inferences drawn therefrom, show and imply unlawful conspiracy *only as likely as* permissible competition *or even less likely*, it must then grant the defendants' motion for summary judgment, even apart from any evidence presented by the defendants or any inferences drawn therefrom, because a reasonable trier of fact could not find for the plaintiff.<sup>27</sup>

We need not, and do not, consider whether summary judgment law in this state now conforms to its federal counterpart as clarified and liberalized in *Matsushita* with respect to a plaintiff's "implausible" antitrust cause of action asserting an unlawful conspiracy under section 1 of the Cartwright Act. See, *ante*, at page 847, footnote 5. That is because, as even the petroleum companies themselves admit, Aguilar's claim, whatever its merits, is far from implausible.

<sup>26</sup> Accord, 2 Areeda and Hovenkamp, Antitrust Law, *supra*, paragraph 322, page 71 (stating that "[a]ssessing the sufficiency of the evidence to determine whether a reasonable juror could find that the plaintiff has satisfied his burden of persuasion is a traditional judicial function").

<sup>27</sup> Accord, 2 Areeda and Hovenkamp, Antitrust Law, *supra*, paragraph 322, page 70 (stating that, "when the evidence is in equipoise on a matter that a party must establish by a preponderance of the evidence, summary judgment will be granted against that party"); 6 Areeda, Antitrust Law, *supra*, paragraph 1423d, page 139 (implying that, when a reasonable trier of fact

Under such circumstances, the unlawful-conspiracy issue is not triable--that is, it may not be submitted to a trier of fact for determination in favor of either the plaintiff or the defendants, but must be taken from the trier of fact and resolved by the court itself in the defendants' favor and against the plaintiff.

[\*\*\*\*59] We acknowledge that a plaintiff like Aguilar must often rely on inference rather than evidence since, usually, unlawful conspiracy is conceived in secrecy and lives its life in the shadows. (See [Quelimane Co. v. Stewart Title Guaranty Co. \(1998\) 19 Cal. 4th 26, 48 \[77 Cal. Rptr. 2d 709, 960 P.2d 513\]](#); [Saxer v. Philip Morris, Inc. \(1975\) 54 Cal. App. 3d 7, 27 \[126 Cal. Rptr. 327\]](#).) But, when he does so, he must all the same rely on an inference implying unlawful conspiracy *more likely than* permissible competition, either in itself or together with other inferences or evidence. Aguilar claims that the inference need only be reasonable. True.<sup>28</sup> But, as she herself effectively admits, the inference is reasonable if, and only if, it implies unlawful conspiracy *more likely than* permissible competition.

[\*\*\*\*60] [\*858] IV

We have before us the decision of the Court of Appeal reversing the order of the superior court granting a new trial on Aguilar's motion and directing it to grant summary judgment on the petroleum companies' motions.

Prior to turning to the Court of Appeal's decision itself, we address an issue at the threshold.

As noted, the Court of Appeal denied Aguilar's motion to dismiss the petroleum companies' appeals.

We believe that the Court of Appeal was right to do so.

[\*\*516] In support of her motion to dismiss the petroleum companies' appeals, Aguilar claimed, *inter alia*, that the Court of Appeal had not been presented with any appealable judgment or order over which it could assert jurisdiction. Unpersuasively so.

[CA\(12\)\[↑\]](#) (12) Aguilar moved the superior court for a new trial following its order granting the petroleum companies summary judgment. [HN36\[↑\]](#) A motion for a new trial is appropriate following an order granting summary judgment. ( [Kohan v. Cohan \(1988\) 204 Cal. App. 3d 915, 919, fn. 4 \[251 Cal. Rptr. 570\]](#); [Scott v. Farrar \(1983\) 139 Cal. App. 3d 462, 467 \[188 Cal. Rptr. 823\]](#); [Green v. Del-Camp Investments, Inc. \(1961\) 193 Cal. App. 2d 479, 481 \[14 Cal. Rptr. 420\]](#); [\*\*\*\*61] see [Waschek v. Department of Motor Vehicles \(1997\) 59 Cal. App. 4th 640, 643-644, fn. 4 \[69 Cal. Rptr. 2d 296\]](#); [Malo v. Willis \(1981\) 126 Cal. App. 3d 543, 546, fn. 2 \[178 Cal. Rptr. 774\]](#); cf. [Carney v. Simmonds \(1957\) 49 Cal. 2d 84, 87-91 \[315 P.2d 305\]](#) [holding that a motion for a new trial is appropriate following an order granting judgment on the pleadings].) This is so, even though, strictly speaking, "summary judgment . . . is a determination that there shall be no trial at all." ( [Green v. Del-Camp Investments, Inc., supra, 193 Cal. App. 2d at p. 481](#).)

On Aguilar's motion, the superior court granted a new trial following its order granting the petroleum companies [\*\*\*869] summary judgment. [HN37\[↑\]](#) An order granting a new trial is appealable. ( *Code Civ. Proc.*, § 904.1, *subd. (a)(4)*.) To be clear, "any order granting a new trial is appealable." ( 9 *Witkin, Cal. Procedure* (4th ed. 1997) *Appeal*, § 146, p. 213, *italics added*.) There is no exception for an order granting a new trial *following an order granting summary judgment*. It makes no difference that an order granting [\*\*\*\*62] a new trial may operate like an order denying summary judgment, which is nonappealable. ( [Waschek v. Department of Motor Vehicles, supra, 59 Cal. App. 4th at pp. 1\\*859\] 643-644, fn. 4](#); [Malo v. Willis, supra, 126 Cal. App. 3d at p. 546, fn. 2](#).) The fact is, it is, and remains, an order granting a new trial, which *is* appealable.

"cannot say whether" a "conspiratorial or non-conspiratorial explanation is more probable," "summary judgment . . . would have to be given against the party bearing the burden of persuasion" by a preponderance of the evidence).

<sup>28</sup> Compare [Eastman Kodak Co. v. Image Technical Services, Inc. \(1992\) 504 U.S. 451, 468 \[112 S. Ct. 2072, 2083, 119 L. Ed. 2d 265\]](#) (stating that "Matsushita demands only that the . . . inferences" of the party opposing a motion for summary judgment "be reasonable in order to reach" a trier of fact).

Unable to avoid the force of our analysis, Aguilar suggests that, in arguing that the Court of Appeal properly denied her motion to dismiss their appeals, the petroleum companies have relied on law that is lacking in vitality, and have done so in an attempt to "manufacture appealability" (*Malo v. Willis, supra, 126 Cal. App. 3d at p. 546, fn. 2*). Their law, however, is not lacking in vitality. Neither have they made any attempt to manufacture appealability. Indeed, it is rather Aguilar who has attempted to manufacture *nonappealability*. On the petroleum companies' motions, the superior court caused entry of an appealable (*Code Civ. Proc., § 437c, subd. (l)*) summary judgment. On Aguilar's motion, the superior court issued an appealable order granting a [\*\*\*\*63] new trial. Aguilar would transform the appealable order granting a new trial into a nonappealable order denying summary judgment. She may not do so. And since she may not, she may not complain that the petroleum companies failed to "petition" the Court of Appeal "for a peremptory writ" against the superior court for its nonexistent nonappealable order denying summary judgment. (*Ibid.*)<sup>29</sup>

[\*\*\*64] **CA(13)[↑]** (13) Turning to the Court of Appeal's decision, we believe that the Court of Appeal was right to apply the independent standard of review to the superior court's order granting a new trial.

[\*\*517] **HN38[↑]** It is true, as Aguilar argues, that, as a general matter, orders granting a new trial are examined for abuse of discretion. (See, e.g., *Schelbauer v. Butler Manufacturing Co. (1984) 35 Cal. 3d 442, 452 [198 Cal. Rptr. 155, 673 P.2d 743, 38 A.L.R.4th 566]*; *Jiminez v. Sears, Roebuck & Co. (1971) 4 Cal. 3d 379, 387 [93 Cal. Rptr. 769, 482 P.2d 681, 52 A.L.R.3d 92]*.)

But it is also true that any determination underlying any order is scrutinized under the test appropriate to such determination. (See, e.g., *People v. Waidla (2000) 22 Cal. 4th 690, 730 [94 Cal. Rptr. 2d 396, 996 P.2d 46]*; *People v. Alvarez (1996) 14 Cal. 4th 155, 188 [58 Cal. Rptr. 2d 385, 926 P.2d 365]*.) [\*860]

[\*\*\*870] The sole determination underlying the superior court's order granting a new trial was the asserted erroneousness of its order granting the petroleum companies summary judgment. **HN39[↑]** An order granting summary judgment, of course, [\*\*\*65] is reviewed independently. (E.g., *Guz v. Bechtel National, Inc., supra, 24 Cal. 4th at p. 334*; *Norgart v. Upjohn Co. (1999) 21 Cal. 4th 383, 404 [87 Cal. Rptr. 2d 453, 981 P.2d 79]*; see *Saelzler v. Advanced Group 400, supra, 25 Cal. 4th at p. 767*.)

We recognize that the superior court's order granting a new trial was predicated, specifically, on its determination that, in granting the petroleum companies summary judgment, it made an error in law in its reading and application of *Biljac*.

**HN40[↑]** But such a determination is itself scrutinized de novo. (See *Parker v. Womack (1951) 37 Cal. 2d 116, 123 [230 P.2d 823]*, overruled on another point by *Butigan v. Yellow Cab Co. (1958) 49 Cal. 2d 652, 660 [320 P.2d 500, 65 A.L.R.2d 1]*; *Stoddard v. Rheem (1961) 192 Cal. App. 2d 49, 53-54 [13 Cal. Rptr. 496]*.)

To be precise: **HN41[↑]** To adopt a reading of decisional law, as the superior court did with regard to *Biljac*, entails the resolution of a pure question of law, inasmuch as it "relate[s] to the selection of a rule." (*Crocker National Bank v. City and County of San Francisco (1989) 49 Cal. 3d 881, 888 [264 Cal. Rptr. 139, 782 P.2d 278]*.) [\*\*\*66] And to make an application of decisional law, as the superior court also did with regard to *Biljac*, entails the resolution of a mixed question of law and fact that is predominantly one of law, inasmuch as it "requires a critical consideration, in a factual context, of legal principles and their underlying values" rather than merely "experience with human

<sup>29</sup> In successfully moving the superior court for a new trial following its order granting the petroleum companies summary judgment, Aguilar, in effect, sought and obtained reconsideration of the order granting summary judgment. It is not hard to infer why she did not move for reconsideration *eo nomine*. First, to make a motion for reconsideration, she would have had to have "new or different facts, circumstances, or law" in support. (*Code Civ. Proc., § 1008, subd. (a)*.) She apparently had none. Second, by the date on which she made her motion for a new trial, the superior court had caused entry of judgment. After entry of judgment, the superior court did not have jurisdiction to entertain or decide a motion for reconsideration. (See, e.g., *In re Marriage of Condon (1998) 62 Cal. App. 4th 533, 541, fn. 8 [73 Cal. Rptr. 2d 33]*; *Betz v. Pankow (1993) 16 Cal. App. 4th 931, 937-938 [20 Cal. Rptr. 2d 841]*.) Hence, she could not have made a motion for reconsideration in the first place.

affairs." ( *Crocker National Bank v. City and County of San Francisco, supra, 49 Cal. 3d at p. 888.*) The former is scrutinized de novo. (*Ibid.*) So too the latter. (*Ibid.*) There is no discretion to adopt a reading, or make an application, of decisional law that is inconsistent with the law itself. (See *City of Sacramento v. Drew (1989) 207 Cal. App. 3d 1287, 1297-1298 [255 Cal. Rptr. 704].*) Any such reading or application must necessarily be deemed an abuse. (See *ibid.*)

The Court of Appeal soundly concluded that the superior court's order granting a new trial was erroneous because the Court of Appeal soundly concluded--in substantial anticipation of our analysis of summary judgment law--that the superior court's underlying order granting the petroleum companies summary judgment [\*\*\*\*67] was *not* erroneous.

In arriving at our determination, we do not ignore the fact that this is, primarily, a complex antitrust action for unlawful conspiracy under section 1 [\*861] of the Cartwright Act, indeed, a very complex one. We could not do so even if we would, confronting as we do the Court of Appeal's lengthy and detailed opinion. But neither can we ignore the fact that HN42[<sup>14</sup>] summary judgment is available, and always remains available, even in complex cases. (See *First State Ins. Co. v. Superior Court (2000) 79 Cal. App. 4th 324, 329-331 [94 Cal. Rptr. 2d 104].*)

**CA(14)**[<sup>14</sup>] (14) To proceed, the superior court's order granting the petroleum companies summary judgment was not erroneous as to Aguilar's primary cause of action, which was for an unlawful conspiracy under section 1 of the Cartwright Act to restrict the output of CARB gasoline and to raise its price.

At trial, Aguilar as plaintiff would have borne the burden of proof by a preponderance [\*\*\*871] of the evidence as to her Cartwright Act cause of action. HN43[<sup>15</sup>] As a general rule, the "party desiring relief" bears the burden of [\*\*518] proof by a preponderance of the evidence. ( *Buss v. Superior Court (1997) 16 Cal. 4th 35, 53-54 [65 Cal. Rptr. 2d 366, 939 P.2d 766]* [\*\*\*\*68] [so holding under Evid. Code, §§ 115 & 500, as to the quantum and placement of the burden of proof, respectively].) So it is here. (See *Corwin v. Los Angeles Newspaper Service Bureau, Inc. (1978) 22 Cal. 3d 302, 317 [148 Cal. Rptr. 918, 583 P.2d 777].*)

The petroleum companies carried their burden of persuasion to show that there was no triable issue of material fact and that they were entitled to judgment as a matter of law as to Aguilar's Cartwright Act cause of action.

At the outset, the petroleum companies carried their initial burden of production to make a *prima facie* showing of the absence of any conspiracy. Through the declarations by their officers and managers and similar employees--and through material from others including third parties--they presented evidence that would require a reasonable jury *not* to find any conspiracy more likely than not.<sup>30</sup> The declarations in question, it must be emphasized, generally stated on personal knowledge how the companies made their capacity, production, and pricing decisions about CARB gasoline. Hence, they did more than baldly assert that they made them independently, and did more [\*\*\*\*69] than baldly deny that they made them collusively with each other.

It is impossible to summarize the petroleum companies' evidence within a scope that would be appropriate to this opinion. The Court of Appeal's [\*862] recounting itself fills 38 pages. With that said, the petroleum companies' evidence showed independence rather than collusion as to their most fundamental strategies with respect to CARB gasoline. For example, at one end of the range, there was Chevron's altogether active plan, which was to "gain an advantage over its competitors by becoming the largest producer of CARB gasoline in the world." At the other end, there was Union Oil's relatively passive stance, which would put [\*\*\*\*70] it at a disadvantage vis-a-vis its competitors in this regard, and would lead it to exit the market completely.

**CA(15)**[<sup>15</sup>] (15) By contrast, Aguilar did not carry the burden of production shifted onto her shoulders to make a *prima facie* showing of the presence of an unlawful conspiracy. She did not present evidence that would allow a

<sup>30</sup> Like the Court of Appeal, Aguilar implies that, in support of its motion for summary judgment, Tosco alone of the petroleum companies did not present, or at least did not rely on, any declaration by any of its officers or managers or similar employees. That is not the case. See, *ante*, at page 842, footnote 2.

reasonable jury to find a conspiracy more likely than not--her "evidence," as the Court of Appeal noted, often being less than it was claimed to be.

Specifically, the evidence that Aguilar did present was at best ambiguous, as were the inferences that she drew therefrom, showing or implying conduct that was at least as consistent with permissible competition by the petroleum companies as independent actors, as with unlawful conspiracy by them as colluding ones. Evidence of this sort, however, was insufficient. So too were related inferences.

Therefore, in addition, Aguilar had to present evidence that tended to exclude the possibility that the petroleum companies acted independently rather than collusively. This she did not do.

[\*\*\*872] [CA\(16\)](#) (16) For example, Aguilar's evidence concerning the gathering and dissemination of capacity, production, and pricing information [\*\*\*\*71] by the petroleum companies, through OPIS or otherwise, with respect to CARB gasoline does not even imply collusive, rather than independent, action. What the United States Supreme Court stated three-quarters of a century ago in [Maple Flooring Assn. v. U. S. \(1925\) 268 U.S. 563 /45 S. Ct. 578, 69 L. Ed. 1093](#), remains true today: "[HN44](#) It is the consensus of opinion of economists and of many of the most important agencies of Government that the public interest is served by the gathering and dissemination, in the widest possible manner, of information" of the sort identified above "because the making available of such information tends to stabilize trade and industry, to produce fairer price levels and to avoid the waste which inevitably attends the unintelligent conduct of economic enterprise. Free competition [\*\*519] means a free and open market among both buyers and sellers for the sale and distribution of commodities. Competition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the [\*863] commercial transaction." ([Id. at pp. 582-583 /45 S. Ct. at p. 585](#).) [\*\*\*\*72] To be sure, such information can be misused as a "basis" for an unlawful conspiracy. ([Id. at p. 585 /45 S. Ct. at p. 585](#).) The evidence here, however, does not suggest such misuse.

[CA\(17\)](#) (17) Neither does Aguilar's evidence going to the use of common consultants by the petroleum companies even imply collusive, rather than independent, action. For decisions of the magnitude and difficulty that the companies each faced with respect to CARB gasoline capacity, production, and pricing, they had available few consultants who possessed the requisite expertise to assure their competence. Hence, practically speaking, they had to utilize the same ones if they were to utilize any. Each company required confidentiality of each consultant. There is no indication that any company got anything less from any consultant. It is true that common consultants can be misused as a "conduit" for an unlawful conspiracy. (*In re Potash Antitrust Litigation* (D.Minn. 1997) 954 F. Supp. 1334, 1360 [dismissing any suggestion that certain foreign governmental officials were so misused], affd. *sub nom. Blomkest Fertilizer v. Potash of Saskatchewan* (8th Cir. 2000) 203 F.3d 1028.) [\*\*\*\*73] But, again, the evidence here does not suggest such misuse.

[CA\(18\)](#) (18) For its part, Aguilar's evidence relating to the exchange agreements entered into by the petroleum companies, including any consequent activity, or lack of activity, in the spot market, does not even imply collusive, rather than independent, action. Exchange agreements have long been common in the petroleum industry. (See [Laketon Asphalt Ref. v. U. S. Dept. of Int. \(7th Cir. 1980\) 624 F.2d 784, 797; Blue Bell Co. v. Frontier Refining Co. \(10th Cir. 1954\) 213 F.2d 354, 359; Marathon Oil Co. v. Mobil Corp. \(N.D. Ohio 1981\) 530 F. Supp. 315, 321, fn. 9](#) [quoting expert testimony that exchange agreements "number[] in the 'zillions . . .'"], affd. (6th Cir.) [669 F.2d 378](#); *Ritchie, Petroleum Dismemberment* (1976) 29 Vand. L.Rev. 1131, 1144-1145.) More important, [HN45](#) exchange agreements have long been recognized as procompetitive in purpose and effect, enabling or facilitating companies to compete in product and/or geographical and/or temporal markets in which they otherwise could not or would not compete as efficiently or at all. (See generally [Blue Bell Co. v. Frontier Refining Co., supra, 213 F.2d at p. 359](#); [\*\*\*\*74] see also [Laketon Asphalt Ref. v. U. S. Dept. of Int., supra, 624 /\\*\\*\\*873 F.2d at p. 797; American Oil Company v. McMullin \(10th Cir. 1975\) 508 F.2d 1345, 1353; Hydrocarbon Trading & Transport Co. v. Exxon Corp. \(S.D.N.Y. 1983\) 570 F. Supp. 1177, 1182; Marathon Oil Co. v. Mobil Corp., supra, 530 F. Supp. at p. 321, fn. 9; Thomas v. Amerada Hess Corporation \(M.D.Pa. 1975\) 393 F. Supp. 58, 74](#); *Ritchie, Petroleum Dismemberment*,

*supra*, 29 Vand. L.Rev. [\*864] at pp. 1144-1145.)<sup>31</sup> Doubtless, exchange agreements can be misused to structure an unlawful conspiracy. (See *Blue Bell Co. v. Frontier Refining Co., supra*, 213 F.2d at p. 359 [semble].) But, yet again, the evidence here does not suggest such misuse.

[\*\*\*\*75] **CA(19)[↑]** (19) Lastly, Aguilar's related evidence of the opinion of her experts, which was itself based at least in part on evidence such as that described above, proved to be of no marginal value. **HN46[↑]** Expert opinion may indeed be "useful as a guide to interpreting market facts . . ." ( *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* (1993) 509 U.S. 209, 242 [113 S. Ct. 2578, 2598, 125 L. Ed. 2d 168].) But "it is" simply "not a substitute" therefor. (*Ibid.*) In our view, the expert opinion here was more a "substitute" than a "guide." In effect, it conjectured that there *must have been* collusive, rather than independent, action. It did so, at bottom, because it discerned interdependent action. But, in an oligopoly, such as obtains here, interdependence is altogether consistent [\*\*520] with independence, and is not necessarily indicative of collusion. "[I]n a market served by" a few "large firms," like the market for CARB gasoline served by the petroleum companies, "each firm must know that if it reduces its price and increases its sales at the expense of its rivals, they will notice the sales loss, identify the cause, and probably respond. In short, each firm is [\*\*\*\*76] aware of its impact upon the others. Though each may independently decide upon its own course of action, any rational decision must take into account the anticipated reaction of the other[s] . . . . Because of their mutual awareness," their "decisions may be interdependent although arrived at independently." (6 Areeda, *Antitrust Law*, *supra*, P 1429a, p. 175.) In such a market, like that here, prices may move generally upward across all of the firms more or less together, rising quickly and falling slowly, and may do so interdependently but nevertheless independently. (See *id.*, P 1429b, pp. 175-177.) For collusion, there must be more than interdependence. The expert opinion here, however, does not supply what is lacking.

**CA(20)[↑]** (20) We recognize that Aguilar did indeed present evidence that the petroleum companies may have possessed the motive, opportunity, and means to enter into an unlawful conspiracy. But that is all. And that is not enough. Such evidence merely allows speculation about an unlawful conspiracy. Speculation, however, is not evidence. As a result, Aguilar's evidence of the petroleum companies' possible motive, opportunity, and means for entry into an unlawful conspiracy [\*\*\*\*77] does not amount to evidence showing [\*865] such a conspiracy more likely than not. Neither does it even support an inference implying as much.<sup>32</sup>

[\*\*\*874] The Court of Appeal rejected the superior court's determination that, in granting the petroleum companies summary judgment as to Aguilar's Cartwright Act cause of action, it made an error in law in its reading and application of *Biljac*. Appropriately so. *Biljac* held *at most* that declarations by each person responsible within [\*\*\*\*78] each of certain entities for certain decisions were *sufficient* under summary judgment law as it stood prior to the 1992 and 1993 amendments to negate an unlawful conspiracy, presumably conclusively. ( *Biljac Associates v. First Interstate Bank, supra*, 218 Cal. App. 3d at pp. 1423-1424.) *Biljac* did *not* hold that declarations by officers and managers and similar employees of the sort that the petroleum companies presented here were *insufficient* under summary judgment law as it stands now even to carry their initial burden of production to make a *prima facie* showing of the absence of any conspiracy.<sup>33</sup>

<sup>31</sup> Exchange agreements have also be recognized as "pro-environmental" and safety enhancing, as by the Court of Appeal, to the extent that they obviate or reduce the ecological and other risks attendant on the storage and transportation of petroleum products.

<sup>32</sup> See, e.g., *Serfecz v. Jewel Food Stores* (7th Cir. 1995) 67 F.3d 591, 600-601 (holding that, "by itself," evidence of motive to enter into an unlawful conspiracy "does not tend to exclude the possibility of independent, legitimate action and supplies no basis for inferring [such] a conspiracy"); *Alvord-Polk, Inc. v. F. Schumacher & Co.* (3d Cir. 1994) 37 F.3d 996, 1013 (holding to similar effect expressly as to evidence of opportunity and impliedly as to evidence of means).

<sup>33</sup> In the course of its opinion, the Court of Appeal characterized the superior court's determination that it made an error in law in its reading and application of *Biljac* as "in fact" a "reflect[ion]" of "its belief that its initial decision regarding the evidentiary strength of" the declarations by officers and managers and similar employees presented by the petroleum companies "was incorrect." We agree with the Court of Appeal about the superior court's belief. But we think it plain that the superior court formed its belief because it determined that it made an error in law in its reading and application of *Biljac*.

[\*\*\*\*79] To the extent that the superior court may have erred as to Aguilar's Cartwright Act cause of action, Aguilar cannot raise any complaint, for any such error could have benefited her alone. The superior court appears to have concluded that, in order to carry their initial burden of production, the petroleum companies had to present evidence that conclusively negated an unlawful conspiracy.<sup>34</sup> [\*\*\*\*80] Such a conclusion, however, would be contrary to our analysis. The superior [\*\*521] court also appears to have concluded that, in order to carry the burden of production shifted onto her shoulders, Aguilar did *not* have to present evidence that tended to exclude the possibility that the petroleum companies acted independently rather than collusively, but could present no more than ambiguous evidence or inferences showing or implying conduct that was as consistent with permissible competition by independent [\*866] actors as with unlawful conspiracy by colluding ones. Such a conclusion, however, would also be contrary to our analysis.<sup>35</sup>

[\*\*\*\*81] [\*\*\*875] Just as the superior court's order granting the petroleum companies summary judgment was not erroneous as to Aguilar's primary cause of action for an unlawful conspiracy under section 1 of the Cartwright Act to restrict the output of CARB gasoline and to raise its price, neither was it erroneous as to her derivative cause of action, which was for an unlawful conspiracy under the unfair competition law for the same purpose.

At trial, Aguilar as plaintiff would have borne the burden of proof by a preponderance of the evidence as to her unfair competition law cause of action. Again, as a general rule, the party desiring relief bears the burden of proof by a preponderance of the evidence. So it is here.

The petroleum companies carried their burden of persuasion to show that there was no triable issue of material fact and that they were entitled to judgment as a matter of law as to Aguilar's unfair competition law cause of action. They did so by doing so as to her Cartwright Act cause of action. Again, they carried their burden of production to make a *prima facie* showing of the absence of any conspiracy, but she did not carry her shifted burden of production to make a *prima facie* showing of the presence of an unlawful one.

It is true, as Aguilar argues, that her unfair competition law cause of action is not based on allegations asserting a conspiracy *unlawful under the Cartwright Act*. But it is indeed based on allegations asserting a *conspiracy*, specifically, one unlawful at least under the unfair competition law itself. As stated, the petroleum companies showed that there was no triable issue of the material fact of conspiracy. Aguilar claims that conspiracy is not an element of an unfair competition law cause of action in the abstract as a matter of [\*867] law. Correctly so. (See *Bus. & Prof. Code, § 17200*.) But she simply cannot deny that conspiracy is indeed a component of the unfair competition law cause of action *in this case as a matter of fact*.

V

For the reasons stated above, we conclude that we must affirm the judgment of the Court of Appeal.

It is so ordered.

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<sup>34</sup> Although it did not criticize the superior court on this score, the Court of Appeal all but expressly concluded that evidence that conclusively negated an unlawful conspiracy was of course sufficient, but not necessary, to carry an initial burden of production to make a *prima facie* showing of the absence of any conspiracy.

<sup>35</sup> In alleging facts for her Cartwright Act cause of action, Aguilar proceeded on a theory, which was legally sound (see *Corwin v. Los Angeles Newspaper Service Bureau, Inc., supra, 22 Cal. 3d at p. 314*), that the assertedly unlawful conspiracy consisted of an agreement among the petroleum companies as competitors to restrict the output of CARB gasoline and to raise its price, and was unlawful per se without regard to any of its effects. In granting the petroleum companies summary judgment, the superior court did so on that theory. On appeal, Aguilar apparently attempted to introduce an alternative theory, which was also legally sound (see *ibid.*), that the assertedly unlawful conspiracy consisted of the various exchange agreements entered into by the various petroleum companies, and was unlawful because of its effects. The Court of Appeal rejected any such attempt as too late. To the extent that Aguilar makes the same attempt on review, we reject it for the same reason. (See *Redwood Hatchery v. Meadowbrook Farms (1957) 152 Cal. App. 2d 481, 486 [313 P.2d 146]* [stating that "it is the duty of litigants to diligently prepare cases for trial and ordinarily they will not be allowed to gamble on the result of a trial by presenting one theory and then if judgment go against them get a new trial in order to try again for a favorable result under a different theory"].)

25 Cal. 4th 826, \*867 24 P.3d 493, \*\*521 107 Cal. Rptr. 2d 841, \*\*\*875 2001 Cal. LEXIS 3758, \*\*\*\*82

George, C. J., Kennard, J., Chin, J., Brown, J., Hollenhorst, J., \* and Kitching, J.,<sup>†</sup> concurred.

On July 11, 2001, the opinion was modified to read as printed above.

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<sup>†</sup> [\*\*\*\*83] Associate Justice of the Court of Appeal, Second Appellate District, Division Three, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).



## Cadence Design Systems, Inc. v. Avant! Corp.

Supreme Court of California

November 21, 2002, Decided ; November 21, 2002, Filed

No. S098266.

### **Reporter**

29 Cal. 4th 215 \*; 57 P.3d 647 \*\*; 127 Cal. Rptr. 2d 169 \*\*\*; 2002 Cal. LEXIS 7960 \*\*\*\*; 2002 Cal. Daily Op. Service 11301; 2002 Daily Journal DAR 13129; 65 U.S.P.Q.2D (BNA) 1678

CADENCE DESIGN SYSTEMS, INC., Plaintiff and Appellant, v. AVANT! CORPORATION, Defendant and Appellant.

**Prior History:** [\*\*\*\*1] Ninth Cir.Ct.App. Nos. 99-17648, 99-17649. U.S. Dist. Ct. No. CV 95-20828.

[Cadence Design Sys. v. Avant! Corp., 253 F.3d 1147, 2001 U.S. App. LEXIS 12093 \(9th Cir. Cal. 2001\)](#)

**Disposition:** We conclude that a plaintiff's claim for misappropriation of a trade secret against a defendant arises only once, when the trade secret is initially misappropriated, and each subsequent use or disclosure of the secret augments the initial claim rather than arises as a separate claim.

## **Core Terms**

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misappropriation, trade secret, single claim, disclosure, occurring, purposes, misuse, improper means, parties, secret, infringement, patent, separate claim, give rise, confidential, continuing wrong, cause of action, source code

## **LexisNexis® Headnotes**

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Torts > Business Torts > Unfair Business Practices > General Overview

Trade Secrets Law > Trade Secret Determination Factors > Economic Value

**HN1** [] **Business Torts, Unfair Business Practices**

See [Cal. Civ. Code § 3426.1\(d\)](#).

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

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Trade Secrets Law > Misappropriation Actions > Definitions of Misappropriation

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Improper Means

## **HN2** [down] **Elements of Misappropriation, Acquisition**

See [Cal. Civ. Code § 3426.1\(b\)](#).

Torts > Business Torts > Unfair Business Practices > General Overview

## **HN3** [down] **Business Torts, Unfair Business Practices**

See [Cal. Civ. Code § 3426.1\(a\)](#).

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

Torts > Business Torts > Unfair Business Practices > General Overview

Trade Secrets Law > Federal Versus State Law > General Overview

Trade Secrets Law > Misappropriation Actions > General Overview

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

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Improper Means

Trade Secrets Law > Misappropriation Actions > Unfair Competition

Trade Secrets Law > Nonprotected Information > Reverse Engineering

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

## **HN4** [down] **Federal Versus State Law, Antitrust Law**

The legal protection accorded trade secrets is fundamentally different from that given to patents, in which the patent owner acquires a limited term monopoly over the patented technology, and use of that technology by whatever means infringes the patent. The owner of the trade secret is protected only against the appropriation of the secret by improper means and the subsequent use or disclosure of the improperly acquired secret. There are various legitimate means, such as reverse engineering, by which a trade secret can be acquired and used.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Business Torts > Unfair Business Practices > General Overview

## **HN5** [down] **Statute of Limitations, Time Limitations**

See [Cal. Civ. Code § 3426.6](#).

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Discovery Rule

Governments > Legislation > Statute of Limitations > Time Limitations

Trade Secrets Law > Civil Actions > Defenses > Statute of Limitations

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Misappropriation

Governments > Legislation > Statute of Limitations > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

Torts > Procedural Matters > Statute of Limitations > General Overview

#### **HN6** Tolling of Statute of Limitations, Discovery Rule

Cal. Civ. Code § 3426 of the California Uniform Trade Secrets Act rejects a continuing wrong approach to the statute of limitations but delays the commencement of the limitation period until an aggrieved person discovers or reasonably should have discovered the existence of misappropriation. If objectively reasonable notice of misappropriation exists, three years is sufficient time to vindicate one's legal rights.

Governments > Legislation > Statute of Limitations > General Overview

Trade Secrets Law > Trade Secret Determination Factors > Continuous Use

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Misappropriation

Torts > Business Torts > Unfair Business Practices > General Overview

Trade Secrets Law > Civil Actions > Defenses > Statute of Limitations

Trade Secrets Law > Misappropriation Actions > General Overview

Trade Secrets Law > Misappropriation Actions > Definitions of Misappropriation

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

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

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Improper Means

#### **HN7** Legislation, Statute of Limitations

Under Cal. Civ. Code § 3426 of the California Uniform Trade Secrets Act, "continuing misappropriation" is the continuing use or disclosure of a trade secret after that secret was acquired by improper means or as otherwise specified in Cal. Civ. Code § 3426.1(b). Thus, for statute of limitations purposes, a continuing misappropriation is viewed as a single claim. Misappropriation does not give rise to multiple claims each time the trade secret is misused or improperly disclosed.

Governments > Legislation > Statute of Limitations > General Overview

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

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Misappropriation

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Discovery Rule

Torts > Business Torts > Unfair Business Practices > General Overview

Torts > Procedural Matters > Statute of Limitations > General Overview

Trade Secrets Law > Civil Actions > Defenses > Statute of Limitations

Trade Secrets Law > Misappropriation Actions > General Overview

## **HN8** [+] Legislation, Statute of Limitations

A misappropriation within the meaning of [Cal. Civ. Code § 3426](#) of the California Uniform Trade Secrets Act occurs not only at the time of the initial acquisition of the trade secret by wrongful means, but also with each misuse or wrongful disclosure of the secret. However, a claim for misappropriation of a trade secret arises for a given plaintiff against a given defendant only once, at the time of the initial misappropriation, subject to the discovery rule provided in [§ 3426.6](#). Each new misuse or wrongful disclosure is viewed as augmenting a single claim of continuing misappropriation, rather than as giving rise to a separate claim.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Misappropriation

Governments > Legislation > Statute of Limitations > General Overview

Trade Secrets Law > Civil Actions > Defenses > Statute of Limitations

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

## **HN9** [+] Bad Faith, Fraud & Nonuse, Misappropriation

A misappropriation of trade secret claim must be defined in the context of litigation.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Misappropriation

Governments > Legislation > Statute of Limitations > General Overview

Trade Secrets Law > Civil Actions > Defenses > Statute of Limitations

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

Torts > Procedural Matters > Statute of Limitations > General Overview

Trade Secrets Law > Civil Actions > General Overview

#### **HN10** [💡] **Bad Faith, Fraud & Nonuse, Misappropriation**

Under [Cal. Civ. Code § 3426.6](#) of the California Uniform Trade Secrets Act, separate "claims" accruing at different times cannot have the same limitations period.

Governments > Legislation > Statute of Limitations > General Overview

#### **HN11** [💡] **Legislation, Statute of Limitations**

Each civil action possesses its own statutorily prescribed limitations period. [Cal. Code Civ. Proc. § 312](#).

Torts > Business Torts > Unfair Business Practices > General Overview

#### **HN12** [💡] **Business Torts, Unfair Business Practices**

See [Cal. Civ. Code § 3426.10](#).

Torts > Business Torts > Unfair Business Practices > General Overview

Trade Secrets Law > Federal Versus State Law > Common Law

Trade Secrets Law > Misappropriation Actions > General Overview

#### **HN13** [💡] **Business Torts, Unfair Business Practices**

A continuing misappropriation of trade secrets is not necessarily a single claim. Rather, the claim must be divided in two if the continuing misappropriation took place partly before January 1, 1985: one common law claim for misappropriation occurring before that date, and one claim under [Cal. Civ. Code § 3426](#) of the California Uniform Trade Secrets Act for misappropriation occurring thereafter.

Torts > Procedural Matters > Multiple Defendants > General Overview

Trade Secrets Law > Misappropriation Actions > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

Trade Secrets Law > Civil Actions > General Overview

#### **HN14** [💡] **Procedural Matters, Multiple Defendants**

An act of continuing misappropriation of trade secrets constitutes more than one claim when multiple defendants are involved.

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

Torts > Business Torts > Unfair Business Practices > General Overview

Trade Secrets Law > Trade Secret Determination Factors > Definition Under Uniform Act

Trade Secrets Law > Misappropriation Actions > Definitions of Misappropriation

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

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Improper Means

## **HN15** [blue icon] Elements of Misappropriation, Acquisition

Under [Cal. Civ. Code § 3426](#) of the California Uniform Trade Secrets Act, the definition of misappropriation includes disclosure or use of a trade secret by persons who knew or had reason to know that the trade secret was acquired by improper means. [Cal. Civ. Code § 3426.1\(b\)\(2\)\(B\)\(i\)-\(ii\)](#).

Trade Secrets Law > Trade Secret Determination Factors > Continuous Use

Torts > Business Torts > Unfair Business Practices > General Overview

Torts > Business Torts > Unfair Business Practices > Defenses

Torts > Procedural Matters > Multiple Defendants > General Overview

Trade Secrets Law > Civil Actions > Defenses > Statute of Limitations

Trade Secrets Law > Misappropriation Actions > General Overview

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

## **HN16** [blue icon] Trade Secret Determination Factors, Continuous Use

There may be separate claims of continuing misappropriation of trade secrets among different defendants, with differing dates of accrual and types of tortious conduct: some defendants liable for initial misappropriation of the trade secret, others only for later continuing use.

Torts > Business Torts > Unfair Business Practices > General Overview

Trade Secrets Law > Trade Secret Determination Factors > Property Rights

## **HN17** [blue icon] Business Torts, Unfair Business Practices

The nature of a trade secret as a property interest and the means by which the interest can be vindicated are matters of state law.

Torts > Business Torts > Unfair Business Practices > General Overview

Trade Secrets Law > Trade Secret Determination Factors > Definition Under Uniform Act

## **HN18[] Business Torts, Unfair Business Practices**

For litigation purposes, [Cal. Civ. Code § 3426](#) of the California Uniform Trade Secrets Act defines an act of continuing misappropriation of trade secrets as a single claim.

Civil Procedure > ... > Defenses, Demurrs & Objections > Affirmative Defenses > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

## **HN19[] Defenses, Demurrs & Objections, Affirmative Defenses**

Parties to a release in a trade secret dispute remain free to fashion the release as broadly or narrowly as they choose.

Civil Procedure > Remedies > General Overview

Trade Secrets Law > ... > Remedies > Injunctions > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

Trade Secrets Law > Civil Actions > Remedies > General Overview

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

## **HN20[] Civil Procedure, Remedies**

Under [Cal. Civ. Code § 3426](#) of the California Uniform Trade Secrets Act, a trade secret infringer is not rewarded for its infringement with a license to use the infringed technology. Rather, a successful trade secret plaintiff is entitled to the full panoply of remedies, including injunctive relief against further misappropriation, [Cal. Civ. Code § 3426.2](#), damages for actual loss, [Cal. Civ. Code § 3426.3](#), and relief from unjust enrichment, [§ 3426.3](#).

## **Headnotes/Summary**

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### **Summary**

#### **CALIFORNIA OFFICIAL REPORTS SUMMARY**

A corporation in the field of integrated circuit design automation sued a competitor for misappropriation of trade secrets after its vice-president joined the competitor. The parties negotiated a settlement of the claims and signed a release. Thereafter, plaintiff sued defendant for misuse of the secrets occurring after the date of the release. The trial court ruled on summary judgment motions that all of the claims for postrelease misuse were barred by the release. (U.S. Dist. Ct. No. CV 95-20828.) On plaintiff's appeal, the Ninth Circuit Court of Appeals certified the following question to the California Supreme Court: Under the California Uniform Trade Secrets Act (UTSA) ([Civ. Code, § 3426](#)), when does a claim for trade secret infringement arise: only once, when the initial misappropriation occurs, or with each subsequent misuse of the trade secret? (Ninth Cir. U.S. Ct. App., Nos. 99-17648 and 99-17649.) The Supreme Court accepted the certification under Cal. Rules of Court, rule 29.5.

The Supreme Court held that a plaintiff's claim under the UTSA for misappropriation of a trade secret against a defendant arises only once, when the trade secret is initially misappropriated, and each subsequent use of disclosure of the secret augments the initial claim rather than arises as a separate claim. Under this interpretation of the UTSA, a trade secret infringer is not rewarded for its infringement with a license to use the infringed technology

after the parties settle a claim and execute a release. The parties to the release remain free to fashion the release as broadly or as narrowly as they choose, and a successful plaintiff is entitled to the full panoply of remedies, including injunctive relief, damages for actual loss, and relief from unjust enrichment. (Opinion by Moreno, J., with Kennard, Acting C. J., Baxter, Chin, and Brown, JJ., \* and Nott, J., + concurring.)

## Headnotes

### [CA\(1a\)](#) [down] (1a) [CA\(1b\)](#) [down] (1b) [CA\(1c\)](#) [down] (1c)

#### **Unfair Competition § 7—Use of Trade Secrets—California Uniform Trade Secrets Acty—When Claim for Continuing Misappropriation Arises—Single or Multiple Claims.**

--A plaintiff's claim under the California Uniform Trade Secrets Act ([Civ. Code, § 3426](#)) for misappropriation of a trade secret against a defendant arises only once, when the trade secret is initially misappropriated. Each subsequent use or disclosure of the secret does not give rise to a separate claim, but rather augments the initial claim. This interpretation is supported by [Civ. Code, § 3426.6](#), the act's statute of limitations, which provides that "a continuing misappropriation constitutes a single claim." The drafters of that provision explicitly affirmed prior case law supporting this interpretation, and rejected the contrary view that each misappropriation gives rise to a separate claim. This provision, as well as the act's definition of "misappropriation" ([Civ. Code, § 3426.1, subd. \(b\)](#)), reveal a distinction between a "misappropriation" and a "claim." A "misappropriation" occurs not only at the time of the initial acquisition of the trade secret, but also with each misuse or wrongful disclosure of the secret. A "claim" for misappropriation arises against a given defendant only once, at the time of the initial misappropriation, with each new misuse or wrongful disclosure augmenting that single claim. In the context of a settlement and release of a claim, this interpretation does not effectively reward the defendant with a license to use the misappropriated technology after execution of the release or discourage parties from entering into such releases. The parties remain free to fashion the release as broadly or narrowly as they choose, and a successful plaintiff is entitled to the full panoply of remedies, including injunctive relief, damages for actual loss, and relief from unjust enrichment. [\*\*\*\*2]

[See 11 Witkin, Summary of Cal. Law (9th ed. 1990) Equity, § 108 et seq.]

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

#### **Appellate Review § 119—Dismissal—Mootness—Settlement—Exception.**

--When parties settle a case after oral argument, the Supreme Court may nonetheless exercise its discretion to issue an opinion to resolve the legal issues raised, which are of continuing public interest and are likely to recur.

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

#### **Unfair Competition § 7—Use of Trade Secrets—Protection—Distinction from Patents.**

--The legal protection accorded trade secrets is fundamentally different from that given to patents, in which the patent owner acquires a limited term monopoly over the patented technology, and another party's use of that technology by whatever means infringes the patent. By contrast, the owner of a trade secret is protected only

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+ Associate Justice of the Court of Appeal, Second Appellate District, Division Two, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).

against the appropriation of the secret by improper means and the subsequent use or disclosure of the improperly acquired secret. There are various legitimate means, such as reverse engineering, by which a trade secret can be acquired and used.

**Counsel:** Keker & Van Nest, John W. Keker, Jeffrey R. Chanin, Michael H. Page and Ragesh K. Tangri for Plaintiff and Appellant.

James Pooley as Amicus Curiae on behalf of Plaintiff and Appellant.

Howard, Rice, Nemerovski, Canady, Falk & Rabkin, Bernard A. Burk and Jeffrey E. Faucette for Oracle Corporation, Xilinx, Inc., and 3Com Corporation as Amici Curiae on behalf of Plaintiff and Appellant.

O'Melveny & Myers, Daniel H. Bookin, Darin W. Snyder, James W. Shannon, Erika R. Frick and Hiro N. Aragaki for Defendant and Appellant.

Horvitz & Levy, H. Thomas Watson and Jason R. Litt for Truck Insurance Exchange as Amicus Curiae on behalf of Defendant and Appellant.

Robert G. Bone as Amicus Curiae on behalf of Defendant and Appellant.

**Judges:** (Opinion by Moreno, J., with Kennard, Acting C. J., Baxter, Chin, and Brown, JJ., Nares, J., \* and Nott, J., \* concurring.)

**Opinion by:** MORENO

## Opinion

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[\*217] MORENO, [\*\*\*170] J.

[\*\*647] We granted the request for certification of the United States Court of Appeals for the Ninth Circuit pursuant to [\*\*648] California Rules of Court, rule 29.5, to address the following question:

**CA(1a)[] (1a)** Under the California Uniform Trade Secrets Act (UTSA), [Civil Code, section 3426](#),<sup>1</sup> when does a claim for trade secret infringement arise: only once, when the initial misappropriation occurs, or with each subsequent misuse of the trade secret?

**CA(2)[] (2)** (See fn. 2.) **CA(1b)[] (1b)** We conclude that in a plaintiff's action against the same defendant, the continued improper use or disclosure of a trade secret after defendant's initial misappropriation is viewed under the UTSA as part of a single claim of "continuing [\*\*\*3] misappropriation" accruing at the time of the initial misappropriation.<sup>2</sup>

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\* Associate Justice of the Court of Appeal, Fourth Appellate District, Division One, assigned by the Acting Chief Justice pursuant to article VI, section 6 of the California Constitution.

\* Associate Justice of the Court of Appeal, Second Appellate District, Division Two, assigned by the Acting Chief Justice pursuant to article VI, section 6 of the California Constitution.

<sup>1</sup> All statutory references are to the Civil Code unless otherwise indicated [\*218].

<sup>2</sup> Shortly before the filing of this opinion, we were informed by the parties to this case that they have settled the underlying litigation, although they do not seek dismissal of proceedings in this court. When parties settle a case after oral argument, we may nonetheless exercise our discretion to issue an opinion "to resolve the legal issues raised, which are of continuing public interest and are likely to recur." ([People v. Eubanks \(1996\) 14 Cal.4th 580, 584, fn. 2 \[59 Cal. Rptr. 2d 200, 927 P.2d 310\]](#).) The certified question asks us to decide a general point of law regarding an aspect of California's trade secret statute. Accordingly, although the matter is apparently rendered moot, we exercise our discretion to resolve the legal question.

## I. STATEMENT OF FACTS

The relevant facts, as stated in the Ninth Circuit's certification order to this court, are as follows:

Cadence Design Systems, Inc., and Avant! Corporation compete in the field of [\*\*\*4] integrated circuit design automation. Both companies design "place and route" software, which enables computer chip designers to place and connect tiny components on a computer chip. Cadence formed in 1988 through the merger of several companies. Four senior employees left Cadence in 1991 to found Avant!, originally known as ArcSys.

In March 1994, Cadence vice-president Gerald Hsu resigned from Cadence to sign on with Avant!. Because Hsu possessed valuable business trade secrets and other confidential information, Cadence informed Hsu that it objected to his working at Avant!. Concerned that Hsu would reveal proprietary Cadence information when managing Avant!, Cadence sent Avant! a draft complaint naming Avant! and Hsu as defendants. Cadence alleged trade secret misappropriation and other causes of action. In negotiating a settlement of Cadence's claims, Cadence and Avant! apparently did not discuss Avant!'s alleged use of Cadence's Framework II (DFII) trade secret source code.<sup>3</sup>

[\*\*\*5] [\*\*171] After extensive negotiations, in June 1994, the parties entered into a confidential settlement agreement (the Agreement or Release) that included a mutual general release, which provided in part:

"Cadence, [Avant!] and Hsu . . . hereby forever release and discharge each other . . . of and from any and all manner of action, claim or cause of [\*219] action, in law or in equity, suits, debts, liens, contracts, agreements, promises, liabilities, demands, losses, damages, costs or expenses, including without limitation court costs and attorneys' fees, which they may have against each other at the time of the execution of this Agreement, known or unknown, including but not limited to any claims arising out of, or in connection with, or relating directly or indirectly to the following: Hsu's employment with Cadence, the cessation of Hsu's employment with Cadence, any wrongful termination of Hsu, any age or race discrimination by Cadence with respect to Hsu, any anticompetitive activity or unfair competition or trade secret misappropriation by Cadence, Hsu or [Avant!] with respect to Cadence, Hsu or [Avant!] with respect to Cadence, Hsu or [Avant!] . . . or any other actions taken by Cadence [\*\*\*6] to with respect to Hsu or [Avant!] or by Hsu or [Avant!] with respect to Cadence."

The Agreement also contained in capital letters a waiver of [Civil Code section 1542](#) with the following language:

**[\*\*649]** "THESE RELEASES EXTEND TO CLAIMS WHICH THE PARTIES DO NOT KNOW OR SUSPECT TO EXIST IN THEIR FAVOR, WHICH IF KNOWN BY THEM WOULD HAVE MATERIALLY AFFECTED THEIR DECISION TO ENTER INTO THIS RELEASE.

"In connection with such waiver and relinquishment, the Parties acknowledge that they are aware that, after executing this Agreement, they or their attorneys or agents may discover claims or facts in addition to or different from those which they now know or believe to exist . . . but that it is their intention hereby fully, finally and forever to settle and release all of the claims, matters, disputes and differences known or unknown, suspected or unsuspected, which now exist, may exist, or heretofore may have existed against each other in connection with the released matters. In furtherance of this intention, the release herein given shall be and remain in effect as a full and complete release notwithstanding the discovery or existence of any such additional or different [\*\*\*7] claim or fact."

In the summer of 1995, a Cadence engineer discovered a "bug" (an error) in Avant!'s ArcCell software program that was similar to a bug he had inadvertently created several years earlier when writing source code for Cadence's DFII product. In December 1995, the Santa Clara County District Attorney executed a search of Avant!'s headquarters.

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<sup>3</sup> Computer software programs are written in specialized languages called source code. The source code, which humans can read, is then translated into language that computers can read. The computer readable form, which operates on a binary system, is called object code.

Among the items seized was a log that showed line-by-line copying of Cadence source code in 1991 by a former Cadence employee and Avant! founder.

In December 1995, Cadence sued Avant! for theft of its copyrighted and trade secret source code and sought a preliminary order enjoining the sale of [\*220] Avant!'s ArcCell and Aquarius products. In anticipation of trial, both sides filed cross-motions for partial summary judgment concerning the effect of the Release. Avant! argued that because Cadence had released all its claims existing at the time of the Release, any claims based on continuing or future misuse of trade secrets that were stolen prior to the [\*\*\*172] date of the Release were now barred. Cadence maintained that the only claims it had released were those for misappropriation occurring before the effective date of the Release, and not claims [\*\*\*\*8] to redress Avant!'s continuing or new misuses of its trade secrets after the date of the Release.

The federal district court ruled on these summary judgment motions on October 13, 1999. Reversing its initial order, the district court held that all of Cadence's trade secret claims for post-Release misuse of its DFII trade secrets taken before the Release were barred by the Release. Cadence now is appealing this decision to the Ninth Circuit. If the Release barred Cadence's claims existing at the time of the Agreement, but did not bar future claims, the question still remains: What claims existed at the time of the Agreement? Are all of Cadence's claims for Avant!'s trade secret misappropriation part of the same claim, or does each successive misuse of Cadence trade secret source code give rise to a separate claim?<sup>4</sup>

## [\*\*\*9] II. DISCUSSION

Avant! argues that a cause of action for misappropriation of a given trade secret by a particular plaintiff against a particular defendant arises only once, when the trade secret is initially misappropriated. In support of this position, it relies in large part on the rationale set forth in [\*Monolith Portland Midwest Co. v. Kaiser Aluminum & Chem. Corp. \(9th Cir. 1969\) 407 F.2d 288\*](#) (*Monolith*), which applied the California common law of trade secrets. The *Monolith* court rejected the position exemplified by *Underwater Storage, Inc. v. United States Rubber Co.* (1966) 125 U.S. App. D.C. 297, 371 F.2d 950, "that the wrong is the adverse use of the secret disclosed [\*\*650] in confidence; each use is a new wrong, and a continuing use is a continuing wrong. Underlying this theory is the concept that a trade secret is in the nature of property, which is damaged or destroyed by the adverse use . . . . California does not treat trade secrets as if they were property. It is the *relationship* between the parties at the time the secret is disclosed that is protected. ([\*221] [\*Futurecraft Corp. v. Clary Corp. \(1962\) 205 Cal. App. 2d 279 \[23 Cal.Rptr. 198\]\*](#)) [\*\*\*\*10] The protected relationship, contractual or confidential, is one to which, as Mr. Justice Holmes observed, 'some rudimentary requirements of good faith' are attached. '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. Therefore the starting point for the present matter is not property . . . , but that the defendant stood in confidential relations with the plaintiffs . . . .' ( [\*E. I. Du Pont de Nemours Powder Co. v. Masland \(1917\) 244 U.S. 100, 102 \[61 L. Ed. 1016, 37 S. Ct. 575, 1917 Dec. Comm'r Pat. 426\]\*](#).) *The fabric of the relationship once rent is not torn anew with each added use or disclosure, although the damage suffered may thereby be aggravated. The cause of action arises but once . . . .*" (*Monolith, supra, 407 F.2d at p. 293*, italics added.)

On the other hand, Cadence asserts that the UTSA, which as discussed below was adopted by California in 1984, changed the common law view typified by *Monolith*, and now views trade secrets as property rather than simply as the protection of a [\*\*\*173] confidential [\*\*\*\*11] relationship. It further reasons that because trade secret

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<sup>4</sup> In the present case, it is unclear from the above facts whether the acquisition of the trade secret was itself improper and therefore a misappropriation, or whether the subsequent use of the secret was the initial misappropriation. In any case, the parties agree that Avant! had both acquired and used the trade secret prior to signing the Release. We will assume for purposes of addressing the certified question that the initial misappropriation occurred with the first use of the secret and will, for purposes of this case, equate "initial misappropriation" with "initial use."

misappropriation is the wrongful taking or use of protected property, each new use represents a new claim of misappropriation. As will be discussed, neither Cadence's nor Avant!'s position is entirely correct.

In order to answer the certified question, we must examine the pertinent language of the UTSA. As the Court of Appeal explained in [Glue-Fold, Inc. v. Slatterback Corp. \(2000\) 82 Cal.App.4th 1018, 1023 \[98 Cal. Rptr. 2d 661\]](#) (*Glue-Fold*), the UTSA "was approved by the National Conference of Commissioners on Uniform State Laws in 1979 and adopted without significant change by California in 1984. (14 West's U. Laws Ann. (1990) U. Trade Secrets Act, p. 433; Stats. 1984, ch. 1724, § 1, pp. 6252-6253.)" (Fn. omitted.) [Section 3426.1](#) defines certain key terms of the UTSA. [HN1](#) "Trade secret" is defined as "information, including a formula, pattern, compilation, program, device, method, technique, or process, that: [P] (1) Derives independent economic value, actual or potential, from not being generally known [\*\*\*\*12] to the public or to other persons who can obtain economic value from its disclosure or use; and [P] (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." ([§ 3426.1, subd. \(d\).](#))

[HN2](#) "Misappropriation" is defined as "(1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or [P] (2) Disclosure or use of a trade secret of another without express or implied consent by a person who: [P] (A) Used improper means to acquire knowledge of the trade secret; or [P] [\*222] (B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was: [P] (i) Derived from or through a person who had utilized improper means to acquire it; [P] (ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or [P] (iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or [P] (C) Before a material change of his or her position, knew or had reason to know that [\*\*\*\*13] it was a trade secret and that knowledge of it had been acquired by accident or mistake." ([§ 3426.1, subd. \(b\).](#))

[HN3](#) "Improper means" is defined to "include[] theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means. Reverse engineering or independent derivation alone shall not be considered improper means." ([§ 3426.1, subd. \(a\).](#))

[CA\(3\)](#) (3) Thus, [HN4](#) the legal protection accorded trade secrets is fundamentally different from that given to patents, in which the patent owner acquires a limited term monopoly over the [\*\*651] patented technology, and use of that technology by whatever means infringes the patent. The owner of the trade secret is protected only against the appropriation of the secret by improper means and the subsequent use or disclosure of the improperly acquired secret. There are various legitimate means, such as reverse engineering, by which a trade secret can be acquired and used. (See 2 Callman, *The Law of Unfair [\*\*\*\*14] Competition, Trademarks, and Monopolies* (1981) § 14.01, p. 14-6; *id.*, § 14.15, p. 14-102.)

[CA\(1c\)](#) (1c) The most critical section of UTSA for purposes of this case is [section 3426.6](#), which provides: [HN5](#) "An action for misappropriation must be brought within three years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. *For the purposes of this section, a continuing misappropriation constitutes a single claim.*" (Italics added.)

[\*\*\*174] As the Court of Appeal recognized in [Glue-Fold, supra, 82 Cal. App. 4th at pages 1023-1024](#), "[s]ection 3426.6 is derived almost verbatim from section 6 of the Uniform Act as originally drafted. (See 14 West's U. Laws Ann., *supra*, U. Trade Secrets Act, com. to § 6, p. 462.) It is therefore appropriate to accord substantial weight to the commissioners' comment on the construction of what is now [section 3426.6](#). [Citations.] [P] THAT COMMENT IS: 'There presently is a conflict of authority as to whether trade secret misappropriation is a continuing wrong. Compare *Monolith Portland Midwest Co. v. Kaiser Aluminum & Chemical Corp.*, 407 F.2d 288 [\*\*\*\*15] (CA9, 1969) (not a [\*223] continuing wrong under California law--limitation period upon all recovery begins upon initial misappropriation) with *Underwater Storage, Inc. v. U.S. Rubber Co.*, 125 U.S. App. D.C. 297, 371 F.2d 950 (CADC, 1966) . . . (continuing wrong under general principles--limitation period with respect to a specific act of misappropriation begins at the time that the act of misappropriation occurs). [P] [HN6](#) This Act rejects a continuing wrong approach to the statute of limitations but delays the commencement of the limitation period until an aggrieved person discovers or reasonably should have discovered the existence of misappropriation. If

objectively reasonable notice of misappropriation exists, three years is sufficient time to vindicate one's legal rights.' (14 West's U. Laws Ann., *supra*, U. Trade Secrets Act, com. to § 6, p. 462.)" (Fns. omitted.)

The UTSA does not define the term "continuing misappropriation," but its meaning appears evident in light of the definition of "misappropriation." [HN7](#) [\*\*\*\*16] It is the continuing use or disclosure of a trade secret after that secret was acquired by improper means or as otherwise specified in [section 3426.1, subdivision \(b\)](#). Thus, for statute of limitations purposes, a continuing misappropriation is viewed as a single claim. The drafters of the UTSA explicitly affirmed *Monolith* and rejected the contrary view that misappropriation gives rise to multiple claims each time the trade secret is misused or improperly disclosed.

From our examination of the above statutes, a distinction between a "misappropriation" and a "claim" emerges. [HN8](#) [↑] A *misappropriation* within the meaning of the UTSA occurs not only at the time of the initial acquisition of the trade secret by wrongful means, but also with each misuse or wrongful disclosure of the secret. But a *claim* for misappropriation of a trade secret arises for a given plaintiff against a given defendant only once, at the time of the initial misappropriation, subject to the discovery rule provided in [section 3426.6](#). Each new misuse or wrongful disclosure is viewed as augmenting a single claim of continuing [\*\*\*\*17] misappropriation rather than as giving rise to a separate claim.

Cadence makes much of the language in [section 3426.6](#) that states, "[f]or the purposes of this section, a continuing misappropriation constitutes a single claim." (Italics added.) Based on that language, Cadence argues that a continuing misappropriation constitutes a single claim only for statute of limitations purposes. This argument cannot withstand scrutiny. The certified question asks when a *claim* for trade secret infringement arises. The term "claim" does not have some theoretical meaning apart from the context in which it is used. In the present case, the certified question is asked in the context of a release, which is intended to settle or prevent litigation. Therefore, [HN9](#) [↑] "claim" must be defined [\*\*652] in the context of litigation. If "continuing [\*224] misappropriation" is viewed as a single claim for statute of limitations purposes (see [Glue-Fold, supra, 82 Cal. App. 4th at pp. 1026-1028](#) [\*\*\*175] ), then it is difficult to fathom how it could be treated as more than one claim for purposes of litigation generally. For example, a plaintiff could [\*\*\*\*18] not legitimately plead separate claims of misappropriation for each misuse of a trade secret, for to do so would impermissibly evade the statute of limitations. Nor can it be asserted that [HN10](#) [↑] separate "claims" accruing at different times can have the same limitations period, because that position is contrary to the rule that [HN11](#) [↑] each civil action possesses its own statutorily prescribed limitations period. (See [Code Civ. Proc., § 312](#).) The only other alternative is to hold that the term "claim" means one thing in the context of litigation and something else in the context of releases. There is no indication the Legislature intended this kind of inconsistency.

In fact, the phrase "for purposes of this section" can plausibly be explained as a means of contrasting [section 3426.6](#) with [section 3426.10](#), the only other section to refer to "continuing misappropriation." THAT SECTION STATES: [HN12](#) [↑] [\*\*\*\*19] "This title does not apply to misappropriation occurring prior to January 1, 1985. If a *continuing misappropriation* otherwise covered by this title began before January 1, 1985, this title does not apply to the part of the misappropriation occurring before that date. This title does apply to the part of the misappropriation occurring on or after that date unless the appropriation was not a misappropriation under the law in effect before the operative date of this title." ([§ 3426.10](#), italics added.) In other words, [HN13](#) [↑] for purposes of [section 3426.10](#), a continuing misappropriation is not necessarily a single claim. Rather, the claim must be divided in two if the continuing misappropriation took place partly before January 1, 1985--one common law claim for misappropriation occurring before that date, and one UTSA claim for misappropriation occurring thereafter. Indeed, if each misappropriation constituted a single claim, all that [section 3426.10](#) would have had to have said is: This title does not apply to misappropriation occurring prior to January 1, 1985. There would be no need to refer [\*\*\*\*20] to continuing misappropriation because, according to Cadence's theory, that concept does not exist outside the statute of limitations section and it would have been meaningless to refer to "the part of the misappropriation occurring on or after that date." (*Ibid.*)

Another occasion in which [HN14](#) [↑] an act of continuing misappropriation may be said to constitute more than one claim is when multiple defendants are involved. For example, in [PMC, Inc. v. Kadisha \(2000\) 78 Cal.App.4th 1368 \[93 Cal. Rptr. 2d 663\]](#), officers, directors, and investors of a corporation were sued personally for a trade secret

misappropriation initiated before their involvement in the corporation. They sought summary judgment in part on the grounds that they could not be held liable because the initial misappropriation had occurred before they assumed their positions. The Court of [\*225] Appeal rejected that position, reasoning that [HN15](#)[<sup>↑</sup>] the definition of misappropriation includes disclosure or use of a trade secret by persons [\*\*\*\*21] who knew or had reason to know that the trade secret was acquired by improper means. ([\*Id. at p. 1382\*](#), citing [§ 3426.1, subd. \(b\)\(2\)\(B\)\(i\)-\(ii\)](#).) But Cadence's assertion that *Kadisha* advances its position is incorrect. That case holds only that [HN16](#)[<sup>↑</sup>] there may be separate claims of continuing misappropriation among *different* defendants, with differing dates of accrual and types of tortious conduct--some defendants liable for initial misappropriation of the trade secret, others only for later continuing use. This holding does not conflict with our conclusion that there is only a single UTSA claim against a [\*\*\*176] single defendant misappropriating a single plaintiff's trade secret.

Cadence cites [Penal Code section 499c](#), providing criminal penalties for theft of trade secrets, in support of its argument. It quotes the noncodified statutory purpose of that statute as, in part, "to make clear that articles representing trade secrets, including the trade secrets represented thereby, constitute goods, chattels, materials and property and can be the subject [\*\*\*\*22] of criminal acts." (Stats. 1967, ch. 132, § 1, p. 1163.) Avant!'s arguments notwithstanding, it appears indisputable that trade secrets are a form of [\*\*653] property. But [HN17](#)[<sup>↑</sup>] the nature of the property interest and the means by which the interest can be vindicated are matters of state law. [HN18](#)[<sup>↑</sup>] The UTSA defines an act of continuing misappropriation for litigation purposes as a single claim.

Cadence cites [Remington Rand Corporation v. Amsterdam-Rotterdam Bank, N.V. \(2d Cir. 1995\) 68 F.3d 1478, 1485](#), in which the court, considering a release similar to the one at issue here, concluded the release did not shield defendants from liability for continuing wrongful use of trade secrets after the date of the release. The case was decided under either New York or New Jersey law. ([Remington Rand Corp., 68 F.3d at p. 1483, fn. 2](#) [acknowledging uncertainty as to which state law applied].) Neither of these states has adopted the UTSA. (14 West's U. Laws Ann. (2002 supp.) U. Trade Secrets [\*\*\*\*23] Act, p. 128.) Moreover, the court did not analyze the relevant state statutes, and it is unclear whether its conclusion was based on statutory interpretation or interpretation of the intent of the parties to the release. It is therefore not persuasive authority for holding that each new trade secret misuse in California gives rise to a separate claim.

Cadence also cites federal case law holding that each act of patent infringement gives rise to a separate cause of action. ([Augustine Medical, Inc. v. Progressive Dynamics, Inc. \(Fed. Cir. 1999\) 194 F.3d 1367, 1371](#).) Again, this case law has little relevance to the question presented. Although there are similarities between trade secret and patent law, there are also significant differences discussed above. Quite apart from these differences, our conclusion in the present case does not rest on reasoning from general principles of [\*226] intellectual property law, but rather on the construction of the specific statutory language of the UTSA. Nor is there any indication that the UTSA was patterned after patent law.<sup>5</sup>

[\*\*\*\*24] Cadence also argues that viewing Avant!'s continuing misappropriation as a single claim effectively rewards Avant! with a license to use the misappropriated technology and to discourage parties from entering into releases in the future. But however the UTSA defines a trade secret claim, [HN19](#)[<sup>↑</sup>] parties to a release in a trade secret dispute remain free to fashion the release [\*\*\*177] as broadly or narrowly as they choose. Moreover, [HN20](#)[<sup>↑</sup>] under our interpretation of the USTA, a trade secret infringer is by no means rewarded for its infringement with a license to use the infringed technology. Rather, a successful trade secret plaintiff is entitled to the full panoply of

<sup>5</sup> Patent law has no equivalent to [section 3426.6](#). The limitations on patent actions set forth in [35 United States Code section 286](#) differ considerably from [section 3426.6](#). It provides in pertinent part: "Except as otherwise provided by law, no recovery shall be had for any infringement committed more than six years prior to the filing of the complaint or counterclaim for infringement in the action." ([35 U.S.C., § 286](#).) "This provision has been said not to constitute a 'statute of limitations' in the usual sense of the term, in that [35 U.S.C. section 286](#) does not say that no suit shall be maintained. . . . The limitation contained in the [35 U.S.C. section 286](#) . . . does not bar infringement actions, but merely limits recovery of damages to infringements occurring during the six years preceding any damages action brought." (Rosenberg, 3 Patent Law Fundamentals (rev. 2d ed. 2001) § 17.06 [1][d], p. 17-100.) The federal statute does not employ "continuing misappropriation" or any equivalent concept.

remedies, including injunctive relief against further misappropriation ([§ 3426.2](#)), damages for actual loss ([§ 3426.3](#)), and relief from unjust enrichment (*ibid.*).<sup>6</sup>

[\*\*\*\*25] Our answer to the certified question is narrow. As stated, we do not accept Avant!'s position, at least stated in its strongest form, [\*\*654] that only the initial misappropriation of a trade secret via the breach of a confidential relationship constitutes misappropriation--the UTSA plainly states otherwise. The potential damages encompassed by a continuing misappropriation claim may expand with each illicit use or disclosure of the trade secret. Nor do we address how the parties intended to define the term "claim" in the present release. All we decide is that the UTSA views a continuing misappropriation of a trade secret of one party by another as a single claim.

### [\*227] III. CONCLUSION

We conclude that a plaintiff's claim for misappropriation of a trade secret against a defendant arises only once, when the trade secret is initially misappropriated, and each subsequent use or disclosure of the secret augments the initial claim rather than arises as a separate claim.

Kennard, Acting C. J., Baxter, J., Chin, J., Brown, J., Nares, J., \* and Nott, J., \* concurred.

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<sup>6</sup> Cadence also cites in support of its position a letter from Assemblyman Elihu Harris, the sponsor of the UTSA, to Governor Deukmejian urging him to sign Assembly Bill No. 501 (1983-1984 Reg. Sess.), the UTSA, in order to bring "clarity and uniformity into this important area of law." (Assemblyman Harris, letter to Governor Deukmejian, Sept. 12, 1984, p. 2.) From this and other general statements in that letter, Cadence wishes to deduce a general policy of strengthening trade secret protection that would lead to support of its position. We are not persuaded. We do not discern how these general statements have any particular bearing on the certified question. Moreover, even if we assume that the UTSA was generally intended to strengthen trade secret protection (a point Avant! disputes), nothing we say in the present opinion vitiates such protection, as discussed immediately above.

\* Associate Justice of the Court of Appeal, Fourth Appellate District, Division One, assigned by the Acting Chief Justice pursuant to [article VI, section 6 of the California Constitution](#) [\*\*\*\*26].

\* Associate Justice of the Court of Appeal, Second Appellate District, Division Two, assigned by the Acting Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).



## Korea Supply Co. v. Lockheed Martin Corp.

Supreme Court of California

March 3, 2003, Decided ; March 3, 2003, Filed

No. S100136.

### **Reporter**

29 Cal. 4th 1134 \*; 63 P.3d 937 \*\*; 131 Cal. Rptr. 2d 29 \*\*\*; 2003 Cal. LEXIS 1301 \*\*\*\*; 2003 Daily Journal DAR 2291; 2003 Cal. Daily Op. Service 1825

KOREA SUPPLY COMPANY, Plaintiff and Appellant, v. LOCKHEED MARTIN CORPORATION et al., Defendants and Respondents.

**Prior History:** [\*\*\*\*1] Superior Court of Los Angeles County, No. BC 209893. Brett C. Klein Judge.

[Korea Supply Co. v. Lockheed Martin Corp., 90 Cal. App. 4th 902, 109 Cal. Rptr. 2d 417, 2001 Cal. App. LEXIS 550 \(Cal. App. 2d Dist., July 18, 2001\)](#)

**Disposition:** We reverse the judgment of the Court of Appeal with respect to its holding that plaintiff has stated a cause of action under the unfair competition law and we affirm the judgment of the Court of Appeal with respect to its determination that plaintiff has stated a cause of action for the tort of interference with prospective economic advantage. The present case is remanded to the Court of Appeal for proceedings consistent with this opinion.

## **Core Terms**

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prospective economic advantage, intentional interference, remote, disgorgement, restitution, indirect, interfere, profits, damages, specific intent, expectancy, wrongful act, unfair competition, economic relations, courts, intent requirement, derivative, disruption, alleges, court of appeals, customers, tort of interference, defendant's conduct, interfering, principles, injuries, dictum, cases, third party, italics

## **LexisNexis® Headnotes**

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Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Defects of Form

Civil Procedure > Appeals > Standards of Review > General Overview

### [HN1](#) [blue download icon] **Defenses, Demurrers & Objections, Defects of Form**

Where a case comes to the supreme court after the sustaining of a general demurrer, the supreme accepts as true all the material allegations of the complaint.

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

## **HN2** Regulated Practices, Trade Practices & Unfair Competition

The unfair competition law (UCL), [Cal. Bus. & Prof. Code § 17200 et seq.](#), prohibits unfair competition, including unlawful, unfair, and fraudulent business acts. The UCL covers a wide range of conduct. It embraces anything that can properly be called a business practice and that at the same time is forbidden by law.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > Standing

## **HN3** Regulated Practices, Trade Practices & Unfair Competition

Standing to sue under the unfair competition law, [Cal. Bus. & Prof. Code § 17200 et seq.](#), is expansive as well. Unfair competition actions can be brought by a public prosecutor or by any person acting for the interests of itself, its members or the general public. [Cal. Bus. & Prof. Code § 17204.](#)

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

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

## **HN4** Regulated Practices, Trade Practices & Unfair Competition

See [Cal. Bus. & Prof. Code § 17200.](#)

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

Criminal Law & Procedure > ... > Bribery > Public Officials > Elements

Business & Corporate Compliance > ... > Recordkeeping & Reporting Requirements > Issuers of Securities > Foreign Corrupt Practices Act

## **HN5** Regulated Practices, Trade Practices & Unfair Competition

[Cal. Bus. & Prof. Code § 17200](#) borrows violations from other laws by making them independently actionable as unfair competitive practices. In addition, under [§ 17200](#), a practice may be deemed unfair even if not specifically proscribed by some other law.

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

Civil Procedure > Remedies > Damages > General Overview

## **HN6** Regulated Practices, Trade Practices & Unfair Competition

While the scope of conduct covered by the unfair competition law (UCL), [Cal. Bus. & Prof. Code § 17200 et seq.](#), is broad, its remedies are limited. A UCL action is equitable in nature; damages cannot be recovered. Civil penalties

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may be assessed in public unfair competition actions, but the law contains no criminal provisions. [Cal. Bus. & Prof. Code § 17206](#). Under the UCL, prevailing plaintiffs are generally limited to injunctive relief and restitution.

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

Civil Procedure > Remedies > Injunctions > General Overview

Criminal Law & Procedure > Sentencing > Restitution

Civil Procedure > Remedies > General Overview

#### [HN7](#) **Regulated Practices, Trade Practices & Unfair Competition**

Through the unfair competition law, [Cal. Bus. & Prof. Code § 17200 et seq.](#), a plaintiff may obtain restitution and/or injunctive relief against unfair or unlawful practices.

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

Civil Procedure > Remedies > General Overview

#### [HN8](#) **Regulated Practices, Trade Practices & Unfair Competition**

An order for restitution is one compelling an unfair competition law, [Cal. Bus. & Prof. Code § 17200 et seq.](#), defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken, that is, to persons who had an ownership interest in the property or those claiming through that person. The object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest.

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

Civil Procedure > Remedies > General Overview

#### [HN9](#) **Regulated Practices, Trade Practices & Unfair Competition**

While restitution is an available remedy under the unfair competition law, [Cal. Bus. & Prof. Code § 17200 et seq.](#), disgorgement of money obtained through an unfair business practice is an available remedy in a representative action only to the extent that it constitutes restitution.

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

#### [HN10](#) **Regulated Practices, Trade Practices & Unfair Competition**

See [Cal. Bus. & Prof. Code § 17203](#).

Governments > Legislation > Interpretation

## [\*\*HN11\*\*](#) [L] Legislation, Interpretation

The fundamental objective of statutory construction is to ascertain the legislature's intent and to give effect to the purpose of the statute. [Cal. Code Civ. Proc. § 1859](#). If the language of the statute is unambiguous, the plain meaning governs.

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

Civil Procedure > Remedies > General Overview

## [\*\*HN12\*\*](#) [L] Regulated Practices, Trade Practices & Unfair Competition

Under [Cal. Bus. & Prof. Code § 17203](#), the statutory authorization to make orders necessary to restore money to any person in interest is clear. An order for restitution, then, is authorized by the clear language of the statute. In fact, restitution is the only monetary remedy expressly authorized by [§ 17203](#).

Governments > Legislation > Interpretation

## [\*\*HN13\*\*](#) [L] Legislation, Interpretation

If the statutory language is ambiguous, an appellate court may look to the history and background of the statute. In ascertaining the legislature's intent, an appellate court attempts to construe the statute to preserve its constitutional validity, as the appellate court presumes that the legislature intends to respect constitutional limits.

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

Civil Procedure > Remedies > Damages > Punitive Damages

Governments > Legislation > Interpretation

Civil Procedure > Remedies > General Overview

## [\*\*HN14\*\*](#) [L] Regulated Practices, Trade Practices & Unfair Competition

The language of [Cal. Bus. & Prof. Code § 17203](#) is clear that the equitable powers of a court are to be used to prevent practices that constitute unfair competition and to restore to any person in interest any money or property acquired through unfair practices. While the "prevent" prong of [§ 17203](#) suggests that the legislature considered deterrence of unfair practices to be an important goal, the fact that attorney fees and damages, including punitive damages, are not available under the unfair competition law, [Cal. Bus. & Prof. Code § 17200 et seq.](#), is clear evidence that deterrence by means of monetary penalties is not the act's sole objective. A court cannot, under the equitable powers of [Cal. Bus. & Prof. Code § 17203](#), award whatever form of monetary relief it believes might deter unfair practices. The fact that the restore prong of [§ 17203](#) is the only reference to monetary penalties in that section indicates that the legislature intended to limit the available monetary remedies under the act.

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

Civil Procedure > Remedies > General Overview

## [\*\*HN15\*\*](#) [blue] Regulated Practices, Trade Practices & Unfair Competition

Under the unfair competition law, [\*Cal. Bus. & Prof. Code § 17200 et seq.\*](#), an individual may recover profits unfairly obtained to the extent that those profits represent monies given to a defendant or benefits in which a plaintiff has an ownership interest.

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

Civil Procedure > Remedies > General Overview

## [\*\*HN16\*\*](#) [blue] Regulated Practices, Trade Practices & Unfair Competition

Nonrestitutionary disgorgement of profits is not an available remedy in an individual action under the unfair competition law, [\*Cal. Bus. & Prof. Code § 17200 et seq.\*](#)

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

Civil Procedure > Remedies > General Overview

## [\*\*HN17\*\*](#) [blue] Regulated Practices, Trade Practices & Unfair Competition

The concept of restoration or restitution, as used in the unfair competition law, [\*Cal. Bus. & Prof. Code § 17200 et seq.\*](#), is not limited only to the return of money or property that was once in the possession of that person. Instead, restitution is broad enough to allow a plaintiff to recover money or property in which he or she has a vested interest.

Estate, Gift & Trust Law > Trusts > Constructive Trusts

Real Property Law > Trusts > General Overview

Estate, Gift & Trust Law > Trusts > General Overview

## [\*\*HN18\*\*](#) [blue] Trusts, Constructive Trusts

To create a constructive trust, there must be a res, an identifiable kind of property or entitlement in defendant's hands. A constructive trust requires money or property identified as belonging in good conscience to a plaintiff which can clearly be traced to particular funds or property in the defendant's possession.

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

Civil Procedure > Remedies > Damages > General Overview

Torts > Business Torts > Unfair Business Practices > Remedies

Torts > Business Torts > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

## [\*\*HN19\*\*](#) [blue] Regulated Practices, Trade Practices & Unfair Competition

An action under the unfair competition law (UCL), [Cal. Bus. & Prof. Code § 17200 et seq.](#), is not an all-purpose substitute for a tort or contract action. Instead, the UCL provides an equitable means through which both public prosecutors and private individuals can bring suit to prevent unfair business practices and restore money or property to victims of these practices. Because of the objective to provide a streamlined procedure for the prevention of ongoing or threatened acts of unfair competition, the remedies provided are limited. While any member of the public can bring suit under the act to enjoin a business from engaging in unfair competition, it is well established that individuals may not recover damages.

Civil Procedure > Remedies > Damages > General Overview

## [HN20](#) Remedies, Damages

Compensation for a lost business opportunity is a measure of damages and not restitution to alleged victims.

Banking Law > ... > Criminal Offenses > Bank Fraud > Penalties

Torts > Business Torts > Unfair Business Practices > Elements

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

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Torts > ... > Prospective Advantage > Intentional Interference > Elements

## [HN21](#) Bank Fraud, Penalties

To state a claim under the unfair competition law, [Cal. Bus. & Prof. Code § 17200 et seq.](#), one need not plead and prove the element of a tort. Instead, one need only show that members of the public are likely to be deceived.

Governments > Legislation > Effect & Operation > General Overview

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

## [HN22](#) Legislation, Effect & Operation

The tort of intentional interference with prospective economic advantage does not contain a requirement that a plaintiff plead and prove that the defendant acted with the specific intent, purpose, or design to interfere with the plaintiff's prospective advantage. Instead, it is sufficient for the plaintiff to plead that the defendant knew that the interference is certain or substantially certain to occur as a result of his action.

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

## [\*\*HN23\*\*](#) [blue icon] **Intentional Interference, Elements**

The elements for a claim for intentional interference with prospective economic advantage are: (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant.

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Torts > ... > Prospective Advantage > Intentional Interference > Remedies

## [\*\*HN24\*\*](#) [blue icon] **Intentional Interference, Elements**

A plaintiff seeking to recover damages for interference with prospective economic advantage must plead and prove as part of its case-in-chief that the defendant's conduct was wrongful by some legal measure other than the fact of interference itself.

Governments > Legislation > Effect & Operation > General Overview

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

## [\*\*HN25\*\*](#) [blue icon] **Legislation, Effect & Operation**

Specific intent is not a required element of the tort of interference with prospective economic advantage. While a plaintiff may satisfy the intent requirement by pleading specific intent, i.e., that the defendant desired to interfere with the plaintiff's prospective economic advantage, a plaintiff may alternately plead that the defendant knew that the interference was certain or substantially certain to occur as a result of its action.

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

## [\*\*HN26\*\*](#) [blue icon] **Intentional Interference, Elements**

A plaintiff that chooses to bring a claim for interference with prospective economic advantage has a more rigorous pleading burden since it must show that the defendant's conduct was independently wrongful.

Admiralty & Maritime Law > Maritime Forfeitures & Penalties > General Overview

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > Business Torts > General Overview

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Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

## **HN27** [blue icon] Admiralty & Maritime Law, Maritime Forfeitures & Penalties

While intentionally interfering with an existing contract is a wrong in and of itself, interfering with a plaintiff's prospective economic advantage is not. To establish a claim for interference with prospective economic advantage, therefore, a plaintiff must plead that the defendant engaged in an independently wrongful act. An act is not independently wrongful merely because defendant acted with an improper motive. The law usually takes care to draw lines of legal liability in a way that maximizes areas of competition free of legal penalties. The tort of intentional interference with prospective economic advantage is not intended to punish individuals or commercial entities for their choice of commercial relationships or their pursuit of commercial objectives, unless their interference amounts to independently actionable conduct. Thus, an act is independently wrongful if it is unlawful, that is if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.

Governments > Legislation > Effect & Operation > General Overview

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > Business Torts > General Overview

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

## **HN28** [blue icon] Legislation, Effect & Operation

In a claim for intentional interference with prospective economic advantage, it is the independent wrongfulness requirement that makes defendants' interference with plaintiff's business expectancy a tortious act. Because the act of interference with prospective economic advantage is not tortious in and of itself, the requirement of pleading that a defendant has engaged in an act that was independently wrongful distinguishes lawful competitive behavior from tortious interference. Such a requirement sensibly redresses the balance between providing a remedy for predatory economic behavior and keeping legitimate business competition outside litigative bounds.

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > General Intent

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

## **HN29** [blue icon] Mens Rea, General Intent

In a claim for intentional interference with prospective economic advantage, California has required plaintiffs to show that a defendant has engaged in an independently, or inherently, wrongful act. Under that requirement, a defendant's motive or purpose is relevant only to the extent that it renders the defendant's conduct unlawful.

Torts > ... > Commercial Interference > Contracts > General Overview

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Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

### **HN30**[] **Commercial Interference, Contracts**

In a claim for intentional interference with prospective economic advantage, a defendant's wrongful actions need not be directed towards a plaintiff seeking to recover for this tort. The interfering party is liable to the interfered-with party when the independently tortious means the interfering party uses are independently tortious only as to a third party. Even under these circumstances, the interfered-with party remains an intended (or at least known) victim of the interfering party - albeit one that is indirect rather than direct. In fact, the most numerous of the tortious interference cases are those in which the disruption is caused by an act directed not at the plaintiff, but at a third person.

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Torts > Business Torts > Commercial Interference > General Overview

### **HN31**[] **Commercial Interference, Prospective Advantage**

In a claim for intentional interference with prospective economic advantage, a plaintiff that wishes to state a cause of action for the tort must allege the existence of an economic relationship with some third party that contains the probability of future economic benefit to the plaintiff. The tort protects the expectation that the relationship eventually will yield the desired benefit, not necessarily the more speculative expectation that a potentially beneficial relationship will arise.

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

### **HN32**[] **Commercial Interference, Prospective Advantage**

In a claim for intentional interference with prospective economic advantage, a defendant must have knowledge of the plaintiff's economic relationship.

Business & Corporate Compliance > ... > Recordkeeping & Reporting Requirements > Issuers of Securities > Foreign Corrupt Practices Act

Criminal Law & Procedure > ... > Bribery > Public Officials > Elements

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Torts > Business Torts > Commercial Interference > General Overview

### **HN33**[] **Securities, Foreign Corrupt Practices Act**

In a claim for intentional interference with prospective economic advantage, a defendant must have engaged in intentionally wrongful acts designed to disrupt a plaintiff's relationship. That requires a plaintiff to plead (1) that the defendant engaged in an independently wrongful act, and (2) that the defendant acted either with the desire to interfere or the knowledge that interference was certain or substantially certain to occur as a result of its action.

Governments > Legislation > Effect & Operation > General Overview

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

#### **HN34** [blue] Legislation, Effect & Operation

In a claim for intentional interference with prospective economic advantage, if the interference is not certain or substantially certain to occur as a result of the defendant's acts, then a plaintiff will not be able to state a claim for intentional interference with prospective economic advantage. However, if a defendant knows that its wrongful acts are substantially certain to injure the plaintiff's business expectancy, the defendant can be held liable, regardless of the motivation behind its actions. Liability will not be imposed for unforeseeable harm, since the plaintiff must prove that the defendant knew that the consequences were substantially certain to occur.

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

#### **HN35** [blue] Intentional Interference, Elements

In a claim for intentional interference with prospective economic advantage, only plaintiffs that can demonstrate actual disruption of their economic relationship will be able to state a claim for that tort.

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

#### **HN36** [blue] Intentional Interference, Elements

In a claim for intentional interference with prospective economic advantage, a plaintiff must establish proximate causation. Specifically, that element requires a plaintiff to show that the economic harm it suffered was proximately caused by the acts of the defendant.

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

#### **HN37** [blue] Commercial Interference, Prospective Advantage

An actor engaging in unlawful conduct with the knowledge that its actions are certain or substantially certain to interfere with a party's business expectancy should be held accountable. Liability for such actions, which are independently wrongful, should not turn on the subjective intent of the defendant.

## **Headnotes/Summary**

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**Summary****CALIFORNIA OFFICIAL REPORTS SUMMARY**

A business representing manufacturers of military equipment brought an action asserting claims under the unfair competition law (UCL) ([Bus. & Prof. Code, § 17200 et seq.](#)) and the tort of interference with prospective economic advantage. Plaintiff alleged that defendants illegally induced a foreign government to award a contract of sale to a company other than the one represented by plaintiff. The trial court sustained defendants' demurrer without leave to amend, finding that plaintiffs complaint did not state facts sufficient to constitute a cause of action under California law, and entered a judgment of dismissal. (Superior Court of Los Angeles County, No. BC209893, Brett C. Lkein, Judge.) The Court of Appeal, Second Dist., Div. Four, No. B136410, reversed the trial courts judgment in full.

The Supreme Court reversed the judgment of the Court of Appeal with respect to its holding that plaintiff stated a cause of action under the unfair competition law, affirmed the judgment of the Court of Appeal with respect to its determination that plaintiff stated a cause of action for the tort of interference with prospective economic advantage, and remanded to the Court of Appeal for further proceedings. As to plaintiff's claim under the unfair competition law, the court held that disgorgement of profits that was not restitutionary in nature was not an available remedy. Restitution is the only monetary remedy expressly authorized by [Bus. & Prof. Code, § 17203](#). Nothing in the legislative history indicates that the Legislature intended to authorize a court to order a defendant to disgorge all profits to a plaintiff who does not have an ownership interest in those profits. The court further held that to state a claim for interference with prospective economic advantage, plaintiff was not required to plead that defendants acted with the specific intent, or purpose, of interfering with plaintiffs prospective economic advantage. It was sufficient for plaintiff to plead that defendants knew that the interference was certain or substantially certain to occur as a result of their action. Moreover, plaintiff satisfied the requirement of pleading that defendants engaged in an act that was independently wrongful, alleging that defendants engaged in bribery and offered sexual favors to key officials of the foreign government in order to obtain the contract from that government. (Opinion by Moreno, J., with Kennard, Acting C.J., Baxter and Werdegar, JJ., and Rubin, J., \* concurring. Concurring opinion by Kennard, Acting C.J. (see p. 1166). Concurring opinion by Werdegar, J. (see p. 1167). Concurring and dissenting opinion by Chin , J., with Brown, J., concurring (see p. 1168)

**Headnotes**[\*\*CA\(1\)\*\*](#) [ ] (1)**Appellate Review §128—Scope of Review—Function of Appellate Court—Rulings on Demurrsers.**

--When a case is reviewed by the appellate court after the sustaining of a general demurrer, the appellate court accepts as true all the material allegations of the complaint.

[\*\*CA\(2a\)\*\*](#) [ ] (2a) [\*\*CA\(2b\)\*\*](#) [ ] (2b)**Unfair Competition §4—Unfair Competition Law—Scope—Conduct and Remedies.**

--The unfair competition law ( [Bus. & Prof. Code, § 17200 et seq.](#)) covers a wide range of conduct. It embraces anything that can properly be called a business practice and that at the same time is forbidden by law. [Bus. & Prof. Code, § 17200](#), borrows violations from other laws by making them independently actionable as unfair competitive practices. In addition, under [Bus. & Prof. Code, § 17200](#), a practice may be deemed unfair even if not specifically

\* Associate Justice of the Court of Appeal, Second Appellate District, Division Eight, assigned by the Acting Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).

proscribed by some other law. While the scope of conduct covered by competition law action is equitable in nature; damages cannot be recovered. Civil penalties may be assessed in public unfair competition actions, but the law contains no criminal provision ([Bus & Prof. Code, § 17206](#)). Under the unfair competition law, prevailing plaintiffs are generally limited to injunctive relief and restitution.

[CA\(3a\)](#) [ ] (3a) [CA\(3b\)](#) [ ] (3b) [CA\(3c\)](#) [ ] (3c) [CA\(3d\)](#) [ ] (3d) [CA\(3e\)](#) [ ] (3e) [CA\(3f\)](#) [ ] (3f) [CA\(3g\)](#) [ ] (3g)  
[CA\(3h\)](#) [ ] (3h)

#### **Unfair Competition § 10—Actions—Remedies—Disgorgement of Nonrestututionary Profits—Propriety.**

--In an action under the unfair competition law (UCL) ([Bus. & Prof. Code, § 17200 et seq.](#)) by a business representing manufacturers of military equipment, in which plaintiff alleged that defendants illegally induced a foreign government to award a contract of sale to a company other than the one represented by plaintiff, disgorgement of profits that was not restitutionary in nature was not an available remedy. Restitution is the only monetary remedy expressly authorized by [Bus. & Prof. Code, § 17203](#). Nothing in the legislative history indicated that the Legislature intended to authorize a court to order a defendant to disgorge all profits to a plaintiff who does not have an ownership interest in those profits. Although plaintiff described its requested remedy as restitution, that term did not accurately describe the relief sought, since plaintiff had neither an ownership interest nor a vested interest in the money it sought to recover. At most, plaintiff had a expectancy in the receipt of a commission. Since the recovery requested could not be traced to any particular funds in possession of one of the defendants, it was not the proper subject of a constructive trust. The nonrestututionary disgorgement remedy sought by plaintiff closely resembled a claim for damages, which is not permitted under the UCL. Allowing such a remedy would have enabled plaintiff to obtain tort damages without proving the elements of liability under its traditional tort claim for intentional interference with prospective economic advantage, and would have exposed defendants to multiple suits and the risk of duplicative liability without the traditional limitations on standing, thereby raising due process concerns.

[See 11 Witkin, Summary of Cal. Law (9th ed. 1990) Equity, § 934.]

[CA\(4a\)](#) [ ] (4a) [CA\(4b\)](#) [ ] (4b)

#### **Statutes § 30—Construction—Language—Plain Meaning Rule—Aids—Legislative Intent.**

--The fundamental objective of statutory construction is to ascertain the Legislature's intent and to give effect to the purpose of the statute ([Code Civ. Proc., § 1859](#)). If the language of the statute is unambiguous, the plain meaning governs. If the statutory language is ambiguous, the court may look to the history and background of the statute. In ascertaining the Legislature's intent, the court attempts to construe the statute to preserve its constitutional validity, presuming that the Legislature intends to respect constitutional limits.

[CA\(5a\)](#) [ ] (5a) [CA\(5b\)](#) [ ] (5b)

#### **Unfair Competition § 10—Actions—Remedies—Restitution—What Constitutes—Purpose.**

--In an unfair competition law case ([Bus. & Prof. Code, § 17200 et seq.](#)), an order for restitution is one compelling the defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken, that is, to persons who had an ownership interest in the property or those claiming through that person. The object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest. The concept of restoration or restitution, as used in the unfair competition law, it is not limited only to the return of money or property that was once in the possession of that person. Instead, restitution is broad enough to allow a plaintiff to recover money or property in which he or she has a vested interest.

**CA(6)** [ ] (6)**Trust § 27—Constructive Trusts—Requisites.**

--To create a constructive trust, there must be a res, an identifiable kind of property or entitlement in defendant's hands. A constructive trust requires money or property identified as belonging in good conscience to the plaintiff that can clearly be traced to particular funds or property in the defendant's possession.

**CA(7)** [ ] (7)**Unfair Competition § 10—Actions—Remedies—Damages.**

--An action under the unfair competition law (UCL) (*Bus. & Prof. Code, § 17200 et seq.*) is not an all-purpose substitute for a tort or contract action. Instead, the UCL provides an equitable means through which both public prosecutors and private individuals can bring suit to prevent unfair business practices and restore money or property to victims or these practices. The overarching legislative concern was to provide a streamlined procedure for the prevention of ongoing or threatened acts of unfair competition. Because of this objective, the remedies provided are limited. While any member of the public can bring suit under the UCL to enjoin a business from engaging in unfair competition, it is well established that individuals may not recover damages.

**CA(8a)** [ ] (8a) **CA(8b)** [ ] (8b) **CA(8c)** [ ] (8c) **CA(8d)** [ ] (8d)**Interference § 7—Interference with Prospective Economic Advantage—Actions—Pleading Requirements—Intent—Act of Independent Wrongfulness.**

--In an action for interference with prospective economic advantage by a business representing manufacturers of military equipment, in which plaintiff alleged that defendants illegally induced a foreign government to award a contract of sale to a company other than the one represented by plaintiff, plaintiff was not required to plead that defendants acted with the specific intent, or purpose, of interfering with plaintiff's prospective economic advantage. It was sufficient for plaintiff to plead that defendants knew that the interference was certain or substantially certain to occur as a result of their action. Moreover, plaintiff satisfied the requirement of pleading that defendants engaged in an act that was independently wrongful, alleging that defendants engaged in bribery and offered sexual favors to key officials of the foreign government in order to obtain the contract from that government. Since independent wrongfulness is a required element of the tort, and additional showing of specific intent to interfere is not necessary. The substantial certainty test, coupled with the independent wrongfulness requirement, sufficiently limits the tort. Only defendants who have engaged in an unlawful act can be held liable for this tort, while the five elements of the tort, all of which were met by plaintiff in this case, serve to limit the number of potential plaintiffs that can state a cause of action.

**CA(9)** [ ] (9)**Interference § 6—Interference with Prospective Economic Advantage—Elements.**

--The elements of the tort of intentional interference with prospective economic advantage are as follows: (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional wrongful acts on the defendant's part designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the defendant's acts.

**CA(10a)** [ ] (10a) **CA(10b)** [ ] (10b)**Interference § 2—Interference with Contract Relationship—Compared to Interference with Prospective Economic Advantage.**

--Although the intent requirement is the same for the torts of intentional interference with contract and intentional interference with prospective economic advantage, these torts remain distinct. Courts should firmly distinguish the two kinds of business contexts, bringing a greater solicitude to those relationships that have ripened into agreements, while recognizing that relationships short of that subsist in a zone where the rewards and risks of competition are dominant. However, although the two torts are distinct, some plaintiffs may be able to state causes of action for both torts. The tort of interference with contract is merely a species of the broader tort of interference with prospective economic advantage. Moreover, the existence of a contract does not mean that a plaintiff's claim must be brought exclusively as one for interference with contract. However, a plaintiff that chooses to bring a claim for interference with prospective economic advantage has a more rigorous pleading burden since it must show that the defendant's conduct was independently wrongful. An act is not independently wrongful merely because the defendant acted with an improper motive. An act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional statutory, regulatory, or common law, or some other determinable legal standard. (Disapproving to the extent inconsistent: *PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal. App. 4th 579 [52 Cal. Rptr. 2d 877].)

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29 Cal. 4th 1134, \*1134 63 P.3d 937, \*\*937 131 Cal. Rptr. 2d 29, \*\*\*29 2003 Cal. LEXIS 1301, \*\*\*\*2

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**Judges:** (Opinion by Moreno, J., with Kennard, Acting C. J., Baxter and Werdegar, JJ., and Rubin, J., \* concurring. Concurring opinion by Kennard, Acting C. J. (see p. 1166). Concurring opinion by Werdegar, J. (see p. 1167). Concurring and dissenting opinion by Chin, J., with Brown, J., concurring (see p. 1168).)

**Opinion by:** MORENO

## Opinion

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[\*\*941] MORENO, [\*1140] J.

[\*\*\*34] This case addresses what claims and remedies may be pursued by a plaintiff who alleges a lost business opportunity due to the unfair practices of a competitor. The Republic [\*\*\*\*4] of Korea wished to purchase military equipment known as synthetic aperture radar (SAR) systems and solicited competing bids from manufacturers, including Loral Corporation (Loral) and MacDonald, Dettwiler, and Associates Ltd. (MacDonald Dettwiler). Plaintiff Korea Supply Company (KSC) represented MacDonald Dettwiler in the negotiations for the contract and stood to receive a commission of over \$ 30 million if MacDonald Dettwiler's bid was accepted. Ultimately, the contract was awarded to Loral (now Lockheed Martin Tactical Systems, Inc.). KSC contends that even though MacDonald Dettwiler's bid was lower and its equipment superior, it was not awarded the contract because Loral and its agent had offered bribes and sexual favors to key Korean officials. KSC instituted the present action asserting claims under both California's unfair competition law ([Bus. & Prof. Code, § 17200 et seq.](#)) and the tort of interference with prospective economic advantage.

[\*\*\*35] We granted review to decide two issues. First, we address whether disgorgement of profits allegedly obtained by means of an unfair business practice is an authorized remedy under the UCL where these [\*\*\*5] profits are neither money taken from a plaintiff nor funds in which the plaintiff has an ownership interest. We conclude that disgorgement of such profits is not an authorized remedy in an individual action under the UCL. Accordingly, we reverse the judgment of the Court of Appeal on this issue.

Second, we address whether, to state a claim for interference with prospective economic advantage, a plaintiff must allege that the defendant [\*1141] specifically intended to interfere with the plaintiff's prospective economic advantage. We conclude that a plaintiff need not plead that the defendant acted with the specific intent to interfere with the plaintiff's business expectancy in order to state a claim for this tort. We affirm the judgment of the Court of Appeal on this issue.

I.

**CA(1)[]** (1) **HN1[]** "Because '[t]his case comes to us after the sustaining of a general demurrer . . . , we accept as true all the material allegations of the complaint.' " ([Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund \(2001\) 24 Cal.4th 800, 807 \[102 Cal. Rptr. 2d 562, 14 P.3d 234\]](#), quoting [Shoemaker v. Myers \(1990\) 52 Cal.3d 1, 7 \[276 Cal. Rptr. 303, 801 P.2d 1054\]](#).)

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\* Associate Justice of the Court of Appeal, Second Appellate District, Division Eight, assigned by the Acting Chief Justice pursuant to article VI, section 6 of the California Constitution.

Plaintiff KSC is a corporation engaged in the business of representing [\*\*\*\*6] manufacturers of military equipment in transactions with the Republic of Korea. In the mid-1990's, the Republic of Korea solicited bids for a SAR system for use by its military. KSC represented MacDonald Dettwiler, a Canadian company, in its bid to obtain the contract award. KSC expected a commission of 15 [\*\*942] percent of the contract price, or over \$ 30 million, if MacDonald Dettwiler were awarded the contract.

In June 1996, the Korean Ministry of Defense announced that Loral,<sup>1</sup> an American competitor of the Canadian company MacDonald Dettwiler, was awarded the contract, despite the fact that MacDonald Dettwiler's bid was about \$ 50 million lower and that the project management office of the Korean Defense Intelligence Command had determined that MacDonald Dettwiler's equipment was far superior to Loral's system. The Ministry of Defense explained that the decision to award Loral the contract was based on a suggestion that the United States government would not be favorably disposed to share intelligence information with the Republic of Korea if the latter selected a Canadian supplier.

[\*\*\*\*7] Beginning in October 1998, major news publications in the Republic of Korea revealed that an internal investigation had established that the SAR contract was awarded to Loral as a result of bribes and sexual favors, rather than pressure from the United States government. Loral's agent for the procurement of the SAR contract, defendant Linda Kim, had bribed two [\*1142] Korean military officers. In addition, Ms. Kim had extended bribes and sexual favors to the Minister of National Defense, the ultimate decision maker with respect to the award of the SAR contract. Ms. Kim reportedly received approximately \$ 10 million in commission from Loral, an [\*\*\*36] amount that exceeded the maximum established by the Foreign Corrupt Practices Act ([15 U.S.C. § 78dd-2](#)) and foreign military sales policies and regulations. As a result of the internal investigation by the Republic of Korea, several persons were imprisoned, including high-ranking Korean military officers. Ms. Kim herself was indicted in absentia; she avoided imprisonment because she resides in the United States and refuses to travel to the Republic of Korea.

Upon learning of these alleged reasons for the award of the [\*\*\*\*8] SAR contract to Loral, KSC commenced the present action on May 5, 1999. In its first amended complaint, KSC alleged that defendants<sup>2</sup> "conspired, knowingly and intentionally to induce and did knowingly and intentionally induce the Republic of Korea, through its authorized agencies, to award the SAR contract to Loral instead of MacDonald Dettwiler by employing wrongful means including bribes and sexual favors." As a direct and proximate result of defendants' actions, the Republic of Korea awarded the contract to Loral; but for the bribes and sexual favors, this contract would have been awarded to MacDonald Dettwiler. "In securing the contract by wrongful means, Loral acted with full knowledge of the commission relationship between plaintiff and MacDonald Dettwiler and knowing that its interference with the award of the contract . . . would cause plaintiff severe loss." "Defendant Lockheed Martin has been the beneficiary of the illegal Loral-Kim conduct and to that extent has been unjustly enriched."

[\*\*\*\*9] The first amended complaint asserts three causes of action: (1) conspiracy to interfere with prospective economic advantage, (2) intentional interference with prospective economic advantage, and (3) unfair competition pursuant to [Business and Professions Code section 17200](#).<sup>3</sup> For its unfair competition claim, KSC sought disgorgement to it of the profits realized by Lockheed Martin on the sale of the SAR to Korea. For the tort claims, KSC sought damages for the loss of its expected compensation from MacDonald Dettwiler.

<sup>1</sup> In 1996, Loral changed its name to Lockheed Martin Tactical Systems, Inc., and became a subsidiary of Lockheed Martin Corporation, both of which are defendants in the present case. These defendants will collectively be referred to as Lockheed Martin, unless otherwise indicated.

<sup>2</sup> Lockheed Martin Corporation, Lockheed Martin Tactical Systems, Inc., and Linda Kim were named as defendants in the present action.

<sup>3</sup> As in [Kraus v. Trinity Management Services, Inc. \(2000\) 23 Cal.4th 116, 121 \[96 Cal. Rptr. 2d 485, 999 P.2d 718\]](#) (*Kraus*), we refer to [Business and Professions Code section 17200 et seq.](#), the unfair competition law, as the UCL, and the claim as one for unfair competition.

Lockheed Martin, joined by Ms. Kim, generally demurred to all counts. The trial court sustained the demurrer without leave [\*\*943] to amend, finding that [\*1143] plaintiff's [\*\*\*\*10] complaint did not state facts sufficient to constitute a cause of action under California law. Judgment was entered dismissing the action on September 7, 1999. After the trial court subsequently denied KSC's motion for reconsideration, KSC filed its notice of appeal. The Court of Appeal reversed the trial court's judgment in full, finding that plaintiff had sufficiently stated causes of action for unfair competition and for intentional interference with prospective economic advantage.

Lockheed Martin sought review in this court of two bases of the Court of Appeal's decision: first, its holding that disgorgement of profits is an available remedy under the UCL even where the disgorgement sought does not represent restitution of money or property in which plaintiff has an ownership interest; and second, its holding that the tort of intentional interference with prospective economic advantage does not require plaintiff to plead that [\*\*\*37] defendant acted with the specific intent to interfere with plaintiff's business expectancy. We granted review on both issues.

## II.

We first address plaintiff's unfair competition claim. [Business and Professions Code section 17200](#) [\*\*\*\*11] et seq.<sup>4</sup> [HN2](#)[<sup>↑</sup>] prohibits unfair competition, including unlawful, unfair, and fraudulent business acts. [CA\(2a\)](#)[<sup>↑</sup>] (2a) The UCL covers a wide range of conduct. It embraces " " "anything that can properly be called a business practice and that at the same time is forbidden by law." " [Citations.]" ([Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. \(1999\) 20 Cal.4th 163, 180](#) [83 Cal. Rptr. 2d 548, 973 P.2d 527] (*Cel-Tech*).) [HN3](#)[<sup>↑</sup>] Standing to sue under the UCL is expansive as well. Unfair competition actions can be brought by a public prosecutor or "by any person acting for the interests of itself, its members or the general public." ([§ 17204](#).)

[\*\*\*\*12] [Section 17200](#) [HN5](#)[<sup>↑</sup>] "borrows" violations from other laws by making them independently actionable as unfair competitive practices. ([Cel-Tech, supra, 20 Cal.4th at p. 180](#).) In addition, under [section 17200](#), "a practice may be deemed unfair even if not specifically proscribed by some other law." ([Cel-Tech, at p. 180](#).) [CA\(3a\)](#)[<sup>↑</sup>] (3a) In the present case, KSC's third cause of action, for unfair competition, "borrowed" from the federal Foreign Corrupt Practices Act, which prohibits, among other things, bribing a foreign government official for the purpose of influencing any act or decision in his or [\*1144] her official capacity and in violation of a lawful duty, or for the purpose of inducing the use of official influence to obtain or retain business. (See [15 U.S.C. § 78dd-2\(a\)\(1\)\(A\), \(B\)](#).) The Court of Appeal determined that a claim under the UCL may be predicated on a violation of this act.<sup>5</sup>

[\*\*\*\*13] [CA\(2b\)](#)[<sup>↑</sup>] (2b) [HN6](#)[<sup>↑</sup>] While the scope of conduct covered by the UCL is broad, its remedies are limited. ([Cel-Tech, supra, 20 Cal.4th at p. 180](#).) A UCL action is equitable in nature; damages cannot be recovered. ([Bank of the West v. Superior Court \(1992\) 2 Cal.4th 1254, 1266](#) [10 Cal. Rptr. 2d 538, 833 P.2d 545] (*Bank of the West*).) Civil penalties may be assessed in public unfair competition actions, but the law contains no criminal provisions. ([§ 17206](#).) We have stated that under the UCL, "[p]revailing plaintiffs are generally limited to injunctive relief and restitution." ([Cel-Tech, supra, 20 Cal.4th at p. 179](#).) [CA\(3b\)](#)[<sup>↑</sup>] (3b) The question raised by this case is whether disgorgement of profits that is not restitutionary in nature is an available remedy for an individual private plaintiff under the UCL.

### A.

[\*\*944] The Court of Appeal in this case held that plaintiff can recover disgorgement of profits earned by defendants as a result of their allegedly unfair practices, even where the money sought to be disgorged was not

<sup>4</sup> [Business and Professions Code section 17200](#) states: [HN4](#)[<sup>↑</sup>] "As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code." All subsequent statutory citations are to the Business and Professions Code, unless otherwise noted.

<sup>5</sup> The parties did not challenge this ruling and so we accept, without deciding, that a claim under the UCL may be predicated on a violation of the Foreign Corrupt Practices Act.

taken from plaintiff and plaintiff did not have an ownership interest in the [\*\*\*38] money. This holding was based on language taken from our recent decision in *Kraus, supra, 23 Cal.4th 116*. [\*\*\*\*14] As we explain, the Court of Appeal's reliance on this language was mistaken.

In *Kraus*, we held that disgorgement of unfairly obtained profits into a fluid recovery fund is not an available remedy in a representative action brought under the UCL. (*Kraus, supra, 23 Cal. 4th at p. 137*.) We began by describing the remedies that are clearly available to a plaintiff under the UCL: **HN7**[] "Through the UCL a plaintiff may obtain restitution and/or injunctive relief against unfair or unlawful practices." (*Kraus, at p. 126*.) We then differentiated between the terms "restitution" and "disgorgement" in order to show why a plaintiff in a representative action under the UCL could recover restitution but could not obtain disgorgement of profits into a fluid recovery fund.

**HN8**[] We defined an order for "restitution" as one "compelling a UCL defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken, that is, to persons [\*1145] who had an ownership interest in the property or those claiming through that person." ( *Kraus, supra, 23 Cal.4th at pp. 126-127*.) We then clarified that "disgorgement" is a broader [\*\*\*\*15] remedy than restitution. We stated that an order for disgorgement "may include a restitutionary element, but is not so limited." ( *Id. at p. 127*.) We further explained that an order for disgorgement "may compel a defendant to surrender all money obtained through an unfair business practice even though not all is to be restored to the persons from whom it was obtained or those claiming under those persons. It has also been used to refer to surrender of all profits earned as a result of an unfair business practice regardless of whether those profits represent money taken directly from persons who were victims of the unfair practice." (*Ibid.*) Relying on this distinction between restitution and disgorgement, we held in *Kraus* that although restitution was an available remedy in UCL actions, a plaintiff in a representative action under the UCL could not recover disgorgement in the broader, nonrestitutionary sense, into a fluid recovery fund. (*Kraus, at p. 137*.)

The Court of Appeal in the present case misread our opinion in *Kraus*. Noting that plaintiff in this case seeks disgorgement of profits unjustly earned by defendants, the Court of Appeal quoted [\*\*\*\*16] our statement in *Kraus* that " '[a]n order that a defendant disgorge money obtained through an unfair business practice may include a restitutionary element, but is not so limited. . . . [S]uch orders may compel a defendant to surrender all money obtained through an unfair business practice even though not all is to be restored to the persons from whom it was obtained or those claiming under those persons. It has also been used to refer to surrender of all profits earned as a result of an unfair business practice *regardless of whether those profits represent money taken directly from persons who were victims of the unfair practice.*' " (Quoting *Kraus, supra, 23 Cal.4th at p. 127*, italics added.) Relying on this language, the Court of Appeal concluded that plaintiff adequately stated a claim under the UCL.

As Lockheed Martin and several amici curiae point out, however, this passage from *Kraus*, cited by the Court of Appeal as authorization for disgorgement under the UCL, merely *defined* the term [\*\*\*39] "disgorgement" in order to demonstrate that it was broader in scope than "restitution." In the above cited quotation, this court was not approving of disgorgement [\*\*\*\*17] as a remedy under the UCL. To the contrary, we held in *Kraus* that **HN9**[] while restitution was an available remedy under the UCL, disgorgement of money obtained through an unfair business practice is an available remedy in a representative action [\*\*945] only to the extent that it constitutes restitution. We reaffirm this holding here in the context of an individual action under the UCL. We therefore reverse the judgment of the Court of Appeal on this issue.

[\*1146] B.

We begin our analysis with the statutory authorization for relief under the UCL, found in *section 17203: HN10*[] "Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition."

**CA(4a)[<sup>1</sup>] (4a) HN11[<sup>1</sup>]** The fundamental objective of statutory construction is to ascertain the Legislature's [\*\*\*\*18] intent and to give effect to the purpose of the statute. ( *Code Civ. Proc., § 1859.*) If the language of the statute is unambiguous, the plain meaning governs. ( *Day v. City of Fontana (2001) 25 Cal.4th 268, 272 [105 Cal. Rptr. 2d 457, 19 P.3d 1196].*) **CA(3c)[<sup>1</sup>] (3c) HN12[<sup>1</sup>]** Under *section 17203*, "[t]he statutory authorization . . . to make orders necessary to restore money to any person in interest is clear." ( *Kraus, supra, 23 Cal.4th at p. 129.*) An order for restitution, then, is authorized by the clear language of the statute. In fact, "restitution is the only monetary remedy expressly authorized by *section 17203*." (*Ibid.*)

While a remedy of nonrestitutionary disgorgement of profits is not expressly authorized by the statute, KSC argues that the equitable language in *section 17203* is sufficiently broad to allow courts to award this monetary remedy for an unfair competition claim. KSC contends that under the UCL a court may, in its discretion, order Lockheed Martin to surrender its profits to KSC because KSC allegedly has been wronged by Lockheed Martin's unfair conduct.

Here, since the remedy of nonrestitutionary disgorgement is not expressly authorized by the statute, we [\*\*\*\*19] determine whether the Legislature intended to authorize such a remedy under *section 17203*. **CA(4b)[<sup>1</sup>] (4b) HN13[<sup>1</sup>]** If the statutory language is ambiguous, we may look to the history and background of the statute. ( *Kraus, supra, 23 Cal. 4th at p. 129.*) In ascertaining the Legislature's intent, we attempt to construe the statute to preserve its constitutional validity, as we presume that the Legislature intends to respect constitutional limits. (See *ibid.*)

**CA(3d)[<sup>1</sup>] (3d)** We described the legislative history of the UCL in *Kraus*. ( *Kraus, supra, 23 Cal.4th at pp. 129-130.*) As amended in 1933, the predecessor to the current law provided express authority to enjoin unfair competition. (Civ. [\*1147] Code, former *§ 3369*, as amended by Stats. 1933, ch. 953, § 1, p. 2482.) While no specific provision empowered courts to order monetary remedies, in *People v. Superior Court (Jayhill) (1973) 9 Cal.3d 283, 286 [107 Cal. Rptr. 192, 507 P.2d 1400]*, we held that trial courts retained their inherent equitable power to [\*\*\*40] order restitution under the UCL. Three years after *Jayhill Corp.*, express authority to order restitution was added to *Civil Code section 3369*, the predecessor [\*\*\*\*20] to *section 17203*. (Stats. 1976, ch. 1005, § 1, p. 2378.) As we have previously said, this revision of the act was intended to codify, not change, the remedies available to a trial court under the UCL. ( *Kraus, supra, at p. 132* [with the 1976 amendments, "the Legislature confirmed, but did not increase, the powers of the court in a UCL action"]; see also Assem. Com. on Judiciary, Analysis of Assem. Bill No. 1763 (1972 Reg. Sess.) May 1, 1972 [congruent amendments to false advertising law were intended to affirm equity power already existing in courts]; Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1763 (1972 Reg. Sess.) [same].)

While express authority to order restitution was added to the UCL, courts were not given similar authorization to order nonrestitutionary disgorgement. Further, plaintiff has not pointed to anything in the legislative [\*\*946] history that suggests that the Legislature intended to provide such a remedy in an individual action. Plaintiff contends that this court's interpretation of the UCL and commentary by leading academic authorities establish that a court's equitable power under the UCL is broad. Notably absent from this argument, [\*\*\*\*21] however, is any showing from the language or history of *section 17203* that the Legislature intended to authorize a disgorgement remedy that was not restitutionary in nature. Instead, KSC merely asserts, without pointing to any particular statutory language or legislative history, that a court's equitable powers under *section 17203* are broad enough to encompass its requested remedy.

We have previously found that the Legislature did not intend *section 17203* to provide courts with *unlimited* equitable powers. In *Kraus*, we rejected the argument, revived by plaintiff in this case, that the general grant of equitable authority in *section 17203* implicitly permitted a disgorgement remedy--in that case, into a fluid recovery fund in a representative action. We found that since there was nothing in the express language of the statute or its legislative history indicating that the Legislature intended to provide such a remedy, the remedy was not available. ( *Kraus, supra, 23 Cal.4th at p. 132.*) Here, again, we find nothing to indicate that the Legislature intended to authorize a court to order a defendant to disgorge all profits to a plaintiff who does not have an [\*\*\*\*22] ownership interest in those profits.

In fact, [HN14](#)<sup>↑</sup> the language of [section 17203](#) is clear that the equitable powers of a court are to be used to "prevent" practices that constitute unfair competition and to "restore to any person in interest" any money or property [\[\\*1148\]](#) acquired through unfair practices. ([§ 17203](#)) While the "prevent" prong of [section 17203](#) suggests that the Legislature considered deterrence of unfair practices to be an important goal, the fact that attorney fees and damages, including punitive damages, are not available under the UCL is clear evidence that deterrence by means of monetary penalties is not the act's sole objective. A court cannot, under the equitable powers of [section 17203](#), award whatever form of monetary relief it believes might deter unfair practices. The fact that the "restore" prong of [section 17203](#) is the only reference to monetary penalties in this section indicates that the Legislature intended to limit the available monetary remedies under the act.<sup>6</sup>

[\*\*\*23] [\*\*\*41] Our previous cases discussing the UCL indicate our understanding that the Legislature did not intend to authorize courts to order monetary remedies other than restitution in an individual action. This court has never approved of nonrestitutionary disgorgement of profits as a remedy under the UCL. While prior cases discussing the UCL may have characterized some of the relief available as "disgorgement," we were referring to the restitutionary form of disgorgement, and not to the nonrestitutionary type sought here by plaintiff. ( [Cortez v. Purolator Air Filtration Products Co. \(2000\) 23 Cal.4th 163, 176 \[96 Cal. Rptr. 2d 518, 999 P.2d 706\]](#) (Cortez) [holding that because [section 17203](#) authorizes an order compelling a defendant to pay back wages as a restitutionary remedy, we "need not consider whether the order might be proper under the UCL on a disgorgement of benefit theory"]; [ABC International Traders, Inc. v. Matsushita Electric Corp. \(1997\) 14 Cal.4th 1247, 1271 \[61 Cal. Rptr. 2d 112, 931 P.2d 290\]](#) [stating that "the defendant's victims may be entitled to restitution" under [section 17203](#)]; [Fletcher v. Security Pacific National Bank \(1979\) 23 Cal.3d 442, 452 \[153 Cal. Rptr. 28, 591 P.2d 51\]](#) [\*\*\*24] (*Fletcher*) [trial court may order restitution under the UCL for bank customers challenging a bank's computation of per annum interest on the basis of a 360-day year]; [People v. Superior Court \(Jayhill\), supra, 9 Cal.3d at p. 286](#) [court may order a defendant to pay restitution to victims who have been defrauded [\[\\*\\*947\]](#) as a result of an unfair business practice].) The present case merely confirms what we have previously held: [HN15](#)<sup>↑</sup> Under the UCL, an individual may recover profits unfairly obtained to the extent that these profits represent monies given to the defendant or benefits in which the plaintiff has an ownership interest.

#### C.

In an attempt to fit its claim within the statutory authorization for relief, and as an implicit acknowledgement that [HN16](#)<sup>↑</sup> nonrestitutionary disgorgement is [\[\\*1149\]](#) not an available remedy in an individual action under the UCL, plaintiff describes its requested remedy as "restitution." This term does not accurately describe the relief sought by plaintiff. [CA\(5a\)](#)<sup>↑</sup> (5a) As defined in *Kraus*, an order for restitution is one "compelling a UCL defendant to return money obtained through an unfair business practice to those persons in interest from whom the property [\[\\*\\*\\*25\]](#) was taken, that is, to persons who had an ownership interest in the property or those claiming through that person." ( [Kraus, supra, 23 Cal.4th at pp. 126-127](#).) The object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest.

[CA\(3e\)](#)<sup>↑</sup> (3e) The remedy sought by plaintiff in this case is not restitutionary because plaintiff does not have an ownership interest in the money it seeks to recover from defendants. First, it is clear that plaintiff is not seeking the return of money or property that was once in its possession. KSC has not given any money to Lockheed Martin; instead, it was from the Republic of Korea that Lockheed Martin received its profits. Any award that plaintiff would recover from defendants would not be restitutionary as it would not replace any money or [\[\\*\\*\\*42\]](#) property that defendants took directly from plaintiff.

Further, the relief sought by plaintiff is not restitutionary under an alternative theory because plaintiff has no vested interest in the money it seeks to recover. [CA\(5b\)](#)<sup>↑</sup> (5b) We have stated that [HN17](#)<sup>↑</sup> "[t]he concept of

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<sup>6</sup> Our discussion in this case is limited to individual private actions brought under the UCL. In public actions, civil penalties may be collected from a defendant. ([§ 17206](#)) Further, in *Kraus* we noted that the Legislature "has authorized disgorgement into a fluid recovery fund in class actions." ( [Kraus, supra, 23 Cal.4th at p. 137](#).) These issues are not before us, and therefore we need not address them further.

restoration or restitution, as used in the UCL, is not limited only to the return [\*\*\*\*26] of money or property that was once in the possession of that person." ([Cortez, supra, 23 Cal.4th at p. 178.](#)) Instead, restitution is broad enough to allow a plaintiff to recover money or property in which he or she has a vested interest. In Cortez, we determined that "earned wages that are due and payable pursuant to [section 200 et seq. of the Labor Code](#) are as much the property of the employee who has given his or her labor to the employer in exchange for that property as is property a person surrenders through an unfair business practice." (*Ibid.*) Therefore, we concluded that such wages could be recovered as restitution under the UCL. We reached this result because "equity regards that which ought to have been done as done [citation], and thus recognizes equitable conversion." ([Cortez, supra, at p. 178.](#))

[CA\(3f\)\[↑\]](#) (3f) While the plaintiffs in Cortez had a vested interest in their earned but unpaid wages, KSC itself acknowledges that, at most, it had an "expectancy" in the receipt of a commission. KSC's expected commission is merely a contingent interest since KSC only expected payment if MacDonald Dettwiler was awarded [\*\*\*\*27] the SAR contract. (See [United States v. Rodrigues \(9th Cir. 2000\) 229 F.3d 842, 846](#) [finding that under the federal Victim and Witness Protection Act of 1982, restitution was not available for a contingent loss in [\*1150] which the company had only an expectancy interest; restitution could only be recovered for the loss of a vested interest].) Such an attenuated expectancy cannot, as KSC contends, be likened to "property" converted by Lockheed Martin that can now be the subject of a constructive trust. [CA\(6\)\[↑\]](#) (6) [HN18\[↑\]](#) To create a constructive trust, there must be a res, an "identifiable kind of property or entitlement in defendant's hands." (1 Dobbs, Law of Remedies (1993) § 4.1(2), pp. 589-590.) As the United States Supreme Court recently said, a constructive trust requires "money or property identified as belonging in good conscience to the plaintiff [which can] clearly be traced to particular funds or property in the defendant's possession." ([Great-West Life & Annuity Insurance Co. v. Knudson \(2002\) 534 U.S. 204](#), 213 [[151 L. Ed. 2d 635, 122 S. Ct. 708](#).]) [CA\(3g\)\[↑\]](#) (3g) The recovery requested in this case cannot be traced to any particular [\*\*948] funds in Lockheed Martin's [\*\*\*\*28] possession and therefore is not the proper subject of a constructive trust.

KSC's expectancy in this case is further attenuated since KSC never anticipated payment directly from Lockheed Martin. Instead, it expected the Republic of Korea to pay MacDonald Dettwiler, which would then pay a commission to KSC. In contrast, in Cortez, the defendant was the employer from which the plaintiffs expected payment. ([Cortez, supra, 23 Cal.4th at p. 169.](#)) Therefore, the order for restitution served to restore to the plaintiffs funds that were directly owed to them by the defendant. Unlike Cortez, then, the monetary relief requested by KSC does not represent a quantifiable sum owed by defendants to plaintiff. Instead, it is a contingent expectancy of payment from a third party. For these reasons, we find that plaintiff's claim is properly characterized as a claim for nonrestitutionary disgorgement of profits.

#### D.

[CA\(7\)\[↑\]](#) (7) We reaffirm that [HN19\[↑\]](#) an action under the UCL "is not an all-purpose substitute [\*\*\*43] for a tort or contract action." ([Cortez, supra, 23 Cal.4th at p. 173.](#)) Instead, the act provides an equitable means through which both public prosecutors and [\*\*\*\*29] private individuals can bring suit to prevent unfair business practices and restore money or property to victims of these practices. As we have said, the "overarching legislative concern [was] to provide a streamlined procedure for the prevention of ongoing or threatened acts of unfair competition." (*Id. at pp. 173-174.*) Because of this objective, the remedies provided are limited. While any member of the public can bring suit under the act to enjoin a business from engaging in unfair competition, it is well established that individuals may not recover damages. ([Bank of the West, supra, 2 Cal.4th at p. 1266.](#))

[CA\(3h\)\[↑\]](#) (3h) The nonrestitutionary disgorgement remedy sought by plaintiff closely resembles a claim for damages, something that is not permitted under [\*1151] the UCL. As one court has noted: [HN20\[↑\]](#) "Compensation for a lost business opportunity is a measure of damages and not restitution to the alleged victims." ([MAI Systems Corp. v. UIPS \(N.D.Cal. 1994\) 856 F. Supp. 538, 542.](#)) Plaintiff suggests that its disgorgement remedy need not include *all* of the profits unfairly obtained by Lockheed Martin; instead, its recovery might be limited to the [\*\*\*\*30] amount it allegedly would have obtained as a commission had McDonald Dettwiler been awarded the contract. This proposed recovery would be in exactly the same amount that plaintiff is seeking to recover as damages for its traditional tort claim of interference with prospective economic advantage. The only difference between what plaintiff seeks to recover as "disgorgement" and the damages it seeks under its traditional

tort claim is that plaintiff would not recover its full expected commission under a "disgorgement" remedy if, for some reason, the profits obtained by Lockheed Martin did not equal the amount of plaintiff's expected commission.

Allowing the plaintiff in this case to recover nonrestitutionary disgorgement under the UCL would enable it to obtain tort damages while bypassing the burden of proving the elements of liability under its traditional tort claim for intentional interference with prospective economic advantage. As we have stated, any member of the public can bring suit under the UCL. In addition, [HN21](#)<sup>1</sup> "to state a claim under the act one need not plead and prove the element of a tort. Instead, one need only show that 'members of the public are likely to be deceived. [\*\*\*31] '[Citation.]'" (*Bank of the West, supra, 2 Cal.4th at p. 1267*; see also *Fletcher, supra, 23 Cal.3d at p. 453* [individual plaintiff's knowledge of the unfair practice not needed in order to recover restitution].) Given the UCL's liberal standing requirements and relaxed liability standards, were we to allow nonrestitutionary disgorgement in an individual action under the UCL, plaintiffs would have an incentive to recast claims under traditional tort theories as UCL violations. They could recover from a competitor without having to meet the more rigorous pleading requirements of a negligence action, [\\*\\*949](#) or a breach of contract suit. The result could be that the UCL would be used as an all-purpose substitute for a tort or contract action, something the Legislature never intended.

In addition, it is possible that due process concerns would arise if an individual business competitor could recover disgorgement of profits under the UCL. While restitution is limited to restoring money or property to direct victims of an unfair practice, a potentially unlimited number of individual plaintiffs could recover [\\*\\*\\*44](#) nonrestitutionary disgorgement. Allowing such a [\\*\\*\\*32](#) remedy would expose defendants to multiple suits and the risk of duplicative liability without the traditional limitations on standing. (See *Stop Youth Addiction v. Lucky Stores, Inc. (1998) 17 Cal.4th 553, 582 [71 Cal. Rptr. 2d 731, 950 P.2d 1086]* (conc. opn. of Baxter, J.) [disgorgement of [\[\\*1152\]](#) profits to a party that has not paid money to the defendant and was not a party to the litigation "raises substantial due process issues implicating the rights of both the defendant and the absent parties"].) The disgorgement remedy requested in this case would not require that the disgorged money or property have come from the prospective plaintiff in the first instance. Nor is there any limit on the number of times the remedy could be sought or any limit on the monetary relief available. There is a risk of unfairness not only to defendants but also to direct victims of the unfair practice. If Lockheed Martin were forced to disgorge its profits to KSC, there might be little left for the Republic of Korea to recover, even though it is the party ostensibly entitled to restitutionary relief.

Plaintiff suggests ways of alleviating these due process concerns, proposing several "options to prevent [\\*\\*\\*33](#) abuse," including that this remedy be "limited to instances where the defendant has engaged in egregious practices." None of plaintiff's proposals, however, alleviate the possibility that defendants would be subjected to duplicate liability. Further, none of plaintiff's proposed "options to prevent abuse" are contemplated by the legislative scheme.

## E.

We conclude, therefore, that allowing plaintiff to recover monetary relief under the UCL in this case would be at odds with the language and history of the statute, our previous decisions construing the UCL, and public policy. We hold that nonrestitutionary disgorgement of profits is not an available remedy in an individual action under the UCL. We note that the UCL remains a meaningful consumer protection tool. The breadth of standing under this act allows any consumer to combat unfair competition by seeking an injunction against unfair business practices. Actual direct victims of unfair competition may obtain restitution as well. The present decision merely reaffirms the balance struck in this state's unfair competition law between broad liability and limited relief.

In addition, we note that our decision does not foreclose [\\*\\*\\*34](#) all relief to plaintiff. While plaintiff may not recover monetary relief under the limited remedies provided by the UCL, plaintiff may pursue a cause of action under traditional tort law. In fact, as we conclude below, plaintiff in this case can state a claim for the tort of intentional interference with prospective economic advantage. While the pleading and proof requirements under this tort are more rigorous than under the UCL, if plaintiff succeeds in meeting its burden of proof, it may recover damages for the injuries it claims to have suffered as a result of unfair competition.

[\*1153] III.

**CA(8a)[<sup>↑</sup>] (8a)** Lockheed Martin argues that KSC fails to state a claim for intentional interference with prospective economic advantage because it has not shown that Lockheed Martin acted with the specific intent to disrupt KSC's business relationship. KSC counters that a plaintiff need only show that the defendant acted with the knowledge that its wrongful acts were substantially certain to disrupt plaintiff's business expectancy. We conclude that **HN22[<sup>↑</sup>]** the tort of intentional interference with [\*\*\*45] prospective economic advantage does not require a plaintiff to plead that the defendant acted with the specific intent, [\*\*\*\*35] or purpose, of disrupting the plaintiff's prospective [\*\*950] economic advantage. Instead, to satisfy the intent requirement for this tort, it is sufficient to plead that the defendant knew that the interference was certain or substantially certain to occur as a result of its action.

A.

**CA(9)[<sup>↑</sup>] (9)** We first articulated the elements of the tort of intentional interference with prospective economic advantage in *Buckaloo v. Johnson* (1975) 14 Cal.3d 815, 827 [122 Cal. Rptr. 745, 537 P.2d 865] (*Buckaloo*). **HN23[<sup>↑</sup>]** These elements are usually stated as follows: " '(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant.' [Citations.]" ( *Westside Center Associates v. Safeway Stores* 23, Inc. (1996) 42 Cal.App.4th 507, 521-522 [49 Cal. Rptr. 2d 793].)

We most recently considered this tort in *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376 [45 Cal. Rptr. 2d 436, 902 P.2d 740] [\*\*\*\*36] (*Della Penna*), where we held that **HN24[<sup>↑</sup>]** a plaintiff seeking to recover damages for interference with prospective economic advantage must plead and prove as part of its case-in-chief that the defendant's conduct was "wrongful by some legal measure other than the fact of interference itself." ( *Id. at p. 393*.) In *Della Penna*, we did not address the elements of the tort as we had formulated them in *Buckaloo*, other than noting that "[t]o the extent that language in *Buckaloo* . . . addressing the pleading and proof requirements in the economic relations tort is inconsistent with the formulation we adopt in this case, it is disapproved." ( *Della Penna, supra, 11 Cal.4th at p. 393, fn. 5*.)

Since our opinion in *Della Penna*, lower courts considering this tort have continued to apply the elements we articulated in *Buckaloo*, with the added [\*1154] understanding that a plaintiff must plead that the defendant engaged in an act that is wrongful apart from the interference itself. (See, e.g., *Limandri v. Judkins* (1997) 52 Cal.App.4th 326, 339 [60 Cal. Rptr. 2d 539]; *Arntz Contracting Co. v. St. Paul Fire and Marine Insurance Company* (1996) 47 Cal.App.4th 464, 475 [54 Cal. Rptr. 2d 888]; [\*\*\*\*37] *Westside Center Associates v. Safeway Stores* 23, Inc., *supra*, 42 Cal.App.4th at pp. 521-522.) The Court of Appeal in the present case, however, in considering whether a plaintiff must plead specific intent, determined that after *Della Penna*, "it is no longer appropriate to apply the elements formulated in *Buckaloo* in all actions for interference with prospective advantage."

We disagree with the Court of Appeal's conclusion that the elements we first articulated in *Buckaloo, supra, 14 Cal.3d 815*, do not still apply to this tort. In *Della Penna*, we did not abandon these elements. Instead, we specifically stated that "[w]e do not in this case . . . go beyond approving the requirement of a showing of wrongfulness as part of the plaintiff's case." (*Della Penna, supra, 11 Cal. 4th at p. 378*.) In fact, we explicitly approved the trial court's modified version of the standard jury instruction on intentional interference with prospective economic advantage, BAJI No. [\*\*\*46] 7.82. The instruction at issue articulated the traditional elements of the tort, but changed the third element to provide that the defendant " 'intentionally engaged in [\*\*\*38] [wrongful] acts or conduct designed to interfere with or disrupt' the relationship." ( *Della Penna, 11 Cal.4th at p. 380, fn. 1*, italics and brackets added.) Rather than overrule the established elements of this tort, *Della Penna* merely clarified the plaintiff's burden as to the third element, stating that to meet this element, a plaintiff must plead and prove that the defendant's acts are wrongful apart from the interference itself. ( *Id. 11 Cal.4th at p. 393*.) Thus, as the majority of the Courts of Appeal have understood, after *Della Penna* the elements of the tort of interference with prospective economic advantage remain the same, except that the third element also requires a plaintiff to plead intentional *wrongful* [\*\*951] acts on the part of the defendant designed to disrupt the relationship.

B.

**CA(8b) [8b]** Having clarified the required elements, we now consider the intent requirement of this tort. The question is whether a plaintiff must plead and prove that the defendant engaged in wrongful acts *with the specific intent* of interfering with the plaintiff's business expectancy. We conclude that **HN25** [HN25] specific intent is not a required element of the tort of interference with prospective economic [\*\*\*\*39] advantage. While a plaintiff may satisfy the intent requirement by pleading specific intent, i.e., that the defendant desired to interfere with the plaintiff's prospective economic advantage, a plaintiff may alternately plead that the defendant knew that the interference was certain or substantially certain to occur as a result of its action.

[\*1155] Lockheed Martin argues that specific intent is an established element of this tort. It contends that to satisfy the tort's third element--intentional wrongful acts designed to disrupt the plaintiff's relationship with its benefactor--a plaintiff must allege that the defendant purposely sought the disruption. It asserts that the inclusion of the word "designed" in the typical formulation of the third element is evidence that a plaintiff is required to plead specific intent. We disagree. The elements of the tort of interference with prospective economic advantage do not require a plaintiff to allege that the defendant acted with the specific intent, or purpose, of disrupting the plaintiff's prospective economic advantage.

Contrary to Lockheed Martin's assertion, the inclusion of the word "designed" in the third element of the tort does [\*\*\*\*40] not necessarily mean that this tort contains a specific intent requirement. Our analysis of the intent requirement for the tort of intentional interference with contract in *Quelimane Company, Inc. v. Stewart Title Guaranty Company* (1998) 19 Cal.4th 26 [77 Cal. Rptr. 2d 709, 960 P.2d 513] (*Quelimane*) is instructive.<sup>7</sup> In *Quelimane*, we [\*\*\*\*47] articulated the elements of this tort, stating that the third element requires a plaintiff to plead the "defendant's intentional acts designed to induce a breach or disruption of the contractual relationship." (*Id. at p. 55.*) Notwithstanding the presence of the word "designed," we found that this tort did not require a plaintiff to plead that the defendant acted with the specific intent to interfere. (*Id. at p. 65.*)

[\*\*\*\*41] In determining that intentional interference with contract does not contain a specific intent requirement, we relied on the Restatement Second of Torts. (*Quelimane, supra, 19 Cal.4th at p. 56.*) The *Restatement, section 766, comment j*, makes clear that the tort of intentional interference with contract applies not only when a defendant acts with the purpose or desire to interfere but that "[i]t applies also to intentional interference . . . in which the actor does not act for the purpose of interfering with the contract or desire it but knows that the interference is certain or substantially certain to occur as a [\*1156] result of his action. The rule applies, in other words, to an interference that is incidental to the actor's independent purpose and desire but known to him to be a necessary consequence of his action." (*Rest.2d Torts, § 766, com. j*, p. 12.)

[\*\*952] We similarly look to the Restatement to determine whether the tort at issue in the present case, intentional interference with prospective economic advantage, contains a specific intent requirement. *Restatement Second of Torts section 766B*, entitled Intentional Interference with Prospective Contractual Relation, [\*\*\*\*42]<sup>8</sup> explains in

<sup>7</sup> The concurring and dissenting opinion argues that we should rely on *Seaman's Direct Buying Service, Inc. v. Standard Oil Co. (1984) 36 Cal.3d 752 [206 Cal. Rptr. 354, 686 P.2d 1158]*, overruled on other grounds in *Freeman & Mills, Inc. v. Belcher Oil Co. (1995) 11 Cal.4th 85, 88 [44 Cal. Rptr. 2d 420, 900 P.2d 669]*, rather than on *Quelimane, supra, 19 Cal.4th 26*. Both cases discuss the intent requirement for the tort of interference with contract. Yet the *Quelimane* court did not consider the earlier per curiam decision in *Seaman's*. As we noted in *Della Penna*, the *Seaman's* court "rel[ied] on the *first Restatement* . . . without reviewing or even mentioning intervening revaluations of the tort by the *Restatement Second*, other state high courts and our own Court of Appeal." (*Della Penna, supra, 11 Cal.4th at p. 389.*) Further, we expressly disapproved of our language in *Seaman's* to the extent that it was inconsistent with *Della Penna*. (*Della Penna, at p. 393, fn. 5.*) Thus, we find in *Quelimane*, which relies on *Della Penna* and the *Restatement Second of Torts*, a better representation than *Seaman's* of the current state of the law.

<sup>8</sup> This section states: "One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for pecuniary harm resulting from loss of the benefits of the relation, whether

comment d: "The intent required for this Section is that defined in § 8A. The interference with the other's prospective contractual relation is intentional if the actor desires to bring it about or if he knows that the interference is certain or substantially certain to occur as a result of his action. (See § 766, Comment J.)" ( *Rest.2d Torts, § 766B, com. d*, p. 22.)

In explaining the intent requirement for intentional interference with prospective economic advantage, the Restatement [\*\*\*\*43] Second of Torts specifically refers to the intent requirement for the tort of intentional interference with contract, as defined in *section 766, comment j*. We relied on this section of the Restatement in *Quelimane* to conclude that this tort contained no specific intent requirement. ( *Quelimane, supra, 19 Cal.4th at p. 56*.) In addition, the Restatement refers to the definition of intent in *section 8A*, which states: "The word 'intent' is used throughout the Restatement [Second] of [Torts] to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to derive from it." ( *Rest.2d Torts, § 8A*.) Comment [\*\*\*\*48] b to this section clarifies that "[i]ntent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result." ( *Rest.2d Torts, § 8A, com. b*, p. 15.)

Based on our reading of the Restatement and our discussion in *Quelimane* of the intent requirement, we reject Lockheed Martin's argument that the [\*\*\*\*44] tort of intentional interference with prospective economic advantage contains a requirement that a plaintiff plead and prove that the defendant acted with the specific intent, purpose, or design to interfere with the plaintiff's prospective advantage. Instead, we agree with the Restatement that it is sufficient for the [\*1157] plaintiff to plead that the defendant "[knew] that the interference is certain or substantially certain to occur as a result of his action." ( *Rest.2d Torts, § 766B, com. d*, p. 22.)<sup>9</sup>

#### C.

**CA(10a)[↑] (10a)** We caution that although we find the intent requirement to be the same for the torts of intentional interference with contract and intentional [\*\*\*\*45] interference with prospective economic advantage, these torts remain distinct. We reiterate our statement in *Della Penna* that "[o]ur courts should . . . firmly distinguish the two kinds of business contexts, bringing a greater solicitude to those relationships that have ripened into agreements, while recognizing that relationships short of that subsist in a zone where the rewards and risks of competition are dominant." ( *Della Penna, supra, 11 Cal.4th at p. 392*.)

We note initially that even though these two torts are distinct, some plaintiffs may be able to state causes of action for both torts. As we stated in *Buckaloo*, "the tort of interference with contract is merely a species of the broader tort of interference with prospective economic advantage." ( *Buckaloo, supra, 14 Cal.3d at p. 823*.) **CA(8c)[↑] (8c)** In the present case, KSC's claim was appropriately stated as one for [\*\*953] interference with prospective economic advantage. KSC did not allege in its complaint that it had a contractual agreement with MacDonald Dettwiler. KSC merely alleged that it had an economic expectancy in that it was acting as MacDonald Dettwiler's broker and it expected a commission [\*\*\*\*46] if the contract was awarded to MacDonald Dettwiler. KSC nowhere pleads that this expectancy amounted to an enforceable contract.

**CA(10b)[↑] (10b)** Moreover, the existence of a contract does not mean that a plaintiff's claim must be brought exclusively as one for interference with contract. In *Buckaloo*, we concluded that the tort of interference with prospective economic advantage "is considerably more inclusive than actions based on contract or interference with contract, and is thus is not dependent on the existence of a valid contract." ( *Buckaloo, supra, 14 Cal.3d at pp 826-827*; see *id. at p. 823, fn. 6* ["'the basic tort of interference with economic relations can be established by

the interference consists of [P] (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or [P] (b) preventing the other from acquiring or continuing the prospective relation." ( *Rest.2d Torts, § 766B*, p. 20.)

<sup>9</sup> We consider only whether, to state a claim for this tort, a plaintiff need allege that the defendant acted with a specific intent to interfere with the plaintiff's business expectancy. A defendant's intent, as defined in *section 8A of the Restatement Second of Torts*, is still a triable issue of fact. (See *Quelimane, supra, 19 Cal.4th at p. 57*.)

showing, *inter alia*, an interference with an [\*1158] existing contract or a contract which is [\*\*\*49] certain to be consummated" ].)<sup>10</sup> Thus, a plaintiff who believes that he or she has a contract but who recognizes that the trier of fact might conclude otherwise might bring claims for both torts so that in the event of a finding of no contract, the plaintiff might prevail on a claim for interference with prospective economic advantage. In the present case, even if KSC could have alleged [\*\*\*\*47] a contractual relationship with MacDonald Dettwiler, its claim was properly brought as one for interference with prospective economic advantage. As we explain below, however, [HN26](#)[<sup>↑</sup>] a plaintiff that chooses to bring a claim for interference with prospective economic advantage has a more rigorous pleading burden since it must show that the defendant's conduct was independently wrongful.

As we have made clear in both *Della Penna* and *Quelimane*, the distinction between these two torts is found in the independent wrongfulness requirement of the [\*\*\*\*48] tort of interference with prospective economic advantage. We stated in *Quelimane*: "Because interference with an existing contract receives greater solicitude than does interference with prospective economic advantage [citation], it is not necessary that the defendant's conduct be wrongful apart from the interference with the contract itself. [Citation.] [P] . . . Intentionally inducing or causing a breach of an existing contract is . . . a wrong in and of itself. Because this formal economic relationship does not exist and damages are speculative when remedies are sought for interference in what is only prospective economic advantage, *Della Penna* concluded that some wrongfulness apart from the impact of the defendant's conduct on that prospect should be required." ([Quelimane, supra, 19 Cal.4th at pp. 55-56.](#))

Thus, [HN27](#)[<sup>↑</sup>] while intentionally interfering with an existing contract is "a wrong in and of itself" ([Quelimane, supra, 19 Cal.4th at p. 56](#)), intentionally interfering with a plaintiff's prospective economic advantage is not. To establish a claim for interference with prospective economic advantage, therefore, a plaintiff must plead [\*\*\*49] that the defendant engaged in an independently wrongful act. (See [Della Penna, supra, 11 Cal.4th at p. 393](#).) An act is not independently wrongful merely because defendant acted with an improper motive. As we said in *Della Penna*, "the law usually takes care to draw lines of legal liability in a way that maximizes areas of competition free of legal penalties." ([Della Penna, supra, 11 Cal.4th at p. 392](#).) The tort of intentional interference with prospective economic advantage is not intended to punish individuals or commercial entities for their choice of [\*1159] commercial relationships or their pursuit of commercial objectives, unless their interference amounts to independently actionable conduct. ([\\*\\*954 Marin Tug & Barge, Inc. \(9th Cir. 2001\) 271 F.3d 825, 832](#).) We conclude, therefore, that an act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.<sup>11</sup> [\*\*\*50] (See [Marin Tug & Barge, Inc., supra, at p. 835](#); see also [Della Penna, supra, 11 Cal.4th at 408](#) (conc. opn. of Mosk, J.) ["It follows that [\*\*\*50] the tort may be satisfied by intentional interference with prospective economic advantage *by independently tortious means*".])

**CA(8d)[<sup>↑</sup>] (8d)** Here, KSC has clearly satisfied the independent wrongfulness requirement. In its complaint, KSC alleged that defendant Kim, as an agent for Loral, engaged in bribery and offered sexual favors to key Korean officials in order to obtain the contract from the Republic of Korea. Under the Foreign Corrupt Practices Act, it is unlawful to pay or offer money or anything of value to a foreign official for the purposes of influencing any act or decision of the foreign official, or to induce the foreign official to use his or her influence with a foreign government to affect or influence any act or decision of the government. ([15 U.S.C. § 78dd-1\(a\)\(1\)\(A\), \(B\).](#)) In addition, the complaint alleges that the commissions paid by Loral to Kim exceeded the maximum allowable

<sup>10</sup> The concurring and dissenting opinion contends that the *Buckaloo* court made other statements indicating that the two torts were mutually exclusive. But it is apparent that each of the statements it quotes in support of this contention, when read in context, are merely made in furtherance of *Buckaloo*'s central thesis: that the existence of a contract is not necessary to maintain an action for intentional interference with prospective economic advantage.

<sup>11</sup> We need not in this case further define which sources of law can be relied on to determine whether a defendant has engaged in an independently wrongful act, other than to say that such an act must be wrongful by some legal measure, rather than merely a product of an improper, but lawful, purpose or motive. To the extent that the lower courts have determined otherwise, these decisions are disapproved. (See, e.g., [PMC, Inc. v. Saban Entertainment, Inc. \(1996\) 45 Cal.App.4th 579, 603 \[52 Cal. Rptr. 2d 877\]](#) [stating that liability may arise from either improper motive or improper means].)

amounts established by the Foreign Corrupt Practices Act. ([15 U.S.C. § 78dd-2\(a\)\(1\)\(A\), \(B.\)](#)) The complaint thus clearly alleges that defendants engaged in unlawful behavior in order to secure the SAR contract. KSC has, therefore, sufficiently alleged that defendants' acts, in addition to interfering with KSC's business expectancy, were wrongful in and of themselves.

D.

**HN28**[] It is this independent wrongfulness requirement that makes defendants' interference with plaintiff's business expectancy a tortious act. Because we have determined that the act of interference with prospective economic advantage is not tortious in and of itself, the requirement of pleading that a defendant [\*\*\*\*52] has engaged in an act that was independently wrongful distinguishes lawful competitive behavior from tortious interference. Such a requirement "sensibly redresses the balance between providing a remedy for [\*1160] predatory economic behavior and keeping legitimate business competition outside litigative bounds." ([Della Penna, supra, 11 Cal.4th at p. 378.](#))

The independent wrongfulness requirement also differentiates California law from that of other states and the Restatement Second of Torts. Lockheed Martin's reliance on these authorities is unpersuasive since they require a plaintiff only to plead that the defendant's interference was improper, and not that the interference was independently unlawful. As we explain, California's independent wrongfulness requirement more narrowly defines actionable conduct under this tort.

According to the Restatement, there are two requirements for liability under this tort: The interference must be both intentional and improper. A defendant who "intentionally and improperly interferes with another's prospective contractual relation" is subject to liability. ([Rest.2d Torts, § 766B.](#)) The intent requirement, as described above, is [\*\*\*\*53] that the defendant either desires to bring about the interference or knows that the interference is certain or substantially certain to occur as a result of its action. ([Rest.2d Torts, § 766B, com. d.](#), p. 22.) In addition to this [\*\*\*51] general intent, the second requirement is that "[t]he interference . . . must also be improper. The factors to be considered in determining whether an interference is improper are stated in [§ 767](#). One of them is the actor's motive and another is the interest sought to be advanced by him. Together these factors [\*\*955] mean that the actor's purpose is of substantial significance. If he had no desire to effectuate the interference by his action but knew that it would be a mere incidental result of conduct he was engaging in for another purpose, the interference may be found to be not improper. Other factors come into play here, however, particularly the nature of the actor's conduct. *If the means used is innately wrongful, predatory in character, a purpose to produce the interference may not be necessary.* On the other hand, if the sole purpose of the actor is to vent his ill will, the interference may be improper although the means are less blameworthy." ([\*\*\*\*54] [Rest.2d Torts, § 766B, com. d.](#), pp. 22-23, italics added.)

Unlike California, the Restatement Second of Torts does not require a plaintiff to plead that a defendant engaged in an independently wrongful act in order to show "improper" interference. Instead, a general intent plus an actor's motive or purpose to interfere is enough to subject a defendant to liability under the Restatement. In the absence of an independent wrongfulness requirement, a purpose to interfere with the plaintiff's business expectancy suffices to distinguish actionable conduct from behavior that is merely competitive, and therefore privileged. The Restatement, however, recognizes that when the defendant's conduct is innately wrongful, a purpose to interfere may be unnecessary. The Restatement appreciates that the independent [\*1161] wrongfulness of a defendant's acts may satisfy the "improper" requirement of the tort without the need to look to the motive or purpose behind a defendant's acts.

Thus, while California does follow the Restatement's general intent requirement, California law adheres to a narrower interpretation of what conduct is improper under this tort. After [Della Penna, supra, 11 Cal.4th 376,](#) [\*\*\*\*55] **HN29**[] California has required plaintiffs to show that a defendant has engaged in an independently, or inherently, wrongful act. Under this requirement, a defendant's motive or purpose is relevant only to the extent that it renders the defendant's conduct unlawful. We are therefore unconvinced by Lockheed Martin's reliance on the Restatement in this regard.

Lockheed Martin's citation to out-of-state decisions holding that a plaintiff must plead that the defendant acted with a specific intent or purpose to interfere with the plaintiff's economic relations is similarly unpersuasive. Like the Restatement Second of Torts, the cases cited by Lockheed Martin look to a defendant's motive or purpose to distinguish tortious conduct from lawful behavior. (See, e.g., *Ethyl Corp. v. Balter* (Fla. Dist. Ct. App. 1980) 386 So. 2d 1220, 1223 [finding no interference because the defendant's purpose or motive was not directed at the plaintiff]; *Bank Computer Network Corp. v. Continental Illinois Nat'l Bank and Trust Co.* (1982) 110 Ill. App. 3d 492 [442 N.E.2d 586, 593, 66 Ill. Dec. 160] [same]; *K&K Management v. Lee* (1989) 316 Md. 137 [557 A.2d 965, 975] [\*\*\*\*56] [same]; *Anderson v. The Regents of the Univ. of California* (1996) 203 Wis. 2d 469 [554 N.W.2d 509, 519] [same].) Unlike California, however, these states do not require a plaintiff to plead that the defendant has engaged in an independently wrongful act in order to state a claim for interference with prospective economic advantage. Instead of independent wrongfulness, a plaintiff is required [\*\*\*52] to plead a purpose or motive to interfere in order to demonstrate that the defendant's interference was improper.

We additionally reject Lockheed Martin's reliance on *DeVoto v. Pacific Fidelity Life Insurance Co.* (9th Cir. 1980) 618 F.2d 1340 (*DeVoto*). In that case, the Ninth Circuit Court of Appeals attempted to anticipate whether California courts would require a plaintiff to plead that the defendant acted with a specific purpose or motive to interfere with the plaintiff's prospective economic advantage. ( *Id. at p. 1347*.) *DeVoto* was decided prior to our opinions in *Della Penna, supra, 11 Cal.4th 376*, and *Quelimane, supra, 19 Cal.4th 26*, and, as the Ninth Circuit noted, there was "a [\*\*\*\*57] scarcity of pertinent authority on this issue." ( *DeVoto, 618 F.2d at p. 1347*.) We agree with the Court of Appeal in the present case that *DeVoto* "does not support the requirement of an allegation of purposeful intent directed specifically at the plaintiff in every [\*1162] case." Instead, the *DeVoto* court states: "*Where the* [\*\*956] actor's conduct is not criminal or fraudulent, and absent some other aggravating circumstances, it is necessary to identify those whom the actor had a specific motive or purpose to injure by his interference and to limit liability accordingly." ( *DeVoto, supra, 618 F.2d at p. 1347*, italics added.)

The *DeVoto* court, then, determined that a defendant's motive or purpose to interfere is a necessary element only when the defendant's conduct is not independently unlawful. After *Della Penna*, independent wrongfulness has been recognized as a required element of the tort. Therefore, an additional showing of specific intent to interfere is not necessary.

#### E.

Lockheed Martin additionally argues that a specific intent requirement is necessary to prevent potential plaintiffs with injuries remotely caused by a defendant's acts from maintaining [\*\*\*\*58] standing to sue for this tort. It contends that since KSC is an indirect victim of defendants' alleged acts of interference, KSC should only be able to state a claim if it can show that Lockheed Martin acted with the purpose of interfering with KSC's economic expectancy. We disagree. Were we to adopt a specific intent requirement, a plaintiff's standing would turn on the subjective intent of a defendant who has committed an independently wrongful act. Such a requirement would lead to absurd and unfair results. A defendant who engaged in an unlawful act knowing that it would harm the plaintiff's business interest could escape liability if the defendant acted with the purpose of furthering its own interest, rather than specifically harming the plaintiff's interest. Standing for this tort should not be made to turn on such a consideration.

As support for its argument, Lockheed Martin cites *section 767 of the Restatement Second of Torts* and argues that a defendant must act with the specific intent of interfering with a plaintiff's business expectancy when the plaintiff is not the direct victim of the interference. We note, however, that *section 767 of the* [\*\*\*\*59] *Restatement Second of Torts* is entitled Factors in Determining Whether Interference is Improper. This section, then, refers to the element of the tort that defines when interference is improper, not to the element that defines the required intent. As stated above, California law does not follow the Restatement's definition of when interference is improper. Instead, California law defines "improper" more narrowly than the Restatement, allowing recovery only when the defendant's conduct is independently unlawful.

We further note that even the Restatement, with its broader definition of improper [\*\*\*53] conduct, recognizes that an indirectly injured plaintiff may state a [\*1163] claim under this tort without pleading that the defendant acted with the purpose to interfere with the plaintiff's business expectancy. [Section 767, comment h](#), of the Restatement, discussing the proximity or remoteness of the defendant's conduct to the interference, supports our conclusion: "This remoteness [between the defendant's conduct and the plaintiff's injury] conduces toward a finding that the interference was not improper. The weight of this factor, however, may be controverted by . . . the factor of the actor's conduct if that conduct [\*\*\*\*60] was inherently unlawful or independently tortious." ([Rest.2d Torts, § 767, com. h](#), p. 36, italics added.)<sup>12</sup> If the defendant's improper conduct constitutes independently wrongful behavior, the fact that the plaintiff is an indirect victim does not preclude recovery.

Contrary to the arguments of Lockheed Martin and the concurring and dissenting opinion, [HN30](#)<sup>13</sup> we find no sound reason for requiring that a defendant's wrongful actions must be directed towards the plaintiff seeking to recover for this tort. The interfering party is liable to the interfered-with party "when the independently tortious means the interfering party uses are independently tortious *only as to a third party*. Even under these circumstances, the interfered-with [\*\*\*\*61] party remains an intended (or at least known) victim of the interfering party--albeit one that is [\*\*957] indirect rather than direct." ([Della Penna, supra, 11 Cal.4th at p. 409](#) (conc. opn. of Mosk, J.) [citing [Rest.2d Torts, § 767, com. c](#), pp. 29-30].) In fact, "[t]he most numerous of the tortious interference cases are those in which the disruption is caused by an act directed not at the plaintiff, but at a third person." (Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine* (1982) 49 U.Chi.L.Rev. 61, 106.)

We do not share the concern of Lockheed Martin and the concurring and dissenting opinion that our ruling today will expose defendants to an unlimited number of potential plaintiffs.<sup>14</sup> [\*\*\*\*63] The "substantial [\*\*\*54] certainty" test used in the Restatement, coupled with the independent wrongfulness requirement of [\*1164] *Della Penna*, sufficiently limits this tort. It is important to underscore that the independent wrongfulness requirement of this tort limits the class of potential *defendants*; only defendants who have engaged in an unlawful act can be held liable for this tort. In addition, as described below, [\*\*\*\*62] each of the five elements of the tort of interference with prospective economic advantage serves to limit the number of potential plaintiffs that can state a cause of action for this tort.<sup>14</sup>

<sup>12</sup>Contrary to the assertion of the concurring and dissenting opinion, [section 767](#) "applies to each form of the tort," and is therefore applicable to both interference with contract and interference with prospective economic advantage. ([Rest.2d Torts, § 767, com. a](#), p. 27.)

<sup>13</sup>Further, we find federal cases discussing antitrust and RICO (Racketeer Influenced and Corrupt Organizations Act) law to be inapplicable to the question of whether a plaintiff may state a claim under the California common law tort of interference with prospective economic advantage. The federal antitrust cases cited by the concurring and dissenting opinion address the question of whether the plaintiffs in those cases could maintain standing under section 4 of the Clayton Act ([15 U.S.C. § 15](#)). ([Associated General Contractors v. California State Council of Carpenters](#) (1983) 459 U.S. 519, 529 [74 L. Ed. 2d 723, 103 S. Ct. 897].) To answer this question, these courts engage, *inter alia*, in an analysis of the statutory language of the Clayton Act, as well as its relevant legislative history and objectives. ([459 U.S. at pp. 529-531, 538-540](#).) The question of whether a plaintiff has standing to bring a claim under a California common law tort is not subject to the same considerations and limitations that were raised in the Clayton Act and RICO cases. Adopting this federal case law would be a significant departure from our prior cases discussing this tort, especially [Buckaloo, supra, 14 Cal.3d 815](#), and [Della Penna, supra, 11 Cal.4th 376](#). Nevertheless, the concurring and dissenting opinion points to the Restatement, which states in [section 768, comment f](#), that "there is therefore interplay between **[antitrust] law** and the law of tortious interference with prospective contractual relations." The concurring and dissenting opinion fails to include the remainder of this sentence, which continues: "**[antitrust] law** is so involved and is so primarily concerned with areas of public law *only tangentially related* to tort law that it must be regarded as *outside the scope* of the Restatement of Torts." ([Rest.2d Torts, § 768, com. c](#), p. 43, italics added.)

<sup>14</sup>We address only plaintiff's allegations as pleaded in its complaint. We express no view as to whether plaintiff's proof will be sufficient to establish these elements at trial.

First, [HN31](#) a plaintiff that wishes to state a cause of action for this tort must allege the existence of an economic relationship with some third party that contains the probability of future economic benefit to the plaintiff. This tort therefore "protects the expectation that the relationship eventually will yield the desired benefit, not necessarily the more speculative expectation that a potentially beneficial relationship will arise." (*Westside Center Associates v. Safeway Stores 23, Inc., supra*, 42 Cal.App.4th at p. 524.) Here, KSC had an agency relationship with MacDonald Dettwiler under which KSC's commission was fixed at 15 percent of the contract price. As alleged in the complaint, if MacDonald Dettwiler had been awarded the contract, KSC's commission would have exceeded \$ 30 million. This business relationship and corresponding expectancy is sufficient to meet this first element. Only plaintiffs [\*\*\*64] that can demonstrate an economic relationship with a probable future economic benefit will be able to state a cause of action for this tort.

Second, [HN32](#) a defendant must have knowledge of the plaintiff's economic relationship. KSC alleges that "Loral acted with full knowledge of the commission relationship between plaintiff and MacDonald Dettwiler." Again, this element serves to restrict the class of plaintiffs that can state a claim for this tort.

Third, [HN33](#) the defendant must have engaged in intentionally wrongful acts designed to disrupt the plaintiff's relationship. As discussed above, this requires a plaintiff to [\*\*958] plead (1) that the defendant engaged in an independently wrongful act, and (2) that the defendant acted either with the desire to [\*1165] interfere or the knowledge that interference was certain or substantially certain to occur as a result of its action. Here, KSC alleges that defendants bribed and offered sexual favors to Korean officials, and paid excessive commissions, in violation of the Foreign Corrupt Practices Act. Further, KSC claims that Loral acted "knowing that its interference with the award of the contract on a competitive basis would cause plaintiff severe loss. [\*\*\*65] "

This intent requirement is an appropriate limitation on both the potential number of plaintiffs that may bring a claim under this tort and the remoteness of these plaintiffs to a defendant's wrongful conduct. At the very least, a defendant must know that its action is substantially certain to interfere with the plaintiff's business expectancy. This interference becomes less certain as the time frame expands, the identity of potential victims becomes more vague, the causal sequence becomes more attenuated, and the assumption of easy preventability becomes less plausible. [HN34](#) If the interference is not certain or substantially certain to occur as a result of the defendant's acts, [\*\*\*55] then a plaintiff will not be able to state a claim for intentional interference with prospective economic advantage. However, if a defendant knows that its wrongful acts are substantially certain to injure the plaintiff's business expectancy, the defendant can be held liable, regardless of the motivation behind its actions.

Liability will not be imposed for unforeseeable harm, since the plaintiff must prove that the defendant knew that the consequences were substantially certain to occur. For example, [\*\*\*66] if the president of MacDonald Dettwiler stood to receive a bonus if the company secured the SAR contract, it would be unlikely that Lockheed Martin would have known this with substantial certainty. Here, however, KSC has alleged that defendants had full knowledge of its commission relationship with MacDonald Dettwiler and that KSC would lose its commission if Lockheed Martin secured the contract through anticompetitive means.

Fourth, [HN35](#) only plaintiffs that can demonstrate actual disruption of their economic relationship will be able to state a claim for this tort. In this case, KSC sufficiently pleads actual disruption by alleging that it did not receive its expected commission, since MacDonald Dettwiler was not awarded the contract.

Fifth, [HN36](#) a plaintiff must establish proximate causation. Specifically, this element requires a plaintiff to show that the economic harm it suffered was proximately caused by the acts of the defendant. Here, KSC claims that MacDonald Dettwiler would have been awarded the contract but for Lockheed Martin's interference. KSC specifically pleads that MacDonald [\*1166] Dettwiler's product was superior and that its bid was significantly lower than the bid submitted [\*\*\*67] by Lockheed Martin. KSC also alleges that its own loss of commission from MacDonald Dettwiler was directly caused by Lockheed Martin's tortious acts. We therefore conclude that KSC has satisfied the proximate cause element. In other cases, however, this proximate cause requirement will prevent a plaintiff from recovering for harm that is more remotely connected to a defendant's wrongful conduct.

**HN37** [+] An actor engaging in unlawful conduct with the knowledge that its actions are certain or substantially certain to interfere with a party's business expectancy should be held accountable. Liability for such actions, which are independently wrongful, should not turn on the subjective intent of the defendant.

We conclude that the Court of Appeal correctly determined that to state a claim for intentional interference with prospective economic advantage, a plaintiff need not plead that the defendant acted with the specific intent to interfere with the plaintiff's business expectancy.<sup>15</sup> Further, we agree that [\*\*959] plaintiff in this case has sufficiently pled that defendants acted with the required intent, that is, the knowledge that its actions were certain or substantially certain [\*\*\*68] to interfere with plaintiff's business expectancy.

#### IV.

We reverse the judgment of the Court of Appeal with respect to its holding that [\*\*\*56] plaintiff has stated a cause of action under the unfair competition law and we affirm the judgment of the Court of Appeal with respect to its determination that plaintiff has stated a cause of action for the tort of interference with prospective economic advantage. The present case is remanded to the Court of Appeal for proceedings consistent with this opinion.

Kennard, Acting C. J., Baxter, J., Werdegar, J., and Rubin, J., \* concurred.

[\*\*\*69]

**Concur by:** KENNARD; WERDEGAR; CHIN

#### Concur

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##### KENNARD, Acting C. J.

I concur in the majority opinion.

The majority holds that disgorgement of profits is not an available remedy under California's unfair competition law (UCL) ([\*1167] *Bus. & Prof. Code, § 17200 et seq.*) when the action is brought by an individual entity on its own behalf. This conclusion logically follows from this court's decision in *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116 [96 Cal. Rptr. 2d 485, 999 P.2d 718] (*Kraus*). That case held that disgorgement of profits is not an available remedy in a representative action under the UCL when the case is not brought as a class action. *Kraus* explained: "[T]he Legislature has not expressly authorized monetary relief other than restitution in UCL actions, but has authorized disgorgement into a fluid recovery fund in class actions. Although the Legislature is well aware of the distinction between class actions and representative actions, it has not done so for representative UCL actions." (*Id. at p. 137*) On this issue, I agreed with the majority in *Kraus*.

I wrote separately in *Kraus*, however, because [\*\*\*70] I was troubled by dictum in that case suggesting "it may be appropriate . . . to condition payment of restitution to [nonparty] beneficiaries of a representative UCL action on execution of acknowledgement that the payment is in full settlement of claims against the defendant." (*Kraus, supra*, 23 Cal. 4th at p. 142 (conc. opn. of Kennard, J.) quoting maj. opn., *id. at pp. 138-139*.) But here the issue of conditioning payment of restitution to nonparty beneficiaries in a representative UCL action is not implicated because this case involves an individual entity, the agent of unsuccessful bidders for a lucrative contract to supply

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<sup>15</sup> As noted above, however, we disagree with the Court of Appeal's determination that, after *Della Penna, supra*, 11 Cal.4th 376, it is no longer appropriate for courts to apply elements of this tort that we first formulated in *Buckaloo, supra*, 14 Cal.3d 815, with the addition of the independent wrongfulness requirement.

\* Associate Justice of the Court of Appeal, Second Appellate District, Division Eight, assigned by the Acting Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

military equipment to the Republic of Korea. Because plaintiff here paid no money to defendant successful bidder, I agree with the majority that plaintiff is not entitled to restitution. (Maj. opn., *ante*, at p. 1149.)

#### **WERDEGAR, J., Concurring.**

I agree with the majority that a plaintiff, in order to state a claim for interference with prospective economic advantage, need not plead that a defendant acted with the specific intent to interfere with the plaintiff's business expectancy, and with the [\*\*\*\*71] reasoning leading to that conclusion. (Maj. opn., *ante*, at pp. 1141, 1153-1166.) Under compulsion of [\*Kraus v. Trinity Management Services, Inc. \(2000\) 23 Cal.4th 116 \[96 Cal. Rptr. 2d 485, 999 P.2d 718\]\*](#), from which I dissented, I further agree that nonrestitutionary disgorgement of profits is not an available remedy in an individual action under the unfair competition law, [\*\*\*57] [\*Business and Professions Code section 17200 et seq.\*](#) (Maj. opn., *ante*, at p. 1152.) Accordingly, I concur in the judgment.

Dissent by: [\*1168] CHIN

#### **Dissent**

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##### **CHIN, J.. [\*\*960] Concurring and Dissenting.**

I agree with the majority's conclusion that disgorgement of profits is not a proper remedy where an individual private plaintiff alleges a violation of California's unfair competition law ([\*Bus. & Prof. Code, § 17200 et seq.\*](#)) and the requested disgorgement would not be restitutionary in nature. However, I dissent from the majority's conclusion that recovery for intentional interference with prospective advantage is available to a plaintiff whose alleged injury only indirectly and remotely followed from the defendant's interference with the prospective economic advantage [\*\*\*\*72] of a third party with whom the plaintiff had a contractual relationship. Here, plaintiff Korea Supply Company (KSC) alleges that it sustained such remote, indirect, and derivative injury as a result of the interference by defendants Lockheed Martin Tactical Systems, Inc., and Lockheed Martin Corporation (collectively Lockheed) with the prospective economic advantage of MacDonald, Dettwiler, and Associates Ltd. (MacDonald). Thus, in my view, KSC may not state a claim for intentional interference with prospective economic advantage.

##### **I. KSC'S CLAIM FAILS FOR LACK OF A PROSPECTIVE ECONOMIC ADVANTAGE.**

As a threshold matter, KSC has improperly brought its claim as one for intentional interference with prospective economic advantage, when it should have brought the claim, if at all, as one for interference with contract. The "first element" of a claim for intentional interference with prospective economic advantage is "an economic relationship between the plaintiff and some third person containing the probability of future economic benefit to the plaintiff." ([\*Blank v. Kirwan \(1985\) 39 Cal.3d 311, 330 \[216 Cal. Rptr. 718, 703 P.2d 58\]\*](#)) Here, KSC had no existing or prospective [\*\*\*\*73] economic relationship with the Republic of Korea, which is the only entity with which Lockheed had any dealings. As KSC alleged and as the majority explains (maj. opn., *ante*, at p. 1150), KSC expected to receive payment from *MacDonald*, not from the Republic of Korea. Thus, KSC's only economic relationship here was its existing *contractual* relationship with MacDonald, and KSC alleges that Lockheed's actions prevented KSC from realizing the benefits of that existing contract. Given these allegations, KSC's claim is, in reality, a claim for interference with contract, not intentional interference with prospective economic advantage. As the Restatement Second of Torts (Restatement Second) explains, the latter claim "is concerned *only* with intentional interference with prospective contractual relations, *not yet reduced to contract*." ([\*Rest.2d, § 766B, com. a\*](#), p. 20, italics added; see also [\*Shoemaker v. Myers \(1990\) 52 Cal.3d 1, 24 \[276 Cal. Rptr. 303, 801 P.2d 1054\]\*](#) [complaint identifying "no 'prospective economic advantage' other than continuation of [plaintiff's] employment relationship" [\*1169] is, "in reality," claim for inducement of breach of contract]. [\*\*\*\*74] ) Thus, as Lockheed argued in its demurrer, KSC's claim for prospective economic advantage fails at the threshold because the complaint fails to allege "a prospective economic relationship between [KSC] and a third person, and the disruption of that relationship."

In reaching a contrary conclusion, the majority errs factually in stating that KSC does "not allege" that it had a contractual [\*\*\*58] agreement with MacDonald. (Maj. opn., *ante*, at p. 1157.) KSC's complaint alleges that KSC

had a "commission relationship" with MacDonald providing for KSC to receive "fifteen percent (15) of the contract price," and that Lockheed's interference caused KSC to lose "its agreed commission." (Italics added.) At oral argument before us, KSC cited these allegations in arguing that it had alleged a "contract between" itself and MacDonald. Similarly, at the hearing on Lockheed's demurrer, KSC argued that it could pursue the interference claim because it "had a contract with [MacDonald] affording [KSC] a 15 percent commission on the contract price if [MacDonald] won the contract." (Italics added.) In the Court of Appeal, KSC argued that it "was contractually entitled to receive fifteen [\*\*\*\*75] percent (15) of the contract price" if MacDonald obtained the contract, that its economic interests were intertwined with MacDonald "given [its] contractual representation [\*\*961] of MacDonald . . . and its contractual entitlement to a commission" if MacDonald obtained the contract, and that it could pursue the interference claim "by virtue of its commissionable contractual interest" in MacDonald's prospective contract. (Italics added.) Thus, the record demonstrates that the majority is simply wrong in asserting that KSC does not allege "an enforceable contract" with MacDonald. (Maj. opn., *ante*, at p. 1157.) Moreover, because this case comes to us after the sustaining of a demurrer, we must assume, based on these allegations, that KSC had a valid and enforceable commission contract with MacDonald.

The majority also errs in asserting that "the existence of a contract does not mean that a plaintiff's claim must be brought exclusively as one for interference with contract." (Maj. opn., *ante*, at p. 1157.) As support for its assertion, the majority cites dictum in *Buckaloo v. Johnson* (1975) 14 Cal.3d 815 [122 Cal. Rptr. 745, 537 P.2d 865] (*Buckaloo*). (Maj. [\*\*\*\*76] opn., *ante*, at p. 1157.) In generally describing the historical development of the interference torts, *Buckaloo* stated that "the tort of interference with contract is merely a species of the broader tort of interference with prospective economic advantage." (*Buckaloo, supra, 14 Cal. 3d at p. 823.*) *Buckaloo* also stated that the tort of intentional interference with prospective economic advantage "is considerably more inclusive than actions based on contract or interference with contract, and thus is not dependent on the existence of a [\*1170] valid contract." (*Id. at pp. 826-827.*) *Buckaloo* also seemingly endorsed a federal district court's view that " '[r]ather than characterizing' interference with contract and intentional interference with prospective business relations "as separate torts, the more rational approach seems to be that the basic tort of interference with economic relations can be established by showing, *inter alia*, an interference with an existing contract or a contract which is certain to be consummated . . . ." (*Id. at p. 823, fn. 6.*) The majority's assertion rests exclusively on this dictum. (See maj. opn. [\*\*\*\*77] , *ante*, at p. 1157.)

For several reasons, *Buckaloo*'s dictum is insufficient to support the majority's conclusion. First, other statements in *Buckaloo* contradict the majority's analysis. *Buckaloo* explained that the tort of intentional interference with prospective advantage applies where "a prospective economic relationship has not attained the dignity of a legally enforceable [\*\*\*59] agreement . . . ." (*Buckaloo, supra, 14 Cal. 3d at p. 827.*) *Buckaloo* also stressed that the "area of activity" this tort protects "is not a contractual relationship but an economic relationship with the potential to ripen into contract." (*Id. at p. 830, fn. 7.*) It is in this sense--the protection of *noncontractual* relationships--that *Buckaloo* stated that the tort of intentional interference with prospective advantage "is considerably more inclusive than" the tort of interference with contract. (*Id. at pp. 826-827.*) As the statements I have quoted make clear, *Buckaloo* was not, as the majority incorrectly suggests, indicating that the tort of intentional interference with prospective economic advantage *also* includes claims based on a [\*\*\*\*78] valid and enforceable contract. Thus, several statements in *Buckaloo* contradict the majority's view that a plaintiff may base a claim for intentional interference with prospective advantage on an interference with a valid and enforceable contract.<sup>1</sup>

Second, the majority's reliance on *Buckaloo*'s dictum is also incorrect because the federal decision *Buckaloo* endorsed did not, [\*\*962] as the majority erroneously suggests, [\*\*\*\*79] state that a claim for interference with contract may be brought as one for intentional interference with prospective economic advantage. Rather, it suggested that these claims should be recognized not as " 'separate torts,' " but as alternative theories for

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<sup>1</sup> The majority asserts that these statements were "merely made in furtherance of *Buckaloo*'s central thesis: that the existence of a contract is not necessary to maintain an action for intentional interference with prospective economic advantage." (Maj. opn., *ante*, at p. 1158, fn 10.) What the majority fails to understand, and what the statements I have quoted establish, is that this thesis does not, as the majority incorrectly concludes, imply that an action for intentional interference with prospective economic advantage may be brought where there *is* a valid contract.

establishing a single, broader tort called " 'interference with economic relations.' " (*Buckaloo, supra, 14 Cal. 3d at p. 823, fn. 6*, quoting *Builders Corporation of America v. United States (N.D.Cal. 1957) 148 F. Supp. 482, 484, fn. 1*, revd. on other [\*1171] grounds (9th Cir. 1958) [259 F.2d 766](#).) Despite *Buckaloo*'s dictum, we have not recognized this broader tort. On the contrary, we have stressed the "need to draw and enforce a sharpened distinction between claims for the tortious disruption of an *existing* contract and claims that a *prospective* contractual or economic relationship has been interfered with by the defendant." (*Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal.4th 376, 392 [45 Cal. Rptr. 2d 436, 902 P.2d 740]*) (*Della Penna*.) Indeed, the majority purports to "reiterate" *Della Penna*'s statement that California courts should " 'firmly distinguish' " between these [\*\*\*\*80] two separate torts. (Maj. opn., *ante*, at p. 1157.) Unfortunately, the majority fails to follow this statement.

Finally, the other statement from *Buckaloo* the majority cites--that " 'the tort of interference with contract is merely a species of the broader tort of interference with prospective economic advantage' " (maj. opn., *ante*, at p. 1157)--is both imprecise and incorrect. *Buckaloo* cited several authorities as establishing this proposition, but none of them stated that the tort of interference with contract is a species of the tort of intentional interference with prospective economic advantage. Rather, to the extent they spoke to this question, consistent with the federal decision discussed above, they characterized or [\*\*\*60] analyzed interference with contract and intentional interference with prospective economic advantage as separate aspects of the broader "subject of interference with commercial or economic relations." (Prosser, *Torts* (4th ed. 1971) § 128, p. 915; see also 1 Harper & James, *Torts* (1956) § 6.5, p. 489 [interference with contract "is one of several segments of a large area of the law of tort in which damages may be recovered for unlawfully causing [\*\*\*\*81] loss to the plaintiff in connection with his business relations"]; *id.* at §§ 6.7, 6.11, pp. 495, 510 [actions for interference with contract and interference with reasonable economic expectations protect different rights and interests]; 4 Witkin, *Summary of Cal. Law* (8th ed. 1974) *Torts*, §§ 380-391, pp. 2634-2643; Note, *Developments in the Law--Competitive Torts* (1964) 77 Harv. L.Rev. 888, 961 [stressing "the difference between the action for inducing breach of contract and the action for interference with prospective advantage"].) <sup>2</sup> Consistent with these authorities, in an extensive historical discussion, we have previously labeled "interference with contract" and "interference with prospective economic relations" as, generally, "the so-called 'interference torts,' " and characterized them as "two torts" that are "sibling[s]." (*Della Penna, supra, 11 Cal. 4th at p. 381*.) Thus, *Buckaloo*'s dictum is erroneous and it fails to support the majority's assertion that KSC may properly base a claim for intentional interference with prospective economic advantage on allegations that Lockheed interfered with the existing contract between KSC and MacDonald.

[\*\*\*\*82] [\*1172] The discussion of this subject in the Restatement Second, on which the majority heavily relies, fully supports the conclusion that *Buckaloo*'s dictum, and the majority's conclusion based on that dictum, are incorrect. Consistent with the authorities I have already discussed, the Restatement Second explains that interference with contract and "interference with prospective advantage" are separate "form[s]" of the broader subject of "intentional interference with business relations." (Rest.2d, § 766A, com. b, p. 18; see also *id.*, [§ 767, com. j](#), p. 37 [interference with contract and interference with prospective [\*\*963] economic advantage are separate "forms of interference with business relations"].) The Restatement Second also explains that, as their names suggest, intentional interference with contract involves only interference with an "existing contract," whereas intentional interference with prospective economic advantage "is concerned *only* with intentional interference with prospective contractual relations *not yet reduced to contract*." (*Rest.2d, § 766B, com. a*, p. 20, italics added.) Thus, the Restatement Second supports the conclusion that because KSC alleges only [\*\*\*\*83] a loss of benefits under its *existing* contract with MacDonald, and it had no *prospective* relationship with the Republic of Korea, its claim for intentional interference with prospective economic advantage fails at the threshold for lack of a prospective economic advantage with which Lockheed allegedly interfered. The majority's contrary conclusion improperly "blurs the analytical line between interference with an existing business contract and interference with commercial relations *less than contractual*," thus "invit[ing] both uncertainty and unpredictability . . ." (*Della Penna, supra, 11 Cal. 4th at p. 392*.)

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<sup>2</sup> *Buckaloo* also cited Bernhardt, *California Real Estate Transactions* (Cont.Ed.Bar 1974 supp.) section 5.81. (*Buckaloo, supra, 14 Cal. 3d at p. 823*.) That source did not address the issue or otherwise support *Buckaloo*'s statement.

[\*\*\*61] II. KSC'S ALLEGED INJURIES ARE TOO REMOTE TO WARRANT RECOVERY.

In its demurrer, Lockheed argued that "the economic relationship [it] allegedly disrupted was MacDonald's . . . effort to obtain the award of the . . . contract from" the Republic of Korea, and that KSC's alleged injury was merely "an indirect consequence of" this alleged disruption. This indirect injury, Lockheed continued, "does not give rise to a claim for intentional interference with prospective economic advantage because [KSC] cannot show that the injury resulted from the disruption [\*\*\*\*84] of a prospective economic relationship to which [KSC] was a party." In sustaining the demurrer, the trial court agreed with Lockheed, finding that KSC's claim failed because it was "secondary and derivative and indirect and [KSC] has found no case from any U.S. state or federal jurisdiction giving cognizance to a comparable secondary or derivative or indirect claim."

The majority rejects this view and holds that "an indirectly injured plaintiff may state a claim" for intentional interference with prospective [\*1173] economic advantage, and may do so "without pleading that the defendant acted with the purpose to interfere with the plaintiff's business expectancy." (Maj. opn., *ante*, at pp. 1162-1163.) The majority gives scant attention to this issue. It cites no decisions, from California or elsewhere, supporting either its analysis or its holding. The sole authority the majority cites is a portion of comment h to [section 767 of the Restatement Second](#) (comment h). The majority states: "[Section 767, comment h](#), of the Restatement [Second], discussing the proximity or remoteness of the defendant's conduct to the interference, supports our conclusion: 'This remoteness [between the defendant's [\*\*\*\*85] conduct and the plaintiff's injury] conduces toward a finding that the interference was not improper. The weight of this factor, however, may be controverted by . . . the factor of the actor's conduct if that conduct was inherently unlawful or independently tortious.' [Citation.] If the defendant's improper conduct constitutes independently wrongful behavior, the fact that the plaintiff is an indirect victim does [\*\*964] not preclude recovery." (Maj. opn., *ante*, at p. 1163, fn. omitted.)

For several reasons, comment h is insufficient support for the majority's conclusion that KSC's status as "an indirect victim does not preclude recovery." (Maj. opn., *ante*, at p. 1163.) First, comment h does not, as the majority suggests, categorically state that a defendant's commission of an independently wrongful act *does* overcome remoteness between the defendant's conduct and the plaintiff's injury. Rather, in decidedly equivocal terms, comment h states that the significance of remoteness "may be controverted . . . perhaps by the factor of the actor's conduct if that conduct was inherently unlawful or independently tortious." ([Rest.2d Torts, § 767, com. h](#), p. 36, italics added. [\*\*\*\*86]) Comment h's equivocal language does not support the majority's categorical holding that where a defendant's conduct is independently wrongful, "the fact that the plaintiff is an indirect victim does not preclude recovery."<sup>3</sup> (Maj. opn., *ante*, at p. 1163.)

[\*\*\*62] Second, comment h addresses proximity and remoteness in the context of an interference with an existing contract, not an interference with a merely prospective economic advantage. This fact is clear from the portion of comment h that immediately precedes the portion the majority quotes, which states: "If [\*\*\*\*87] . . . A induces B to sell certain goods to him and thereby causes him not to perform his *contract* to supply the goods to C, this may also have the effect of preventing C from performing his *contractual obligations* to [\*1174] supply them to D and E. C's failure to perform *his contracts* is a much more indirect and remote consequence of A's conduct than B's breach of his contract with C, even assuming that A was aware of all *contractual obligations* and the interference can be called intentional." ([Rest.2d, § 767, com. h](#), p. 36, italics added.) This fact is significant because, as the Restatement Second elsewhere explains, the law affords "greater protection . . . to the interest in an existing contract than to the interest in acquiring prospective contractual relations," and [section 767](#)'s "weighing process" therefore "does not necessarily reach the same result in regard to" these separate "forms of interference with business relations." ([Rest.2d, § 767, com. j](#), p. 37; see also *id.*, com. a, p. 27 [weight of various factors "may vary considerably" with respect to different "forms of the tort"].) Thus, comment h's discussion of the interaction between independently wrongful [\*\*\*\*88] means and remoteness in the context of an interference with an existing contract

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<sup>3</sup> Comment b of [section 767 of the Restatement Second](#) makes the same point. In discussing "the interplay between" a defendant's "motive" and "the nature of [his or her] conduct," it states, in equivocal terms, that "[i]f the conduct is independently wrongful . . . the desire to interfere with the other's contractual relations *may be less essential* to a holding that the interference is improper." ([Rest.2d, § 767, com. on](#) cl. b, p. 33, italics added.)

does not necessarily apply to the same extent with regard to an interference with a merely prospective economic advantage. By failing to distinguish between these torts, the majority, in the words of the Restatement Second, "produce[s] a blurring of the significance of the factors involved in determining liability."<sup>4</sup> (Rest.2d, ch. 37, Introductory Note, p. 5.)

[\*\*\*\*89] Third, and most important, the Restatement Second's sections and comments regarding interference with contract and intentional interference with prospective economic advantage do not even purport to address the fundamental question before us: whether Lockheed's alleged interference is the legal cause of the remote, indirect, and derivative injury KSC alleges. The relevant sections of the Restatement Second state rules for determining whether someone is "subject to liability." ([Rest.2d, §§ 766, 766B](#).) Under the Restatement Second, "subject to liability" means only that "the actor's conduct is such as to make him liable for another's injury, *if*, *in addition*, "the actor's conduct is a *legal cause*" of the injury. (Rest.2d, § 5, italics added.) "Legal cause," according to the Restatement, means that "the causal sequence by which the actor's tortious conduct has resulted in an invasion of some legally protected interest of another is such that the law holds the actor responsible for such harm unless there is some defense to liability." (Rest.2d, § 9.) Regarding the relationship between these concepts, the Restatement Second explains: "To become liable . . . under the [\*\*\*\*90] principles of the law of [\*1175] Torts, an actor's conduct must not only be tortious in character but it must also be a legal [\*\*\*63] cause of the invasion of another's interest. If the actor has engaged in conduct which is tortious in character, he thereby subjects himself to liability . . . In order that the actor become liable to another, it is necessary, [\*\*965] among other things, that his conduct be the legal cause of the invasion of the other's interest . . ." (Rest.2d, § 9, com. a, p. 16.) "In order that a particular act or omission may be the legal cause of an invasion of another's interest, the act or omission must be a substantial factor in bringing about the harm, and there must be no principle or rule of law which restricts the actor's liability because of the manner in which the act or omission operates to bring about such invasion." (Rest.2d, § 9, com. b, p. 16.) Thus, a defendant "may be 'subject to liability' " within the meaning of the Restatement Second "but may escape" liability if his or her conduct is not "the legal cause of the plaintiff's harm." (Rest.2d, § 5, com. b, p. 11.) Because the Restatement Second's sections on interference with contract and intentional interference [\*\*\*\*91] with prospective economic advantage consider the circumstances only for determining whether a defendant is "subject to liability" ([Rest.2d, §§ 766, 766B](#)), they do not even purport to address the more fundamental question now before us: whether Lockheed's alleged interference is the legal cause of the remote, indirect, and derivative injury KSC alleges. Thus, the majority's reliance on the Restatement Second is both inadequate and unpersuasive.

Our prior decisions discuss similar concepts in tort law. As we have explained, "[p]roximate cause involves two elements. [Citation.] One is *cause in fact*. An act is a cause in fact if it is a necessary antecedent of an event. [Citation.] . . . [P] To simply say, however, that the defendant's conduct was a necessary antecedent of the injury does not resolve the question of whether the defendant should be liable. . . . [T]he consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would "set society on edge and fill the courts with endless litigation. [\*\*\*\*92] " ' [Citation.] Therefore, the law must impose limitations on liability other than simple causality. These additional limitations are related not only to the degree of connection between the conduct and the injury, but also with public policy. [Citation.] As Justice Traynor observed, proximate cause 'is ordinarily concerned, not with the fact of causation, but with the various considerations of policy that limit an actor's responsibility for the consequences of his conduct.' [Citation.]' (" [PPG Industries, Inc. v. Transamerica Ins. Co. \(1999\) 20 Cal.4th 310, 315-316 \[84 Cal. Rptr. 2d 455, 975 P.2d 652\]](#) [holding that although the defendant was cause in fact of the plaintiff's damages, for policy reasons, it was not proximate cause].) In [\*1176] short, proximate cause is " 'a policy-based legal filter on "but for" causation' " that courts apply " 'to those

<sup>4</sup> As should be clear, I do not, as the majority states, "assert[]" that [section 767 of the Restatement Second](#) does not apply to intentional interference with prospective economic advantage. (Maj. opn., *ante*, at p. 1163, fn. 12.) What I do assert is that given the Restatement Second's caution that "the weight carried by" the various factors "may vary considerably" with respect to the different interference torts ([Rest.2d, § 767, com. a](#), p. 27), the majority errs in simply assuming that comment h's discussion of remoteness in the context of interference with contract necessarily applies to the same extent to intentional interference with prospective economic advantage.

more or less undefined considerations which limit liability even where the fact of causation is clearly established." ' [Citation.]" ( [Vons Companies, Inc. v. Seabest Foods, Inc. \(1996\) 14 Cal.4th 434, 464 \[58 Cal. Rptr. 2d 899, 926 P.2d 1085\]](#).) Moreover, to the extent proximate cause involves "limitations imposed upon liability as a matter of [\*\*\*\*93] public policy, the issue is for the court" to decide as "a question of law." ( [Mosley v. Arden Farms Co. \(1945\) 26 Cal.2d 213, 223 \[157 P.2d 372\]](#) (conc. opn. of Traynor, J.).) Thus, the majority errs in concluding that KSC "has satisfied the proximate cause element" merely by *pleading* that its injury "was directly caused by" Lockheed's alleged interference. (Maj. opn., *ante*, at p. 1166.) [\*\*\*64] This allegation does "not . . . render the complaint sufficient" because, as I later explain, "it affirmatively appears from other allegations that the act[s] made the basis of liability [are], as a matter of law, not the proximate cause of the injury complained of." ( [Katz v. Helbing \(1928\) 205 Cal. 629, 633 \[271 P. 1062\]](#).)

Regarding the more fundamental policy question of legal, or proximate, cause, the majority has little to say. The majority declares that there is "no sound reason for requiring that a defendant's wrongful actions must be directed towards the plaintiff." (Maj. opn., *ante*, at p. 1163.) To do so, the majority suggests, would exclude what a law review article describes as " 'the most numerous of the tortious interference cases' "-- "those [\*\*\*\*94] in which the disruption is caused by an act directed not at the plaintiff, but at a third [\*\*966] person!" (Maj. opn., *ante*, at p. 1163.)

This analysis simply attacks a straw man of the majority's own creation. Contrary to the majority's suggestion, no one asserts that we should allow recovery only where the defendant's wrongful act is "directed towards the plaintiff." (Maj. opn., *ante*, at p. 1163.) Rather, the issue here is whether to allow recovery where the wrongful act is not directed towards the plaintiff *or* towards anyone with whom the plaintiff had a prospective economic advantage. As I have previously explained, Lockheed directed no actions towards either KSC or MacDonald. It directed its actions only towards the Republic of Korea--with which KSC has no prospective economic relationship--and KSC's alleged injury is only a remote, indirect, and derivative consequence of those alleged acts towards the Republic of Korea. Moreover, contrary to the majority's suggestion, cases involving such derivative injury are not among those that the cited law review article described as being the "most numerous." (Perlman, *Interference with Contract and Other Economic Expectancies: [\*\*\*\*95] A Clash of Tort and Contract Doctrine* (1982) 49 U.Chi. L.Rev. 61, 106.) According to the article, that category consists of cases in which the defendant's act of interference was directed towards a third person who [\*1177] was "in a [r]elationship with the [p]laintiff." (*Ibid.*; see also *id.* at p. 99.) Again, this is not such a case, because Lockheed's alleged acts were not directed towards anyone having either an existing or prospective relationship with KSC. <sup>5</sup>

The majority also summarily declares that because, under [Della Penna, supra, 11 Cal.4th 376](#), a defendant's liability [\*\*\*\*96] for intentional interference with prospective economic advantage requires commission of "an independently wrongful act," a plaintiff's standing to sue should not "turn on" the defendant's "subjective intent." (Maj. opn., *ante*, at p. 1162.) A contrary conclusion, the majority reasons, would produce "absurd and unfair results." (*Ibid.*) Again, the majority cites no case law supporting its analysis and conclusion. Moreover, the majority's reliance on *Della Penna*'s wrongful act requirement subverts and distorts the [\*\*\*65] purpose of that requirement. In *Della Penna*, we required an independently wrongful act in order to *restrict* the scope of the tort. Contrary to this purpose, the majority here uses that requirement as justification for significantly *expanding* the tort's scope by allowing recovery for remote, indirect, and derivative injuries. Finally, the majority's conclusion that it would be unfair to preclude recovery for indirect and remote injury simply because the defendant lacked specific intent begs the more fundamental, threshold question of whether a plaintiff with remote, indirect, and derivative injury should be able to recover even if the defendant had specific [\*\*\*\*97] intent.

Regarding this threshold policy question, and lacking governing California authority, we should follow the substantial body of case law from other courts--including the United States Supreme Court--that deals with analogous causes of action and holds that parties with remote, indirect, and derivative injuries may not recover. The

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<sup>5</sup> Nor does the passage the majority cites from the concurring opinion in *Della Penna* (maj. opn., *ante*, at p. 1163) address recovery where the defendant's alleged act of interference is not directed towards the plaintiff or towards anyone with whom the plaintiff has an existing or prospective economic relationship. ([Della Penna, supra, 11 Cal. 4th at p. 409](#) (conc. opn. of Mosk, J.).)

high court has addressed this subject in the context of **antitrust law**. Consistent with the causation principles I have previously discussed, the high court has explained that although "[a]n antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy," "there is a point beyond which the wrongdoer should not be held liable." [Citation.]" ([Blue Shield of Virginia v. McCready \(1982\) 457 U.S. 465, 476-477 \[73 L. Ed. 2d 149, 102 S. Ct. 2540\]](#) (*Blue Shield*)). Like "common-law" remedies, "the judicial remedy" for an antitrust violation "cannot encompass every conceivable harm that can be traced to alleged wrongdoing." ([\[\\*\\*967\] Associated General Contractors of California, Inc. v. California State Council of Carpenters \(1983\) 459 U.S. 519, 535-536 \[74 L. Ed. 2d 723, 103 S. Ct. 897\]](#) [\*1178] [[\\*\\*\\*\\*98](#) *Associated General*].) Thus, in an antitrust case, the "question of which persons have been injured by" the alleged antitrust violation "is analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue for damages . . ." ([Illinois Brick Co. v. Illinois \(1977\) 431 U.S. 720, 728, fn. 7 \[52 L. Ed. 2d 707, 97 S. Ct. 2061\]](#) (*Illinois Brick*); see also [Blue Shield, supra, 457 U.S. at p. 476 \[102 S. Ct. at pp. 2546-2547\]](#).)

The high court focused on these questions in *Associated General*, where several labor unions sought damages for an alleged antitrust violation by an employers association. The unions alleged that the employers association illegally "coerced certain third parties . . . to enter into business relationships with nonunion firms. This coercion, according to the [unions'] complaint, adversely affected the trade of certain unionized firms and thereby restrained the business activities of the unions." ([Associated General, supra, 459 U.S. at pp. 520-521](#).) The court of appeals held that the unions "had standing to recover damages for the injury to their own business activities" because their [\*\*\*\*99] injury was not only "a foreseeable consequence of the antitrust violation," but also "was specifically intended by the defendants." ([Id. at p. 525](#).) The high court disagreed and held that the unions could not maintain their antitrust action notwithstanding their "allegation of intent to harm." ([Id. at p. 545](#))

Notably, in reaching its conclusion, the high court in *Associated General* expressly relied on common law principles, which are, of course, applicable in the case now before us. The court reasoned: "In 1890, notwithstanding general language in many state constitutions providing in substance that 'every wrong shall have a remedy,' a number of judge-made rules circumscribed the availability of damages recoveries in both tort and contract litigation--doctrines [\*\*\*66] such as foreseeability and proximate cause, directness of injury, certainty of damages, and privity of contract. Although particular common-law limitations were not debated in Congress, the frequent references to common-law principles [in congressional debates on the antitrust laws] imply that Congress simply assumed that antitrust damages would be subject to constraints comparable [\*\*\*\*100] to well-accepted common-law rules applied in comparable litigation." ([Associated General, supra, 459 U.S. at pp. 532-533](#), fn.s. omitted.) The court noted that, based on this understanding of congressional intent, federal judges had "held as a matter of law that neither a creditor nor a stockholder of a corporation that was injured by a violation of the antitrust laws could recover" because a "plaintiff's injury as a stockholder [is] 'indirect, remote, and consequential.' [Citation.]" ([Id. at p. 533](#).) "This holding," the high [\*1179] court continued, is "consistent with . . . 't]he general tendency of the law, in regard to damages at least, . . . not to go beyond the first step.' [Citation.]" ([Id. at p. 534](#).) Thus, the court reasoned, "as was required in common-law damages litigation in 1890," the question of whether the plaintiff "may recover for the injury it allegedly suffered by reason of the defendants' coercion against certain third parties . . . requires . . . evaluat[ion] of the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." ([Id. at p. 535](#), fn. omitted.)

In [\*\*\*\*101] holding that the unions could not maintain their antitrust action, the high court in *Associated General* stressed, among other factors, the "indirectness of the [unions'] asserted injury." ([Associated General, supra, 459 U.S. at p. 540](#).) Focusing on the "chain of causation" between the unions' injury and the alleged antitrust violation, the high court found "that any such injuries were only an indirect result of whatever harm may have been suffered by [the] construction contractors and subcontractors" that lost business due to the defendants' coercion. ([Id. at pp. 540-541](#).) "If either these firms, or the immediate victims of coercion by defendants, have been injured by an antitrust violation, their injuries would be direct and . . . they would have a right to maintain their own . . . actions against the defendants. . . . The existence of an identifiable class of persons whose self-interest would normally motivate them to" sue "diminishes the justification for allowing [\*\*968] . . . more remote part[ies] such as the [unions] to" maintain an action. ([Id. at pp. 541-542](#).) "Denying the [u]nion[s] a remedy on the basis of [the] allegations [\*\*\*\*102] in this case is not likely to leave a significant antitrust violation undetected or unremedied." (

*Id. at p. 542.*) "Indeed," the court explained, "if there is substance to the [u]nion[s'] claim, it is difficult to understand why these direct victims of the conspiracy have not asserted any claim in their own right." ( *Id. at p. 542, fn. 47.*)

In *Illinois Brick*, the high court applied similar principles in holding that where the defendant violates the antitrust laws by fixing prices and sells to an entity that passes the resulting overcharges on to its customers, the injuries of the customers resulting from the defendant's antitrust violation are legally too remote to support recovery. (*Illinois Brick, supra, 431 U.S. at pp. 725-729 [97 S. Ct. at pp. 2064-2066]*.) The court acknowledged that this holding "denies recovery to . . . indirect purchasers who may have been actually injured by antitrust violations." ( *Id. at p. 746 [97 S. Ct. at p. 2075]*.) However, "[i]n view of" the relevant policy "considerations," the court was "unwilling to carry the compensation principle to its logical extreme by [\*1180] attempting to allocate damages among all 'those within the [\*\*\*67] defendant's chain of distribution' [\*\*\*\*103] [citation] . . ." (*Ibid.*) The considerations the court cited were the defendant's "interest . . . in avoiding multiple liability for" the amount of the overcharge, "the interest of absent potential plaintiffs in protecting their right to recover for the portion of the [overcharge] allocable to them and the social interest in the efficient administration of justice and the avoidance of multiple litigation." ( *Id. at pp. 737-738 [97 S. Ct. at p. 2071]*.)

The high court reaffirmed *Illinois Brick* in *Kansas v. Utilicorp United, Inc. (1990) 497 U.S. 199 [111 L. Ed. 2d 169, 110 S. Ct. 2807]*. There, the court held that where natural gas suppliers illegally overcharged a public utility and the utility passed on the overcharge to its customers, the customers' injuries were too remote to support an antitrust action. ( *Id. at p. 204.*) The court explained that the customers "have the status of indirect purchasers" because "[i]n the distribution chain, they are not the immediate buyers from the alleged antitrust violators." ( *Id. at p. 207.*) The court next observed that its decision in *Illinois Brick* "den[ies] relief to consumers who have paid inflated [\*\*\*\*104] prices because of their status as indirect purchasers. [Citations.]" (*Kansas, supra, 497 U.S. at pp. 211-212 [110 S. Ct. at p. 2814]*.) Finally, the court refused to create an exception to "the *Illinois Brick* rule" for cases involving public utilities, "even assuming that any economic assumptions underlying [that] rule might be disproved in a specific case . . ." (*Kansas, supra, 497 U.S. at p. 217 [110 S. Ct. at p. 2817]*.)

In *Holmes v. Securities Investor Protection Corp. (1992) 503 U.S. 258 [117 L. Ed. 2d 532, 112 S. Ct. 1311]* (*Holmes*), the high court applied these same principles to a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO). In *Holmes*, plaintiff Securities Investor Protection Corporation (SIPC) alleged that the defendant, in violation of RICO, illegally "conspired in a stock-manipulation scheme that disabled two broker-dealers from meeting obligations to customers," which in turn "trigger[ed] SIPC's statutory duty to advance funds to reimburse the customers." (*Holmes, supra, 503 U.S. at p. 261 [112 S. Ct. at p. 1314]*.) The court held that SIPC could not maintain its claim because its injuries were too remote.

In reaching its conclusion, the *Holmes* court [\*\*\*\*105] began by finding it "unlike[y] that Congress meant to allow all factually injured plaintiffs to recover . . ." (*Holmes, supra, 503 U.S. at p. 266 [112 S. Ct. at p. 1316]*, fn. omitted.) The court explained that " [i]n a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose [\*1181] responsibility upon such a basis would result in infinite liability for all wrongful acts, and would "set society on edge and fill the courts with endless litigation." ' [Citation.]" ( *Id. at p. 266, fn. 10.*) Relying on *Associated General*, the *Holmes* court then found that because Congress "incorporate[d] common-law principles of proximate causation" into RICO, a plaintiff's right to recover [\*\*969] under RICO "require[s] a showing that the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well." (*Holmes, supra, 503 U.S. at p. 268 [112 S. Ct. at p. 1317]*.) The court next explained that one aspect of proximate cause--which is a generic label for "the judicial tools used to limit a person's responsibility for the consequences of [his or her] acts"--is "a demand for some [\*\*\*\*106] direct relation between the injury asserted and the injurious conduct alleged. Thus, a plaintiff who complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [i]s generally said to stand [\*\*\*68] at too remote a distance to recover. [Citation.]" ( *Id. at pp. 268-269.*)

The *Holmes* court next discussed its application of the proximate cause concept in antitrust cases. Citing *Associated General*, the court explained that "directness of relationship" between the plaintiff's injury and the defendant's conduct is one of the "central elements" of "causation" under **antitrust law** "for a variety of reasons.

First, the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors. [Citation.] Second, quite apart from problems of proving factual causation, recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries. [Citations.] And, finally, [\*\*\*\*107] the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely. [Citation.]" (*Holmes, supra, 503 U.S. at pp. 269-270 [112 S. Ct. at pp. 1318-1319]*.)

Finally, applying these principles to RICO, the *Holmes* court held that SIPC could not maintain its RICO action. After noting SIPC's theory of recovery--that SIPC was "subrogated to the rights of those customers of the broker-dealers who did not purchase manipulated securities" (*Holmes, supra, 503 U.S. at p. 271 [112 S. Ct. at p. 1319]*)--the court explained: "[E]ven assuming, *arguendo*, that [SIPC] may stand in the shoes of nonpurchasing customers, the link is too remote between the stock manipulation alleged and the customers' harm, being purely contingent on the harm suffered by the [\*1182] broker-dealers. That is, the conspirators have allegedly injured these customers only insofar as the stock manipulation first injured the broker-dealers and left them without the wherewithal to pay customers' claims. Although the customers' [\*\*\*\*108] claims are senior (in recourse to 'customer property') to those of the broker-dealers' general creditors, [citation], the causes of their respective injuries are the same: The broker-dealers simply cannot pay their bills, and only that intervening insolvency connects the conspirators' acts to the losses suffered by the nonpurchasing customers and general creditors. [P] As we said, however, in *Associated General Contractors*, quoting Justice Holmes, ' "The general tendency of the law, in regard to damages at least, is not to go beyond the first step[]" ' [citation], and the reasons that supported conforming [antitrust] causation to the general tendency apply just as readily to the present facts, underscoring the obvious congressional adoption of the Clayton Act direct-injury limitation among the requirements of" RICO. (*Holmes, supra, 503 U.S. at pp. 271-272 [112 S. Ct. at pp. 1319-1320]*, fns. omitted.) A contrary conclusion would "[a]llow[] suits by those injured only indirectly," thereby "open[ing] the door to 'massive and complex damages litigation'" that would " 'not only burde[n] the courts, but [would] also undermin[e] the effectiveness of treble-damages suits.' [Citation.]" (*Id. at p. 274*). [\*\*\*\*109]

Lower federal courts have applied these principles to preclude recovery for remote, indirect, and derivative injury in several cases that are relevant here because they involved commission relationships, bribes, pendent state claims for interference with prospective economic advantage, and/or allegations of specific intent to harm. In *Brian Clewer, Inc. v. Pan American World Airways, Inc.* (C.D.Cal. 1986) 674 F. Supp. 782, 784-788, the court held that [\*\*\*69] Clewer, a travel [\*970] agency, could not maintain an antitrust action against several airlines that had allegedly conspired to destroy Laker, another airline with which Clewer had a commission arrangement. Like KSC, Clewer alleged damages in the form of lost commissions. (*Id. at p. 788*.) Clewer also alleged that the defendants had acted " 'with the object of . . . damaging [its] business.' " (*Id. at p. 784*.) Despite this allegation, the court, applying *Associated General*, found that Clewer could not maintain the action because "any injury to Clewer [was] only an indirect result of whatever harm may have been suffered by Laker, and thus Clewer's injury [was] derivative of . . . [\*\*\*\*110] Laker's." (*Brian Clewer, Inc., supra, at p. 787*.) The court explained that "other potential plaintiffs"--Laker, Laker passengers, former Laker employees--"stand in a better posture to assert antitrust claims due to a more direct harm than" Clewer. (*Ibid.*) Given all of these potential plaintiffs, "if Clewer and other similarly situated travel agencies are found to have standing" to sue "for a portion of Laker's revenues, a possibility exists of duplicative recovery against the defendants." (*Id. at p. 788*.) In concluding, the court [\*1183] explained: "Clewer stands in the same position as numerous other prospective plaintiffs whose alleged losses are indirect and derivative, i.e., other travel agencies, other supplie[r]s of goods and services, food vendors, waste disposal services, and custodians. . . . Clewer's injury is too indirect to provide standing under" the antitrust laws. (*Id. at pp. 787-788*.)

On analogous facts, another federal court reached a similar conclusion in *Fallis v. Pendleton Woolen Mills, Inc.* (6th Cir. 1989) 866 F.2d 209. There, the plaintiff, a sales representative for the defendant, filed an antitrust action [\*\*\*\*111] alleging that he lost commissions as a result of the defendant's alleged price-fixing scheme. (*Id. at pp. 210-211*.) The court held that the plaintiff could not maintain his action because his alleged injury was "derivative; it [was] simply a side effect of [the defendant's] alleged antitrust violations. . . . Any injury to [the plaintiff]

was merely incidental to the purposes of the alleged price-fixing arrangement," which was "aimed at disciplining retailers and raising consumer prices, not reducing the commissions earned by salespersons." (*Ibid.*) "As is generally true where the plaintiff's injury is indirect, more direct victims of the alleged conspiracy exist in the present case . . ." ( *Id. at p. 211.*) "[I]f the court were to allow all indirect victims standing to sue . . . , the dangers of duplicative recovery and complex apportionment of damages would become very real.' [Citations.]" ( *Id. at pp. 211-212.*) "In light of these factors"--the indirectness of plaintiff's injury, the existence of more direct victims, the possibility of duplicative recovery--the court held that the plaintiff "lack[ed] antitrust standing." ( [\*\*\*\*112] *Id. at p. 212.*)

Another case involving analogous facts is *Eagle v. Star-Kist Foods, Inc. (9th Cir. 1987) 812 F.2d 538.* There, fishermen alleged that fish canneries had violated the antitrust laws by conspiring to set tuna prices at artificially low levels. ( *Id. at p. 539.*) The fishermen worked as crewmembers on vessels owned by others, who sold the vessels' catch to the canneries and then paid the fishermen based on a "share of the catch" or the "price per ton." (*Ibid.*) Regarding damages, the fishermen alleged that the artificially low price levels "result[ed] in a reduction of the wages" they received. (*Ibid.*) Applying *Associated General*, the court held that the fishermen could not maintain an antitrust action because their alleged injuries were "derivative of the injuries suffered by the vessel owners." ( *Eagle, supra, at p. 541.*) In [\*\*70] reaching its conclusion, the court rejected the argument that the fishermen "were directly injured because calculation of their wages . . . was completely and inextricably intertwined with the artificially low selling prices" and because "they were joint venturers with the [\*\*\*\*113] vessel owners . . ." (*Ibid.*) The court explained: "[W]hat exists between the vessel owners and the crewmembers is an employer-employee relationship. . . . Once a sale has been completed, [\*1184] the crewmembers are paid their wages . . . either on a 'share of the catch' or 'per-ton' basis. . . . Thus, any injury [they] suffered . . . is derived from any injury suffered by the vessel owners . . . . 'When the employer reacts to [a] loss by terminating employees, or when employees receive diminished salary or commissions, as a result [\*\*971] of the employers' weakened market position, these employees suffer derivative injury only.' [Citation.]" ( *Id. at pp. 541-542*, first italics added.) The court also reasoned that "the vessel owners . . . [have] the requisite motivation to vindicate the public interest" in enforcement of the antitrust laws, and that "[t]he justification for allowing the crewmembers . . . to bring the action is thereby diminished because they are more remote parties." <sup>6</sup> ( *Eagle, supra, at p. 542.*)

[\*\*\*\*114] Still another relevant application of these remoteness principles occurred in *Hawaii Health & Welfare Trust Fund for Operating Engineers v. Philip Morris, Inc. (D.Hawai'i 1999) 52 F. Supp. 2d 1196.* There, numerous "multi-employer labor management health and welfare funds," which paid medical bills for union workers, filed a RICO action against "the major cigarette manufacturers" alleging a conspiracy to suppress information regarding the effects of smoking and claiming damage "in the form of . . . payment of unnecessary medical costs to [fund] beneficiaries." ( *Id. at p. 1197.*) Applying *Holmes*, the court held that "the 'remoteness doctrine' " barred the claim because "the Funds themselves ha[d] suffered no direct injury." ( *Hawaii Health & Welfare Trust Fund for Operating Engineers, supra, 52 F. Supp.2d at p. 1198.*) The court explained that the remoteness doctrine, "[w]hether analyzed in terms of proximate cause or standing, . . . generally bars indirect claims where other more directly-injured parties are the proper plaintiffs. [Citation.]" (*Ibid.*) The court found the doctrine applicable because the alleged injuries were "derivative, [\*\*\*\*115] " not "direct," in that they were " 'entirely dependent upon injuries sustained by [fund] participants and beneficiaries, making [the plaintiffs] at least one step removed from the challenged harmful conduct.' [Citation.]" ( *Id. at pp. 1199-1200.*) Thus, the plaintiffs were "seek[ing] recovery for the same injuries to victims represented, or able to be represented, in other direct suits." ( *Id. at p. 1199.*) The court's conclusion is especially relevant to the case now before us because, in applying the remoteness doctrine, the court expressly rejected the plaintiffs' argument that "the[ir] injury was allegedly intentional and directed [\*1185] specifically to the

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<sup>6</sup> See also *Southwest Suburban Board of Realtors, Inc. v. Beverly Area Planning Assn. (7th Cir. 1987) 830 F.2d 1374, 1378* (corporate president who may have lost commissions as a result of alleged antitrust violation may not maintain antitrust action, because "[m]erely derivative injuries sustained by employees, officers, stockholders, and creditors of an injured company do not constitute 'antitrust injury' sufficient to confer antitrust standing"); *Warnick v. Washington Education Association (E.D.Wash. 1984) 593 F. Supp. 66, 67-69* (commissions that sales agents lost due to the defendant's attempt to restrain trade were derivative injury and could not support antitrust claim).

trust funds because the [d]efendants knew their fraudulent scheme would cause the trust funds to expend [\*\*\*71] additional money on health related costs." (*Ibid.*)

[Carter v. Berger \(7th Cir. 1985\) 777 F.2d 1173](#) is relevant here because it applied these remoteness principles in a case involving alleged bribes. The plaintiffs in *Carter* filed a RICO action claiming that the defendant used illegal bribes to obtain lower property tax assessments, which resulted in higher taxes for everyone [\*\*\*\*116] else. ( [Id. at p. 1174](#).) The court held that the plaintiffs were "not the right parties to bring th[e] suit" because their "injury derive[d] from the County's . . ." (*Ibid.*) After describing *Illinois Brick's* remoteness analysis, the court explained: "The same approach prevails throughout the law. . . . [T]he general tendency of the law, in regard to damages at least, is not to go beyond the first step.' [Citations.]" ([Carter, supra, at p. 1175](#).) Thus, "the indirectly injured party may not sue . . . If a wrong committed against a firm causes it to become bankrupt and discharge its employees or discontinue its purchases, the injured employees and suppliers may not sue." (*Ibid.*) "[A]n indirectly injured party should look to the recovery of the directly injured party, not to the wrongdoer, for relief." ( [Id. at p. 1176](#); see also [National Enterprises, Inc. v. Mellon Financial Services Corp. Number 7 \(5th Cir. 1988\) 847 F.2d 251, 252-255](#) [unpaid creditor of bankrupt corporation could not pursue RICO action against defendant that required kickbacks from corporation as a loan condition].)

[\*\*972] Finally, among the federal [\*\*\*\*117] cases, [Newton v. Tyson Foods, Inc. \(8th Cir. 2000\) 207 F.3d 444](#) is particularly noteworthy here because it involved bribes and it applied these remoteness principles to claims for a RICO violation *and* a pendent state law claim for intentional interference with prospective economic advantage. In *Newton*, cattle producers sued a poultry producer, alleging that it "was able to exempt the poultry industry from strict regulations by providing illegal payments to" government officials. ( [Id. at p. 445](#).) They alleged that this exemption resulted in lower costs, which enabled poultry producers to lower poultry prices, which increased demand for poultry and lowered the demand for beef, which reduced beef sales by packers, which reduced the plaintiffs' sales to packers and lowered the price of cattle sold. ( [Id. at p. 446](#).) The court first held that the plaintiffs could not maintain their RICO claim because their alleged injuries were "far distant along the chain of causation from [the defendant's] alleged wrongs and [were] too attenuated and removed from those wrongs to provide a basis for standing under RICO. [Citation.]" ( [Id. at p. 447](#).) [\*\*\*\*118] Noting that "proximate cause" was also "an element" of the plaintiffs' claim for "intentional interference with prospective economic advantage," the court next held that the plaintiffs' "common-law tort claim fail[ed] as a matter of law for the same [\*1186] reasons that the [plaintiffs] lack[ed] standing to pursue their RICO claim. [Citation.]" ( [Id. at p. 448](#); see also [Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc. \(2d Cir. 1999\) 191 F.3d 229, 242-243](#) [applying RICO remoteness/proximate cause analysis to dismiss common law claims for fraud and breach of special duty].)

Given the overlap between [antitrust law](#) and the tort of intentional interference with prospective economic advantage, we should follow these federal decisions and decline to recognize a tort cause of action for plaintiffs, like KSC, that allege only remote, indirect, and derivative injury. Liability for both the tort and an antitrust violation requires an independently wrongful act. Moreover, the purpose of the tort is similar to the purpose of the antitrust laws: to "provid[e] a remedy for predatory economic behavior" while "keeping [\*\*\*72] legitimate business competition outside [\*\*\*\*119] litigative bounds." ([Della Penna, supra, 11 Cal. 4th at p. 378](#).) Notably, the Restatement Second expressly recognizes the "interplay between [antitrust law](#) and the law of tortious interference with prospective contractual relations." ([Rest.2d, § 768, com. c](#), p. 43.) It explains that because a claim for this tort is often based on an antitrust violation, antitrust legislation "and the very extensive case law that has developed as a gloss upon it are pertinent to a great number of the [tort] cases . . ." <sup>7</sup> ( [Id. at pp. 42-43](#); see also *id.*, [§ 767, com. c](#), p. 31 ["conduct that is in violation of antitrust provisions or is in restraint of trade" may make interference "improper"].) Finally, as I have already explained, the federal courts have based their proximate causation analysis on common law principles, which are no less applicable in defining the scope of the common law

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<sup>7</sup> The significance of the Restatement Second's discussion is not, as the majority incorrectly suggests (maj. opn., *ante*, at pp. 1163-1164, fn. 13), diminished by the Restatement Second's further observation that complete discussion of [antitrust law](#) is "outside the scope of the Restatement of Torts." ([Rest.2d, § 768, com. f](#), p. 43.)

tort. Given this overlap, we should follow the extensive antitrust case law and decline to extend tort liability to plaintiffs, like KSC, that allege only remote, indirect, and derivative injury.

[\*\*\*\*120] Moreover, a claim for intentional interference with prospective economic advantage by a plaintiff with only remote, indirect, and derivative injuries implicates the same factors the federal courts have cited in precluding antitrust recovery for such injuries. Allowing recovery under these circumstances creates a risk of duplicative recovery. Here, for example, the lost commission KSC seeks to recover represents a percentage of the contract price MacDonald would have paid to KSC had MacDonald obtained the contract. There are, no doubt, others who also stood to gain from the award of the contract to MacDonald and who would have claims to other portions of the contract price. There is "no principled way to cut off a myriad of other [\*1187] indirect claimants" who can each [\*\*973] "claim that their business was somehow impacted or adversely affected by" MacDonald's loss of the contract. ( *Sharp v. United Airlines, Inc.* (10th Cir. 1992) 967 F.2d 404, 409 [dismissing antitrust and prospective economic advantage claims of employees alleging that the defendant's illegal conduct destroyed their employer].) Of course, MacDonald may also sue for the *entire* contract price. Moreover, [\*\*\*\*121] MacDonald, which is absent from this action, has an interest in protecting its right to recover. Finally, given MacDonald's much more direct connection to Lockheed's alleged interference, denying KSC a remedy for its alleged remote, indirect, and derivative injury is not likely to leave tortious conduct undetected or unremedied. Thus, "the social interest in the efficient administration of justice and the avoidance of multiple litigation" supports a rule precluding a plaintiff like KSC from maintaining a claim for intentional interference with prospective economic advantage where the plaintiff's injury only remotely and indirectly follows from a defendant's alleged interference with the prospective economic advantage of some third party. ( *Illinois Brick, supra*, 431 U.S. at p. 738 [97 S. Ct. at pp. 2070-2071].) There is simply insufficient reason for the law to "shoulder[] these difficulties" when "those directly injured" can "be counted on to bring suit for the law's vindication." ( *Holmes, supra*, 503 U.S. at p. 273 [112 S. Ct. at p. 1320].) "The existence of an identifiable [\*\*\*73] class of persons whose self-interest would normally motivate them to" sue "diminishes the justification for allowing . . . more remote part[ies]," [\*\*\*\*122] such as KSC, to maintain an action. ( *Associated General, supra*, 459 U.S. at p. 542 [103 S. Ct. at pp. 910-911].)

Indeed, courts applying New York law have reached precisely this conclusion and have held that parties with indirect and remote injuries may not recover for intentional interference with prospective economic advantage. Like California, New York precludes recovery for intentional interference with prospective economic advantage "unless the means employed by [the defendant] were wrongful." ( *NBT Bancorp Inc. v. Fleet/Norstar Financial Group, Inc.* (1996) 87 N.Y.2d 614 [641 N.Y.S.2d 581, 585, 664 N.E.2d 492].) In addition, "under New York law, in order for a party to make out a claim . . . , the defendant must interfere with the business relationship directly; that is, the defendant must direct some activities towards the third party and convince the third party not to enter into a business relationship with the plaintiff. [Citation.]" ( *Fonar Corp. v. Magnetic Resonance Plus, Inc.* (S.D.N.Y. 1997) 957 F. Supp. 477, 482.) Applying this rule, in *G.K.A. Beverage Corp. v. Honickman* (2d Cir. 1995) 55 F.3d 762, 768, the court held that soft [\*\*\*\*123] drink distributors could not state a claim for intentional interference with prospective economic advantage by alleging that the defendants' acts to drive out of business a bottling company with which the distributors had contracted "interfered with their relationships with retailers and other final [\*1188] purchasers of soft drinks." THE COURT EXPLAINED: "[The defendants'] alleged goal was to obtain a monopoly in bottling, and the distributors' relationship with their retail customers is irrelevant to that goal. The distributors thus make no allegations that [the defendants] had any contact with the distributors' customers or that [the defendants] tried to convince the customers to make contracts with them rather than the distributors. It is axiomatic that, in order to prevail on this claim, the distributors would have to show that the [defendants] intentionally caused the retailers not to enter into a contractual relationship with them. [Citations.] The distributors cannot allege such intentional interference, and their claim therefore fails." (*Ibid.*)<sup>8</sup>

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<sup>8</sup> For similar reasons, the court also held that the distributors' antitrust claim failed as a matter of law. The court explained that the distributors' injury was "derivative of" the bottling company's injury, and that "a party in a business relationship with an entity that failed as a result of an antitrust violation" does "not have standing to bring an antitrust claim." ( *G.K.A. Beverage Corp. v. Honickman, supra*, 55 F.3d at pp. 766-767.) This rule, the court explained, "follows naturally" from the rule that " [m]erely

[\*\*\*\*124] In *Piccoli A/S v. Calvin Klein Jeanswear Co. (S.D.N.Y 1998) 19 F. Supp. 2d 157, 167-168*, [\*\*974] the court applied similar principles in dismissing a claim for tortious interference with business relations. The plaintiff alleged that the defendant exported "surplus Calvin Klein jeans to 'lower-end stores' in Scandinavia and that the presence of these jeans in lower-end stores caused [the plaintiff's] exclusively upper-end clients to cease doing business with it." (*Id. at p. 167*, fn. omitted.) The court held "that such an indirect relationship cannot form the basis of a tortious interference claim. [P] . . . [U]nder New York law, . . . the defendant must interfere with the business relationship directly; that is, the defendant must direct some activities towards the third party and convince the third party not to enter into a business relationship with the plaintiff." [P] Here, [\*\*\*\*74] the plaintiff's claim fails because] the defendants' alleged conduct concededly was not directed towards any third party with whom [the plaintiff] had an existing or prospective business relationship." (*Id. at pp. 167-168*, fn. omitted.)<sup>9</sup>

[\*\*\*\*125] In summary, regarding the fundamental policy question of proximate cause, we should adopt the approach of the courts applying federal and New York law and hold that parties who allege only remote, indirect, and [\*1189] derivative injury may not recover for intentional interference with prospective economic advantage. Applying this principle here, KSC's claim fails because Lockheed's alleged acts were not directed towards MacDonald or any other third party with which KSC had a prospective economic advantage; they were directed solely towards the Republic of Korea.

The majority's explanation for disregarding these decisions is demonstrably incorrect. The majority asserts that because the federal antitrust decisions "analy[ze] . . . the statutory language of the Clayton Act, as well as its relevant legislative history and objectives," they are "inapplicable" in determining "standing to bring a claim" for intentional interference with prospective economic advantage, which is governed by the "common law." (Maj. opn., *ante*, at pp. 1163-1164, fn. 13.) However, the high court's decisions in both *Blue Shield* and *Associated General* conclusively refute the majority's assertion. In [\*\*\*\*126] *Blue Shield*, the court explained that "neither the statutory language nor the legislative history of [the Clayton Act] offers any focused guidance on the question of which injuries are too remote" to support recovery. (*Blue Shield, supra*, 457 U.S. at p. 477 [102 S. Ct. at p. 2547].) "[I]ndeed," the court observed, the Clayton Act's "unrestrictive language" and "the avowed breadth of the congressional purpose, cautions [sic] us not to cabin [the Clayton Act] in ways that will defeat its broad remedial objective." (*Ibid.*) Finding no "direct guidance from Congress" for determining whether "a particular injury is too remote . . . to warrant . . . standing" under the Clayton Act, the court turned to the "analysis . . . employed traditionally by courts at common law with respect to the matter of 'proximate cause.' [Citations.]" (*Ibid.*, italics added, fn. omitted.) Similarly, in *Associated General*, the high court explained that despite the breadth of the Clayton Act's statutory language and its legislative history, "common-law rules" and "constraints" govern remoteness questions in "antitrust damages litigation." (*Associated* [\*\*\*\*127] *General, supra*, 459 U.S. at p. 533.) Thus, in addressing remoteness issues under the Clayton Act, the high court has expressly looked to the common law, not, as the majority asserts, to the Clayton Act's statutory language or legislative history. The majority's rationale for disregarding the federal cases is, therefore, erroneous. We should follow the federal antitrust cases precisely because [\*\*\*75] they apply common law remoteness principles.<sup>10</sup>

derivative injuries sustained by employees, officers, stockholders, and creditors of an injured company do not . . . confer antitrust standing.' [Citation.]" (*Id. at p. 766*.)

<sup>9</sup> Apparently, under New York law, instead of showing wrongful means, a plaintiff may alternatively show that the defendant "acted for the sole purpose of inflicting intentional harm on plaintiffs." (*NBT Bancorp Inc. v. Fleet/Norstar Financial Group Inc. (1995) 215 A.D.2d 990 [628 N.Y.S.2d 408, 410]*.) This fact does not undermine my conclusion that we should follow New York law regarding remoteness. On the contrary, it reinforces my conclusion, because a defendant who acts solely to harm the plaintiff is at least as blameworthy as a defendant who uses wrongful means and is only substantially certain that the plaintiff will be harmed.

<sup>10</sup> Notably, in the Court of Appeal, even KSC agreed that federal cases addressing "standing under the antitrust laws provide useful guidance . . . in determining the reach of the tort of intentional interference with prospective economic advantage." Similarly, the law review article on which the majority relies (maj. opn., *ante*, at p. 1163) states that "[i]n a business competition setting, antitrust laws . . . may serve as a yardstick for liability," and it argues for "[i]ncorporating the fluid doctrines of antitrust

[\*\*\*\*128] [\*1190] [\*\*975] III. THE MAJORITY'S SUBSTANTIAL CERTAINTY STANDARD IS INCORRECT UNDER PRIOR CALIFORNIA DECISIONS.

The majority holds that to state a claim for intentional interference with prospective economic advantage, a plaintiff need not "plead that the defendant acted with the specific intent, or purpose, of disrupting the plaintiff's prospective economic advantage." (Maj. opn., *ante*, at p. 1153.) "Instead," the majority states, "to satisfy the intent requirement for this tort, it is sufficient to plead that the defendant knew that the interference was certain or substantially certain to occur as a result of its action." (*Ibid.*)

The majority's conclusion is incorrect under existing California law. In *Seaman's Direct Buying Service, Inc. v. Standard Oil Co. (1984) 36 Cal.3d 752, 758 [206 Cal. Rptr. 354, 686 P.2d 1158]* (Seaman's), we expressly considered whether " 'intent' [is] an element of a cause of action for intentional interference with contractual relations." We answered this question affirmatively, holding: "[I]n an action for inducing breach of contract it is essential that plaintiff plead and prove that the defendant *'intended* to induce a breach [\*\*\*\*129] thereof . . . ." [Citations.] Similarly, to prevail on a cause of action for intentional interference with prospective economic advantage, plaintiff must plead and prove '*intentional* acts on the part of the defendant *designed* to disrupt the relationship.' [Citations.]" (*Id. at p. 766*.) Thus, we rejected the plaintiff's argument "that [the defendant's] 'intent' to interfere with the contract is not a necessary prerequisite to liability." (*Id. at pp. 766-767*, fn. omitted.) Notably, in defining the intent requirement, we also expressly rejected the plaintiff's argument that to establish intent, it is necessarily sufficient to show that the defendant "knew that interference with the contract was 'substantially certain' to result from its conduct." (*Id. at p. 765*.) We explained: "Intent, of course, may be established by inference as well as by direct proof. Thus, the trial court could properly have instructed the jury that it *might* infer culpable intent from conduct 'substantially certain' to interfere with the contract. Here, though, the jury was instructed that culpable intent was 'deemed' to exist if [the defendant] [\*\*\*\*130] knew that its conduct would interfere with the contract. Under the principles outlined above, this instruction was clearly error." (*Id. at p. 767*.) Thus, Seaman's rejects the very standard the majority here adopts. Our Courts of Appeal have followed Seaman's in this regard. (E.g. *Kasparian v. County of Los Angeles (1995) 38 Cal.App.4th 242, 270-271 [45 Cal. Rptr. 2d 90]*; *Savage v. Pacific Gas & Electric Co. (1993) 21 Cal.App.4th 434, 449 [26 Cal. Rptr. 2d 305]*.)

[\*1191] In reaching its conclusion, the majority virtually ignores our *holding* in Seaman's [\*\*\*76] and relies instead on *dictum* in *Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal.4th 26 [77 Cal. Rptr. 2d 709, 960 P.2d 513]* (Quelimane). (Maj. opn., *ante*, at pp. 1155-1157.) In Quelimane, the only issue the defendant raised in challenging the adequacy of the plaintiff's claim for intentional interference with contract was the plaintiff's failure to allege that the defendant's conduct was "wrong." (*Quelimane, supra, 19 Cal. 4th at p. 55*.) We disagreed, holding that "[w]rongfulness independent of the inducement to breach the contract is not an element of the tort of intentional interference with *existing* [\*\*\*\*131] contractual relations . . ." (*Ibid.*) In *dictum*, we went on to state: "Moreover, the tort of intentional interference with performance of [\*\*976] a contract does not require that the actor's primary purpose be disruption of the contract. As explained in comment j to *section 766 of the Restatement Second* . . . : 'The rule stated in this Section is applicable if the actor acts for the primary purpose of interfering with the performance of the contract, and also if he desires to interfere, even though he acts for some other purpose in addition. The rule is broader, however, in its application than to cases in which the defendant has acted with this purpose or desire. It applies also to intentional interference, as that term is defined in § 8A, in which the actor does not act for the purpose of interfering with the contract or desire it but knows that the interference is certain or substantially certain to occur as a result of his action. The rule applies, in other words, to an interference that is incidental to the actor's independent purpose and desire but known to him to be a necessary consequence of his action. [P] 'The fact that this interference with the other's contract was not [\*\*\*\*132] desired and was purely incidental in character is, however, a factor to be considered in determining whether the interference is improper.' " (*Quelimane, supra, 19 Cal. 4th at p. 56*, fn. omitted.)

For several reasons, *Quelimane* is insufficient authority to support the majority's holding. First, as already noted, *Quelimane*'s discussion of the intent requirement is dictum because the defendant did not raise this issue. It is dictum for another reason as well; the complaint in *Quelimane* "allege[d] that 'defendants . . . ha[d] deliberately, willfully, and intentionally interfered with the [plaintiff's] contractual relations . . . !'" (*Quelimane, supra, 19 Cal. 4th at p. 57.*) Thus, we had no need in *Quelimane* to consider whether an allegation of substantial certainty is enough to state a claim.<sup>11</sup> Second, *Quelimane*'s dictum addressed the intent requirement for interference with contract, not intentional interference with prospective economic advantage. [\*1192] (*Id. at p. 56.*) As *Quelimane* also explained, because existing contracts "receive[] greater solicitude" than merely prospective economic advantages, the elements of interference with [\*\*\*\*133] contract and intentional interference with prospective economic advantage are not identical. (*Id. at pp. 55-56.*) We made the same point earlier in *Della Penna*, explaining that "[e]conomic relationships short of contractual"--i.e., prospective economic relationships--"should stand on a different legal footing as far as the potential for tort liability is [\*\*\*77] reckoned." (*Della Penna, supra, 11 Cal. 4th at p. 392.*) Logically, because prospective economic advantages receive less protection than existing contracts, the intent requirement for intentional interference with prospective economic advantage should be heightened. Third, *Quelimane* did not involve a plaintiff, like KSC, whose alleged injuries were only an indirect and remote consequence of the defendant's conduct; the complaint in *Quelimane* alleged that the defendants directly interfered with the plaintiffs' existing land sales contracts by refusing to issue title insurance. (*Quelimane, supra, 19 Cal. 4th at pp. 55-57.*) Because remoteness was not a factor in *Quelimane*, its dictum regarding the intent required to recover for direct injuries carries even less weight in the case now before us. [\*\*\*\*134] Finally, *Quelimane* did not consider or even cite *Seaman's*, which directly considered the intent question and held that proof of substantial certainty permits an inference of intent, but that substantial certainty is not a substitute for or an alternative articulation of intent to interfere.

The majority gives only slightly more consideration to *Seaman's* than did *Quelimane*; its discussion is as incorrect as it is brief. Relegating *Seaman's* to a mere footnote, the majority states that in *Della Penna*, "we expressly disapproved of" *Seaman's* "to the extent that it was inconsistent with *Della Penna*." (Maj. opn., *ante*, at p. 1155, fn. 7.) The [\*\*\*\*135] majority's statement, though accurate (see [\*\*977] *Della Penna, supra, 11 Cal. 4th at p. 393, fn. 5*), is completely irrelevant because *with regard to the intent requirement*, *Seaman's* is not in any way inconsistent with *Della Penna*. *Della Penna* never discussed the intent requirement and, as the majority concedes, did not affect the elements of the tort other than to add the wrongfulness requirement. (Maj. opn., *ante*, at pp. 1153-1154.) Consistent with its concession, the majority cites nothing in *Della Penna* to support its (the majority's) suggestion that *Seaman's* is somehow inconsistent with *Della Penna* with regard to the intent requirement. The majority also stresses *Della Penna*'s observation that *Seaman's* " 'rel[ied] on the first Restatement [of Torts] . . . without reviewing or even mentioning intervening revaluations of the tort by the Restatement Second, other state high courts and our own Court of Appeal.' [Citation.]" (Maj. opn., *ante*, at p. 1155, fn. 7.) However, in *Seaman's*, we based our *holding* regarding the intent requirement *on prior decisions of both this court and our Courts of Appeal*, and mentioned the first Restatement [\*\*\*\*136] of Torts only briefly. [\*1193] (*Seaman's, supra, 36 Cal. 3d at pp. 765-767.*) Notably, the majority fails to cite a single decision from our Courts of Appeal--or from the courts of other states--that *Seaman's* should have, but failed to, consider. Nor did *Quelimane* cite a case from either California or from some other jurisdiction to support its dictum regarding the intent requirement; as I have already explained and as the majority acknowledges (maj. opn., *ante*, at p. 1155, fn. 7), *Quelimane* completely ignored *Seaman's* (and the cases following it) and relied instead exclusively on the Restatement Second. Unlike the majority, I consider a prior *holding* of this court to be more binding--and "a better representation" of California law (maj. opn., *ante*, at p. 1155, fn. 7)--than the Restatement Second, or dictum that relied exclusively on the Restatement Second.

[\*\*\*78] The other basis for the majority's conclusion--that specific intent to interfere is unnecessary in light of *Della Penna*'s wrongful act requirement for intentional interference with prospective economic advantage (maj. opn., *ante*, at pp. 1159-1162)--is both questionable and ironic. It is questionable because, [\*\*\*\*137] as I have explained and as the majority acknowledges (maj. opn., *ante*, at pp. 1153-1154), *Della Penna* never discussed the intent

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<sup>11</sup> The same is true in the case now before us, because KSC's complaint alleges that Lockheed "intentionally induc[ed]" the Republic of Korea to award the contract to Lockheed "[i]n order to disrupt" KSC's relationship with MacDonald. Thus, it is unnecessary to decide whether a complaint alleging only substantial certainty adequately states a claim.

requirement or considered whether the wrongful act requirement would affect the intent requirement. The majority's analysis is ironic because, as I have also already explained, our purpose in *Della Penna* in adopting the wrongful act requirement was to *restrict* the scope of the tort of intentional interference with prospective economic advantage. The majority again turns *Della Penna* on its head by citing its wrongful act requirement as justification for relaxing the intent requirement and greatly *expanding* the tort's scope. Thus, the majority's conclusion that a plaintiff may state a claim by pleading "that the defendant knew that the interference was certain or substantially certain to occur," and need not "plead that the defendant acted with the specific intent . . . of disrupting the plaintiff's prospective economic advantage" (maj. opn., *ante*, at p. 1153), is inconsistent with California case law. Under *Seaman's* and the cases following it, a plaintiff who alleges injury that only remotely and indirectly follows from a defendant's [\*\*\*\*138] intentional interference with the prospective economic advantage of some third party should be allowed to recover, if at all, only upon pleading and proving that the defendant specifically intended to interfere with the plaintiff's prospective economic advantage.

Finally, I disagree with the majority's assertion that its substantial certainty requirement "is an appropriate limitation on both the potential number of plaintiffs that may bring a claim under this tort and the remoteness of these plaintiffs to a defendant's wrongful conduct." (Maj. opn., *ante*, at p. 1165.) [\*1194] As explained in the law review article on which the majority relies, "[e]conomic relationships are intertwined so intimately that disruption [\*\*978] of one may have far-reaching consequences. Furthermore, the chain reaction of economic harm flows from one person to another without the intervention of other forces. Courts facing a case of pure economic loss thus confront the potential for liability of enormous scope, with no easily marked intermediate points and no ready recourse to traditional liability-limiting devices such as intervening cause." (Perlman, *Interference with Contract and Other Economic Expectancies: A Clash [\*\*\*\*139] of Tort and Contract Doctrine*, *supra*, 49 U.Chi. L.Rev. at p. 72, fns. omitted.) However, "if a plaintiff suffering economic loss is required to show that [the defendant] knew of [the plaintiff's] contract or expectancy and *purposely disrupted it*, the number of successful plaintiffs and the extent of liability are considerably smaller." (*Id. at p. 77*, italics added.) Thus, "requiring the plaintiff to show intent by the defendant to interfere with a particular contract" or expectancy would help "distinguish[] the plaintiff's loss from injuries resulting more indirectly from the defendant's act." (*Id. at p. 76*, fn. omitted.) By contrast, the majority's relaxed substantial certainty requirement does little to narrow the enormous scope of potential liability for harm to economic relationships and offers "no principled way to cut off a myriad of other indirect claimants" who can each "claim that their business was somehow impacted or adversely affected by" MacDonald's loss of the contract.<sup>12</sup> [\*\*\*79] ( *Sharp v. United Airlines, Inc., supra, 967 F.2d at p. 409*.)

#### IV. CONCLUSION.

[\*\*\*\*140] In "[a]llowing suits by those injured only indirectly," the majority "open[s] the door to" greatly expanded liability for intentional interference with prospective economic advantage. (*Holmes, supra, 503 U.S. at p. 274 [112 S. Ct. at p. 1321]*.) Ironically, in doing so, it relies principally on a requirement--the defendant's commission of an independently wrongful act--that we established specifically to *restrict* liability. Based on the relevant policy considerations and case law, I would hold that a plaintiff whose alleged injury only indirectly and remotely follows from the defendant's interference with the prospective economic advantage of some third party may not maintain an action for intentional interference with prospective [\*1195] economic advantage. Therefore, I would affirm the trial court's dismissal of KSC's claim.

Brown, J., concurred.

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<sup>12</sup> For example, although the majority states that a defendant's interference "becomes less certain as . . . the identity of potential victims becomes more vague" (maj. opn., *ante*, at p. 1165), at least one California court has held that recovery is available as long as the plaintiff was "identified [to the defendant] in some manner," even if the defendant did not know "of the injured party's specific identity or name." ( *Ramona Manor Convalescent Hospital v. Care Enterprises (1986) 177 Cal. App. 3d 1120, 1133 [225 Cal. Rptr. 120]*.)

## Bronco Wine Co. v. Jolly

Supreme Court of California

August 5, 2004, Filed

S113136

**Reporter**

33 Cal. 4th 943 \*; 95 P.3d 422 \*\*; 17 Cal. Rptr. 3d 180 \*\*\*; 2004 Cal. LEXIS 7082 \*\*\*\*; 2004 Daily Journal DAR 9587; 2004 Cal. Daily Op. Service 7075

BRONCO WINE COMPANY et al., Petitioners, v. JERRY R. JOLLY, as Director, etc., et al., Respondents; NAPA VALLEY VINTNERS ASSOCIATION, Intervener.

**Notice:** As modified Oct. 13, 2004.

**Subsequent History:** Writ of mandamus denied, On remand at [Bronco Wine Co. v. Jolly, 2004 Cal. LEXIS 8027 \(Cal., Aug. 25, 2004\)](#)

Modified by [Bronco Wine Co. v. Jolly, 2004 Cal. LEXIS 9647 \(Cal., Oct. 13, 2004\)](#)

Rehearing denied by [Bronco Wine Co. v. Jolly, 2004 Cal. LEXIS 9765 \(Cal., Oct. 13, 2004\)](#)

US Supreme Court certiorari denied by *Bronco Wine Co. v. Jolly*, 161 L. Ed. 2d 479, 125 S. Ct. 1646, 2005 U.S. LEXIS 2479 (U.S., 2005)

Writ denied by, On remand at [Bronco Wine Co. v. Jolly, 2005 Cal. App. LEXIS 861 \(Cal. App. 3d Dist., May 26, 2005\)](#)

**Prior History:** [\*\*\*\*1] Court of Appeal, Third Dist., No. C037254.

[Bronco Wine Co. v. Espinoza, 104 Cal. App. 4th 598, 128 Cal. Rptr. 2d 320, 2002 Cal. App. LEXIS 5177 \(Cal. App. 3d Dist., 2002\)](#)

**Disposition:** Judgment of the Court of Appeal reversed; remanded.

## **Core Terms**

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wine, labeling, regulations, food, preempt, federal regulation, federal law, grapes, pure food, state regulation, brand name, preemption, appellation, state law, consumers, italics, grandfather clause, brand, geographic, stringent, brand-name, Alcohol, FAA Act, misbranding, misleading, license, bottle, beverage, obstacle, stricter

## **LexisNexis® Headnotes**

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## **HN1** [down arrow] Consumer Protection, Deceptive Labeling & Packaging

See [Cal. Bus. & Prof. Code § 25241](#).

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > General Overview

International Trade Law > General Overview

## **HN2** [down arrow] Consumer Protection, Deceptive Labeling & Packaging

The Federal Alcohol Administration Act, or FAA Act, [27 U.S.C.S. § 201 et seq.](#), enacted by Congress in 1935, bars misleading statements on wine labels, [27 U.S.C.S. § 205\(e\)](#), and requires federal approval of each label (via a certificate of label approval) before that label may be used in interstate or foreign commerce. A 1986 federal regulation, designed to implement [27 U.S.C.S. § 205\(e\)](#), generally prohibits the use of a label bearing a brand name that implies the wine was made from grapes grown in the area suggested by the brand, unless at least 75 percent of the grapes used to make the wine was in fact grown in that area . [27 C.F.R. § 4.39\(i\)\(1\) \(2003\)](#). But a “grandfather clause” appended to the federal regulation exempts from the federal regulation's prohibition an otherwise misleading geographic brand name if the brand name was in use prior to July 7, 1986, and the front label also discloses the true geographic source of the grapes used to make the wine contained in the bottle. [§ 4.39\(i\)\(2\)\(ii\)](#).

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > General Overview

## **HN3** [down arrow] Consumer Protection, Deceptive Labeling & Packaging

See [27 C.F.R. § 4.39\(i\) \(2003\)](#).

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > General Overview

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

## **HN4** [down arrow] Consumer Protection, Deceptive Labeling & Packaging

[Cal. Bus. & Prof. Code § 23090.5](#) divests the superior court of jurisdiction to enjoin or restrain a decision of the Department of Alcoholic Beverage Control, the agency charged with enforcing [Cal. Bus. & Prof. Code § 25241](#).

Constitutional Law > Supremacy Clause > Federal Preemption

Governments > Federal Government > US Congress

International Trade Law > General Overview

Constitutional Law > Supremacy Clause > General Overview

Governments > Federal Government > General Overview

## **HN5** [down arrow] **Supremacy Clause, Federal Preemption**

Under the [supremacy clause of the United States Constitution](#), U.S. Const. art. VI, [cl. 2](#), Congress has the power to preempt state law concerning matters that lie within the authority of Congress. In determining whether federal law preempts state law, a court's task is to discern congressional intent. Congress's express intent in this regard will be found when Congress explicitly states that it is preempting state authority. Congress's implied intent to preempt is found (i) when it is clear that Congress intended, by comprehensive legislation, to occupy the entire field of regulation, leaving no room for the states to supplement federal law; (ii) when compliance with both federal and state regulations is an impossibility; or (iii) when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Constitutional Law > Supremacy Clause > General Overview

Evidence > Burdens of Proof > General Overview

## **HN6** [down arrow] **Constitutional Law, Supremacy Clause**

The party who claims that a state statute is preempted by federal law bears the burden of demonstrating preemption. An important corollary of this rule is that, when Congress legislates in a field traditionally occupied by the states, the court starts with the assumption that the historic police powers of the states were not to be superseded by the federal act unless that was the clear and manifest purpose of Congress. This venerable presumption provides assurance that the federal-state balance will not be disturbed unintentionally by Congress or unnecessarily by the courts.

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Distribution, Processing & Storage

Antitrust & Trade Law > Consumer Protection > Consumer Product Safety Act > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

Governments > Police Powers

## **HN7** [down arrow] **Consumer Protection, Deceptive Labeling & Packaging**

State police powers properly are employed both to protect consumers' health and to prevent the deception of consumers. A state has an interest in protecting its reputation as a reliable source of authentic, high-quality goods in all markets where its goods compete. A state wine labeling statute, designed to protect the health of consumers and the integrity of the wine industry, is a proper exercise of the police power.

Governments > State & Territorial Governments > Licenses

## **HN8** [down arrow] **State & Territorial Governments, Licenses**

See [Cal. Const. art. XX, § 22](#).

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Banking Law > Consumer Protection > State Law > General Overview

Constitutional Law > Supremacy Clause > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Distribution, Processing & Storage

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > General Overview

Governments > Police Powers

## **HN9** [blue download icon] Consumer Protection, State Law

When Congress finally entered the specific field of wine label regulation in August 1935 by enacting the Federal Alcohol Administration Act, [27 U.S.C.S. § 201 et seq.](#), Congress was legislating in a field “traditionally regulated by the States.” Accordingly, a strong presumption against preemption applies, and a court should not find that the traditional police powers of the states to regulate wine labels (in order to prevent the deception of consumers) are superseded unless it is clear and manifest that Congress intended to preempt state law.

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > General Overview

Constitutional Law > Supremacy Clause > General Overview

## **HN10** [blue download icon] Consumer Protection, Deceptive Labeling & Packaging

The history of the 1935 Federal Alcohol Administration Act, [27 U.S.C.S. § 201 et seq.](#), discloses no intent on the part of Congress to supplant or preempt state efforts to regulate wine labeling.

Criminal Law & Procedure > ... > Alcohol Related Offenses > Distribution & Sale > Elements

International Trade Law > General Overview

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > General Overview

Criminal Law & Procedure > Criminal Offenses > Alcohol Related Offenses > General Overview

Criminal Law & Procedure > ... > Alcohol Related Offenses > Distribution & Sale > General Overview

Criminal Law & Procedure > ... > Alcohol Related Offenses > Transportation > Elements

## **HN11** [blue download icon] Distribution & Sale, Elements

The Federal Alcohol Administration Act (FAA Act), [27 U.S.C.S. § 201 et seq.](#), makes it illegal for any person to produce, sell, or ship wine in interstate or foreign commerce unless that person is licensed to do so by the Secretary of the Treasury. [27 U.S.C.S. § 203\(a\), \(b\)](#). [27 U.S.C.S. § 205\(e\)](#) directs the Secretary of the Treasury to promulgate such regulations with respect to packaging, marking, branding, and labeling (1) as will prohibit deception of the consumer with respect to alcoholic beverage products; and (2) as will provide the consumer with adequate information as to the identity and quality of the products. To enforce these requirements, this section of the FAA Act also requires that any person who sells or ships wine in interstate or foreign commerce first obtain from the Secretary of the Treasury (or his or her designee) a certificate of label approval, or COLA, for each wine, and directs that no wine may be shipped or sold in interstate commerce unless it bears a label that has been reviewed

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and approved by the Secretary of the Treasury, through issuance of a COLA. Finally, the section further provides that no wine label may be removed or altered “except as authorized by Federal law” or except pursuant to federal regulations authorizing relabeling for purposes of compliance with the requirements of this subsection or of State law.

Governments > Legislation > Interpretation

### [\*\*HN12\*\*](#) [L] **Legislation, Interpretation**

Statements by a single member of Congress can provide evidence of Congress' intent.

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Distribution, Processing & Storage

### [\*\*HN13\*\*](#) [L] **Consumer Protection, Deceptive Labeling & Packaging**

[27 C.F.R. § 4.25\(b\)\(1\)\(i\)](#) and [\(iii\) \(2003\)](#) states that a wine is “entitled” to be described with an appellation of origin if at least 75 percent of the wine is derived from fruit grown in the appellation area indicated and it conforms to the laws and regulations of the named appellation area governing the composition, method of manufacture, and designation of wines made in such place.

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Distribution, Processing & Storage

### [\*\*HN14\*\*](#) [L] **Consumer Protection, Deceptive Labeling & Packaging**

“Composition” refers to the ingredients used to make a wine, [27 C.F.R. § 4.34 \(2003\)](#), and generally consists simply of grapes. “Method of manufacture” refers to approved wine treatment materials and processes. [27 C.F.R. § 24.175 et seq. \(2003\)](#). “Designation of wines” is a concept distinct from brand name or appellation; it refers to the class or type of wine rather than the source or origin of the wine. [27 C.F.R. §§ 4.32\(a\)\(2\), 4.34 \(2003\)](#). For example, a wine may be designated by class as a grape wine, sparkling grape wine, or carbonated grape wine, [27 C.F.R. § 4.21 \(2003\)](#), or by the grape varietal. [27 C.F.R. §§ 4.23, 4.24, 4.28 \(2003\)](#). California long has enforced regulations that differ from the federal regulations with respect to method of manufacture.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Quality

### [\*\*HN15\*\*](#) [L] **Agriculture & Food, Food Product Quality**

See [Cal. Health & Safety Code § 110525](#).

Constitutional Law > Supremacy Clause > General Overview

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## [\*\*HN16\*\*](#) [blue icon] Constitutional Law, Supremacy Clause

An express definition of the pre-emptive reach of a statute supports a reasonable inference that Congress did not intend to pre-empt other matters.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

Constitutional Law > Supremacy Clause > Federal Preemption

Governments > Federal Government > Claims By & Against

Constitutional Law > Supremacy Clause > General Overview

## [\*\*HN17\*\*](#) [blue icon] Agency Rulemaking, Rule Application & Interpretation

The United States Supreme Court has stated that it is even more reluctant to infer pre-emption from the comprehensiveness of regulations than from the comprehensiveness of statutes. As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in the Supremacy Clause jurisprudence. Moreover, because agencies normally address problems in a detailed manner and can speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments, they will make their intentions clear if they intend for their regulations to be exclusive.

Constitutional Law > Supremacy Clause > General Overview

## [\*\*HN18\*\*](#) [blue icon] Constitutional Law, Supremacy Clause

What constitutes a sufficient obstacle for a finding of implied preemption is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects. A court's inquiry in this regard requires it to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written.

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > General Overview

Constitutional Law > Supremacy Clause > General Overview

## [\*\*HN19\*\*](#) [blue icon] Consumer Protection, Deceptive Labeling & Packaging

Cal. Bus. & Prof. Code § 25241 is consistent with Congress's overall purpose in enacting 27 U.S.C.S. § 205(e) -- that is, to insure that the purchaser should get what he thought he was getting, and that the representations both on labels and in advertising should be honest and straightforward and truthful. The state statute also is consistent with the recognition that the Federal Alcohol Administration Act, 27 U.S.C.S. § 201 et seq., was necessary in order to do something to supplement legislation by the States to carry out their own policies because the states alone cannot do the whole job. Cal. Bus. & Prof. Code § 25241 does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Constitutional Law > Supremacy Clause > General Overview

## **HN20** [blue icon] Constitutional Law, Supremacy Clause

The presumption against preemption reinforces the appropriateness of a narrow reading of assertedly preempting language.

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Quality

## **HN21** [blue icon] Consumer Protection, Deceptive Labeling & Packaging

It is apparent from the Federal Alcohol Administration Act, [27 U.S.C.S. § 201 et seq.](#), and from the corresponding regulations, that both Congress and the Bureau of Alcohol, Tobacco, and Firearms (BATF) well understand the distinction between a license or permit, on one hand, and a certificate of label approval (COLA), on the other. Congress requires wine importers, producers, and wholesalers to secure a “basic permit,” [27 U.S.C.S. § 203\(a\)-\(c\)](#), and the BATF has adopted extensive corresponding regulations concerning such permits, [27 C.F.R. §§ 1.20-1.59 \(2003\)](#). By contrast, nowhere in the separate COLA procedures set forth in [27 U.S.C.S. § 205\(e\)](#), or the extensive COLA regulations, [27 C.F.R. §§ 4.50-4.52](#), 13.1-13.92 (2003), does Congress or the BATF even imply that a COLA constitutes a license or permit.

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Quality

International Trade Law > General Overview

## **HN22** [blue icon] Consumer Protection, Deceptive Labeling & Packaging

The Bureau of Alcohol, Tobacco, and Firearms (BATF) has observed that a certificate of label approval (COLA) was never intended to convey any type of proprietary interest to the certificate holder and that a certificate is issued for BATF use only. The COLA is a statutorily mandated tool used to help the BATF in its enforcement of the labeling requirements of the Federal Alcohol Administration Act, [27 U.S.C.S. § 201 et seq.](#) [64 Fed. Reg. 2122, 2123 \(Jan. 13, 1999\)](#). A COLA goes no further than evidencing compliance with federal regulatory standards imposed only for the purposes mentioned in the valid exercise of federal authority.

## **Headnotes/Summary**

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### **Summary**

#### CALIFORNIA OFFICIAL REPORTS SUMMARY

A bulk wine producer and a wine bottler filed an original petition for a writ of mandamus in the Court of Appeal, seeking to prohibit the Department of Alcoholic Beverage Control and its director from enforcing [Bus. & Prof. Code, § 25241](#), the state wine labeling statute, with respect to three brand-name wines bottled and marketed by the wine company, on the ground that regulations designed to implement the Federal Alcohol Administration Act (FAA Act), [27 U.S.C. § 201 et seq.](#), preempted the state statute. [Bus. & Prof. Code, § 25241](#), requires that, when the word “Napa” (or the name of any federally recognized viticultural region within Napa County, such as Rutherford) appears

on a brand label, at least 75 percent of the grapes used to make that wine must be from Napa County. The wine company however, uses the three brand names (Napa Ridge, Napa Creek Winery, and Rutherford Vintners) exclusively to sell wines made from grapes grown outside Napa County. The brand names had been acquired from predecessor owners of wineries located in Napa County and the wine company's continued use of the brand-name labels had been approved by the federal agency charged with enforcing the federal labeling law. A "grandfather clause" appended to the federal regulations ([27 C.F.R. § 4.39\(i\)\(2\)\(ii\)](#)) exempted the three labels from the federal regulation, which would have similarly required that 75 percent of the grapes had in fact been grown in Napa County or one of its viticultural regions ([27 C.F.R. § 4.39\(i\)\(1\)](#)), because the brand name had been in use prior to July 7, 1986, and the front labels also disclosed the true geographic source of the grapes used to make the wines. The Court of Appeal, Third Dist., No. C037254, concluded that [Bus. & Prof. Code, § 25241](#), is preempted by federal law.

The Supreme Court reversed the judgment of the Court of Appeal and remanded the. The court concluded that the state labeling statute was neither expressly nor impliedly preempted by federal law. Extensive review of the history of state and federal regulation of beverage and wine labels revealed [\*944] substantial state involvement and very little federal regulation prior to the adoption of the [FAA Act](#), leading to the conclusion that the presumption against preemption applied. The intent of Congress in enacting the [FAA Act](#) was to preventing the deception or misleading of consumers related to the labeling of wine, and to supplement—but not supplant—existing state regulation of the industry. The wine company failed to demonstrate that the long history of concurrent state and federal regulation of wine labeling, including historically, the representations appearing on labels suggesting the place of origin of the grapes used to make wine, was no longer compatible with the overall purposes of the federal regulation of wine labeling. [Bus. & Prof. Code, § 25241](#), by prohibiting, with respect to Napa County, what was not prohibited by the federal regulation's grandfather clause—the use of established geographical brand names for wines from a variety of appellation areas—did not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The congressional and regulatory acquiescence in California's long-standing regulations applicable to the labeling of wines produced in California demonstrated that the responsible federal regulatory agency operated on the understanding that states may and would continue to impose their own stricter wine labeling regulations. Finally, by purchasing a brand name that had been used prior to 1986, the wine company had not acquired a federally recognized right of license exempting it from stricter state regulation. (Opinion by George, C. J., with Kennard, Baxter, Chin, Brown, and Moreno, JJ., and Swager, J.\* concurring.)

## **Headnotes**

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

**Alcoholic Beverages § 4—Alcoholic Beverage Control Act—Wine Produced or Marketed in California—Brand Name and Label—Napa County and Napa Viticultural Regions—Appellation of Origin.**

[Bus. & Prof. Code, § 25241, subd. \(b\)](#), provides in relevant part that no wine produced or marketed in California shall use a brand name or have a label bearing the word "Napa" (or any federally recognized viticultural area within Napa County) unless at least 75 percent of the grapes from which the wine was made was grown in Napa County.

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

**Alcoholic Beverages § 3—Federal Alcohol Administration Act—Wine—Geographic Brand Name—Viticultural Region—Appellation of Origin—Grandfather Clause.**

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\* Associate Justice of the Court of Appeal, First Appellate District, Division One, assigned by the Chief Justice pursuant to article VI, section 6, of the California Constitution.

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The Federal Alcohol Administration [\*945] Act, [27 U.S.C. § 201 et seq.](#), bars misleading statements on wine labels ([27 U.S.C. § 205\(e\)](#)) and requires federal approval of each label via a certificate of label approval before that label may be used in interstate or foreign commerce. Title [27 C.F.R. § 4.39\(i\)\(1\)](#), designed to implement [27 United States Code § 205\(e\)](#), generally prohibits the use of a label bearing a brand name that implies the wine was made from grapes grown in the area suggested by the brand, unless at least 75 percent of the grapes used to make the wine was in fact grown in that area. But a “grandfather clause” appended to the federal regulation exempts from the federal regulation’s prohibition an otherwise misleading geographic brand name if the brand name was in use prior to July 7, 1986, and the front label also discloses the true geographic source of the grapes used to make the wine contained in the bottle. ([27 C.F.R. § 4.39\(i\)\(2\)\(ii\).](#))

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

##### **Constitutional Law § 34—Distribution of Governmental Powers—Between Federal and State Governments—Conflicts Between Federal and State Powers—Federal Preemption.**

Under the supremacy clause of the [U.S. Const., art. VI, cl. 2](#), Congress has the power to preempt state law concerning matters that lie within the authority of Congress. In determining whether federal law preempts state law, a court’s task is to discern congressional intent. Congress’s express intent in this regard is found when Congress explicitly states that it is preempting state authority. Congress’s implied intent to preempt is found (i) when it is clear that Congress intended, by comprehensive legislation, to occupy the entire field of regulation, leaving no room for the states to supplement federal law; (ii) when compliance with both federal and state regulations is an impossibility; or (iii) when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

#### [CA\(4\)](#) [ ] (4)

##### **Constitutional Law § 34—Distribution of Governmental Powers—Between Federal and State Governments—Conflicts Between Federal and State Powers—Federal Preemption—Burden of Proof.**

The party who claims that a state statute is preempted by federal law bears the burden of demonstrating preemption.

#### [CA\(5\)](#) [ ] (5)

##### **Constitutional Law § 34—Distribution of Governmental Powers—Between Federal and State Governments—Conflicts Between Federal and State Powers—Federal Preemption—Field Traditionally Occupied by the States.**

When Congress legislates in a field traditionally occupied by the states, a court starts with the assumption that the historic police powers of the states were not to be superseded by the federal act unless that was the clear and manifest purpose of Congress.

#### [\*946] [CA\(6\)](#) [ ] (6)

##### **Alcoholic Beverages § 3—Federal Alcohol Administration Act—Preemption.**

Historic evidence demonstrates that when Congress finally entered the specific field of wine label regulation in August 1935 by enacting the Federal Alcohol Administration Act, [27 U.S.C. § 201 et seq.](#), Congress was legislating in a field traditionally regulated by the States. Accordingly, a strong presumption against federal preemption of state law applies, and a court should not find that the traditional police powers of the states to regulate wine labels (in

order to prevent the deception of consumers) are superseded unless it is clear and manifest that Congress intended to preempt state law.

**CA(7)[] (7)**

**Alcoholic Beverages § 3—Federal Alcohol Administration Act—Federal Preemption—No Intent to Preempt State Regulation—Wine Labeling.**

The history of the 1935 Federal Alcohol Administration Act discloses no intent on the part of Congress to supplant or preempt state efforts to regulate wine labeling.

**CA(8)[] (8)**

**Alcoholic Beverages § 3—Federal Alcohol Administration Act.**

The Federal Alcohol Administration Act (FAA Act), [27 U.S.C. § 201 et seq.](#), makes it illegal for any person to produce, sell, or ship wine in interstate or foreign commerce unless that person is licensed to do so by the Secretary of the Treasury. ([27 U.S.C. § 203\(a\) & \(b\).](#)) Title [27 U.S.C. § 205\(e\)](#), directs the Secretary of the Treasury to promulgate such regulations with respect to packaging, marking, branding, and labeling (1) as will prohibit deception of the consumer with respect to alcoholic beverage products and (2) as will provide the consumer with adequate information as to the identity and quality of the products. To enforce these requirements, this section of the FAA Act also requires that any person who sells or ships wine in interstate or foreign commerce first obtain from the Secretary of the Treasury a certificate of label approval, for each wine, and directs that no wine may be shipped or sold in interstate commerce unless it bears a label that has been reviewed and approved by the Secretary of the Treasury, through issuance of such a certificate. Finally, the section further provides that no wine label may be removed or altered except as authorized by federal law or except pursuant to federal regulations authorizing relabeling for purposes of compliance with the requirements of this subsection or of state law.

**CA(9)[] (9)**

**Alcoholic Beverages § 3—Federal Alcohol Administration Act—Federal Preemption—No Intent to Preempt State Regulation—Wine Labeling.**

Nothing in the body of the Federal Alcohol Administration Act, [27 U.S.C. § 201 et seq.](#), reveals congressional intent to supersede concurrent (or more stringent) regulation of wine labeling by the states under their traditional police powers.

**[\*947] CA(10)[] (10)**

**Alcoholic Beverages § 3—Federal Alcohol Administration Act—Federal Regulation—Concurrent or Stricter State Regulation—Wine Labeling.**

The federal agencies within the Department of the Treasury responsible for wine labeling regulation have long contemplated or at least acquiesced in concurrent and stricter state regulation.

**CA(11)[] (11)**

**Alcoholic Beverages § 3—Federal Alcohol Administration Act—Federal Labeling Regulations—Wine Labels—Appellation of Origin.**

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Title [27 C.F.R. § 4.25\(b\)\(1\)\(i\), \(iii\)](#) states that a wine is entitled to be described with an appellation of origin if at least 75 percent of the wine is derived from fruit grown in the appellation area indicated and it conforms to the laws and regulations of the named appellation area governing the composition, method of manufacture, and designation of wines made in such place.

[CA\(12\)](#) [ ] (12)

**Alcoholic Beverages § 3—State Department of Health Services—Wine Regulation.**

Since mid-1939, the California Legislature has authorized state wine regulations that are stricter than federal wine regulations, and since 1970, the Legislature expressly has authorized state wine regulations to differ from or be inconsistent with federal wine regulations ([Health & Saf. Code, § 110525](#)).

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

**Alcoholic Beverages § 3—Federal Alcohol Administration Act—Federal Preemption.**

The history of the federal and Oregon wine labeling regulations in the mid-1970s through the present reveals no evidence of any intent to preempt more stringent state regulations. Instead, that history strongly indicates that the Bureau of Alcohol, Tobacco and Firearms has long contemplated that the states will enforce their own stricter labeling requirements, and that the agency did not and does not view its labeling regulations as preempting more stringent state regulations such as [Bus. & Prof. Code, § 25241](#).

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

**Constitutional Law § 34—Distribution of Governmental Powers—Between Federal and State Governments—Conflicts Between Federal and State Powers and Their Resolution—Federal Preemption.**

An express definition of the preemptive reach of a statute supports a reasonable inference that Congress did not intend to preempt other matters.

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

**Alcoholic Beverages § 4—Alcoholic Beverage Control Act—Wine Produced or Marketed in California—Brand Name and Label—Napa County and Napa Viticultural Regions—Appellation of Origin—Not Obstacle to Purposes and Objectives of Federal Alcohol Administration Act.**

[Bus. & Prof. Code, § 25241](#), is consistent with [\*948] Congress's overall purpose in enacting [27 U.S.C. § 205\(e\)](#)—that is, to ensure that the purchaser should get what he or she thought he or she was getting, and that the representations both on labels and in advertising should be honest and straightforward and truthful. The state statute also is consistent with the recognition that the Federal Alcohol Administration Act, [27 U.S.C. § 201 et seq.](#), was necessary in order to do something to supplement legislation by the states to carry out their own policies because the states alone cannot do the whole job. [Bus. & Prof. Code, § 25241](#), does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

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

**Alcoholic Beverages § 4—Alcoholic Beverage Control Act—Wine Produced or Marketed in California—Geographical Brand Name and Label—Napa County and Napa Viticultural Regions—Not Preempted by the Grandfather Clause of Federal Regulations Which Exempted Certain Geographic Brand Names from Appellation of Origin Requirements.**

Nothing in the history of the Federal Alcohol Administration Act, [27 U.S.C. § 201 et seq.](#), or its enabling regulations, [27 C.F.R. §§ 4.20–4.39](#), suggests that, although the Bureau of Alcohol, Tobacco and Firearms (BATF) may have determined that the grandfather clause of [27 C.F.R. § 4.39\(i\)\(2\)\(ii\)](#), which exempted from federal regulation certain established but otherwise misleading geographic brand names, was appropriate so as to avoid destroying an entire class of brand-name labels, states would or should be precluded from adopting more stringent brand-name labeling requirements as necessary to address local concerns. The more stringent requirement of [Bus. & Prof. Code, § 25241](#), that no wine produced or marketed in California can use a brand name label bearing the word “Napa” (or any federally recognized viticultural area within Napa County) unless at least 75 percent of the grapes from which the wine was made were grown in Napa County, did not frustrate Congress’s intent or stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. A wine company that had acquired three brand names bearing the words “Napa” or “Rutherford” from predecessor owners of wineries in Napa County could not demonstrate that the grandfather clause of [27 C.F.R. § 4.39\(i\)\(2\)\(ii\)](#), preempted [Bus. & Prof. Code, § 25241](#), and, thus, could not establish its right to use, on wines made from grapes grown in areas far from Napa County and the Rutherford viticultural region, the geographical brand names it had acquired.

[7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 15.]

[\*949] [CA\(17\)](#) [  ] (17)

**Alcoholic Beverages § 3—Federal Alcohol Administration Act—Federal Preemption—Bureau of Alcohol, Tobacco and Firearms—Enforcement of Bare Terms of Federal Wine Labeling Law.**

The Bureau of Alcohol, Tobacco and Firearms (BATF) envisions that states will enforce their own labeling laws to the extent they impose more stringent requirements, and generally views its role as being confined to ensuring compliance with the bare terms of federal labeling law. The BATF itself has confirmed this view of its enforcement authority and of any resulting certificate of label approval that it issues by noting, on its application form, that the BATF uses the form only for its own federal enforcement duties but that it may share the information supplied to state regulators to aid in the performance of their duties.

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

**Alcoholic Beverages § 3—Federal Alcohol Administration Act—Federal Preemption—Bureau of Alcohol, Tobacco and Firearms—Certificate of Label Approval.**

A federal certificate of label approval cannot properly be viewed as conferring a right on the holder to market wines in interstate or foreign commerce so long as the bare Bureau of Alcohol, Tobacco and Firearms (BATF) labeling regulations are satisfied. The BATF itself has observed that a certificate of label approval was never intended to convey any type of proprietary interest to the certificate holder and that a certificate is issued for BATF use only. The certificate of label approval is a statutorily mandated tool used to help the BATF in its enforcement of the labeling requirements of the Federal Alcohol Administration Act, [27 U.S.C. § 201 et seq.](#) A certificate goes no further than evidencing compliance with federal regulatory standards imposed only for the purposes mentioned, in the valid exercise of federal authority.

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Pillsbury Winthrop, Kevin M. Fong and James M. Seff for Jordan Vineyard & Winery and North Coast Winegrowers Association et al., as Amici Curiae on behalf of Respondent and Intervener.

**Judges:** George, C. J., with Kennard, Baxter, Chin, Brown and Moreno, JJ., and Swager, J.P.T.\* concurring.

(\*Associate Justice, Court of Appeal, First Appellate District, Division One, assigned by the Chief Justice pursuant to article VI, section 6, of the California Constitution.) [\*\*\*\*2]

**Opinion by:** George

## Opinion

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[\*\*\*183] [\*\*424] **GEORGE, C. J.**?This case concerns three brand-name labels (Napa Ridge, Napa Creek Winery, and Rutherford Vintners) appearing on wine bottled and marketed by petitioners Bronco Wine Company and Barrel Ten Quarter Circle, Inc. (hereafter Bronco). These wines are made not from grapes grown in Napa County, or in the Rutherford viticultural (wine grape growing) region of Napa County,<sup>1</sup> but instead from grapes grown in areas far from Napa, such as Stanislaus County and the environs of the City of Lodi—areas where the cost of grapes, and often their perceived quality as well, is considerably lower. The challenged bottle labels have been approved by the federal agency charged by Congress with enforcing federal labeling law but violate a four-year-old California wine labeling statute, which requires that, when the word “Napa” (or any federally recognized viticultural [\*\*425] region within Napa County) appears on a brand label, at least 75 percent of the grapes used to make that wine must be from Napa County. ([Bus. & Prof. Code, § 25241](#) (hereafter [section 25241](#).) We granted review to consider the Court of Appeal’s conclusion that federal [\*\*\*3] law preempts the state law. We conclude that the state labeling statute is not preempted by federal law and hence that the judgment rendered by the Court of Appeal must be reversed.

I.

Bronco asserts that it specializes in “premium wines at affordable prices.” Some of Bronco’s wine is bottled at its facilities in Ceres (near Modesto, in Stanislaus County) and in Sonoma County; other Bronco wines are bottled by petitioner Barrel Ten Quarter Circle, Inc., at a recently completed facility in the City of Napa, in Napa County. The latter plant is capable of producing approximately 18 million 12-bottle cases per year—output that would be more than double the current annual production of Napa-grown wines.

[\*951] Bronco sells wines under approximately 30 labels or brand names. A representative [\*\*\*4] label for the three challenged brand names (Napa Ridge, Napa Creek Winery, and Rutherford Vintners) is set forth in the appendix.<sup>2</sup> [\*\*\*5] As can be seen, with regard to the representative Napa Ridge label, the label lists (in smaller lettering and below the brand name) the “designation” of the wine (the varietal name White Merlot), followed underneath by the “appellation of origin”—the geographic source of the grapes (Lodi). The representative Napa

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<sup>1</sup> Rutherford is a federally recognized viticultural region located within Napa County. ([27 C.F.R. § 9.133 \(2003\)](#); all further citations to the Code of Federal Regulations are to the 2003 edition unless otherwise indicated.)

<sup>2</sup> The labels set forth in Bronco’s appendix to the petition for writ of mandate are divided into sections for each of the three brand names. The labels selected for description below and displayed in the appendix to our opinion are the first from each section.

Creek Winery label lists (in smaller lettering and below the brand name) the appellation of origin (Lodi), followed underneath by the varietal name (Chardonnay). [\*\*\*184] The representative Rutherford Vintners label lists (in smaller lettering and below the brand name) the appellation of origin (Stanislaus County), followed underneath by the varietal name (Merlot). The “back label” of each states that the wine was “vinted and bottled” by the named winery in “Napa, CA” or in “Napa, California.”<sup>3</sup> In addition, many of the Napa Ridge wines include the word “Napa” on bottleneck collars, and some include that word on branded corks.

Bronco acquired these three brand names, and the right to use these labels, from predecessor owners of wineries located in Napa County. The Napa Ridge brand, which Bronco acquired in January 2000 from Beringer Wine Estates for more than \$ 40 million, had been in use since [\*\*\*\*6] the early 1980s. The Napa Creek Winery brand, introduced in 1981, was acquired by Bronco in 1993. The Rutherford Vintners brand originated in the early 1970s, and was acquired by Bronco in 1994.

The prior owner of the Napa Ridge brand had used that name and label for wines made from grapes grown in California's Central Coast, North Coast, and Lodi appellation areas, as well as from Napa County. All of the wines previously marketed by the prior owner under the Napa Creek Winery brand and most wines previously marketed by the prior owner under the Rutherford Vintners brand had been made from Napa County grapes. Under Bronco's [\*952] ownership, all three of these brands have been used almost exclusively to sell wines made from grapes grown outside Napa County.

The bill that became [section 25241](#) was introduced in the California Legislature in February 2000 (Assem. Bill No. 683 (1999–[\*\*426] 2000 Reg. Sess.)). After receiving substantial public comment and holding hearings,<sup>4</sup> [\*\*\*\*8] the Legislature found: “(a)(1) … [F]or more than a century, Napa Valley and Napa County have been widely recognized for producing grapes and wine of the highest quality. Both consumers and the wine industry understand the [\*\*\*\*7] name Napa County and the viticultural area appellations of origin contained within Napa County (collectively ‘Napa appellations’) as denoting that the wine was created with the distinctive grapes grown in Napa County. [¶] (2) The Legislature finds, however, that certain producers are using Napa appellations on labels, on packaging materials, and in advertising for wines that are not made from grapes grown in Napa County, and that consumers are confused and deceived by these practices. [¶] (3) The Legislature further finds that legislation is necessary to eliminate these misleading practices. It is the [\*\*\*185] intent of the Legislature to assure consumers that the wines produced or sold in the state with brand names, packaging materials, or advertising referring to Napa appellations in fact qualify for the Napa County appellation of origin.” ([§ 25241, subd. \(a\)](#), added by Stats. 2000, ch. 831, § 1.)<sup>5</sup>

<sup>3</sup> The word “vinted” is used when wine is fermented at one address and thereafter subjected to “cellar treatment” (such as filtering) at a different address stated on the label. (See 27 C.F.R. § 4.35a(a)(3)(iii) & (v).) Each back label also contains a further statement concerning the appellation of origin. The Napa Ridge back label states: “This White Merlot, from the Lodi Region of Northern California, starts with an enticing aroma of strawberry and cherry … .” The Napa Creek Winery back label states: “From vineyards blessed by the warm days and cool nights of California's famed Lodi viticultural area, our Chardonnay is well structured with complex flavors from partial barrel fermentation. … .” The Rutherford Vintners back label reads: “These grapes were harvested from the lush vineyards of Stanislaus County. … .”

<sup>4</sup> The Legislature heard evidence of intent, or at least willingness, to expand dramatically the marketing of Napa-named brands, including the hope of fully utilizing the capacity of the new 18-million-case bottling plant in the City of Napa, to produce wine from grapes grown outside Napa County. (See transcript of Sen. Governmental Organization Com., hearings on Assem. Bill No. 683 (1999–2000 Reg. Sess.) (June 27, 2000), pp. 29 & 31 [responses to questions by Sen. Chesbro].)

<sup>5</sup> Bronco contests the Legislature's findings, asserting that labels such as those set out in the record are not in law or in fact deceptive because they display a correct appellation of origin. The Legislature's findings to the contrary, however, are supported both by testimony and survey results presented at the hearings disclosing consumer confusion relating to such labels. Moreover, as observed at the hearings, an uninformed consumer may not know that an unelaborated term (for example, Lodi) appearing on a label refers to a geographic location outside Napa County or even that the named location (in contrast to the brand name of the wine) signifies the place where the grapes used to make the wine actually were grown. Similarly, consumers in restaurants who order wine by the bottle or the glass from menus may be aware only of the brand name of the wine and generally will not have an opportunity to read the label of the bottle before placing an order.

**CA(1)**<sup>↑</sup> (1) The resulting legislation, [section 25241](#), provides in relevant part that no wine produced or marketed in California shall use a brand [\*\*\*\*9] name or have a label bearing the word "Napa" (or any federally recognized viticultural area within Napa County) unless at least 75 percent of the grapes from which the wine was made were grown in Napa County. (*Id.*, [subd. \(b\).](#))<sup>6</sup>

[\*\*\*\*10] [\*953] [\*\*427] **CA(2)**<sup>↑</sup> (2) The legislative history discloses that [section 25241](#) was designed to close what some legislators termed a "loophole" created by an exception in a federal wine labeling [\*\*\*\*186] regulation. As discussed more fully below, federal law, [HN2](#)<sup>↑</sup> the Federal Alcohol Administration Act, or FAA Act ([27 U.S.C. § 201 et seq.](#)), enacted by Congress in 1935, bars misleading statements on wine labels (*id.*, [§ 205\(e\)](#)) and requires federal approval of each label via a certificate of label approval (hereafter sometimes COLA) before that label may be used in interstate or foreign commerce. A 1986 federal regulation, also described more fully below, designed to implement [27 United States Code section 205\(e\)](#), generally prohibits the use of a label bearing a brand name that implies the wine was made from grapes grown in the area suggested by the brand, unless at least 75 percent of the grapes used to make the wine were in fact grown in that area ([27 C.F.R. § 4.39\(i\)\(1\)](#)). But a "grandfather clause" appended to the federal regulation exempts from the federal regulation's prohibition an otherwise misleading geographic brand name if the brand name was in use prior to July 7, 1986, [\*\*\*\*11] and the front label also discloses the true geographic source of the grapes used to make the wine [\*954] contained in the bottle. (*Id.*, [§ 4.39\(i\)\(2\)\(ii\).](#))<sup>7</sup> [\*\*\*\*12] In other words, the state statute prohibits, with respect to Napa County, what the federal regulation's grandfather clause does not prohibit.<sup>8</sup>

<sup>6</sup> [Section 25241](#) sets out in [subdivision \(a\)](#) the findings quoted above, and then [HN1](#)<sup>↑</sup> provides:

"(b) No wine produced, bottled, labeled, offered for sale or sold in California shall use, in a brand name or otherwise, on any label, packaging material, or advertising, any of the names of viticultural significance listed in subdivision (c), unless that wine qualifies under Section 4.25a [now section 4.25—see 68 Federal Register 39454, 39455 (July 2, 2003)] of Title 27 of the Code of Federal Regulations for the appellation of origin Napa County and includes on the label, packaging material, and advertising that appellation or a viticultural area appellation of origin that is located entirely within Napa County, subject to compliance with Section 25240.

"Notwithstanding the above, this subdivision shall not grant any labeling, packaging, or advertising rights that are prohibited under federal law or regulations.

"(c) The following are names of viticultural significance for purposes of this section:

"(1) Napa.

"(2) Any viticultural area appellation of origin established pursuant to Part 9 (commencing with Section 9.1) of Title 27 of the Code of Federal Regulations that is located entirely within Napa County.

"(3) Any similar name to those in paragraph (1) or (2) that is likely to cause confusion as to the origin of the wine.

"(d) The appellation of origin required by this section shall meet the legibility and size-of-type requirements set forth in either Section 4.38 or Section 4.63 of Title 27 of the Code of Federal Regulations, whichever is applicable.

"(e) Notwithstanding subdivision (b), any name of viticultural significance may appear either as part of the address required by Sections 4.35 and 4.62 of Title 27 of the Code of Federal Regulations, if it is also the post office address of the bottling or producing winery or of the permittee responsible for the advertising, or as part of any factual, nonmisleading statement as to the history or location of the winery.

"(f) The department may suspend or revoke the license of any person who produces or bottles wine who violates this section. Following notice of violation to the person in possession of the wine and a hearing to be held within 15 days thereafter, if requested by any interested party within five days following the notice, the department may seize wine labeled or packaged in violation of this section regardless of where found, and may dispose of the wine upon order of the department. From the time of notice until the departmental determination, the wine shall not be sold or transferred.

"(g) This section applies only to wine which is produced, bottled, or labeled after January 1, 2001."

<sup>7</sup> [27 Code of Federal Regulations section 4.39\(i\)](#) [HN3](#)<sup>↑</sup> provides:

[\*\*\*\*13] In late December 2000, shortly before [section 25241](#) was to become effective, Bronco filed an original petition for a writ [\*\*\*187] of mandamus in the Court of Appeal,<sup>9</sup> seeking to prohibit respondents (the Department of Alcoholic Beverage Control and its then Interim [\*\*428] Director, Manuel R. Espinoza, currently Jerry R. Jolly, Director) (hereafter the Department) from enforcing [section 25241](#) with respect to Bronco's wines, on the ground that the state [\*955] statute to the extent it applies to wine destined for interstate or foreign commerce is preempted by the grandfather clause contained in the federal law. Bronco also claimed that the California statute violates the [First Amendment](#), the commerce clause, and the [takings clause of the United States Constitution](#). Intervener Napa Valley Vintners Association (NVVA) joined with the Department in defending the validity of the state enactment. The Court of Appeal issued an alternative writ and granted a stay of enforcement of [section 25241](#). As noted above, that court ultimately concluded that [section 25241](#) is preempted by federal law, and to date that statute has not been enforced. We granted review to address the preemption issue only.

[\*\*\*\*14] II.

A.

[CA\(3\)](#) [↑] (3) The basic rules of preemption are not in dispute: [HN5](#) [↑] Under the supremacy clause of the [United States Constitution](#) (art. VI, cl. 2), Congress has the power to preempt state law concerning matters that lie within the authority of Congress. ([Crosby v. National Foreign Trade Council \(2000\) 530 U.S. 363, 372 \[147 L. Ed. 2d 352,](#)

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"(i) *Geographic brand names.* (1) Except as provided in subparagraph 2, a brand name of viticultural significance may not be used unless the wine meets the appellation of origin requirements for the geographic area named.

"(2) For brand names used in existing certificates of label approval issued prior to July 7, 1986:

"(i) The wine shall meet the appellation of origin requirements for the geographic area named; or

"(ii) The wine shall be labeled with an appellation of origin in accordance with [§ 4.34\(b\)](#) as to location and size of either:

"(A) A county or a viticultural area, if the brand name bears the name of a geographic area smaller than a state, or;

"(B) A state, county or a viticultural area, if the brand name bears a state name; or

"(iii) The wine shall be labeled with some other statement which the appropriate ATF [Bureau of Alcohol, Tobacco and Firearms] officer finds to be sufficient to dispel the impression that the geographic area suggested by the brand name is indicative of the origin of the wine.

"(3) A name has viticultural significance when it is the name of a state or county (or the foreign equivalents), when approved as a viticultural area in part 9 of this chapter, or by a foreign government, or when found to have viticultural significance by the appropriate ATF officer."

<sup>8</sup> Bronco asserts that the statute was drafted in such a manner as to protect other established Napa County wineries, and to target "only a single brand owner—Bronco" (and its three grandfathered brands). The record discloses, however, at least 32 other Napa-related "grandfathered" brands (none of which, it appears, *presently* produces any wine that would violate [section 25241](#)) that also would be covered by the statute, including the "Napa named" brands Napa Wine Cellars, Napa Wine Co., Napa Cellars, Napa Valley Winery, Napa Vintners, and "Napa viticultural appellation" brands Rutherford Hill, Stag's Leap Wine Cellars, Stags' Leap Winery, Spring Mountain, Mount Veeder Winery, St. Helena Vineyards, and Oakville Vineyards.

Bronco also complains that the statute is underinclusive, in that it does not restrict the use of non-Napa brand names, such as "Monterey Vineyards" or "Sonoma Creek," nor does it preclude the use of brand labels denoting a viticultural area within Napa, such as the brand "Stag's Leap Wine Cellars," for a Napa County wine made with grapes grown outside the Stags Leap District of the Napa Valley. (Cf. [Bus. & Prof. Code, § 25240](#) [requiring such labels to state a "Napa Valley" appellation in addition to the viticultural area within Napa Valley].) Any such underinclusiveness, however, is irrelevant to our present preemption inquiry.

<sup>9</sup> [Business and Professions Code section 23090.5](#) [HN4](#) [↑] divests the superior court of jurisdiction to enjoin or restrain a decision of the Department of Alcoholic Beverage Control, the agency charged with enforcing [Business and Professions Code section 25241](#).

120 S. Ct. 2288] (Crosby.)) In determining whether federal law preempts state law, a court's task is to discern congressional intent. (English v. General Elec. Co. (1990) 496 U.S. 72, 78–79 [110 L. Ed. 2d 65, 110 S. Ct. 2270].) Congress's express intent in this regard will be found when Congress explicitly states that it is preempting state authority. (Jones v. Rath Packing Co. (1977) 430 U.S. 519, 525 [51 L. Ed. 2d 604, 97 S. Ct. 1305] (Jones).) Congress's implied intent to preempt is found (i) when it is clear that Congress intended, by comprehensive legislation, to occupy the entire field of regulation, leaving no room for the states to supplement federal law (Rice v. Santa Fe Elevator Corp. (1947) 331 U.S. 218, 230 [91 L. Ed. 1447, 67 S. Ct. 1146] (Rice)); (ii) when compliance with both federal and state regulations is an impossibility [\*\*\*\*15] (Florida Avocado Growers v. Paul (1963) 373 U.S. 132, 142–143 [10 L. Ed. 2d 248, 83 S. Ct. 1210] (Florida Avocado)); or (iii) when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (Hines v. Davidowitz (1941) 312 U.S. 52, 67 [85 L. Ed. 581, 61 S. Ct. 399] (Hines); see also Crosby, supra, 530 U.S. at p. 373; Barnett Bank of Marion Cty., N.A. v. Nelson (1996) 517 U.S. 25, 31 [134 L. Ed. 2d 237, 116 S. Ct. 1103] (Barnett Bank); Lawrence County v. Lead-Deadwood School Dist. (1985) 469 U.S. 256, 260 [83 L. Ed. 2d 635, 105 S. Ct. 695] (Lawrence County); Capital Cities Cable, Inc. v. Crisp (1984) 467 U.S. 691, 699 [81 L. Ed. 2d 580, 104 S. Ct. 2694]; see also Dowhal v. SmithKline Beecham Consumer Healthcare (2004) 32 Cal.4th 910, 923–924 [12 Cal. Rptr. 3d 262, 88 P.3d 1] (Dowhal).)

In the present case, it is clear that Congress has not expressly preempted state authority with respect to the regulation of wine generally, or with [\*956] respect to wine labels in particular, and Bronco does not [\*\*\*188] contend otherwise. Neither does Bronco contend that this is a case in which Congress has occupied the field and [\*\*\*16] thus impliedly preempted the state statute here at issue. Nor does Bronco contend that implied preemption is shown because compliance with both federal and state regulations is impossible; as Bronco concedes, it can comply with the stricter state law and simultaneously comply with federal law. Instead, Bronco asserts that we should find implied preemption in this case because section 25241 stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.<sup>10</sup> (Cf. Dowhal, supra, 32 Cal.4th 910, 929, 935 [state law warnings concerning nicotine frustrate the purposes of the federal *Food, Drug & Cosmetic Act* and corresponding federal regulations].)

[\*\*429] As we shall explain, we disagree that section 25241 is impliedly preempted by federal [\*\*\*17] law. In reaching this conclusion we first address Bronco's assertion that a presumption against preemption does not apply in this matter. (See *post*, pt. II.B.1.) After extensively reviewing the history of state regulation of beverage and wine labels prior to Congress's adoption of the FAA Act in 1935—a history that reveals substantial state involvement and very little federal regulation—we conclude that a presumption against preemption does indeed apply in this case. Next, we address the intent of Congress in enacting the FAA Act in 1935. (See *post*, pt. II.C.1.) The legislative history of that enactment reveals congressional intent, among other things, (i) to prevent the deception or misleading of consumers related to the labeling of wine and other alcoholic beverages, and (ii) to supplement—but not supplant—existing state regulation of the industry. We next consider the intent of the responsible federal regulatory agency vis-à-vis state regulation of wine brand labeling, as reflected in regulations and comments set out in the Federal Register. (See *post*, pt. II.C.2.) As we explain, the record reveals that the federal regulatory agency has long operated on [\*\*\*18] the understanding that states may and would continue to impose their own stricter wine labeling regulations. Finally, we address the substantive issue of implied preemption of the particular state legislation at issue and conclude that the California statute in question does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. (See *post*, pt. II.D.)

## B.

**HN6[<sup>1</sup>] CA(4)[<sup>2</sup>] (4)** The party who claims that a state statute is preempted by federal law bears the burden of demonstrating preemption. (See, e.g., McCall v. PacifiCare of Cal., Inc. (2001) 25 Cal.4th 412, 422 [106 Cal. Rptr. 2d 271, 21 P.3d [\*957] 1189], and cases cited.) **CA(5)[<sup>3</sup>] (5)** An important corollary of this rule, often noted and applied by the United States Supreme Court, is that "[w]hen Congress legislates in a field traditionally occupied by

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<sup>10</sup> Bronco suggests, however, that the state properly may "enact an 'in-state' version of section 25241"—a regulation that would, presumably, apply only with respect to wine that is not sold in interstate commerce.

the States, ‘we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’” ([California v. ARC America Corp. \(1989\) 490 U.S. 93, 101 \[104 L. Ed. 2d 86, 109 S. Ct. 1661\]](#), italics added (ARC America Corp.), quoting [Rice, supra, 331 U.S. 218, 230; \\*\\*\\*\\*19](#) see also, e.g., [United States v. Locke \(2000\) 529 U.S. 89, 107–108 \[146 L. Ed. 2d 69, 120 S. Ct. 1135\] \[\\*\\*\\*\\*189\] \(Locke\); Medtronic, Inc. v. Lohr \(1996\) 518 U.S. 470, 485 \[135 L. Ed. 2d 700, 116 S. Ct. 2240\] \(Medtronic\)](#) [presumption applies both to the existence of preemption and the scope of preemption]; [Ray v. Atlantic Richfield Co. \(1978\) 435 U.S. 151, 157 \[55 L. Ed. 2d 179, 98 S. Ct. 988\] \(Ray\); Jones, supra, 430 U.S. 519, 525; Florida Avocado, supra, 373 U.S. 132, 146; Allen-Bradley Local v. Board \(1942\) 315 U.S. 740, 749 \[86 L. Ed. 1154, 62 S.Ct. 820\]; Napier v. Atlantic Coast Line R. Co. \(1926\) 272 U.S. 605, 611 \[71 L. Ed. 432, 47 S. Ct. 207\]; Savage v. Jones \(1912\) 225 U.S. 501, 533 \[56 L. Ed. 1182, 32 S. Ct. 715\] \(Savage\); Reid v. Colorado \(1902\) 187 U.S. 137, 148 \[47 L. Ed. 108, 23 S. Ct. 92\].\)](#) As explained in [Jones, supra, 430 U.S. 519, 525](#), this venerable presumption “provides assurance that ‘the federal-state balance,’ ... will not be disturbed unintentionally by Congress or unnecessarily by the courts.” (Citation omitted; see [Olszewski v. Scripps Health \(2003\) 30 Cal.4th 798, 815 \[135 Cal. Rptr. 2d 1, 69 P.3d 927\] \(Olszewski\).\)](#) [\*\*\*\*20]

The Department and the NVVA assert that the state regulation at issue in this case directly implicates the traditional police powers of the states to protect consumers from deception in the marketing of food and beverages and to safeguard the integrity—and worldwide market—of a vital California industry. (See, e.g., [Florida Avocado, supra, 373 U.S. 132, 146 HNT](#) [↑] [state police powers properly are employed both to protect consumers' health and to “prevent the deception of consumers”]; [Pike v. Bruce Church, Inc. \(1970\) 397 U.S. 137, 143 \[25 L. Ed. 2d 174, 90 S. Ct. 844\]](#) [recognizing a state's interest in protecting its reputation as a reliable source of authentic, high-quality goods in all markets where its [\*\*430] goods compete].) Indeed, we observed as much concerning the California wine industry more than 100 years ago. ([Ex parte Kohler \(1887\) 74 Cal. 38, 42–43 \[15 P. 436\]](#) [state wine labeling statute, designed to protect the health of consumers and the integrity of the wine industry, was a proper exercise of the police power].)

[\*958] Bronco and amici curiae on its behalf, Abundance Vineyards et al,<sup>11</sup> [\*\*\*\*22] assert, however, that no presumption [\*\*\*\*21] against preemption applies in this case because there is no evidence that states traditionally have exercised their police powers to regulate the labeling of wine.<sup>12</sup> Specifically, Bronco argues [\*\*\*190] that prior to the August 1935 enactment of the FAA Act, [27 United States Code section 201 et seq.](#), federal regulation of wine labeling was “well-established,” whereas the activity of the states in that enterprise was “limited.” Bronco maintains that “although the states have played a limited role in regulating wine labeling over the past century, the federal government's presence in that field ... would negate the application of any presumption against preemption in this case.” Amici curiae assert, similarly and more emphatically, that prior to enactment of the [FAA Act in August](#)

<sup>11</sup> Counsel for amici curiae represent, among other entities, more than 68 wineries in Alabama, Arizona, Arkansas, California, Georgia, Maine, Massachusetts, Michigan, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Virginia, and Washington, as well as 47 wine grape growers in California.

<sup>12</sup> Bronco, relying upon two Eleventh Circuit Court of Appeals decisions ([Lewis v. Brunswick Corp. \(11th Cir. 1997\) 107 F.3d 1494, 1502](#), and [Taylor v. General Motors Corp. \(11th Cir. 1989\) 875 F.2d 816, 826](#)), and, to a lesser extent, two high court decisions ([Geier v. American Honda Motor Co. \(2002\) 529 U.S. 861, 870–874 \[146 L. Ed. 2d 914, 120 S. Ct. 1913\] \(Geier\)](#), and [Engine Manufacturers Association v. South Coast Air Quality Management District \(2004\) 541 U.S. 246, 256 \[158 L. Ed. 2d 529, 124 S. Ct. 1756, 1763\] \(Engine Manufacturers\)](#)), also asserts, as a preliminary matter, that the presumption against preemption is categorically inapplicable in implied preemption cases such as this, in which the question is whether state law would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The United States Supreme Court has not so held, however, and indeed has assumed otherwise. ([Crosby, supra, 530 U.S. 363, 373–374 & fn. 8.](#)) [Geier](#), by contrast, did not even address the presumption-against-preemption doctrine, and in [Engine Manufacturers](#) the court simply found it unnecessary, because of its conclusion that the federal legislation expressly preempted the relevant state law, to address the presumption against preemption or even the legislative history of the federal statute. We discern no persuasive reason why the traditional presumption against preemption should be categorically inapplicable in the present circumstances, and until the high court directs otherwise, we reject Bronco's view on this point. (See, e.g., [Philip Morris Inc. v. Harshbarger \(1st Cir. 1997\) 122 F.3d 58, 85–86](#) [applying a “strong presumption against preemption” concerning state health and safety regulations and finding those regulations not to frustrate congressional purposes].)

1935 “state and local authorities had exercised control over the *distribution and sale of liquor*” but that “it was the federal government that first comprehensively regulated the packaging and labeling” of wine.

[\*\*\*\*23] The Department and the NVVA, on the other hand, point to early California statutes addressing wine labeling, isolated statements in treatises and legal articles, and statements in congressional reports and debates suggesting an intent by Congress in 1935 that the *FAA Act*, including 27 United States Code section 205(e) and the regulations that would be expected to flow therefrom, would supplement state regulation of wine labeling but not preempt it.

[\*959] Prior to oral argument we solicited supplemental briefing from the parties, asking them to address the effect, if any, of numerous additional state statutes and regulations disclosed in the course of our review of this case. Having considered those materials and the parties' supplemental briefs, we conclude below that the historic record amply supports the conclusion that a presumption against preemption applies in this case because the protection of consumers from potentially misleading brand names and labels of food and beverages in general, and wine in particular, is a subject that traditionally has been regulated by the states.<sup>13</sup>

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#### [\*\*431] 1. Regulation of wine labels prior to adoption of the FAA Act in August 1935

Prior to the 20th century, federal legislation relating to wine and alcohol focused essentially upon revenue collection—specifically, enforcement of federal tax laws. [\*\*\*191] (See Byse, *Alcoholic Beverage Control Before Repeal* (1940) 7 Law & Contemp. Probs. 543, 552, fn. 57 & 58 (*Alcoholic Beverage Control Before Repeal*).) By contrast, as disclosed below, widespread legislation enacted by states in the mid to late 19th century, and continuing through adoption of the FAA Act in August 1935, focused upon the substantive public problems of “adulteration” and “misbranding” (or “mislabeling”) of wines and alcohol. This historic record supports the view that prior to adoption of the federal act in 1935, states vigorously exercised their police powers to regulate wine labeling.

##### a. The emergence of state “pure food” and labeling statutes

During the latter half of the 19th century, awareness gradually increased throughout the nation concerning a combination of related problems in the supply of food and beverages. Some food and beverage products were mere imitations or dilutions of what they purported [\*\*\*\*25] to be; other products, subject to spoilage, were “adulterated” by a “soaring employment of chemical preservatives.” (Young, *Pure Food* (1989) p. 126.) Many of these preservatives—such [\*960] as salicylic acid, employed as a preservative in wine (*id.*, at p. 105)—were used in excessive quantities dangerous to health. (*Id.*, at pp. 110, 112, 126.) As a result, it was found that more than “73 per cent of the milk in Buffalo [New York] was watered, 69 of 171 samples of ground coffee collected in New York were adulterated, 71 percent of the olive oils examined in New York and Massachusetts were mixed with cotton seed oil which had been shipped from the United States and returned as ‘olive oil’[, and] [f]orty-six percent of candy samples collected in Boston contained mineral pigments, chiefly lead chromate.” (Hart, *A History of the Adulteration of Food Before 1906* (1952) 7 Food Drug Cosm. L.J. 5, 21); see also McCumber, *The Alarming Adulteration of Food and Drugs* (Jan. 5, 1905) *The Independent*, 28, 29–31 [listing common adulterations of various products].) Wines too were subject to abuses. Some were “made from cheap substances and then doctored [\*\*\*\*26] up.”

<sup>13</sup> At oral argument, as in the Department's briefs, the NVVA maintained that the “relevant area” for purposes of determining whether the presumption against preemption is applicable should be viewed as consumer protection related to the labeling of foods and beverages in general or, more specifically, as consumer protection related to the labeling of wines. Bronco, although generally challenging the appropriateness of applying any presumption against preemption in this case (see *ante*, fn. 12), does not contest the definition of the relevant area for such an inquiry as proposed by the Department and the NVVA. For purposes of this opinion, and consistently with the high court's approach in such matters (see, e.g., ARC America Corp., supra, 490 U.S. 93, 101 [in addressing whether federal *antitrust law* preempts state law, defining the relevant area as “state common-law and statutory remedies against monopolies and unfair business practices”]), we view the relevant area as being consumer protection related to food and beverage labeling, with special emphasis upon wine labeling.

(Regier, *The Struggle for Federal Food and Drugs Legislation* (1933) 1 Law & Contemp. Probs. 3, 8.) Others were mislabeled as to place of origin. (Carosso, *The California Wine Industry: A Study of the Formative Years* (1951) p. 25 (California Wine Industry); see also Fanshawe, *Liquor Legislation in the United States and Canada* (1892) p. 308.)

In response to the general threat to the food and beverage supply, many if not most states exercised their traditional police powers to regulate generally the marketing of impure or deceptively labeled foods and beverages. (See, e.g., *Dig. of Pure Food and Drug Laws*, Sen. Rep. No. 3, 57th Cong., 1st Sess. (1901).)<sup>14</sup> The vast majority of the resulting general “pure food” statutes broadly covered liquors and wines, as well as the mislabeling of those products.

[\*\*\*\*27] For example, in 1879 Wisconsin enacted a general pure food, drugs, and liquors statute, making it illegal to manufacture or sell any [\*\*432] food (defined to include “drink”), accompanied by “any label, mark or device whatever, so as and with intent to mislead [\*\*\*192] or deceive as to the true name, nature, kind and quality thereof ... .” (1879 Wis. Laws, ch. 248, § 3, p. 502.) A similar labeling law was enacted in North Dakota. (1903 N.D. Laws, ch. 6, §§ 1–2, pp. 9–10; 1905 N.D. Laws, ch. 11, §§ 1–2, pp. 19–20.) An Ohio statute, enacted in 1884, made it illegal to manufacture or sell any food (defined to include drink) “if by any means it is made to appear better or of greater value than it really is,” or if it contained any impure substance not “distinctly labeled” as such. (1884 Ohio Laws, § 3, p. 67; 1890 Ohio Laws, § 3, p. 248.) Substantially similar labeling statutes were enacted in Indiana, Massachusetts, [\*961] Michigan, Pennsylvania, and Washington. (1899 Ind. Acts, ch. 121, § 1, pp. 189–190; 1882 Mass. Acts, ch. 263, §§ 1–3, pp. 206–207; 1895 Mich. Pub. Acts, No. 193, § 3, p. 358; 1895 Pa. Laws, No. 233, § 3, p. 317; 1899 Wash. Laws, ch. 113, §§ 1–3, pp. 183–184.) A Maryland statute, enacted [\*\*\*\*28] in 1890, required that food or drink “be so manufactured ... or sold, or offered for sale under its true and appropriate name” and required that the purchaser be “fully informed by the seller of the true name and ingredients ... of such article of food or drink ... .” (1890 Md. Laws, ch. 604, § 1, p. 733.) Similar laws were enacted in Connecticut, North Carolina, and Tennessee. (1895 Conn. Pub. Acts, ch. 235, §§ 1, 2, p. 578; 1895 N.C. Sess. Laws, ch. 122, §§ 1, 2, 5, pp. 176–178; 1897 Tenn. Pub. Acts, ch. 45, §§ 1, 4, pp. 177–178.) Finally, a New York statute (1893 N.Y. Laws, ch. 338), subsequently amended in 1903 and 1905, prohibited “adulterated or misbranded food.” The statute defined as “misbranded”—and illegal—any food or beverage “package ... or label” that bore “any statement regarding the ingredients or the substances contained therein, which statement [is] false or misleading in any particular, or if the same is *falsely branded as to the state or territory in which it is manufactured or produced ... .*” (1903 N.Y. Laws, ch. 524, § 1, p. 1192, *italics added*; 1905 N.Y. Laws, ch. 100, § 1, p. 141.) A substantially identical labeling law was enacted in [\*\*\*\*29] South Dakota. (1905 S.D. Laws, ch. 114, §§ 6, 8 & 10, pp. 162–163.)<sup>15</sup>

#### b. Early state wine labeling statutes

As early as 1860, California enacted a statute to penalize the sale of “adulterated alcoholic or spirituous liquors, wines, cider, beer, or other liquid used as a beverage.” [\*\*\*\*30] (Stats. 1860, ch. 223, § 2, p. 186, currently Pen. Code, § 382.) But in the face of rampant deception in the labeling of wines—including the bottling of California wines under false foreign labels, and the bottling of inferior foreign wines under California labels (Cal. Wine Industry, *supra*, at p. 25) the California Legislature in 1866 passed a resolution asking Congress to enact nationwide legislation to curb the marketing of “spurious” and “imitation” wines and alcohols. (Sen. Conc. Res. No.

<sup>14</sup> Some state laws of this era regulated the production and labeling of specific items of food such as flour, butter, oleomargarine, and vinegar. (E.g., Hutt & Hutt, *A History of Government Regulation of Adulteration and Misbranding of Food* (1984) 39 Food Drug Cosm. L.J. 2, 42–44 [citing and describing early Virginia statutes].) During this same period, Congress enacted similar laws concerning specific food items such as tea, oleomargarine, and meats. (*Id.*, at pp. 45–46.)

<sup>15</sup> Citing only the 1895 North Carolina law, Bronco asserts that “some” of these state laws were intended to apply only to food and beverages sold within a given state. The North Carolina provision, however, is the only such law of which we are aware to have intimated or specified such a limitation; none of the other laws cited above was so confined, and most instead broadly applied to foods and beverages that were “manufactured for sale”—wherever that sale would occur. But in any event, the relevant point is that the states (most of them broadly, although in the case of North Carolina, narrowly) exercised their traditional police powers by specifically regulating the labeling of food products and beverages, including wines.

36, Stats. 1866 (approved Apr. 2, 1866) p. 908.) After much effort during the ensuing two decades, this endeavor ultimately failed in 1886. (See Cal. Wine Industry, *supra*, at pp. 154–155.)

[\*\*\*193] [\*962] Congress's inability to adopt a nationwide wine regulation and labeling statute induced the three primary wine-producing states—California, New York, and Ohio<sup>16</sup> [\*\*\*\*31]—as well as other states with lesser wine industries (such as Arkansas, Colorado, and Oregon)<sup>17</sup> to enact, [\*\*433] under their traditional police powers, specific and detailed statutes tailored to the problems of impurity and deception in the production and labeling of wines.

California—then, as now, by far the leading producer of wine in the nation,<sup>18</sup> [\*\*\*\*33] and an acknowledged leader in quality as well<sup>19</sup>—apparently was the first state to adopt such a statute, in March 1887. (Stats. 1887, ch. 36, p. 46; see *Ex parte Kohler, supra, 74 Cal. 38, 42–43*.) The California statute defined as “pure wine” that which was made from only pure grapes. (Stats. 1887, ch. 36, § 1, p. 46.) The statute further defined “[d]ry wine” as that produced by “complete fermentation of saccharine contained in [grape] must”; “[s]weet wine” as that which contains “saccharine appreciable to the taste”; “[f]ortified wine” as “wine to which distilled spirits have been added”; and “[p]ure champagne, or sparkling wine” as that which “contains ... effervescence produced only by natural fermentation of saccharine matter of [grape] must, or partially fermented wine in bottle.” (*Id.*, § 1, p. 47.) The statute prevented the use [\*\*\*\*32] or introduction of impure “substitutes for grapes” or coloring, or foreign fruit juices “not the pure product of grapes,” and further barred the use of preservatives such as “salicylic acid, glycerin, alum, or other chemical antiseptics.” (*Id.*, § 2, p. 47.) The statute also provided for inspection of wine samples and for the use of bottleneck seals and label certificates (*id.*, § 7, pp. 48–49), and required either the statement “‘Pure California wine’” (together with the maker’s name) or the label certificate to be affixed to each bottle of pure wine. (*Id.*, § 8, p. 49.)<sup>20</sup> This court’s decision in *Ex parte Kohler, supra, 74 Cal. 38*, rejected constitutional challenges to the act and concluded that, like legislation designed to ensure the marketing of [\*963] pure milk and safe meats, the statute was a proper exercise of the state’s police powers. (*Id.*, at pp. 41–42.)<sup>21</sup>

[\*\*\*194] Colorado quickly followed in April 1887 with its own statute regulating the “manufacture or sale” of wine and other alcoholic [\*\*\*\*34] beverages.<sup>22</sup> New York adopted its own wine labeling statute in June 1887.<sup>23</sup> [\*\*\*\*35] Two [\*\*434] years later Ohio adopted a law that expanded upon the three wine labeling statutes

<sup>16</sup> As of 1890, those three states produced approximately 60, 10, and 8 percent, respectively, of the wine produced in the United States. (U.S. Dept. of Interior, Census Off., Rep. of Statistics of Agriculture in the U.S. at the 11th Census: 1890 (1895) p. 602.)

<sup>17</sup> See Pinney, *A History of Wine in America* (1989) pages 404–405, 420–422 (describing early winemaking in Arkansas and Oregon).

<sup>18</sup> As observed *ante*, footnote 16, by 1890 California produced most of the wine grown and made in the United States. Today, according to the Wine Institute, California produces more than 90 percent of the nation’s wine. (See <[http://www.wineinstitute.org/communications/statistics/wine\\_production\\_key\\_facts.htm](http://www.wineinstitute.org/communications/statistics/wine_production_key_facts.htm)> [as of Aug. 5, 2004].)

<sup>19</sup> See generally, California Wine Industry, *supra*, at pages 26 (“the French viticultural journal, *Revue Viticole*, in 1862, credited California with being the only wine-producing area of North America capable of competing with the product from Europe”) and 133 (noting that 35 medals were awarded to California wines at the Paris Exposition Universelle in 1889).

<sup>20</sup> In addition—and belying Bronco’s claims that this and similar statutes lacked detail—the statute contained various other provisions dealing comprehensively with the production and labeling of wine. (See Stats. 1887, ch. 36, §§ 3–6, pp. 47–49.)

<sup>21</sup> The *Ex parte Kohler* decision proceeded to construe the act’s labeling requirements as prohibiting the sale of wines not meeting the definition of pure wines under the act, but as not subjecting to penalty a merchant who sells wine that is pure but lacks the required labels. (*Ex parte Kohler, supra, 74 Cal. at pp. 44–45*.)

<sup>22</sup> (1887 Colo. Sess. Laws, § 2, p. 18 et seq.) The legislation required that wine be “pure”—defined as made from “the juice of the grape”—and specified that “[n]o vinous ... liquors shall be offered or exposed for sale in this State, unless the ... package, containing such liquors, shall be plainly” marked with “the word ‘pure’ wine,” and displaying “the name or brand of the particular kind of wine so offered or exposed.” (*Id.*, §§ 3 & 4, pp. 18–19.)

described above.<sup>24</sup> Arkansas adopted a wine labeling statute in 1897,<sup>25</sup> and in 1905 Oregon adopted its own wine labeling statute.<sup>26</sup>

**[\*964] [\*\*\*\*36] c. Relevant federal law in the early 20th century: A failed wine statute; adoption of the Pure Food and Drugs Act of 1906; administrative “food standards”; and “Food Inspection Decisions”**

Far from supplanting these early efforts by the states, Congress in 1906 at first attempted but failed to enact a federal wine labeling statute similar to those adopted by the states.<sup>27</sup> As explained below, [\*\*\*195] later in the same session Congress did enact a general pure food and beverage statute, but the resulting federal scheme produced no enforceable wine labeling regulation.

**[\*\*\*\*37]** Congress's 1906 federal Pure Food and Drugs Act (*Pub.L. No. 59-384 (June 30, 1906) 34 Stat. 768* (hereafter sometimes the 1906 Act)) borrowed substantially from the preceding state food and beverage legislation. Like the earlier New York statute described above (*ante*, pt. II.B.1.a.), the federal act defined as “misbranded”—and

<sup>23</sup> (1887 N.Y. Laws, ch. 603, p. 814 et seq.) The New York law was designed to address its specific regional needs as reflected in the industry practices of New York winemakers who, like those in Europe and other areas of the United States but unlike those in California, often found it necessary to add sugar in the production of their wines. The law defined and made illegal adulterated wine, and thereafter defined and required the proper labeling of “pure wine,” “half wine,” and “made wine.” (*Id.*, §§ 1–4, pp. 814–816.)

As Bronco observes, the New York provision, as codified in 1889 (N.Y. Pub. Health Law, ch. 25, art. III, §§ 46–49 (Birdseye 1889)), referred, in its definition of adulterated wines, to those “offered for sale or manufactured with intent to sell within this state.” (*Id.*, § 46.) Bronco asserts this and similar phrasing in the statute’s penalty provision (*id.*, § 49) suggests the New York statute was intended to apply only to wines sold within the state. There is no evidence that the similar California law mentioned above, or the Ohio law mentioned below, was so confined or intended. But in any event, the relevant point is that New York—like the other states—exercised its traditional police powers by specifically regulating the labeling of wines.

<sup>24</sup> (1889 Ohio Laws, p. 96 et seq.; 1891 Ohio Laws, p. 231.) As amended in 1891, the Ohio law defined three versions of permitted wine: “pure wine,” “wine,” and “compound wine,” and specifically allowed sugar to be added to the latter two products. The statute provided that each type of wine “shall be … labeled, designated and sold” as such and made it illegal to label or package, in a manner “calculated to mislead or deceive any person, or cause to be supposed that the contents thereof be pure wine,” any product not meeting the definition of pure wine. (1891 Ohio Laws, §§ 2–4, pp. 231–233.)

<sup>25</sup> (1897 Ark. Acts, act 42, § 4, p. 108.) As subsequently amended (1899 Ark. Acts, act 80, pp. 137–138) and codified (Stats. of Ark., ch. 103, § 5101 (Kirby 1904)), the statute provided: “All wine sold in this State shall, before sale, be labeled so as to truly designate its kind and quality. Nothing but the pure fermented juice of the grape shall be labeled ‘Natural Wine.’ Wine to which sugar has been added before fermentation shall be labeled ‘Sugared Wine.’ The label shall also state if the wine be sweetened or unsweetened.”

<sup>26</sup> (1905 Or. Laws, ch. 209, p. 347 et seq.) The Oregon law defined and barred “adulterated wine,” allowed certain amounts of sugar to be used in the production of “pure wine,” and defined and permitted “half wine” and “made wine,” so long as those products were labeled as such. (*Id.*, §§ 54–56, pp. 361–362.)

<sup>27</sup> See Hearing before the House Committee on Ways and Means, on House Resolution No. 12868, 59th Congress, 1st Session, pages 1–60 (Feb. 1, 1906) (February hearings); Second Hearing before the House Committee on Ways and Means, 59th Congress, 1st Session, pages 61–114 (Apr. 6 & 10, 1906) (April hearings). The proposed legislation would have defined wine as “pure,” “carbonated,” or “artificial,” and required labeling as such. (Feb. hearings, *supra*, at pp. 5–7.) During a second committee hearing concerning the bill and a revised version of the bill, the committee made clear that in considering the proposed federal legislation it had consulted the related wine laws of France, Italy, Germany, Ohio, New York, “and other states.” (Apr. hearings, *supra*, at pp. 62, 73, 101, 109–112.)

A recurring theme during the hearings was the harm posed to the wine industry by the sale of “sophisticated and fabricated wines.” The proponents’ stated concern was that if the sale of such products were “allowed or countenanced … in time honest wine will be driven from the market, … to the injury of the vineyardists … .” (Apr. hearings, *supra*, at p. 66; see also *id.*, at pp. 73–74, 102.) That wine labeling legislation, however, died in committee.

illegal—any food or beverage “package … or label” that bore “any statement, design, or device regarding … the ingredients or the substances contained therein, which [is] false or misleading in any particular, and [] any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.” ([Pub.L. No. 59-384, § 8 \(June 30, 1906\) 34 Stat. 770.](#))

Also like the previous general pure food and beverage laws of the states, the 1906 federal Act applied to food and “drink” ([Pub.L. No. 59-384, § 6 \(June 30, 1906\) 34 Stat. 769](#)), which in turn was construed to include wine. (See [United States v. Sweet Valley Wine Co. \(N.D. Ohio 1913\) 208 F. 85, 87 \(Sweet Valley\)](#).) The 1906 Act directed [\*\*435] three department secretaries—the Secretary of the Treasury, the Secretary of Agriculture, [\*\*\*\*38] and the Secretary of Commerce and Labor—jointly to adopt regulations “for carrying out the provisions of this Act.” ([Pub.L. No. 59-384, § 3 \(June 30, 1906\) 34 Stat. 768-769.](#))

As commanded by Congress, in October 1906 the three department secretaries jointly adopted a set of regulations under the 1906 Act. (See U.S. [\*965] Dept. of Agriculture, Circular No. 21, reprinted as amended through 1909 in Thornton, *The Law of Pure Food and Drugs, National and State* (1912) pp. 843–860 (Law of Pure Food and Drugs); see generally Hayes & Ruff, *The Administration of the Federal Food and Drugs Act* (1933) 1 Law & Contemp. Probs. 16, 20 (*Administration of the Federal Food and Drugs Act*).) One provision of those regulations governed the labeling of foods and beverages and prohibited, among other things, false or misleading statements concerning a product’s “place [of] origin.” (Circular No. 21, *supra*, Reg. 17(d), reprinted in Law of Pure Food and Drugs, *supra*, at p. 851.)

Implicitly acknowledging, as it must, that “[p]rior to the repeal of Prohibition, no agency of the Federal Government was provided with statutory authority to regulate the labeling … of alcoholic beverages [\*\*\*\*39] specifically” (Russell, *Controls Over Labeling and Advertising of Alcoholic Beverages* (1940) 7 Law & Contemp. Probs. 645, 645 (*Controls Over Labeling*)), Bronco’s supplemental brief points to (i) separate “food standards” (including wine standards) adopted solely by the Secretary of Agriculture [\*\*\*\*196] in the two years prior to enactment of the 1906 federal Pure Food and Drugs Act, and (ii) two “Food Inspection Decisions” (hereafter sometimes F.I.D.), one issued solely by the Secretary of Agriculture and the other issued jointly by the three secretaries. (See Standards of Purity for Food Products (June 26, 1906) Circular No. 19, reprinted in Westervelt, *American Pure Food and Drug Laws* (1912) pp. 61, 78–79 (*American Pure Food and Drug Laws*); F.I.D. No. 109 (Aug. 21, 1909); & F.I.D. No. 120 (May 13, 1910), both reprinted in *American Pure Food and Drug Laws*, *supra*, at pp. 212–214.) As explained below, under federal law the cited food standards (including the wine standards) were merely advisory, and not legally binding, and with respect to the cited Food Inspection Decisions, the first was nonbinding and the second, even if binding, did not demonstrate federal control over the labeling [\*\*\*\*40] of wines.

The cited food standards had been created at the behest of Congress, which in 1902 and 1903 directed the Secretary of Agriculture to undertake numerous projects, including one “to establish standards for purity of food products and determine what are regarded as adulterations therein, *for the guidance of the officials of the various States and of the courts of justice …*” ([Pub.L. No. 57-1008 \(Mar. 3, 1903\) 32 Stat. 1147, 1158](#), italics added; see also [Pub.L. No. 57-139 \(June 3, 1902\) 32 Stat. 286, 296](#).) The resulting detailed food standards addressed more than 200 categories of food items, including salted meats, oatmeal, lemon and vanilla extracts, olive oil, coffee, and—in part II.F.a.3 of the secretary’s food standards—what Bronco characterizes as “detailed and comprehensive” standards for wine, dry wine, fortified dry wine, sweet wine, fortified sweet wine, sparkling wine, modified wine (a [\*966] low-alcohol product made by the addition of sugar), and raisin wine (a product made from pomace—dried, evaporated, or previously crushed grapes).

Contrary to Bronco’s suggestions and representations, the Secretary of Agriculture’s food standards (and hence the wine [\*\*\*\*41] standards contained therein) were not enforceable under the 1906 federal Pure Food and Drugs Act (which, as noted, required that enforcing regulations be adopted by *all three* named secretaries), or indeed under federal law at all. (See [United States v. St. Louis Coffee & Spice Mills \(E.D.Mo. 1909\) 189 F. 191](#) [finding the food standards relating to vanilla extract unenforceable under the 1906 Act].) In view of the 1906 Act’s “three secretaries” requirements for regulations and the resulting case law, the food standards proclaimed by the Secretary of Agriculture acting alone have been described by authoritative commentators as merely “advisory” and as being “*for the guidance of officials and the trade but not having the force and effect of* [\*\*436] [federal] law.” (Salthe, *State*

*Food, Drug and Cosmetic Legislation and its Administration* (1939) 6 Law & Contemp. Probs. 165, 167, italics added; see also Lee, *Legislative and Interpretative Regulations* (1940) 29 Geo. L.J. 1, 4–17 (*Interpretative Regulations*) [noting that despite many congressional attempts in the course of three decades to make the food standards enforceable, [\*\*\*\*42] manufacturers “could take ‘em or leave ‘em’ without legal consequences” under federal law]; *Alcoholic Beverage Control Before Repeal*, *supra*, 7 Law & Contemp. Probs. 544, 553; cf. *Administration of the Federal Food and Drugs Act*, *supra*, 1 Law & Contemp. Probs. 16, 32, fn. 71.) Indeed, even the treatise upon which Bronco relies concurred on this point, characterizing those same food standards as “not controlling” under federal law. (American Pure Food and Drug Laws, *supra*, at p. 60.) In view of this history, we must [\*\*\*197] reject Bronco’s suggestion that the cited food standards, and the wine standards contained therein, constituted enforceable federal regulations under the 1906 Act or were otherwise enforceable as a matter of federal law.

We reach similar conclusions with respect to the two Food Inspection Decisions cited by Bronco, issued in 1909 and 1910, respectively. The first Food Inspection Decision, approved by the Secretary of Agriculture acting alone, stated that Missouri and Ohio wines, which typically were produced by adding substantial amounts of sugar, “would properly be called a ‘sugar wine’”—and that when made by the mixture of pomace, sugar, water, [\*\*\*43] colorings and preservatives, such products should be called “‘imitation wine.’” (F.I.D. No. 109, reprinted in American Pure Food and Drug Laws, *supra*, at p. 212.) The second cited Food Inspection Decision, issued under the signatures of the three department secretaries, essentially retreated from and modified the first and stated that in light of (and apparently in deference to) the fairly lax Ohio wine statute (see *ante*, fn. 24), which had long permitted the use of sugar in wine production, such “sugared” wines properly [\*\*967] could be called “‘Ohio Wine,’ or ‘Missouri Wine,’ respectively, without further qualification.” (F.I.D. No. 120, reprinted in American Pure Food and Drug Laws, *supra*, at p. 213.) Moreover, the decision stated, Ohio and Missouri imitation wines could be labeled as “‘Ohio Pomace Wine,’ or ‘Missouri Pomace Wine.’” (*Id.*, at p. 214.)

These decisions reveal that the federal agency, far from exercising federal authority to control state practices by requiring adherence to the “detailed and comprehensive” wine provisions of the food standards cited by Bronco, instead completely ignored those federal standards and, in the second decision, actually [\*\*\*44] deferred to the applicable state wine statute, which in turn codified long-standing and lenient regional winemaking practices.

In any event, contrary to Bronco’s suggestion that these Food Inspection Decisions evinced federal control, the first cited decision, No. 109 (approved by the Secretary of Agriculture acting alone), did not constitute a regulation under the 1906 Act and was merely advisory.<sup>28</sup> Because the second cited Food Inspection Decision, No. 120, was signed by all three secretaries it arguably qualified as an enforceable federal regulation under the 1906 Pure Food and Drugs Act. (See American Pure Food and Drug Laws, *supra*, at p. 17.) As noted above, however, in substance this assumed regulation merely acquiesced in and adopted fairly lax state (Ohio) law. It does not, therefore, support Bronco’s implicit [\*\*437] argument that federal regulatory authorities during [\*\*\*198] this period exercised power to control wine labels in a manner different from that of the states.

[\*\*\*45] For these reasons we reject Bronco’s suggestion that the Secretary of Agriculture’s food standards, including the detailed and comprehensive wine standards, constituted enforceable federal law, that Food Inspection Decision No. 109 constituted an enforceable federal wine labeling regulation, or that Food Inspection Decision No.

<sup>28</sup> The very limited effect of such decisions was described by the issuing entity itself as follows: “*The opinions or decisions of this Department ... are ... issued more in an advisory than in a mandatory spirit. It is clear that if the manufacturers, jobbers, and dealers interpret the rules and regulations in the same manner as they are interpreted by this Department, and follow that interpretation in their business transactions, no prosecution will lie against them. ... [¶] It may often occur that the opinion of this Department is not that of the manufacturer, jobber, or dealer. In this case there is no obligation resting upon the manufacturer, jobber, or dealer to follow the line of procedure marked out or indicated by the opinion of this Department. Each one is entitled to his own opinion and interpretation and to assume the responsibility of acting in harmony therewith. ...*” (F.I.D. No. 44 (Dec. 1, 1906), reprinted in Gwinn, U.S. Dept. of Agriculture, *Food and Drugs Act* (1914) pp. 35–36, italics added; see also American Pure Food and Drug Laws, *supra*, at pp. 16–18; *Administration of the Federal Food and Drugs Act*, *supra*, 1 Law & Contemp. Probs. at pp. 20–21.)

120 evinced anything more than federal acquiescence in state law. Based upon the material cited to us, we conclude that whatever federal regulation of wine labeling existed between the first decade of the 20th century and the advent [**\*968**] of Prohibition was achieved only indirectly, on a case-by-case basis, through prosecutions under the general misbranding provisions of the 1906 federal Pure Food and Drugs Act.<sup>29</sup> That relatively limited federal activity, however, neither erased nor eclipsed the previous quarter-century of state regulation described above. (*Ante*, pt. II.B.1.a. & b.)

[\*\*\*\*46] Moreover, at the same time federal activity in this area was commencing, state activity was continuing and at least keeping pace. By 1906, nearly all of the states had exercised their traditional police powers to enact pure food and beverage laws, almost all of which covered drinks, including wine.<sup>30</sup> Even more importantly, as explained below, within a few years of 1906 the Secretary of Agriculture's food standards (including the detailed and comprehensive wine standards)—although remaining merely advisory and unenforceable under *federal* law—specifically were adopted as part of the general food laws of most states (including California). The perhaps ironic result was that the Secretary of Agriculture's wine standards were to become enforceable substantive law in most states under *state* law, even while they remained unenforceable as a matter of federal law.

[\*\*\*\*47] d. *Relevant state law in the early 20th century: Adoption of California's place-name wine statute; California's Pure Foods Act and adoption of the food standards, including the wine standards; and corresponding labeling regulations*

Nothing in the 1906 federal Pure Food and Drugs Act implied that the existing and continuing state regulation of the misbranding of food and beverages was preempted by that federal legislation. Indeed, the act “disclose[d] very clearly that it [was] not intended to trench upon the powers of the states in any respect.” (*Cleveland Macaroni Co. v. State Board of \*\*\*1991 Health* (N.D.Cal. 1919) 256 F. 376, 379; see also *Savage, supra*, 225 U.S. 501 [upholding, against a claim of preemption, Indiana food and drug labeling [**\*969**] regulations]; see generally Fisher, *The Proposed Food and Drugs Act: A Legal Critique* (1933) 1 Law & Contemp. Probs. 74, 75 & fn. 4 (*Proposed Food and Drugs Act*) [noting case law holding that states were permitted to prescribe “additional standards” and that “[c]ompliance with federal standards does not secure the right to interstate transportation free from ‘reasonable’ regulation by the state”]. [\*\*\*\*48] )

Soon after passage of the 1906 federal act, the California Legislature, in an apparent effort to combat the continuing problem of [**\*\*438**] the labeling of California wines as foreign wines, adopted a statute requiring a “uniform wine nomenclature” that, for the first time, specifically regulated the use of place names on wine labels. The statute provided for “pure” California wines to be labeled with the “prefix ‘Cal’ or ‘Cala’ … as for example, ‘Calclaret,’ ‘Calburgundy,’ ‘Calariesling,’ etc., …” (Stats. 1907, ch. 104, § 1, pp. 127–128.) The statute further prohibited the use of any such label on wines other than pure California wines. It barred “labeling any vessel, bottle, … or package containing any liquid other than pure wine of California manufacture, … or any paper or brand in similitude or resemblance thereof, or any paper or brand of such form and appearance as to be calculated to mislead or deceive

<sup>29</sup> In addition to the federal prosecution under the 1906 Act that resulted in the decision in *Sweet Valley, supra*, 208 F. 85, in which the federal district court held that the challenged “pomace wine” product in that case, labeled as German “Select Riesling” and “Hochheimer,” was misbranded under both the 1906 Act and the Ohio wine statute—we are aware of one similar wine mislabeling prosecution under the 1906 Act ( *Sixty Barrels of Wine* (D.C.Mo. 1915) 225 F. 846) and three similar federal prosecutions concerning bottled “Champagne.” ( *Duffy-Mott Co. v. United States* (3d. Cir. 1923) 285 F. 737; *Schraubstadter v. United States* (9th Cir. 1912) 199 F. 568; *United States v. Five Cases of Champagne* (N.D.N.Y. 1913) 205 F. 817.) One might ask why the *Duffy-Mott* case arose during Prohibition. The answer is that even during Prohibition, pharmacists were permitted to sell “prescription Champagne.” (Byszewski, *What’s in the Wine? A History of the FDA’s Role* (2002) 57 Food & Drug J. 544, 554.)

<sup>30</sup> See Hearings before the House Committee on Interstate and Foreign Commerce on the Pure-Food Bills, 59th Congress, 1st Session (Feb. 13, 1906) page 308. Indeed, according to contemporaneous assessments, those states with adequate enforcement mechanisms (approximately 20 states) were, by 1906, applying their laws “very rigidly.” (*Ibid.*)

any unwary person or cause him to suppose the contents thereof to be pure wine of California manufacture, origin or production . . ." (*Id.*, § 2, p. 128.)

Following passage of the 1906 federal Pure Food and Drugs Act, states left in place or expanded (or in [\*\*\*\*49] other instances enacted for the first time) their own statutes to address the problems of adulteration, misbranding, and mislabeling of food and beverages. (See generally American Pure Food and Drug Laws, *supra*, at pp. 260–1450; *Proposed Food and Drugs Act*, *supra*, 1 Law & Contemp. Probs. 74, 75 & fn. 4.) California, for its part, adopted such a general scheme in March 1907, addressing the problem of "adulterated, mislabeled or misbranded food, or liquor." (Stats. 1907, ch. 181, § 1, p. 208; 1907 Pure Foods Act or 1907 State Act.) That statute—like those of many other states—specifically adopted under state law the food standards (including the wine standards) that had been formulated by the Secretary of the United States Department of Agriculture, but which, as described above, were unenforceable under federal law. (Stats. 1907, ch. 181, § 3, p. 209.) Further going beyond anything set forth in the federal law, the state statute also made it illegal to, among other things, "*falsely brand[]*" any food or liquor concerning the "county, . . . city, town, [or] state . . . in which it is manufactured, or produced" (*id.*, § 5, p. 210, italics added),<sup>31</sup> [\*\*\*\*50] and provided that "[f]ood and liquor shall be deemed *mislabeled or misbranded* within the [\*970] meaning of this act . . . [¶] . . . [¶] [i]f the package containing it or its label shall bear any statement, design or device regarding the ingredients or the substance contained therein, which statement, design, or device shall be false or misleading in any particular." (Stats. 1907, ch. 181, § 6, p. 210, italics added.)<sup>32</sup>

[\*\*\*\*51] [\*\*\*200] Accordingly, as of March 1907 and continuing through the next three decades, California (like many other states)<sup>33</sup> [\*\*\*\*52] had adopted [\*\*439] specific and enforceable wine standards that exceeded federal law. During this same period—and indeed, until repeal of the 1906 federal Pure Food and Drugs Act in 1938—the Secretary of Agriculture's food standards remained unenforceable under federal law despite periodic attempts to provide otherwise. (See *Interpretative Regulations*, *supra*, 29 Geo. L.J. 1, 6–17.)<sup>34</sup>

#### e. California's post-Prohibition-repeal wine labeling regulations

With the advent of Prohibition, which became effective on January 29, 1920 (*U.S. Const., 18th Amend.*), the California wine industry fell into a dormant phase, awakening upon repeal of Prohibition in December 1933 through

<sup>31</sup> In this respect, the author of the 1912 treatise relied upon by Bronco observed that "the prohibitions in the California statute . . . against misstatements as to geographical source" were "more detailed" than those under federal law. (American Pure Food and Drug Laws, *supra*, at p. 339.)

<sup>32</sup> In early 1908, California's Department of Public Health adopted comprehensive regulations implementing the 1907 state Act, broadly regulating "for domestic commerce" the labeling of foods and beverages and specifically providing that "[t]he label shall be free from any statement, design, or device regarding . . . place of origin, which is false or misleading in any particular." (Cal. Dept. of Pub. Health, Rules and Regs. for Enforcement of Cal. Pure Foods and Drugs Acts (1909) reg. No. 16, p. 22, italics added.) Those regulations, as periodically amended, continued in force through at least 1935. (Cal. Dept. of Pub. Health, Rules and Regs. for Enforcement of Cal. Pure Foods and Drugs Acts (1928) reg. No. 13(d) & (e), p. 20 [providing as quoted above, and further providing that food or beverages shall not be "labeled or branded in such a manner as to deceive or mislead the consumer"]; Cal. Dept. of Pub. Health, Rules and Regs. for Enforcement of Cal. Pure Foods and Drugs Acts (1933) reg. No. 13(d) & (e), p. 18 [same].)

<sup>33</sup> See American Pure Food and Drug Laws, *supra*, listing, as of 1912, the following additional states that had adopted the Secretary of Agriculture's food (and wine) standards, or essentially identical standards: Alabama (at p. 270); Delaware (at p. 418); Florida (at p. 438); Georgia (at pp. 468–474); Idaho (at p. 499); Illinois (at pp. 524–525); Indiana (at p. 551); Kansas (at pp. 604–605); Kentucky (at pp. 634–635); Louisiana (at pp. 661–662); Maine (at pp. 680–681); Maryland (at pp. 705–706); Mississippi (at pp. 828–829); Missouri (at p. 851); Montana (at p. 880); Nevada (at p. 932); New Hampshire (at p. 952); New Jersey (at p. 980); North Carolina (at p. 1051); Oklahoma (at p. 1128); Rhode Island (at pp. 1207–1208); South Dakota (at p. 1241); Texas (at p. 1285); Utah (at p. 1306); Virginia (at pp. 1350–1351); Wisconsin (at pp. 1416–1417); and Wyoming (at p. 1441). (See also *Interpretative Regulations*, *supra*, 29 Geo. L.J. at p. 13 & fn. 27.)

<sup>34</sup> Effective through at least 1935, the state's 1907 Pure Foods Act continued to adopt—as *minimum* standards—the federal food standards (including the wine standards). (Stats. 1933, ch. 758, § 10, pp. 2001–2002.)

adoption of the [Twenty-first Amendment to the federal Constitution](#). [\*971] At least two years prior to adoption of the FAA Act in August 1935—and indeed before, and in anticipation of, the repeal of Prohibition—the California Legislature, exercising both its traditional police powers and its authority under newly enacted [article XX, section 22](#) of the state Constitution,<sup>35</sup> adopted as an interim measure the State Liquor Control Act (Stats. 1933, ch. 178, p. 625; *id.*, ch. 658, p. 1697) and thereafter adopted the California Alcoholic Beverage Control Act (ABC Act), which [\*\*\*\*53] went into effect on June [\*\*\*201] 13, 1935. (Stats. 1935, ch. 330, p. 1123; see [Bus. & Prof. Code, § 23000 et seq.](#))<sup>36</sup>

[\*\*\*\*54] Meanwhile, in late December 1934—before adoption of any federal regulation applicable to wine labels—California, acting through its Department of Public Health, Bureau of Food and Drug Inspections, and pursuant to its own 1907 Pure Foods Act (Stats. 1907, ch. 181, §§ 5 & 6, p. 210), adopted regulations concerning “Definitions and Standards—Wines.” (Cal. Dept. of Pub. Health, Bur. of Food and Drug Inspection, Regs. adopted Dec. 31, 1934, amended April 13, 1935, as printed Jan. 18, 1936 (1934 Regulations).) A preamble set forth in broad terms the purpose and scope of the regulations. The stated goal was to protect both “the consuming public” and “the wine industry as a whole.” (*Id.*, at p. 1.)<sup>37</sup> To this end, the regulations adopted specific chemical definitions for dry red wines, dry white wines, and sweet wines (*id.*, at pp. 1–2), similar in substance to the standards incorporated into the state’s 1907 Pure Foods Act, and which, as explained *ante*, part II.B.1.d, had by then been in place in California (and numerous other states) for nearly 30 years. The 1934 Regulations also established strict and detailed labeling requirements for sparkling and artificially [\*\*\*\*55] carbonated wines ([\*972] Regs., at p. 2)<sup>38</sup> [\*\*\*\*56] and for still wines (*id.*, at pp. 2–3). [\*\*440] In the latter respect, the regulations addressed the decades-old problem of California wines being labeled with foreign place names such as “Burgundy.” The state regulations allowed the unqualified use of that name and similar French place names “only [for] products from France,” and provided that a wine would be “regarded as *misbranded*” (and hence in violation of the state’s 1907 Act and ensuing regulations described *ante*, pt. II.B.1.d.) if the label read “Burgundy” (or any other foreign place name) and the wine was not produced there, unless the label also “displayed with prominence equal to that” of the foreign place name, “the name of the state or country where the wine is produced.” (1934 Regs., at p. 2, italics added.)<sup>39</sup>

<sup>35</sup> In 1932, anticipating ratification of the repeal of Prohibition, California voters passed a constitutional amendment, providing as follows: “[HN8](#) [↑] The State of California, subject to the internal revenue laws of the United States, shall have the exclusive right and power to license and regulate *the manufacture*, sale, purchase, possession and transportation of alcoholic beverages within the State, and subject to the laws of the United States regulating commerce between foreign nations and among the states shall have the exclusive right and power to regulate the importation into and *exportation from the State*, of alcoholic beverages. ...” ([Cal. Const., art XX, § 22](#), italics added.)

<sup>36</sup> At that same time, the Legislature repealed the 1907 “Cala” wine labeling statute. (See Stats. 1935, ch. 330, § 69, p. 1152; Caddow, *Permanent Wine Labeling Regulations* in Wines & Vines (Feb. 1936) 10.) The 1887 state “pure wine” labeling statute (Stats. 1887, ch. 36, p. 46) previously had been repealed in 1911. (Stats. 1911, ch. 587, § 1, p. 1110.) Of course, despite these repeals, the state’s 1907 Pure Foods Act (Stats. 1907, ch. 181, p. 208 et seq.), which as noted above incorporated specific wine standards, and the regulations adopted under the 1907 Act (all described *ante*, pt. II.B.1.d.), remained in effect and prohibited the mislabeling of wine.

<sup>37</sup> Contrary to assertions in Bronco’s supplemental briefs, there is no indication that the scope of the 1934 regulations was limited to wine sold to consumers in California and that the regulations did not address wines destined for interstate commerce.

<sup>38</sup> The regulation provided: “*Champagne* is a light white sparkling wine identical with champagne as made in the Champagne district in France in respect to composition and basic manufacturing principle. If the secondary fermentation is not within the bottle, there shall be stated in direct conjunction with the word ‘Champagne’ the words ‘Secondary Fermentation in Bulk.’” (1934 Regs., at p. 2.) The regulations also provided specific labeling requirements for artificially carbonated wines: “The word ‘carbonated’ should be in the same color [and] style of type on the same colored background as the wine described.” (*Ibid.*)

<sup>39</sup> The regulations also restricted the use, on wine labels, of statements of age and the word “old” (1934 Regs., at pp. 2–3), and further required that any product made from pomace be labeled “IMITATION WINE/ Made of Wine Pomace, Water and Sugar” (*id.*, at p. 2).

Bronco insists that these various state regulations, viewed as a whole, “did not represent any innovation by California” [\*\*\*202] and that “similar, albeit more detailed and comprehensive … standards already had been adopted nearly thirty years before by federal regulators.” As explained *ante*, part II.B.1.c, however, the historic record does not support Bronco’s claim. The standards to which Bronco refers never were enforceable under federal law, but in fact, by 1907, they had become part of the substantive (and enforceable) law of California—and within a short time, of most other states as well. In other words, the touted innovation (enforceable wine labeling standards) was accomplished by California and other states, and not by the federal government.

f. *Initial (and short-lived) federal wine labeling regulations issued by [\*\*\*\*57] the Federal Alcohol Control Administration*

As Bronco emphasizes, a few months after adoption of the 1934 California wine labeling regulations, federal wine labeling regulations (which, as explained below, proved to be short-lived and never became effective) were for the first time adopted in late March 1935 by the recently created Federal Alcohol Control Administration (FAC Administration), which had been established by executive order under the National Industrial Recovery Act ([15 U.S.C. § 703](#)). (See Harrison & Lane, *After Repeal* (1936) p. 24 (After Repeal).) The FAC Administration’s regulations, like the numerous similar [\*973] state food and beverage regulations that preceded them, were directed against, among other things, “misbranding”—the false or misleading labeling of alcoholic beverages. (See FAC Admin., Misbranding Regs., Series 7, Regs. Relating to the Labeling of Wine (Mar. 25, 1935) § 3(b)(3) (Misbranding Regulations) [a wine bottle is misbranded if its label “tends to create a misleading impression of the wine”]; see generally O’Neill, *Federal Activity in Alcoholic Beverage Control* (1940) 7 Law & Contemp. Probs. 570, 572; After Repeal, [\*\*\*\*58] *supra*, at pp. 27–29.) Nowhere in these nascent federal regulations was there any suggestion that they preempted stricter state regulations. In any event, within two months of their adoption and prior to their effective date (see Misbranding Regs., *supra*, § 1(a)(3)), the federal regulations became unenforceable in late May 1935 after the United States Supreme Court invalidated as unconstitutional similar “fair competition” codes adopted under the National Industrial Recovery Act. ([Schechter Corp. v. United States \(1935\) 295 U.S. 495, 541–542 \[79 L. Ed. 1570, 55 S. Ct. 837\]](#).)

g. *Continuing regulation by other states*

Despite the initial failure of federal regulation of wine labels, regulation by the states continued in and through 1935. In addition to California’s then long-established general food and beverage regulations, and its then recent specific wine regulations, described *ante*, part II.B.1.d–e, the Ohio and Oregon wine labeling statutes, described above (*ante*, fns. 24 & 26), still were in effect<sup>40</sup> and most [\*\*441] other states had food and beverage statutes, the majority of which regulated mislabeling or misbranding [\*\*\*203] of beverages, including wine. As already explained, many [\*\*\*\*59] of those statutes adopted specific and comprehensive wine standards that were enforceable only under state, and not federal, law—and as of 1935, many had been revised specifically to bar misrepresentations on labels concerning the place of manufacture or production.<sup>41</sup>

<sup>40</sup> The original Ohio wine law (1889 Ohio Laws, p. 96 et seq.) was, by 1938, codified in Page’s Ohio Revised Code Annotated (Anderson 1938) title II, chapter 1, sections 5795–5805. Oregon’s 1905 wine labeling statute (1905 Or. Laws, ch. 209, §§ 54–56, pp. 361–362) was reenacted a decade later (1915 Or. Laws, ch. 343, §§ 41–43, pp. 570–571) and apparently still was effective through mid-1937, when Oregon adopted post-Prohibition-repeal wine labeling regulations. (See also Or. Liquor Control Admin. (1937) reg. 5(c) [specifically enforcing the California wine regulations discussed above] & 6 [setting forth labeling requirements].)

<sup>41</sup> For example, the food and beverage labeling statutes of Massachusetts, North Dakota, and Washington, described *ante*, part II.B.1.a, each remained in force in 1935, as revised, and each defined as “misbranded” any food or drink label bearing “any statement, design or device” that was “false or misleading in any particular,” or any item “falsely branded as to the state or country where it was manufactured or produced,” or very similar words to that effect. (See [1932 Mass. Gen. Laws, ch. 94, §§ 186, 187](#); 1923 N.D. Laws, ch. 222, §§ 4, 6, pp. 289–291; Rev. Stats. of Wash. (Remington 1932) tit. 40, §§ 6145, 6147; see also Rev. Stats. of Wash., *supra*, § 6137 [adopting the federal food standards, including wine standards, as minimum standards].)

[\*\*\*\*60]

[\*974] 2. Propriety of imposing a presumption against preemption in this case

**CA(6) [6]** In light of the history set forth above, we disagree with Bronco's assertion, advanced in its original brief in this court, that federal regulation of wine labeling prior to Congress's adoption of the FAA Act in August 1935 was "well established," and that "[b]y contrast, the states' regulation of wine labeling ... ranged from limited to none." Nor do we agree with the accusation of amici curiae Abundance Vineyards et al. that the Department and the NVVA have "suggested, *misleadingly*, that the States, and not the Federal government, historically played the dominant role in the regulation of the alcoholic beverage industry before enactment of the FAA Act." (Italics added.) Based upon our review of the relevant history, we conclude that from the mid to late 19th century until shortly after the repeal of Prohibition, the states' exercise of their traditional police power to regulate the labeling of food—including wine and other alcoholic beverages—was both extensive and dominant. This historic evidence demonstrates that [HN9](#) when, as described below, Congress finally entered the specific field of [\*\*\*\*61] wine label regulation in August 1935 by enacting the FAA Act, under which the federal regulation here at issue was promulgated, Congress was legislating in a field "traditionally regulated by the States." ([ARC America Corp., supra, 490 U.S. 93, 101](#), and cases cited.)<sup>42</sup> Accordingly, a strong presumption [\*\*\*204] against preemption applies, and a court should not find that the traditional police powers of the states to regulate wine labels (in order to prevent the deception of consumers) are superseded unless it is clear and manifest that Congress intended to preempt state law.

[\*975] [\*\*\*\*62] We turn now to consider whether, as Bronco claims, there was, at the time of the [\*\*442] enactment of the [FAA Act](#) or thereafter, a clear and manifest intent on the part of Congress to preempt wine labeling regulation by the states such as is found in [section 25241](#). We find no such intent. We thereafter consider whether, as Bronco claims, [section 25241](#) is *impliedly* preempted by federal law because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." ([Hines, supra, 312 U.S. 52, 67](#).) As we explain, we find no such implied preemption.

C.

1. Whether Congress, when it enacted the FAA Act in 1935, intended to preempt state wine labeling regulation

**CA(7) [7]** (7) As explained below, contrary to Bronco's assertions [HN10](#) the history of the 1935 FAA Act discloses no intent on the part of Congress to supplant or preempt state efforts to regulate wine labeling.

In late August 1935, Congress replaced the defunct FAC Administration with the Federal Alcohol Administration Act. (Pub.L. No. 74-401 (Aug. 29, 1935) 49 Stat. 977, presently [27 U.S.C. § 201 et seq.](#)) The essential aspects of the [FAA Act](#) exist [\*\*\*\*63] today in substantially unamended form and remain the basis for federal regulation of wine labeling. (See Benson, *Regulation of American Wine Labeling: In Vino Veritas?* (1978) 11 U.C. Davis L.Rev. 115, 154 et seq. (*Regulation of American Wine Labeling*)).

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In New York, Colorado, and Arkansas, the previous wine-specific labeling statutes described *ante*, part II.B.1.b, had given way, by 1935, to the states' respective general food and beverage mislabeling/misbranding regulations, all of which regulated both food and drink. (See N.Y. Agric. & Mkts. Law, ch. 1, art. 17, § 200 (Cahill 1930); Ann. Stats. of Colo., ch. 1, § 6 (Courtright 1930); Stats. of Ark., ch. 69, § 4823 (1919).) There is no indication, with respect to any of these changes in the various states' laws, that any diminution of state regulatory authority over the labeling of wines thereby was intended or effected.

<sup>42</sup> For the reasons set forth above, we also reject Bronco's related assertion, pressed in its supplemental briefs and at oral argument, that no presumption against preemption applies here because, Bronco claims, the states' regulatory activity was augmented in the early 20th century by a "significant federal presence." (See [Locke, supra, 529 U.S. 89, 108](#) [finding no presumption against preemption regarding regulation of maritime vessels].) As explained *ante*, part II.B.1, prior to adoption of the [FAA Act in 1935](#), the federal role with respect to wine label regulation was neither dominant nor particularly significant in comparison with that of the states—and in any event, unlike the situation in [Locke](#), federal activity in the field of wine label regulation certainly was not "manifest since the beginning of our Republic." ([Locke, supra, at p. 99.](#))

**HN11** [CA(8)] (8) Substantively, the FAA Act in large measure emulated the main aspects of the invalidated FAC Administration. (After Repeal, *supra*, at p. 32; *Regulation of American Wine Labeling*, *supra*, 11 U.C. Davis L.Rev. 115, 165.) The *FAA Act* makes it illegal for any person to produce, sell, or ship wine in interstate or foreign commerce unless that person is licensed to do so by the Secretary of the Treasury.<sup>43</sup> (*27 U.S.C. § 203(a)* & *(b)*.) Title *27 United States Code section 205(e)*—the primary federal statutory provision [**\*976**] for present purposes—directs the Secretary of the Treasury to promulgate such regulations “with respect to packaging, marking, branding, and *labeling* … (1) as will prohibit deception of the consumer with respect to [alcoholic beverage] products … ; [and] (2) as will provide the consumer with adequate information as [\*\*\*\*64] to the identity and quality of the products … .” (Italics added.) To enforce these requirements, this section of the *FAA Act* also requires that any person who sells or ships [**\*\*\*205**] wine in interstate or foreign commerce first obtain from the Secretary of the Treasury (or his or her designee) a certificate of label approval, or COLA, for each wine, and directs that no wine may be shipped or sold in interstate commerce unless it bears a label that has been reviewed and approved by the Secretary of the Treasury through issuance of a COLA. Finally, the section further provides that no wine label may be removed or altered “except as authorized by Federal law” or except pursuant to federal regulations “authorizing relabeling for purposes of compliance with the requirements of this subsection or of State law.” (*Ibid.*)

[\*\*\*\*65] Testifying in support of the legislation that became the *FAA Act*, Joseph H. Choate, former Chairman of the FAC Administration, explained that the goal was to continue the work of the recently invalidated FAC Administration. Adverting to the regulations mentioned above that recently had been adopted by the FAC Administration (*ante*, pt. II.B.1.f.), Mr. Choate explained that the purpose of those regulations—and of the new *FAA Act*—was to “to provide such regulations, not [**\*\*443**] laid down in statute, so as to be inflexible, but laid down under the guidance of Congress, under general principles, by a body which could change them as changes were found necessary. [¶] *These regulations were intended to insure that the purchaser should get what he thought he was getting, that the representations both on labels and in advertising should be honest and straightforward and truthful. … [The consumer] should be told what was in the bottle, and all the important factors which were of interest to him about what was in the bottle.*” (Hearings before House Com. on Ways and Means on H.R. No. 8539, 74th Cong., 1st Sess., p. 10 (1935), testimony of Joseph H. Choate, italics added.) [\*\*\*\*66] Similarly, Representative Thomas Cullen of New York, the author of the bill that became the *FAA Act* (see 79 Cong. Rec. (1935) 11713 et seq.), promoting his legislation on the floor of the House, asserted that the proposed bill was necessary in order to “do something to prevent the unfair trade activities of those in the industry who chisel and take advantage of the ignorance of the consumer by dishonest labeling … .” (Remarks of Rep. Cullen on H.R. No. 8539, 74th Cong., 1st Sess., 79 Cong. Rec. (1935) 11714; see generally *Regulation of American Wine Labeling*, *supra*, 11 U.C. Davis L.Rev. 115, 165–167.)

**CA(9)** [CA(9)] (9) As with the 1906 federal Pure Food and Drugs Act, and by contrast to other legislation passed only days prior to adoption of the FAA Act in August [**\*977**] 1935,<sup>44</sup> nothing in the body of the *FAA Act* reveals

<sup>43</sup> As originally enacted, the statute referred to the “Administrator” of the “Federal Alcohol Administration.” That agency was abolished, and its functions were directed to be administered by the Secretary of the Treasury through the Bureau of Internal Revenue (now the Internal Revenue Service) in the Department of the Treasury. (See *27 U.S.C. § 201*, Transfer of Functions.) Thereafter, the Bureau of Alcohol, Tobacco and Firearms (BATF) was established in 1972 and given the pertinent functions of the Internal Revenue Service with regard to wine regulation. (*Ibid.*) Subsequently, the Homeland Security Act of 2002 (*6 U.S.C. § 101*) transferred responsibility for the regulation of interstate commerce in alcoholic beverages to a newly formed Alcohol and Tobacco Tax Trade Bureau within the Department of the Treasury. (68 Fed.Reg. 3744 (Jan. 24, 2003).) For convenience, and because the regulations here at issue were adopted by the BATF, we shall continue to refer in this case to the BATF as the responsible regulatory agency.

<sup>44</sup> In the Tobacco Inspection Act (Pub.L. No. 74-314 (Aug. 23, 1935) 49 Stat. 731)—enacted six days prior to adoption of the *FAA Act*—Congress used language making very clear its intent to adopt “uniform” national standards that would displace state regulation, thereby revealing that when the 74th Congress intended to make its regulation exclusive, it knew how to do so. As observed in *Florida Avocado, supra*, 373 U.S. 132, 147, with regard to the Tobacco Act, “Congress had declared ‘uniform standards of classification and inspection’ to be ‘imperative for the protection of producers and others engaged in commerce and the public interest therein.’ [Citation.] The legislative history was replete with references to a need for ‘uniform’ or ‘official’

congressional intent to supersede concurrent (or more stringent) regulation of wine labeling by the states under their traditional police [\*\*\*206] powers. As already explained, at the time Congress adopted the [FAA Act in August 1935, the](#) states, led by California (see *ante*, pt. II.B.1.d. & e.), were continuing to exercise their traditional police powers in this area. (See *ante*, [\*\*\*\*67] pt. II.B.1.g., describing the then extant statutes of various states.)

[\*\*\*\*68] Consistently with this history and contemporaneous practice, the bill's author, Representative Cullen, while promoting the bill embodying the [FAA Act](#) on the floor of the House, emphasized the cooperative, as opposed to preemptive, nature of the federal legislation. He asserted: “[W]e must do something to *supplement* legislation by the States to carry out their own policies. The liquor industry is too big and the constitutional and practical limitations on the States are so considerable that *they alone cannot do the whole job.*” (Remarks of Rep. Cullen on H.R. No. 8539, 74th Cong., 1st Sess., 79 Cong. Rec. (1935) 11714, italics added; accord, H.R. Rep. No. 1542, 74th Cong., 1st Sess., pp. 2–3 (1935).)<sup>45</sup> [\*\*\*\*69] Representative Cullen also assured the House that by enactment of the bill, “[n]o power is taken away from the States to provide such safeguards [\*\*444] as they deem best for their own protection.” (79 Cong. Rec., *supra*, 11174.)<sup>46</sup>

[\*978] [\*\*\*\*70] Based upon this legislative history, and in light of the backdrop against which Congress acted—the prior decades of state legislation regulating the labeling or “misbranding” of wine as a general food and beverage product, or of wine specifically—we conclude that Bronco has failed to establish [\*\*\*207] that Congress, at the time it enacted the [FAA Act](#), acted with the “clear or manifest” purpose of preempting state statutes regulating wine labels.

## 2. Post-1935 congressional and regulatory agency intent to preempt state wine label regulation

[CA\(10\)↑](#) (10) Bronco further suggests that *subsequent* to the enactment of [27 United States Code section 205\(e\)](#) in August 1935 and the adoption, by agencies within the Department of the Treasury, of implementing regulations, both Congress and the federal regulators manifested intent that the federal wine labeling regulations would preempt

standards, which could harmonize the grading and inspection of tobacco at all markets throughout the country. Under the statute a single set of standards was to be promulgated by the Secretary of Agriculture, ‘and the standards so established would be the official standards of the United States for such purpose.’ ” No such language or comparable provision appears in the [FAA Act](#), as adopted in 1935.

<sup>45</sup> See also House of Representatives Report No. 1542 (74th Cong., 1st Sess.) pages 13–14 (July 17, 1935) (citing the [FAA Act](#)’s “relabeling” provision and noting that anticipated regulations would permit “appropriate additional labeling requirements imposed by a State pursuant to its own law not in conflict with the Federal requirements”). Bronco asserts that by this relabeling provision (see 27 C.F.R. § 4.30(b)(1)) and the cited comment, Congress had in mind only the authority of states, pursuant to the [Twenty-first Amendment](#), to impose additional labeling requirements on alcoholic products imported for sale from other states, and did not contemplate that a state would be permitted to impose additional labeling requirements on wines destined for interstate commerce. We find no persuasive evidence of any such intent, however.

<sup>46</sup> Although on occasion we have questioned reliance upon the views of individual legislators as a basis upon which to discern the intent of the state Legislature (e.g., [People v. Dennis \(1998\) 17 Cal.4th 468, 501, fn. 7](#) [[71 Cal. Rptr. 2d 680, 950 P.2d 1035](#)], and cases cited), in the present case Bronco does not challenge Representative Cullen’s statements on that ground, and we recently observed in [Dowhal, supra, 32 Cal.4th 910](#), that [HN12↑](#) statements by a single member of Congress “ ‘can provide evidence of Congress’ intent.’ ” (*Id.*, at p. 926, fn. 6.) Moreover, in the present case there are strong reasons to rely upon the quoted statements. Representative Cullen was the author of the [FAA Act](#), and was looked upon as an authority during the House debates, fielding many questions from his colleagues. (E.g., Remarks of Rep. Doughton, 79 Cong. Rec. (1935) 11713 [Rep. Doughton, author of a prior version of the bill, observing on the House floor that Rep. Cullen “is more familiar with the provisions of this bill than myself or perhaps any other member . . . . He has given much study to the bill and is better qualified to explain it than I am . . . .”]; *id.*, pp. 11715–11718, 11727–11730, 11737, 11790, 11792–11793, 11797, 11799 [Rep. Cullen’s various responses to questions, etc.].) In addition, Representative Cullen’s comments essentially reiterated that which was set out in the House Report of the Ways and Means Committee, cited in the text above—and later incorporated into the Senate Report of the Committee on Finance on House Resolution No. 8870 (Fed. Alcohol Control Admin., Legis. History of Fed. Alcohol Admin. Act (Sept. 15, 1935) appen. IV, p. 166), and hence the cited comments did not amount merely to expressions of personal opinion. ([In re Marriage of Bouquet \(1976\) 16 Cal.3d 583, 590](#) [[128 Cal. Rptr. 427, 546 P.2d 1371](#)].)

more stringent state wine labeling regulations. Applying again, as we must, a presumption against preemption in this context, we inquire whether Congress or the regulatory arm established within the Department of the Treasury evinced a clear and manifest intent to preempt state wine labeling [\*\*\*\*71] regulations such as California's [section 25241](#). In so doing, we keep in mind the entire history of state regulation of wine labeling and the history and language of the [FAA Act](#) described above. As explained below, after reviewing (i) the early federal regulations and early state regulations that imposed standards higher than the federal regulations, (ii) subsequent federal regulations and pronouncements recognizing the applicability of state labeling law, and state wine regulations enacted in the mid-1970s (especially certain Oregon regulations, one of which is substantively similar to the challenged [section 25241](#)), and (iii) a 1988 amendment to the [FAA Act](#), concerning health warnings on alcoholic beverages, we continue to find no evidence of any clear or manifest intent on the part of [\*979] Congress or the responsible federal agency to preempt state wine labeling regulation such as [section 25241](#). Indeed, the evidence demonstrates that the federal agency has long contemplated or at least acquiesced in concurrent and stricter state regulation.

a. *Federal and California regulations issued after passage of the FAA Act*

As noted above, prior to adoption of the [FAA Act](#), California had in [\*\*\*\*72] place, by December 1934, specific and detailed wine regulations restricting, among other things, the use of place names on wine labels. (See *ante*, pt. II.B.1.e.) In bulletins and reports issued in the years immediately thereafter, the California Department of Public Health touted its enforcement of those state regulations, [\*\*445] which it described as requiring the "honest labeling of wines."<sup>47</sup>

In late December 1935, four months [\*\*\*\*73] after adoption of the [FAA Act](#), and one year after California's adoption of its own post-Prohibition-repeal wine labeling regulations, valid federal wine labeling regulations were approved, and those regulations became effective on March 1, 1936. (U.S. Dept. Treas., Fed. Alcohol Admin., Regs. No. 4 Relating to Labeling and Advertising of Wine (Dec. 30, 1935) arts. I-VII, 1 Fed.Reg. 83 (Apr. 1, 1936) (hereafter Regulations No. 4); see, generally, *Controls Over Labeling*, *supra*, 7 Law & Contemp. Probs. 645, 652, fn. 25 et seq.)

[\*\*\*208] [CA\(11\)\[↑\]](#) (11) The federal labeling regulations, as amended in 1938 (see 3 Fed.Reg. 2093 (Aug. 26, 1938)) and thereafter, presently are designated [27 Code of Federal Regulations, sections 4.20 through 4.39](#). One key provision—Code of Federal Regulations [section 4.25\(b\)\(1\)\(i\) and \(iii\)](#)—[HN13\[↑\]](#) states that a wine is "entitled" to be described with an appellation of origin if "[a]t least 75 percent of the wine is derived from fruit ... grown in the appellation area indicated" and "it conforms to the laws and regulations of the named appellation area governing the composition, method of manufacture, and designation of wines made [\*\*\*\*74] in such place." (Italics added.)<sup>48</sup>

<sup>47</sup> See California Department of Public Health, Weekly Bulletin (Feb. 19, 1938) page 14; *id.*, at page 13 (describing enforcement of the California wine quality standards and noting their adoption by the beverage control authorities in Oregon, Virginia, and Arizona); see also Thirty-sixth Biennial Report of the California Department of Public Health (Sept. 1940) page 177; Thirty-fifth Biennial Report of the California Department of Public Health (Sept. 1938) page 142; Thirty-fourth Biennial Report of the California Department of Public Health (Sept. 1936) page 100.

<sup>48</sup> "[HN14\[↑\]](#) Composition" refers to the ingredients used to make a wine ([27 C.F.R. § 4.34](#)) and generally consists simply of grapes. "Method of manufacture" refers to approved wine treatment materials and processes. ([27 C.F.R. § 24.175 et seq.](#)) "Designation of wines" is a concept distinct from brand name or appellation; it refers to the class or type of wine rather than the source or origin of the wine. ([27 C.F.R. §§ 4.32\(a\)\(2\), 4.34](#).) For example, a wine may be designated by class as a grape wine, sparkling grape wine, or carbonated grape wine ([27 C.F.R. § 4.21](#)), or by the grape varietal. ([27 C.F.R. §§ 4.23, 4.24, 4.28](#).)

As Bronco concedes, California long has enforced regulations that differ from the federal regulations with respect to method of manufacture. (See, e.g., [Cal. Code Regs., tit. 17, §§ 17005](#) [providing, concerning "cellar treatment," that "[i]n case of conflict between Federal and State laws or regulations the California law or regulation shall take precedence"], [17010](#) [adopting regulations more restrictive than those contained in federal regulations concerning the use of sugar in the production or cellar treatment of wine].) Bronco contrasts what it asserts are these and similar permissible and specifically sanctioned departures

[\*\*\*\*75] [\*980] Soon after the adoption of this federal provision in 1938, a California statute was enacted, and two regulations were adopted, all three of which imposed *more stringent* California wine labeling requirements. First, in 1939, the Legislature amended the state ABC Act ([Bus. & Prof. Code, § 23000 et seq.](#)) to prohibit the use on wine labels of the phrase “California Central Coast counties dry wine,” unless the wine was in fact made *entirely* from grapes grown in specified Central Coast counties. (Stats. 1939, ch. 1033, §§ 1–4, p. 2838; see [Bus. & Prof. Code, §§ 25236–25238](#).) Second, by 1942, a regulation had been adopted imposing a similar 100 percent grape origin requirement for any wine labeled as “‘California’ or any geographical subdivision thereof.” (See Cal. Dept. of Pub. Health, Regs. Establishing Stds. of Identity, Quality, Purity and Sanitation and Governing the Labeling and Advertising of Wine in Calif. (May 23, 1942) art. I, § 2(aa)<sup>49</sup> [\*\*\*\*77] (hereafter 1942 Regulations), [\*\*446] presently found at [Cal. Code Regs., tit. 17, § 17015, subd. \(a\)\(1\)](#).) Third, by 1942 a California [\*\*\*\*76] regulation barred the sale of [\*\*\*209] wines labeled with so-called coined (or semi-generic) brand names if the “brand designation resembles an established wine type name such as ... Madeira, ... Port, ... Claret, [or] Burgundy, etc. ...” (See 1942 Regs., art. II, § 8.) Under this and subsequent versions of the same regulation, a label such as “Burgundy brand” was long barred in California.<sup>50</sup>

[\*981] The first two California labeling rules described above plainly imposed (and still impose) a more stringent standard than the 75 percent requirement set forth in the federal appellation of origin regulation. (Regs. No. 4, § 25, as revd., 3 Fed.Reg. 2093, 2096 (Aug. 26, 1938), presently found at [27 C.F.R. § 4.25\(b\)\(1\)\(i\)](#).) The third provision described above prohibited name types that the federal regulations have permitted since 1941 upon a proper showing. (See [27 C.F.R. § 4.33\(b\)](#), as revd., 6 Fed.Reg. 2874 (June 13, 1941) [disallowing such a geographic name *unless* a federal officer finds the name, either qualified by word “brand” or otherwise, “conveys no erroneous impressions as to the ... origin ... of the product”].)

Although the [\*\*\*\*78] parties dispute whether the first two state rules cited above are sanctioned by title 27 Code of Federal Regulations [section 4.25\(b\)\(1\)\(iii\)](#)—the federal provision that expressly authorizes state regulation concerning the “composition” (the grape ingredients) or “designation” of wine (the class or type of wine, as distinct from its source or origin)—the third California regulation, the coined brand-name provision, cannot be so distinguished. That state regulation plainly controlled, more strictly than the federal rules, not the mere composition or designation of wines, but the brand-name labeling of wines.

**CA(12)[↑] (12)** In any event, there is no indication that any question previously has arisen concerning the authority or enforceability of the California statute<sup>51</sup> or of either regulation. Indeed, since mid-1939, the California Legislature has authorized state wine regulations that are stricter than federal wine regulations,<sup>52</sup> [\*\*\*\*80] and for nearly the

from federal regulations with what it contends are impermissible deviations from federal *labeling* standards—especially federal regulations concerning the use of brand names on labels.

<sup>49</sup> This requirement may have gone into effect earlier than 1942. A predecessor to the regulations of 1942 had been adopted in April 1940. (See 1942 Regs., cover page [“These regulations supersede the Definitions and Standards—Wines, adopted December 1934, as amended, and Rules Governing California Vintage Wines, adopted April 6, 1940”].) The December 1934 regulations, as amended through January 18, 1936, have been described *ante*, part II.B.1.d. Despite the efforts of librarians throughout the state, we have been unable to locate the intervening regulations—if indeed there were any—or the 1940 Rules Governing California Vintage Wines.

Article III, section 12(1) of the 1942 Regulations also provided, consistently with many of the prior statutes and regulations described earlier, that wine labels “shall not contain [¶] (1) *any statement, design, device or representation which is false or misleading in any material particular.*” (Italics added.)

<sup>50</sup> That California regulation, as adopted in the early 1940s, was in force until the mid-1980s. (See former Cal. Admin. Code, tit. 17, §§ 17001(a) & 17075(c)(2) (1978).) Oregon as well had a similar “coined” brand-name provision until the mid-1980s. (See Or. Admin. R. 845-10-285(3)(a) (1978).)

<sup>51</sup> The appellation “California Central Coast counties” has since fallen into disuse. (See *Regulation of American Wine Labeling, supra*, 11 U.C. Davis L.Rev. at p. 143.)

past 35 years, the Legislature expressly has authorized state wine regulations to “*differ [\*\*\*210] from or be inconsistent with*” [\*982] federal wine regulations ([Health & Saf. Code, § 110525](#), italics added);<sup>53</sup> yet there is no [\*\*\*\*79] indication the federal [\*\*447] government has taken issue with this long-standing assertion of broad state authority.<sup>54</sup>

[\*\*\*\*81] The history of the early post-Prohibition-repeal California and federal wine labeling regulations reveals no evidence of any clear or manifest intent on the part of Congress, or the regulatory agency charged with executing the relevant law, to preempt state wine labeling regulation such as [section 25241](#). This history suggests, instead, the opposite.

b. *Modification of federal regulations in the 1970s and 1980s, and adoption by Oregon of its more stringent wine labeling regulations*

Beginning in the mid-1970s, the BATF, which in 1972 had been delegated the task of creating and enforcing federal regulations (see *ante*, fn. 43), began to consider proposals to further define and regulate appellations of origin. In connection with that inquiry, the BATF also began to consider how better to regulate the use in brand names of terms of “geographic or viticultural significance.” (42 Fed.Reg. 30517, 30518 (June 15, 1977).)<sup>55</sup> In 1978 the BATF adopted, but then postponed enforcement of, new brand-name rules,<sup>56</sup> [\*\*\*\*83] [\*\*\*211] and it also adopted new

<sup>52</sup> See Statutes 1939, chapter 60 (establishing the Health & Safety Code), page 992 (enacting former [§ 26541](#), requiring that certain state food and distilled spirits regulations not impose a standard higher than certain federal regulations—but *not* requiring such conformity with regard to state *wine* regulations); Statutes 1941, chapter 1042, section 3, page 2698 (enacting former [§ 26540.2](#), authorizing the State Board of Health to promulgate wine regulations), and section 4, page 2699 (amending [§ 26541](#) to specify that the section’s general prohibition on imposition of higher state standards concerning food and distilled spirits “*shall not apply to wine*”). (Italics added.) Former [section 26541](#)’s exemption of state wine regulations from the general rule against imposition of higher state standards relating to other foods and distilled spirits continued through various amendments of that former section, until that exemption ultimately was recast in 1970 as a positive right of state regulators to “differ from or be inconsistent with” corresponding federal wine regulations. (Stats. 1970, ch. 1573, § 5, p. 3255; see *post*, fn. 53 [quoting current [Health & Saf. Code, § 110525](#); cf. [44 Ops.Cal.Atty.Gen. 122, 125 \(1964\)](#) [discussing similar history of Health & Saf. Code, former § 26542].)

<sup>53</sup> In 1970, Health and Safety Code former [section 26515](#) was amended to specify: “Standards of identity and quality for wine adopted pursuant to this section *may differ from or be inconsistent with* the standards promulgated by [the federal regulators in the Department of the Treasury].” (Stats. 1970, ch. 1573, § 5, p. 3255, italics added.) The statute today provides the same. ([Health & Saf. Code, § 110525 HN15](#) ↑) [“Standards of identity and quality for wine adopted pursuant to this section may differ from or be inconsistent with the standards promulgated by the Secretary of the Treasury pursuant to the [Federal Alcohol Administration Act](#)”].)

<sup>54</sup> Indeed, other jurisdictions, since 1976, expressly have recognized and incorporated California’s more stringent “100 percent rule” into their own state wine regulations (see 16 Tex. Admin. Code, § 45.45(b) & (c) (eff. Jan. 1976) [“all grape wine bearing labels showing ‘California’ as the origin of such wine shall be derived 100 % from grapes grown and wine from such grapes fermented within the State of California”]; [Wash. Admin. Code, § 314-24-003\(5\)](#) [same]), and the federal regulating body itself has recognized California’s “100 percent rule” as a valid exercise of state regulatory power. (See 58 Fed.Reg. 65295, 65297 (Dec. 14, 1993) [acknowledging “California’s authority to enforce its own labeling requirements within the area of its jurisdiction”].)

<sup>55</sup> Under the then existing federal regulations, use of geographic brand names was permitted if (i) the word “brand” appeared after the brand name ([27 C.F.R. § 4.33\(b\) \(1976\)](#)) or (ii) at least 75 percent of the grapes originated in the appellation suggested by the brand name (*id.*, [§ 4.25 \(1976\)](#)).

<sup>56</sup> Although the BATF in 1978 adopted new rules regulating the use in brand names of terms of geographic or viticultural significance, it delayed implementation of those rules, first until 1983 and ultimately until 1986. (43 Fed.Reg. 37672, 37674, 37678 (Aug. 23, 1978).) The brand-name rules that were adopted in 1978 (but never became effective) would have provided: “A brand name of viticultural significance may not be used unless the bottling winery is located within the geographical area used in the brand name, and the wine meets the appellation of origin requirements for the area named” (meaning at least 75 percent of

regulations concerning appellations of origin—[\*983] including a new subcategory within appellations of origin known as “viticultural areas.” [\*\*\*\*82] (43 Fed.Reg. 37672, 37674, 37678 (Aug. 23, 1978).) <sup>57</sup> The 1978 federal appellations of origin regulation expressly recognized the enforceability of state laws in relation to placing a “viticultural area” designation on a wine label, making the right to so label a wine contingent on compliance [\*\*448] with, among other things, “*the laws and regulations of all of the States contained in the viticultural area.*” (27 C.F.R. former § 4.25a(e)(3)(iv) (1978–1981); *id.*, former § 4.25a(e)(3)(v) (1981–1986), *italics added.*)<sup>58</sup>

Prior to and during this same period of federal regulatory action and consideration of geographic brand-name regulations (see *ante*, fn. 56), in 1977 the State of Oregon departed from the federal labeling [\*\*\*\*84] regulations in substantial ways, imposing more stringent state rules concerning matters such as percentage content of Oregon appellation wines,<sup>59</sup> [\*\*\*\*85] use of “semi-generic” [\*984] place names,<sup>60</sup> percentage content of varietal wines,<sup>61</sup> use of the term “estate bottled,”<sup>62</sup> [\*\*\*\*86] [\*\*\*212] and the use of geographic brand names.<sup>63</sup> In each of

the grapes used to make the wine must be from that area). (43 Fed.Reg. 37672, 37678 (Aug. 23, 1978).) Alternatively, the 1978 regulation, as initially adopted, would have permitted use of a brand name of viticultural significance if “the brand name is qualified by the word ‘brand’ immediately following the brand name in the same size of type and as conspicuous as the brand name itself.” (*Ibid.*)

As noted, implementation of the brand-name aspects of the rules repeatedly was delayed. (See 48 Fed.Reg. 2762 (Jan. 21, 1983); 50 Fed.Reg. 758 (Jan. 7, 1985).) Meanwhile, in 1984 the BATF retreated from its 1978 proposal concerning the use of brand names and proposed instead to address the issue by adopting either that plan, or one of three alternative plans. (49 Fed.Reg. 19330, 19331–19332 (May 7, 1984); see *post*, fn. 70 [describing the BATF’s 1984 comments concerning proposed branding rules].) As explained below, based upon further review and the comments concerning its 1984 proposal, the BATF ultimately adopted, effective July 7, 1986, the regulation at issue in the present case. (51 Fed.Reg. 20480 (June 5, 1986).)

<sup>57</sup> An “appellation of origin” was, and continues to be, defined as a political division or subdivision—for example, a state, or group of states, or a county, or group of counties—in which grapes used to make a wine are grown. (See [27 C.F.R. § 4.25\(a\)\(1\)\(i\)-\(vi\)](#).) A “viticultural area,” by contrast, is a special subcategory within an appellation of origin (see [27 C.F.R. § 4.25\(a\)\(1\)\(vi\)](#)) demarcated not by political boundaries, but by geographic terms and characteristics.

<sup>58</sup> The other requirements for “viticultural area appellation” labeling were (and remain) (i) that the area be recognized under part 9 of 27 Code of Federal Regulations; (ii) that the wine be made from at least 85 percent grapes grown in that viticultural area; and (iii) that the wine be fully “finished” within the state (or one of the states) of the viticultural area. ([27 C.F.R. § 4.25\(e\)\(3\)\(i\), \(ii\) & \(iv\).](#))

<sup>59</sup> An administrative regulation of the Oregon Liquor Control Commission (former Or. Admin. R. 845-10-292(6)(c), eff. Mar. 1, 1977, currently Or. Admin. R. 845-010-0920(1) & (2) (2004)), requires: “(1) An appellation of origin must appear on every wine brand label in direct conjunction with, and in lettering as conspicuous as, the wine’s class or type designation. The lettering must be at least two millimeters in height. [¶] (2) No person may sell or offer to sell a wine, claiming or implying a certain appellation of origin anywhere on its label, unless 100 percent of the grapes used in its production grew within the legal boundaries of that appellation of origin. ...” The corresponding federal regulations, by contrast, impose only a 75 percent rule for appellations of origin ([27 C.F.R. § 4.25\(b\)\(1\)\(i\)](#)), an 85 percent rule for American viticultural areas ([27 C.F.R. § 4.25\(e\)\(3\)\(ii\)](#)), and a 95 percent rule for individual vineyard appellations ([27 C.F.R. § 4.39\(m\)](#)).

<sup>60</sup> Compare Oregon Administrative Rule 845-10-292(5), effective March 1, 1977, currently Oregon Administrative Rule 845-010-0930 (2004) (barring use of “semi-generic” place names [such as Burgundy, Chablis, and Chianti] on Oregon wine labels) with [27 Code of Federal Regulations section 4.24\(b\)\(2\)](#) (permitting those same names on federally approved labels).

<sup>61</sup> Compare Oregon Administrative Rule 845-10-292(3)(a), effective March 1, 1977, currently Oregon Administrative Rule 845-010-0915(1) (2004) (a varietal name [such as Chardonnay or Pinot Noir] may not be used on an Oregon wine label unless at least 90 percent of the wine’s grapes are of that varietal) with [27 Code of Federal Regulations section 4.23\(b\)](#) (permitting use of a varietal name on federally approved labels if only 75 percent of the wine’s grapes are of that varietal).

<sup>62</sup> Compare Oregon Administrative Rule 845-10-292(4)(c), effective March 1, 1977, currently Oregon Administrative Rule 845-010-0925 (2004) (barring use of the term “estate bottled” on Oregon wine labels unless, among other things, the wine’s grapes

these respects, Oregon reserved the right to *disapprove* wine labels that had been granted a valid federal certificate of label approval.<sup>64</sup>

For present purposes, the most relevant of these various departures from federal wine labeling regulations concerns Oregon's geographic brand-name rule.

Effective March 1, 1977, Oregon Administrative Rule 845-10-292(6)(e) provided that appellation names—including the names of Oregon counties, and the names of Oregon wine-producing regions Willamette Valley, Umpqua Valley, and Rogue Valley—“shall not be used in a brand name, in the name of a winery or in any other manner on a label unless 100 percent of the grapes [\*\*\*\*87] used to produce the wine were grown within the boundaries of that appellation of origin.” (Italics added.) The regulation included a grandfather clause permitting “use by a winery of a brand name which has been in use by that winery on its approved labels prior to January 1, 1977.” (Or. Admin. R. 845-10-292(6)(e) (1977), [\*\*449] italics added.)<sup>65</sup> [\*\*\*\*88] Like the other Oregon labeling rules that specifically exceed the federal regulations, this Oregon geographic [\*985] brand regulation remains in force today, more than a quarter-century after its adoption. (See Or. Admin. R. 845-010-0920(4)(f) (2004)).<sup>66</sup>

We find these Oregon regulations relevant to our current inquiry in three interrelated respects.<sup>67</sup> First, the state regulations—[\*\*213] especially the strict [\*\*\*\*89] geographic brand-name rule, and the estate-bottled rule—

were grown within five miles of the winery) with [27 Code of Federal Regulations section 4.26](#) (permitting the term “estate bottled” on federally approved labels without requiring that the wine’s grapes have been grown within five miles of the winery).

<sup>63</sup> See Oregon Administrative Rule 845-10-292(6)(e), effective March 1, 1977, currently Oregon Administrative Rule 845-010-0920(4)(f) (2004), discussed in the text, *post*.

<sup>64</sup> See Oregon Administrative Rule 845-10-290(2) (1977), currently Oregon Administrative Rule 845-010-0290(2) (2004) (providing that each wine label must (i) receive a federal COLA and (ii) comply with the more stringent Oregon rules concerning percentage contents for appellations of origin, semi-generic names, grape content of varietal wines, brand names, and use of the term “estate bottled”).

<sup>65</sup> We note the narrowness of this grandfather provision compared with the federal grandfather clause that we consider in the present case. In addition to the earlier cutoff date (1977 under the state regulation, as compared with 1986 under the federal regulation), the phrasing of the provision suggests that the right of grandfathered use may not be transferred to another entity, as was done in the present case. (Cf. Comment, *On Vino Veritas Clarifying the Use of Geographic References on American Wine Labels* (2001) [89 Cal. L.Rev. 1881, 1912–1913](#).)

<sup>66</sup> As most recently amended, the regulation provides that appellation names—again including the names of Oregon counties, and the names of Oregon wine-producing regions Willamette Valley, Umpqua Valley, and Rogue Valley or “words that may be mistaken for an approved appellation of origin in a brand name [or] in a winery name, or in any other manner on a wine label” may not be used “unless the wine meets the requirements for use of that appellation of origin” (Or. Admin. R. 845-010-0920(4)(f) (2004)), that is, “100 percent of the grapes used in its production grew within the legal boundaries of that appellation of origin.” (*Id.*, 845-010-0920(2) (2004).) Like the original version of the regulation, the provision also retains a restrictive grandfather clause: “A winery may continue to use any brand name that *it has used* on its approved label since before January 1, 1977.” (*Id.*, 845-010-0920(4)(f) (2004), italics added.)

<sup>67</sup> We reject Bronco’s preliminary argument, raised in its supplemental briefs, that Oregon Administrative Rule 845-010-0280 implicitly nullifies Oregon wine regulations discussed above, such as the estate-bottled provision and the geographic brand-name provision.

The cited rule addresses “Standards of Identity and Prohibited Practices Concerning Wine” and provides that Oregon regulations concerning those two topics, set forth in Oregon Administrative Rule “845-010-0905 [definitions] and 845-010-0940 [use of water, wine spirits and other sweetening agents],” shall prevail over any less stringent or restrictive federal law. (Or. Admin. R. 845-010-0280 (2004), italics added.) As Bronco observes, in an introductory sentence the regulation *also* states: “The Commission adopts, by reference, 27 CFR [parts] 4 [the federal wine labeling regulations] and 24[] [wineries and wine-making regulations] (1986). These regulations of the Bureau of Alcohol, Tobacco [] and Firearms of the United States Department of Treasury apply to all wine sold in Oregon by a Commission licensee.” (*Ibid.*)

demonstrate that Oregon has long imposed labeling rules that are both (i) more stringent than the federal rules and (ii) go far beyond 27 Code of Federal Regulations section 4.25(b)(1)(iii)'s authorization for states to regulate the "composition, method of manufacture, [or] designation of wines . . . ."

[\*\*\*\*90] Second, it is clear that the BATF has long been aware of these stricter Oregon rules and apparently views them as enforceable. The Oregon regulations had been in place for approximately 16 months at the time the BATF [\*986] adopted its 1978 regulation concerning the use of "viticultural area" appellations on wine labels. That 1978 BATF regulation, as noted above, *expressly acknowledged and required compliance with "the laws and regulations of all the States contained in the viticultural area."* (27 C.F.R. former § 4.25a(e)(3)(iv) (1978–1981); *id.*, former § 4.25a(e)(3)(v) (1981–1986), *italics added.*) By so providing, the BATF, as of 1978, acknowledged the propriety and enforceability of the more stringent labeling rules promulgated by the states.

Indeed, any doubt in this regard is dispelled by the BATF's action and comments seven years later (in late January 1986) when, in the course of repealing as a *federal* [\*\*450] requirement 27 Code of Federal Regulations former section 4.25a(e)(3)(v)'s rule concerning compliance with state regulations relating to viticultural areas, the BATF expressly and repeatedly acknowledged both the existence and the *enforceability* of Oregon's "more [\*\*\*\*91] stringent" wine labeling regulations.<sup>68</sup> [\*\*\*\*92] The BATF explained [\*\*\*214] that although it had decided, with regard to viticultural areas, to eliminate compliance with state laws as a *federal requirement*, the underlying substantive state law requirements relating to viticultural areas would remain, to be enforced solely by the respective states. The BATF observed: "*State laws and regulations of the [\*987] state in which the wine was fermented or finished will, of course, continue to apply to the producing winery. These state laws and regulations are enforced by the state involved.*" (51 Fed.Reg. 3773, 3774 (Jan. 30, 1986), *italics added.*)<sup>69</sup>

Bronco reads this language as adopting generally the federal regulations concerning, for example, the use of the term "estate bottled" and geographic brand names for all Oregon wines sold in that state—and hence as implicitly repealing or at least superseding those Oregon rules insofar as in-state sales of Oregon wines are concerned. Bronco's interpretation of the Oregon rules is belied by Oregon Administrative Rule 845-010-0910(2) (2004), which plainly states that Oregon Administrative Rules "845-010-0905 through 845-010-0940 [i.e., including Oregon's estate-bottled and geographic brand-name provisions] apply to all grape wines *produced or bottled in Oregon ...*"—that is, regardless where such wines are *sold*—and that "[t]hese rules prevail in any conflict between ... other rules in Chapter 845, Division 010." (*Italics added.*)

<sup>68</sup> As the BATF explained, prior to adoption of its 1978 appellation rules, appellations of origin relating to American wines generally were characterized as regions or places delimited by political boundaries, such as states or counties. As observed *ante*, at footnote 57, the 1978 appellation rules expanded the concept of appellations of origin by additionally including under that term "viticultural areas"—that is, grape-growing regions—defined by geographic features, and not political lines. Because some of these viticultural areas straddled states, a problem eventually arose concerning the federal requirement, then set out in 27 Code of Federal Regulations former section 4.25a(e)(3)(v) (1981–1986), that in order to employ a viticultural area designation, a winery must "conform[] to the laws and regulations of all the States contained in the viticultural area." Specifically, the BATF noted (51 Fed.Reg. 3773, 3774 (Jan. 30, 1986)), if a wine were to use the viticultural area designation "Columbia Valley" (a federally recognized viticultural area straddling Oregon and Washington), the winery producing the wine would be required to comply with Oregon's state regulations, even if the grapes were grown in the Washington part of the Columbia Valley and the wine was made and finished only in Washington. Moreover, the BATF observed, "regulations of Oregon and Washington differ greatly regarding the production and labeling of wine. *Oregon regulations are more stringent than Federal regulations.*" (51 Fed.Reg. 3773, 3774 (Jan. 30, 1986), *italics added.*) The BATF observed that because former section "4.25a(e)(3)(v) required compliance with laws and regulations of all states within a multistate viticultural area, regardless of where the wine is fermented or finished, wine made from grapes originating and fermented in Washington, and finished and bottled within Washington was, nevertheless, subjected to Oregon law and regulations if the wine claimed a multistate viticultural area appellation such as Columbia Valley." (51 Fed.Reg. 3773, 3774 (Jan. 30, 1986).) And yet, the BATF determined, "[a] *Federal requirement* for compliance with State laws and regulations is both unnecessary and difficult for the Federal Government to enforce *due to the multitude of state and local laws and regulations.*" (*Ibid.*, *italics added.*) Accordingly, the BATF concluded, it did not "believe that Federal regulation should impose the State laws or regulations of one state upon transactions occurring in other states." (*Ibid.*)

<sup>69</sup> Underscoring this point, the BATF observed in the summary of its decision that although "the requirement to comply with State laws and regulations is removed as a *Federal requirement*," still, "[t]he State laws and regulations remain in effect and *will*

Third and finally, the Oregon geographic brand-name regulation, in particular, sheds light upon the BATF's apparent understanding of the grandfather clause at issue in this case. Almost 10 years after Oregon adopted its restrictive geographic brand-name labeling regulation, the BATF, after considering various options over the preceding decade (see *ante*, fn. 56, and *post*, fn. 70), amended [27 Code of Federal Regulations section 4.39\(i\)\(1\)](#) in the manner at issue in this case, to prohibit the use of labels with brand names implying that a wine was made with grapes grown in the area suggested by the brand name, unless at least 75 percent of the grapes used to make the wine were in fact from [\*\*\*\*93] that area. But, as noted above, the new federal regulation also contained a grandfather clause that lies at the center of the controversy in this case, under which such otherwise misleading labels are not prohibited, so long as the label was in use prior to July 1986 and the label discloses the true appellation of origin of at least 75 percent of the grapes actually used to make the wine inside the bottle. (*Id.*, [§ 4.39\(i\)\(2\)\(ii\).](#))<sup>70</sup>

[\*\*\*\*94] [\*\*\*215] [\*\*451] In view of the BATF's explicit acknowledgement, only four months prior to its adoption of the provision at issue in the present case, that the Oregon labeling regulations are proper and enforceable (see 51 Fed.Reg. 3773, 3774 (Jan. 30, 1986)), it is reasonable to assume that the BATF, when it adopted [\*988] the grandfather clause, was aware of Oregon's "more stringent" geographic brand-name labeling rule. And yet the BATF said nothing in its new provision or in its discussion of that new rule to suggest that the new rule preempted Oregon's long-standing, closely related, and more stringent brand-name labeling rule.

**CA(13)↑ (13)** Accordingly, contrary to Bronco's theory that the BATF itself viewed or views its wine labeling regulations as preempting more stringent state regulations, we conclude that the history of the federal and Oregon wine labeling regulations in the mid-1970s through the present reveals no evidence of any such intent. Instead, that history strongly indicates that the BATF has long contemplated that the states will enforce their own stricter labeling requirements, and that the agency did not and does not view its labeling regulations as preempting more stringent state [\*\*\*\*95] regulations such as [section 25241](#).

c. *Amendment of the FAA Act in 1988, and corresponding regulations, requiring health warning labels and expressly preempting state regulation of such labels*

In 1988, Congress amended the FAA Act to require that all wine labels (and the labels of other alcoholic beverages) contain a warning on the back label, as follows: "GOVERNMENT WARNING: (1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects. (2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health problems." ([27 U.S.C. § 215\(a\)](#).) Congress gave the BATF authority to issue appropriate regulations to enforce Congress's will ([27 U.S.C. § 215\(b\) & \(d\)](#)), and, stressing the perceived need in this particular area for Congress to "exercise the full reach of the Federal Government's constitutional powers in order to establish a comprehensive Federal program" ([27 U.S.C. § 213](#)), further provided expressly for federal preemption of such health warnings on alcoholic beverage labels: "No statement relating to alcoholic [\*\*\*\*96] beverages and health, other than the statement required by [section 215](#) of this title, shall be required under State law to be placed on any container of an alcoholic beverage . . ." ([27 U.S.C. § 216](#).) The BATF responded by adopting implementing regulations (see [27](#)

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*continue to be enforced by the agencies of the states involved in winemaking.*" (51 Fed.Reg. 3773 (Jan. 30, 1986), italics added.)

<sup>70</sup> See [27 Code of Federal Regulations section 4.39\(i\)](#), quoted in full *ante*, at footnote 7. As Bronco observes, in a notice of proposed rulemaking issued in 1984—two years prior to the BATF's adoption of the present brand-name provision and its grandfather clause—the BATF stated that it did not wish to adopt a regulation that "may be too restrictive." (49 Fed.Reg. 19330, 19331 (May 7, 1984).) After outlining four possible regulatory responses to the brand-name problem, the BATF stated, in reference to a possible rule strictly regulating the use of terms of viticultural significance in brand names, its "believe[that] the wine industry should be allowed flexibility in selecting brand names under which to market their products *without having a whole class of brand names become totally unusable.*" (*Id.*, at pp. 19331–19332, italics added.) As explained *post*, part II.D.1, Bronco suggests that this language supports a conclusion that two years later, when the BATF adopted [27 Code of Federal Regulations section 4.39\(i\)\(2\)\(ii\)](#) and concluded that the new rule "will provide the industry with sufficient flexibility in designing their labels, while at the same time providing consumers with protection from any misleading impressions that might arise from the use of geographic brand names" (51 Fed.Reg. 20480, 20482 (June 5, 1986)), the BATF, in so acting, engaged in a "careful balancing of federal policy objectives" and intended to allow the kind of brand-name labeling here at issue.

C.F.R. § 16.20 et seq.) as well as a provision expressly reaffirming the preemptive effect of that regulation. ([27 C.R.F. § 16.32.](#))

**CA(14)** (14) As the United States Supreme Court has observed, “[HN16](#) ‘an express definition of the preemptive reach of a statute … supports a reasonable inference … that Congress did not intend to pre-empt [\*\*\*216] other matters.’” ([Lorillard Tobacco Co. v. Reilly \(2001\) 533 U.S. 525, 541 \[150 L. Ed. 2d 532, 121 S. Ct. 2404\]](#), quoting [Freightliner Corp. v. Myrick \(1995\) 514 U.S. 280, 1\\*989\] 288 \[131 L. Ed. 2d 385, 115 S. Ct. 1483\]](#); accord, [Bass River Associates v. Mayor, Tp. Com'r \(3d Cir. 1984\) 743 F.2d 159, 162](#) [“It is of some interest and no small significance that a provision in the same title does provide for federal preemption of state and local laws or regulations … .”].)

This inference and these observations are especially apt here, in light of the history [\[\\*\\*452\]](#) described above, which strongly [\[\\*\\*\\*\\*97\]](#) suggests (i) no intent on the part of Congress, in 1935 or thereafter, to preempt any *other* category of state wine label laws, and (ii) the BATF's acknowledgement of, and apparent acquiescence in, the more stringent wine labeling laws of the states, and specifically those of Oregon. Indeed if Congress, as Bronco asserts, by enactment of the FAA Act in 1935, already had generally preempted state regulation of wine labels, there would have been no need for any express preemption clause or preemption regulation with respect to the 1988 health warnings for wine labels.

Once again, this history reveals no evidence of any clear or manifest intent on the part of Congress or the BATF to preempt state wine labeling regulation such as [section 25241](#). Instead, the history supports an opposite inference that neither Congress nor the BATF intended to preempt state wine labeling laws such as [section 25241](#).

#### D.

Having concluded that Bronco has failed to carry its burden of establishing clear or manifest intent on the part of Congress, or congressional intent as interpreted by the BATF, to preempt the traditional exercise of state police power such as the wine labeling regulation found [\[\\*\\*\\*\\*98\]](#) in [section 25241](#), we proceed under the presumption that no such preemption was intended. We bear this presumption in mind when we consider below Bronco's assertion that [section 25241](#), by imposing a labeling requirement that is more exacting than the federal requirement, is impliedly preempted by federal law.

1. *Does section 25241, by prohibiting, with respect to Napa County, what the federal grandfather clause does not prohibit, stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress?*

In support of its assertion that [section 25241](#) frustrates the full purposes and objectives of federal law, Bronco cites various cases in which courts have made such (or similar) findings in other contexts. ([Geier, supra, 529 U.S. 861, 881](#) [state tort action based upon failure to equip automobile with airbags would frustrate federal highway safety standards permitting car [\[\\*990\]](#) makers to employ passive restraint devices other than airbags]; [Barnett Bank, supra, 517 U.S. 25, 31](#) [state statute barring national bank from selling insurance would obstruct federal statute that permitted, but did not require, national banks to sell [\[\\*\\*\\*\\*99\]](#) insurance]; [Lawrence County, supra, 469 U.S. 256, 260–268](#) [state law requiring certain method of distribution of federal funds held to obstruct federal statute that was designed to provide local governments freedom to spend those federal funds “as they saw fit”]; [McDermott v. Wisconsin \(1913\) 228 U.S. 115, 129 \[57 L. Ed. 754, 33 S. Ct. 431\]](#) [state statute that required removal of certain labels on syrup was preempted by federal statute under which such labels had been approved]; [Dowhal, supra, 32 Cal.4th 910, 1\\*\\*\\*217\] 929, 935](#) [state law warnings concerning nicotine frustrated the purposes of the federal [Food, Drug & Cosmetic Act](#)].)

The Department and the NVVA, by contrast, distinguish each of these cases and rely instead primarily upon [Sprietsma v. Mercury Marine \(2002\) 537 U.S. 51, 68–70 \[154 L. Ed. 2d 466, 123 S. Ct. 518\]](#), in which the high court declined to find preemption of a state tort action seeking to impose standards for boat propeller guards, even in the face of a decision by federal authorities not to impose any general or universal propeller guard requirements. (See also, e.g., [California Coastal Comm'n v. Granite Rock Co. \(1987\) 480 U.S. 572, 582–584 \[94 L. Ed. 2d 577, 107 S. Ct. 1419\] \(Granite Rock Co.\)](#) [\[\\*\\*\\*\\*100\]](#) [federal approval of mining project was not frustrated by California's stricter

environmental requirements; indeed, the federal regulations assumed the applicability of the state regulations]; [Hillsborough County v. Automated Medical Labs. \(1985\) 471 U.S. 707, 720–721 \[85 L. Ed. 2d 714, 105 S. Ct. 2371 \(Hillsborough County\)\]](#) [stricter local regulations concerning plasma donors posed no serious obstacle to related federal regulations]; cf. [Exxon Corp. v. Governor of Maryland \(1978\) 437 U.S. 117, 132 \[57 L. Ed. 2d 91, 98 S. Ct. 2207\] \(Exxon\)](#) [no preemption **[\*\*453]** of state discriminatory pricing regulations barring conduct that triggered a limited defense under federal law].)

Bronco asserts that [section 25241](#) frustrates the purposes of Congress, or at least of the BATF's regulation establishing a grandfather clause ([27 C.F.R. § 4.39\(i\)\(2\)\(ii\)](#)), in "four interrelated ways." Bronco argues: (i) [Section 25241](#) prohibits precisely what the regulation establishing the grandfather clause "expressly and unambiguously authorizes"; (ii) the regulation establishing the grandfather clause "embodies a specific determination by federal regulators that the use of established **[\*\*\*\*101]** geographical brand names for wines from a variety of appellation areas would not be misleading if the labels also featured the true appellation of origin"; (iii) the regulation establishing the grandfather clause "reflects a careful balancing of federal policy objectives" and a determination by the BATF that the regulations should not render a "whole class" of established brand names "totally unusable" (see *ante*, fn. 70); and (iv) the BATF, in adopting its rule and regulation establishing a grandfather **[\*991]** clause, expressly rejected as "too restrictive" a general rule that would have confined the use of established geographic brand names to wines made from the region referred to in the brand name.

In reply, the Department and the NVVA assert that [section 25241](#) is in aid of, and consistent with, Congress's general and overriding purpose in adopting 27 United States Code [section 205\(e\)](#) in 1935—namely, the prevention of consumer deception relating to wine labeling. The Department and the NVVA claim that Bronco has failed to identify any congressional purpose with which [section 25241](#) interferes. In this respect, the NVVA argues, "[t]he assertion that the grandfather clause represents **[\*\*\*\*102]** a 'deliberate federal policy determination' or 'regulatory balance' assumes that Congress or [the] BATF identified some affirmative reason that the government of the United States wanted Bronco to be able to sell wine made from non-Napa grapes under labels saying 'Napa.' " The Department asserts there is no support for the proposition that federal regulators have concluded that in all cases, the presence of a true appellation of origin dispels the effects of misrepresentations reflected in a brand name.

Both the Department and the NVVA acknowledge that in 1984 the BATF, in discussing various options for addressing **[\*\*\*218]** the problems posed by geographic brand names, asserted that it did not believe it appropriate to issue regulations that "may be too restrictive" or render "totally unusable" a "whole class" of brand-name labels. (49 Fed. Reg. 19330, 19331 (May 7, 1984) see *ante*, fn. 70.) But, the Department and the NVAA argue, those statements suggest at most that the BATF did not believe it prudent to impose a *national*, or total, ban on the use of existing brand-name labels that suggested an origin of wine different from the actual origin of the grapes used in making the wine. The Department and the NVVA argue that the circumstance **[\*\*\*\*103]** that the BATF did not see fit "totally" to eliminate a "whole class" of existing labels on a national basis without regard to the policies of a particular state does not provide evidence establishing that [section 25241](#) frustrates any significant federal purpose. In this respect, the NVVA asserts that when, as here, the objectives of the state legislature are identical to the overriding purpose of section 205(e) of the FAA Act (protecting consumers from misleading wine labels), "in the absence of preemptive intent, the fact that [the] BATF may have balanced federal policies and arrived at a particular result does not prevent California from considering its own local policies and needs and passing its own [more stringent] laws." Finally, the Department and the NVVA observe that the BATF apparently never contemplated, much less rejected, any area-specific exemption from the federal grandfather clause, such as is found in [section 25241](#)'s special Napa County labeling rule. The NVVA concludes, "There is no evidence that [the] BATF considered the limited consumer protection provided by the grandfather clause to be sufficient to protect consumers in all cases, or intended to prevent **[\*\*\*\*104]** states from **[\*992]** preventing the kind of abuses which Bronco and other opportunistic winemakers could perpetuate under the grandfather clause."

**[\*\*454]** In view of Bronco's repeated suggestions that we should be influenced in our assessment by the circumstance that the federal regulations at issue are part of a comprehensive scheme, in resolving these conflicting views concerning whether [section 25241](#) stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress we bear in mind the high court's admonition in [Hillsborough County,](#)

supra, 471 U.S. 707, 717: “[HN17](#)” We are even more reluctant to infer pre-emption from the comprehensiveness of regulations than from the comprehensiveness of statutes. As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our [Supremacy Clause](#) jurisprudence. See [\*\*\*\*105] [Jones](#), supra, 430 U.S. 519 at 525. ¶ Moreover, because agencies normally address problems in a detailed manner and can speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments, we can expect that they will make their intentions clear if they intend for their regulations to be exclusive.” (Italics added.)

In addition, we are guided by the high court's observation in [Crosby](#), supra, 530 U.S. 363, 373, that [HN18](#) what constitutes a “sufficient obstacle [for a finding of implied preemption] is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose [\*\*\*219] and intended effects.” (Italics added.) The high court also has explained that our inquiry in this regard “requires us to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written.” ([Jones](#), supra, 430 U.S. 519, 526, italics added.)

We question Bronco's characterization of the state statute as prohibiting “precisely what [the regulation establishing the grandfather clause] authorizes.” [\*\*\*\*106] (Italics added.) As the NVVA asserted at oral argument and as we observed in [Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.](#) (1999) 20 Cal.4th 163, 183 [83 Cal. Rptr. 2d 548, 973 P.2d 527], “[t]here is a difference between (1) not making an activity unlawful, and (2) making that activity lawful.” In our view it is more accurate to characterize the state statute as prohibiting—with respect to Napa County—what the federal regulation's grandfather clause does not prohibit.

[CA\(15\)](#) (15) In any event, Bronco's repeated emphasis upon an alleged federal “authorization” presents a myopic and oversimplified analysis. The crucial [\*993] question is, instead, whether the state rule would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Turning to that question, we agree with the Department and the NVVA that [section 25241](#) [HN19](#) is consistent with Congress's overall purpose in enacting [27 United States Code section 205\(e\)](#)—that is, to “insure that the purchaser should get what he thought he was getting, [and] that the representations both on labels and in advertising should be honest and straightforward and truthful.” [\*\*\*\*107] (Hearings before House Com. on Ways and Means on H.R. No. 8539, Fed. Alcohol Control Act, (1935), testimony of Joseph H. Choate, former Chairman of FAC Admin., 74th Cong., 1st Sess., at p. 10; H.R. Rep. No. 1542, 74th Cong., 1st Sess., p. 3 (1935) [highlighting deceptive labeling practices]; 79 Cong. Rec. (1935) 11714 [same].) The state statute also is consistent with the recognition that the [FAA Act](#) was necessary in order to “do something to supplement legislation by the States to carry out their own policies” because the states “alone cannot do the whole job.” (Remarks of Rep. Cullen on H.R. No. 8539, 74th Cong., 1st Sess., 79 Cong. Rec. (1935) 11714.) For the reasons set forth above by the Department and the NVVA, we find that [section 25241](#) does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

[\*\*455] In reaching this determination, we also are persuaded by the apparent congressional and regulatory acquiescence in California's long-standing regulations applicable to the labeling of wines produced in California. This acquiescence militates against concluding that California's [section 25241](#), enacted in 2000, constitutes [\*\*\*\*108] a “sufficient obstacle” supporting a finding of implied preemption based upon a theory of frustration of federal purpose. Indeed, any doubt that we may have had in this regard is dispelled by the related history of Oregon's corresponding geographic brand-name labeling regulation, which, as explained above, since 1977 has imposed a rule far stricter than the federal rule that existed in the mid-1970s and, like the California statute now under review, also established a regulation far more stringent than that set forth, effective in 1986, under the federal grandfather clause. In other words, like the California statute, the Oregon brand-name regulation prohibits for certain Oregon names what the federal grandfather does not prohibit.

As explained above, the BATF long has been aware of these stricter state law brand-name labeling regulations, and, far [\*\*\*220] from suggesting that their enforcement would frustrate any federal purpose,<sup>71</sup> the BATF expressly has stated its understanding that such labeling regulation will be enforced by the states. In this setting, the BATF's failure to question the enforcement of these [\*994] more stringent state regulations—while instead acknowledging generally [\*\*\*\*109] the propriety of such regulations—suggests that the BATF, the expert body charged with the enforcement of [27 United States Code section 205\(e\)](#), does not view these state regulations as being preempted by federal law, and also does not view them as posing an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. (See, e.g., [Hillsborough County, supra, 471 U.S. 707, 721](#) [because “the agency has not suggested that the county ordinances interfere with federal goals, we are reluctant in the absence of strong evidence to find a threat to the federal goal of ensuring sufficient plasma”]; accord, [Granite Rock Co., supra, 480 U.S. 572, 582–583](#) [“If, as Granite Rock claims, it is the federal intent that Granite Rock conduct its mining unhindered by state environmental regulation, one would expect to find the expression of this intent in these Forest Service regulations”].)

[\*\*\*\*110] [CA\(16\)↑](#) (16) We find nothing in the history of the underlying federal statute or the federal regulations suggesting that, although the BATF may have determined that as a *general matter* its grandfather clause was appropriate so as to avoid destroying an “entire class” of brand-name labels, states would or should be precluded from adopting more stringent brand-name labeling requirements as necessary to address local concerns. (See [Olszewski, supra, 30 Cal.4th 798, 815 HN20↑](#) [the presumption against preemption “reinforces the appropriateness of a narrow reading of” assertedly preempting language]; accord, [Cipollone v. Liggett Group, Inc. \(1992\) 505 U.S. 504, 518 \[120 L. Ed. 2d 407, 112 S. Ct. 2608\]](#); [Medtronic, supra, 518 U.S. 470, 485](#); cf. [Exxon, supra, 437 U.S. 117, 132](#) [“it is illogical to infer that by excluding certain competitive behavior from the general ban against discriminatory pricing, Congress intended to pre-empt the States' power to prohibit any conduct within that exclusion”].) For the reasons set forth above, we conclude that the state labeling rule in question does not frustrate Congress's intent or stand as an obstacle to the [\*\*\*\*111] accomplishment and execution of the full purposes and objectives of Congress.<sup>72</sup>

[\*995]

[\*\*456] 2. Does section 25241, by imposing additional conditions not required for the issuance of a federal COLA, stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress?

Bronco also asserts that [section 25241](#) is impliedly preempted because, it is claimed, the statute imposes additional conditions [\*\*\*\*112] not required by federal COLAs [\*\*\*221] and thereby nullifies an asserted “right” or federal “license” to market wine in interstate and foreign commerce. In support, Bronco relies upon numerous cases holding, on the facts presented, that a state may not, by its own regulations, impair rights granted under a federal license or permit. (E.g., [Gibbons v. Ogden \(1824\) 22 U.S. 1 \[6 L. Ed. 23\]](#) [federal steamboat license preempted New York statute barring passage between New Jersey and New York]; [Ray, supra, 435 U.S. 151, 164–165](#) [federal permit authorizing a vessel to carry cargo in United States waters prevails over the contrary state judgment]; [Sperry v. Florida \(1963\) 373 U.S. 379, 385 \[10 L. Ed. 2d 428, 83 S. Ct. 1322\]](#) [state statute barring unauthorized practice of law could not be applied to nonlawyers licensed under federal law to prosecute patents]; [Leslie Miller, Inc. v. Arkansas \(1956\) 352 U.S. 187, 188–190 \[1 L. Ed. 2d 231, 77 S. Ct. 257\]](#) [state licensing law could not be applied so as to effectively allow state to declare “irresponsible” a contractor certified by the federal

<sup>71</sup> We note that the BATF has not been reluctant to commit its thoughts to public view through publication of proposed rules and related comments in the Federal Register.

<sup>72</sup> For similar reasons, we find unpersuasive the related arguments of amici curiae on behalf of Bronco that [section 25241](#) stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, because the statute assertedly (i) “impairs the long-standing national policy favoring uniform and consistent federal wine labeling regulations,” (ii) “impairs the consistent federal policy permitting continued use of established brands,” and (iii) “will frustrate the United States' ability to protect established brands and trademarks in ongoing trade negotiations.”

government as “responsible”]; [Castle v. Hayes Freight Lines, Inc. \(1954\) 348 U.S. 61, 64 \[99 L. Ed. 68, 75 S. Ct. 191\]](#) [\*\*\*\*113] [state could not bar federally licensed truck driver from its roads for repeated violations of state traffic laws]; [First Iowa Coop. v. Power Comm'n \(1946\) 328 U.S. 152, 164–167 \[90 L. Ed. 1143, 66 S. Ct. 906\]](#) [federal permit issued for interstate utility project precluded state attempt to proscribe project].)

The Department and the NVVA, asserting that these cases are distinguishable, rely upon other high court cases holding that, in certain circumstances, possession of a federal license does not confer immunity “from the operation of the normal incidents of local police power.” ([Huron Cement Co. v. Detroit \(1960\) 362 U.S. 440, 447 \[4 L. Ed. 2d 852, 80 S. Ct. 813\]](#) [upholding enforcement of city's smoke abatement ordinance against federally licensed vessels]; see also [Florida Avocado, supra, 373 U.S. 132, 141](#) [upholding California's right to enforce regulations prohibiting the sale of certain federally approved Florida avocados]; [Medtronic, supra, 518 U.S. 470, 492–494](#) [federal approval of medical device did not preempt state action claiming the approved device was defectively designed]; [Granite Rock Co., supra, 480 U.S. 572, 582–583](#) [\*\*\*\*114] [federal approval of mining project did not preempt California's stricter environmental requirements]; [Pacific Gas & Elec. v. Energy Resources Comm'n \(1983\) 461 U.S. 190, 222–223 \[75 L. Ed. 2d 752, 103 S. Ct. 1713\]](#) [federal nuclear power plant license did not preempt stricter state licensing requirements].)

[\*996] These licensing cases in essence present the same issue discussed above, namely, whether the state regulation stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. But as both the Department and the NVVA observe, it is quite doubtful that a federal COLA issued pursuant to [27 United States Code section 205\(e\)](#) and the corresponding wine label certificate regulations ([27 C.F.R. § 4.50 et seq.](#)) are equivalent to the licenses or permits at issue in the cases upon which Bronco relies, and Bronco does not provide any convincing authority suggesting that a COLA constitutes a license or permit as understood in those cases. Indeed, [HN21](#) [↑] it is apparent from the [FAA Act](#) itself, and from the corresponding regulations, that both Congress and the BATF well understand the distinction between a license or permit, on one [\*\*\*\*115] hand, and a COLA, on the other. Congress requires wine importers, producers, and wholesalers to secure a “basic permit” ([27 U.S.C. § 203\(a\)–\(c\)](#); see also *id.*, [§ 204](#) [\*\*\*222] [setting forth permit procedures]), and the BATF has adopted extensive corresponding regulations concerning such permits ([27 C.F.R. §§ 1.20–1.59](#)). By contrast, nowhere in the separate COLA procedures set forth in [27 United States Code section 205\(e\)](#), or the extensive COLA regulations ([27 C.F.R. §§ 4.50–4.52, 13.1–13.92](#)), [\[\[\\*\\*457\]\]](#) does Congress or the BATF even imply that a COLA constitutes a license or permit. Quite the contrary.

[CA\(17\)](#) [↑] (17) As explained above, it is evident that the BATF envisions that states will enforce their own labeling laws to the extent they impose more stringent requirements, and that BATF generally views its role as being confined to ensuring compliance with the bare terms of *federal* labeling law. (See, e.g., 51 Fed.Reg. 3773, 3774, discussed *ante*, at pt. II.C.2.b.) As the NVVA observes, the BATF itself has confirmed this view of its enforcement authority and of any resulting COLA that it issues by noting, on its COLA application form, that [\*\*\*\*116] the BATF uses the form only for its own federal enforcement duties but that it may share the information supplied to *state regulators* “to aid in the performance of their duties.” (Dept. of Treas., Alcohol and Tobacco Tax Trade Bur., Application for and Certification/Exemption of Label/Bottle Approval, TTB F 5100.31 (4/2004), p. 3 <[# alcohol> \[as of Aug. 5, 2004\].\)](http://www.ttb.gov/forms/5000.htm)

[CA\(18\)](#) [↑] (18) Nor, contrary to the assertions of Bronco and suggestions by the Court of Appeal below, can a COLA properly be viewed as conferring a “right” on the holder to market wines in interstate or foreign commerce so long as the bare BATF labeling regulations are satisfied. [HN22](#) [↑] The BATF itself has observed that a “certificate of label approval was never intended to convey any type of proprietary interest to the certificate holder” and that a certificate “is issued for [B]ATF use only . . . .” The certificate of label approval is a statutorily mandated tool used to help the [B]ATF in its enforcement of the labeling requirements of the [FAA Act](#). (64 Fed.Reg. 2122, 2123 (Jan. 13, 1999).) As the New Jersey Supreme Court observed in a related context, a [\*997] COLA “goes no further than [\*\*\*\*117] evidencing compliance with [federal regulatory] standards imposed only for the purposes mentioned in the valid exercise of federal authority.” ([Boller Beverages, Inc. v. Davis \(1962\) 38 N.J. 138 \[183 A.2d 64, 69\]](#).)

### III.

Bronco has failed to carry its burden of demonstrating federal preemption of a long-established and legitimate exercise of state police power with respect to the subject regulated by [section 25241](#). As we have seen, there is no express preemption in the present context, and Bronco's assertions of implied preemption are contradicted by the long history we have described of concurrent state and federal regulation of wine labels including, historically, the representations appearing on labels suggesting the place of origin of the grapes used to make wine. Nor has Bronco succeeded in providing any persuasive indication that this long-standing concurrent regulatory scheme no longer is compatible with Congress's overall purposes which have been to support the states' efforts to protect consumers from misleading labeling, not to permit the type of labeling at issue here. Finally, Bronco has not established that, by purchasing a brand name [\*\*\*\*118] that had been used prior to 1986, it acquired a federally recognized right or license exempting it from stricter state regulation.

California is recognized as a preeminent producer of wine, and the geographic source of its wines reflecting the attributes of distinctive locales, particularly the [\*\*\*223] Napa Valley—forms a very significant basis upon which consumers worldwide evaluate expected quality when making a purchase. We do not find it surprising that Congress, in its effort to provide minimum standards for wine labels, would not foreclose a state with particular expertise and interest from providing stricter protection for consumers in order to ensure the integrity of its wine industry.

For the reasons set forth above, we reverse the judgment of the Court of Appeal and remand the case to that court to enable it to address Bronco's remaining claims.

Kennard, J., Baxter, J., Chin J., Brown, J., Moreno, J., and Swager, J.,<sup>\*</sup> concurred.

Petitioner's petition for a rehearing was denied October 13, 2004, and the opinion was modified to read as printed above. Werdegar, J., did not participate therein.

[\*998]

### APPENDIX

GET ATTACHMENT 1 of 1 [\*\*\*\*119]

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\* Associate Justice of the Court of Appeal, First Appellate District, Division One, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.



## Soukup v. Law Offices of Herbert Hafif

Supreme Court of California

July 27, 2006, Filed

S126715, S126864

**Reporter**

39 Cal. 4th 260 \*; 139 P.3d 30 \*\*; 46 Cal. Rptr. 3d 638 \*\*\*; 2006 Cal. LEXIS 9073 \*\*\*\*; 2006 Daily Journal DAR 9839; 2006 Cal. Daily Op. Service 6772

PEGGY J. SOUKUP, Plaintiff and Respondent, v. LAW OFFICES OF HERBERT HAFIF et al., Defendants and Appellants; PEGGY J. SOUKUP, Plaintiff and Respondent, v. RONALD C. STOCK, Defendant and Appellant.

**Subsequent History:** Time for Granting or Denying Rehearing Extended [Soukup \(Peggy\) v. Hafif \(Herbert\), 2006 Cal. LEXIS 9856 \(Cal., Aug. 16, 2006\)](#)

Later proceeding at [Soukup v. Hafif, 2006 Cal. LEXIS 10060 \(Cal., Aug. 24, 2006\)](#)

Later proceeding at [Soukup v. Hafif, 2006 Cal. LEXIS 10090 \(Cal., Aug. 24, 2006\)](#)

Rehearing denied by, Modification denied by, Motion to strike denied by, Moot [Soukup v. Stock, 2006 Cal. LEXIS 12453 \(Cal., Oct. 11, 2006\)](#)

**Prior History:** [\*\*\*\*1] Superior Court of Los Angeles County, No. BC247941, Gregory C. O'Brien, Jr., Judge. Court of Appeal of California, Second Appellate District, Division Five, No. B152759, No. B154311.

[Soukup v. Hafif, 2006 Cal. LEXIS 6630 \(Cal., May 4, 2006\)](#)

[Flatley v. Mauro, 39 Cal. 4th 299 \[46 Cal. Rptr. 3d 606, 139 P.3d 2, 2006 Cal. LEXIS 9074\] \(2006\)](#)

[Soukup v. Stock, 118 Cal. App. 4th 1490 \[15 Cal. Rptr. 3d 303, 2004 Cal. App. LEXIS 814\] \(Cal. App. 2d Dist., 2004\)](#)

**Disposition:** The court reversed the judgment of the Court of Appeal and remanded the case for further proceedings.

## Core Terms

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underlying action, anti-SLAPP, matter of law, Stock, motion to strike, lawsuit, cause of action, prevailing, malicious prosecution action, special motion, exemption, cases, probable cause, defendants', malicious prosecution, malicious prosecution claim, probability, malice, allegations, initiate, pension plan, trial court, termination, deposition, diaries, declaration, illegality, codefendants, demonstrates, complaints

## LexisNexis® Headnotes

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**HN1** [Defenses, Demurrs & Objections, Motions to Strike]

See [Code Civ. Proc., § 425.16, subd. \(b\)\(1\)](#).

Civil Procedure > ... > Defenses, Demurrs & Objections > Motions to Strike > General Overview

**HN2** [Defenses, Demurrs & Objections, Motions to Strike]

The legislature enacted [Code Civ. Proc., § 425.16](#), to prevent and deter lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. [Section 425.16, subd. \(a\)](#). Because these meritless lawsuits seek to deplete a defendant's energy and drain his or her resources, the legislature sought to prevent strategic lawsuits against public participation (SLAPPs) by ending them early and without great cost to the SLAPP target. [Section 425.16](#) therefore establishes a procedure where a trial court evaluates the merits of a lawsuit using a summary-judgment-like procedure at an early stage of the litigation. [Section 425.16](#) posits a two-step process for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. Only a cause of action that satisfies both prongs of the anti-SLAPP statute - i.e., that arises from protected speech or petitioning and lacks even minimal merit - is a SLAPP, subject to being stricken under the statute.

Civil Procedure > ... > Defenses, Demurrs & Objections > Motions to Strike > General Overview

Governments > Legislation > Interpretation

**HN3** [Defenses, Demurrs & Objections, Motions to Strike]

The legislature's purpose in enacting the anti-SLAPP (strategic lawsuit against public participation) statute, [Code Civ. Proc., § 425.16](#), is set forth in its findings and declarations. The legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. [Section 425.16, subd. \(a\)](#). Furthermore, to accomplish this purpose the legislature has directed that the statute be construed broadly. To this end, when construing the anti-SLAPP statute, where possible, the state supreme court follows the legislature's intent, as exhibited by the plain meaning of the actual words of the law. Where this principle is applied, recourse to extrinsic material like legislative history is unnecessary but, in prior cases interpreting [§ 425.16](#), the court has more than once consulted that history and found in it material that has buttressed its construction of the statutory language.

Civil Procedure > ... > Defenses, Demurrs & Objections > Motions to Strike > General Overview

Torts > Intentional Torts > Malicious Prosecution > General Overview

**HN4** [Defenses, Demurrs & Objections, Motions to Strike]

A SLAPPback suit is an action, typically for malicious prosecution filed by the target of a SLAPP (strategic lawsuit against public participation) suit against the SLAPP filer after the dismissal of the SLAPP suit as a result of the target's appropriate use of the SLAPP statute. The purpose of a SLAPPback is to seek compensation for damages beyond the attorney fees and costs awarded to the defendant who prevails on the special motion to strike under the anti-SLAPP statute. [Code Civ. Proc., § 425.16, subd. \(b\)\(3\)](#). SLAPP victims commonly experience stress-related

health issues, strained family relationships, and financial distress or even insolvency. The only way a SLAPP victim can recover for these damages is to pursue a legal claim against the person or entity that filed the original SLAPP.

Civil Procedure > ... > Defenses, Demurrsers & Objections > Motions to Strike > General Overview

#### **HN5** **Defenses, Demurrsers & Objections, Motions to Strike**

The filing of a SLAPPback does not end the roundelay of special motions to strike under the anti-SLAPP (strategic lawsuit against public participation) statute. The SLAPPback defendant may in turn file such a motion arguing that the filing and maintenance of the underlying action that is the basis of the SLAPPback was itself activity protected by the anti-SLAPP statute.

Governments > Legislation > Effect & Operation > Retrospective Operation

#### **HN6** **Effect & Operation, Retrospective Operation**

Applying changed procedural statutes to the conduct of existing litigation, even though the litigation involves an underlying dispute that arose from conduct occurring before the effective date of the new statute, involves no improper retrospective application because the statute addresses conduct in the future.

Civil Procedure > ... > Defenses, Demurrsers & Objections > Motions to Strike > General Overview

Governments > Legislation > Effect & Operation > Retrospective Operation

#### **HN7** **Defenses, Demurrsers & Objections, Motions to Strike**

Amendments to the anti-SLAPP (strategic lawsuit against public participation) statute apply to cases pending before the effective date of the amendments.

Civil Procedure > ... > Defenses, Demurrsers & Objections > Motions to Strike > General Overview

#### **HN8** **Defenses, Demurrsers & Objections, Motions to Strike**

Code Civ. Proc., § 425.18, creates different procedures for SLAPPbacks than those that ordinarily apply to motions to strike under the anti-SLAPP (strategic lawsuit against public participation) statute and also, like Code Civ. Proc., § 425.17, amends Code Civ. Proc., § 425.16, to except certain claims from applicability of the statutorily conferred remedy of the screening mechanism provided by § 425.16. In neither event does § 425.18 impose new, additional or different liabilities based on past conduct or deprive defendants of any substantive defense to the action.

Civil Procedure > ... > Defenses, Demurrsers & Objections > Motions to Strike > General Overview

Torts > Intentional Torts > Malicious Prosecution > General Overview

#### **HN9** **Defenses, Demurrsers & Objections, Motions to Strike**

Code Civ. Proc., § 425.18, defines a SLAPPback as any cause of action for malicious prosecution or abuse of process arising from the filing or maintenance of a prior cause of action that has been dismissed pursuant to a special motion to strike under Code Civ. Proc., § 425.16. Section 425.18, subd. (b)(1). In its findings and declarations, the legislature states that a SLAPPback cause of action should be treated differently, as provided in § 425.18, from an ordinary malicious prosecution action because a SLAPPback is consistent with the legislature's intent to protect the valid exercise of the constitutional rights of free speech and petition by its deterrent effect on SLAPP (strategic lawsuit against public participation) litigation and by its restoration of public confidence in participatory democracy. Section 425.18, subd. (a).

Civil Procedure > ... > Defenses, Demurrs & Objections > Motions to Strike > General Overview

Torts > Intentional Torts > Malicious Prosecution > General Overview

## **HN10** [blue icon] **Defenses, Demurrs & Objections, Motions to Strike**

Code Civ. Proc., § 425.18, treats SLAPPbacks differently from ordinary malicious prosecution actions in two ways. First, it makes inapplicable to special motions to strike a SLAPPback certain procedures that would normally apply to such motions and sets forth different procedures. Thus, the statute states that the provisions of Code Civ. Proc., § 425.16, subds. (c), (f), (g), and (i), and Code Civ. Proc., § 904.1, subd. (a), para. (13), shall not apply to a special motion to strike a SLAPPback (§ 425.18, subd. (c)).

Civil Procedure > Remedies > Writs > General Overview

Civil Procedure > ... > Defenses, Demurrs & Objections > Motions to Strike > General Overview

## **HN11** [blue icon] **Remedies, Writs**

A motion to strike a SLAPPback is allowed to be brought within 120 days of the service of the complaint or, subject to a trial court's discretion, as long as six months after service of the complaint or, in extraordinary cases, at any later time. Code Civ. Proc., § 425.18, subd. (d)(1)(A)-(C). The plaintiff opposing the special motion to strike is permitted to file an ex parte application for a continuance to obtain discovery, § 425.18, subd. (e), and is permitted to recover costs and attorney fees if the court finds that the motion to strike is frivolous or solely intended to cause unnecessary delay, but makes no provision for such costs and fees to be awarded to the prevailing defendants. Section 425.18, subd. (f). Appellate review of a denial of a motion to strike, in whole or part, is limited to review by peremptory writ. Section 425.18, subd. (g). These provisions stack the procedural deck in favor of the SLAPPback plaintiff confronted with a special motion to strike by providing the plaintiff with a longer timeframe, and the means with which, to conduct discovery that might yield evidence to resist the motion to strike, exempting the plaintiff from fees and costs even if the plaintiff's SLAPPback action is stricken and minimizing the delays and expense the plaintiff might otherwise incur while the case is on appeal by limiting the unsuccessful defendant to writ review.

Civil Procedure > ... > Defenses, Demurrs & Objections > Motions to Strike > General Overview

Torts > Intentional Torts > Malicious Prosecution > General Overview

## **HN12** [blue icon] **Defenses, Demurrs & Objections, Motions to Strike**

The second way in which Code Civ. Proc., § 425.18, treats SLAPPbacks differently from ordinary malicious prosecution actions is to provide a limited exemption for SLAPPbacks from the anti-SLAPP statute in § 425.18, subd. (h). Section 425.18, subd. (h), provides that a special motion to strike may not be filed against a SLAPPback

by a party whose filing or maintenance of the prior cause of action from which the SLAPPback arises was illegal as a matter of law. [Section 425.18, subd. \(h\).](#)

Civil Procedure > ... > Defenses, Demurrs & Objections > Motions to Strike > General Overview

### [HN13](#) [Defenses, Demurrs & Objections, Motions to Strike]

An illegal act is an act forbidden by law. By specifying that only those defendants whose filing or maintenance of the underlying action was illegal as a matter of law are barred from bringing a special motion to strike a SLAPPback, it is clear that the legislature intended to require something more than that the underlying action was dismissed as a SLAPP (strategic lawsuit against public participation) before [Code Civ. Proc., § 425.18, subd. \(h\)](#), applies. Had the legislature intended to create a categorical rule exempting all SLAPPbacks from the anti-SLAPP statute, it could have done so.

Civil Procedure > ... > Defenses, Demurrs & Objections > Motions to Strike > General Overview

Evidence > Burdens of Proof > Burden Shifting

Torts > Intentional Torts > Malicious Prosecution > General Overview

### [HN14](#) [Defenses, Demurrs & Objections, Motions to Strike]

[Code Civ. Proc., § 425.18, subd. \(h\)](#), provides a narrow exception to the rule that malicious prosecution actions are subject to scrutiny under the anti-SLAPP (strategic lawsuit against public participation) statute which applies only if the malicious prosecution action is a SLAPPback and the filing and maintenance of the underlying action was illegal as a matter of law. The burden of establishing that the underlying action was illegal as a matter of law should be shouldered by the plaintiff in such cases because the legislature's decision not to create a categorical exemption for SLAPPbacks demonstrates a legislative preference that the anti-SLAPP statute operate in the ordinary fashion in most SLAPPback cases, subject to the special procedural rules applicable to all motions to strike a SLAPPback. In the ordinary SLAPP case, a defendant's initial burden in invoking the anti-SLAPP statute is to make a threshold showing that the challenged cause of action is one arising from protected activity. There is no further requirement that he initially demonstrate his exercise of constitutional rights of speech or petition was valid as a matter of law. A defendant who invokes the anti-SLAPP statute should not be required to bear the additional burden of demonstrating in the first instance that the filing and maintenance of the underlying action was not illegal as a matter of law.

Civil Procedure > ... > Defenses, Demurrs & Objections > Motions to Strike > General Overview

Evidence > Burdens of Proof > Burden Shifting

### [HN15](#) [Defenses, Demurrs & Objections, Motions to Strike]

Once a defendant invoking the anti-SLAPP (strategic lawsuit against public participation) statute has made the required threshold showing that the challenged action arises from assertedly protected activity, the plaintiff may counter by demonstrating that the underlying action was illegal as a matter of law because either the defendant concedes the illegality of the assertedly protected activity or the illegality is conclusively established by the evidence presented in connection with the motion to strike. In doing so, the plaintiff must identify with particularity the statute or statutes violated by the filing and maintenance of the underlying action.

Civil Procedure > ... > Defenses, Demurrs & Objections > Motions to Strike > General Overview

Evidence > Burdens of Proof > General Overview

#### **HN16** [Defenses, Demurrs & Objections, Motions to Strike]

The requirement of identifying a specific statute, violation of which a plaintiff contends is illegal as a matter of law, is consistent with the narrow nature of the exemption set forth in [Code Civ. Proc., § 425.18, subd. \(h\)](#), because it prevents a plaintiff from advancing a generalized claim that a defendant's conduct was illegal and therefore subject to the exemption. In this same vein, the requirement of specificity provides notice to both the defendant and the court about the particular statute or statutes the defendant is alleged to have violated as a matter of law so as to allow the defendant to intelligibly respond to, and the court to assess, the claim. Additionally, as part of the plaintiff's burden of demonstrating illegality as a matter of law, the plaintiff must show the specific manner in which the statute or statutes were violated with reference to their elements. A generalized assertion that a particular statute was violated by the filing or maintenance of the underlying action without a particularized showing of the violation will be insufficient to demonstrate illegality as a matter of law.

Business & Corporate Compliance > ... > Whistleblower Protection Act > Scope & Definitions > Protected Activities

#### **HN17** [Whistleblower Protection Act, Protected Activities]

See *Lab. Code, § 1102.5, subd. (b)*.

Labor & Employment Law > ... > Whistleblower Protection Act > Evidence > Burdens of Proof

Labor & Employment Law > ... > Whistleblower Protection Act > Scope & Definitions > General Overview

#### **HN18** [Evidence, Burdens of Proof]

*Lab. Code, § 1102.5*, is a whistleblower statute, the purpose of which is to encourage workplace whistle-blowers to report unlawful acts without fearing retaliation. To establish a *prima facie* case of retaliation, a plaintiff must show that she engaged in protected activity, that she was thereafter subjected to adverse employment action by her employer, and there was a causal link between the two. Thus, it appears that a prerequisite to asserting a violation of § 1102.5 is the existence of an employer-employee relationship at the time the allegedly retaliatory action occurred.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

#### **HN19** [Noerr-Pennington Doctrine, Sham Exception]

The Noerr-Pennington doctrine has two prongs. First, the challenged action must have been undertaken with an improper motive. That is, it must have been done not with the hope of securing a favorable governmental result, but solely to harass and hinder another party. The other prong of the doctrine is that the challenged action must have been objectively baseless. Absent such a patent lack of merit, an action protected under the First Amendment by the right of petition cannot be the basis for litigation.

Governments > Courts > Authority to Adjudicate

## [HN20](#) [blue icon] Courts, Authority to Adjudicate

Where the legislature has spoken, the state supreme court is not at liberty to create a broader exception for sham litigation.

Evidence > Burdens of Proof > General Overview

Torts > Intentional Torts > Malicious Prosecution > General Overview

## [HN21](#) [blue icon] Evidence, Burdens of Proof

By definition, a malicious prosecution suit alleges that a defendant committed a tort by filing a lawsuit. The filing of lawsuits is an aspect of the First Amendment right of petition. If a trial court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.

Civil Procedure > ... > Defenses, Demurrs & Objections > Motions to Strike > General Overview

Evidence > Burdens of Proof > General Overview

Torts > ... > Malicious Prosecution > Elements > General Overview

## [HN22](#) [blue icon] Defenses, Demurrs & Objections, Motions to Strike

To establish a probability of prevailing on a malicious prosecution claim, a plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient *prima facie* showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. For purposes of this inquiry, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant, [Code Civ. Proc., § 425.16, subd. \(b\)\(2\)](#); though the court does not weigh the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim. In making this assessment it is the court's responsibility to accept as true the evidence favorable to the plaintiff. The plaintiff need only establish that his or her claim has minimal merit to avoid being stricken as a strategic lawsuit against public participation.

Evidence > Burdens of Proof > General Overview

Torts > ... > Elements > Lack of Probable Cause > Determinations of Probable Cause

Torts > ... > Malicious Prosecution > Elements > Favorable Termination

Torts > ... > Malicious Prosecution > Elements > Malice

## [HN23](#) [blue icon] Evidence, Burdens of Proof

To prevail on a malicious prosecution claim, a plaintiff must show that the prior action: (1) was commenced by or at the direction of the defendant and was pursued to a legal termination favorable to the plaintiff; (2) was brought

without probable cause; and (3) was initiated with malice. The question of probable cause is whether as an objective matter, the prior action was legally tenable or not. A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him. In a situation of complete absence of supporting evidence, it cannot be adjudged reasonable to prosecute a claim. Probable cause, moreover, must exist for every cause of action advanced in the underlying action. An action for malicious prosecution lies when but one of alternate theories of recovery is maliciously asserted.

Evidence > Burdens of Proof > General Overview

Torts > ... > Malicious Prosecution > Elements > Malice

#### **HN24** [ ] Evidence, Burdens of Proof

The malice element on a malicious prosecution claim relates to the subjective intent or purpose with which a defendant acted in initiating the prior action. The motive of the defendant must have been something other than that of bringing a perceived guilty person to justice or the satisfaction in a civil action of some personal or financial purpose. The plaintiff must plead and prove actual ill will or some improper ulterior motive. Malice may range anywhere from open hostility to indifference. Malice may also be inferred from the facts establishing lack of probable cause.

Civil Procedure > Appeals > Appellate Briefs

#### **HN25** [ ] Appeals, Appellate Briefs

Briefs filed in the California Supreme Court are required to conform to Cal. Rules of Court, rule 14, which governs the content and form of briefs filed in the court of appeal. Cal. Rules of Court, rule 28.1(a). The court of appeal does not permit incorporation by reference of documents filed in the trial court.

Civil Procedure > Appeals > Frivolous Appeals

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

#### **HN26** [ ] Appeals, Frivolous Appeals

The filing of an appeal is the continuation of an action. The maintenance of an appeal by plaintiffs in an action discovered to lack probable cause may expose the plaintiff's attorney to liability for malicious prosecution. The filing of such an appeal, which stays the litigation, may itself be a tactic that operates to the detriment of the defendant as to whom the action has been found to be a strategic lawsuit against public participation.

## **Headnotes/Summary**

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### **Summary**

#### **CALIFORNIA OFFICIAL REPORTS SUMMARY**

A former employee was sued by her former employers on causes of action for malicious prosecution, defamation, breach of fiduciary duty, and tortious interference with business relationships. The employee obtained dismissal of

the employers' action under the anti-SLAPP (strategic lawsuit against public participation) statute ([Code Civ. Proc., § 425.16](#)). She then sued them for malicious prosecution and abuse of process. The employers moved to strike the action as a SLAPP. The superior court denied the motions on the ground that the anti-SLAPP statute did not apply under the circumstances. (Superior Court of Los Angeles County, No. BC247941, Gregory C. O'Brien, Jr., Judge.) The Court of Appeal, Second Dist., Div. Five, Nos. B152759 and B154311, reversed, holding that the motions to strike should have been granted.

The Supreme Court reversed the judgment of the Court of Appeal and remanded the case. The court held that the filing and maintenance of the employers' underlying action could not be characterized as "illegal as a matter of law" so as to exempt the employee's malicious prosecution action from the anti-SLAPP statute. Furthermore, because, as demonstrated by its enactment of [Code Civ. Proc., § 425.18, subd. \(h\)](#), the Legislature has decided against a categorical rule exempting SLAPPbacks from the anti-SLAPP statute, the court was not at liberty to read such a broader exemption into the statute. However, while the court found that the employers were not barred from using the anti-SLAPP statute to attempt to strike the employee's action, it concluded that the employee had nonetheless demonstrated a probability of prevailing on her malicious prosecution claim so as to defeat the employers' motion. The employee could show that one of the employers lacked probable cause for his malicious prosecution claim in the underlying action because her evidence demonstrated that she did not initiate any of the lawsuits against [\*261] him that were the basis of that claim; that she had minimal or no contact with any of her codefendants in the time period during which those actions were filed; and that the employer, while maintaining that the employee was involved in the general work of implementing the attack on him, conceded at his deposition that he would not be producing any witnesses to testify that she assisted her codefendants in filing their complaints. (Opinion by Moreno, J., expressing the unanimous view of the court.)

## **Headnotes**

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

#### **Pleading § 90—Motions and Objections—Anti-SLAPP Statute—SLAPPback—Malicious Prosecution—Motion to Strike Improperly Granted.**

Although defendants were not barred from using the anti-SLAPP (strategic lawsuit against public participation) statute ([Code Civ. Proc., § 425.16](#)) to attempt to strike plaintiff's action because the filing and maintenance of defendants' underlying action could not be characterized as "illegal as a matter of law" so as to exempt plaintiff's malicious prosecution action from the anti-SLAPP statute, and because the Legislature has decided against a categorical rule exempting SLAPPbacks from the anti-SLAPP statute by its enactment of [Code Civ. Proc., § 425.18, subd. \(h\)](#), defendants' motion to strike the action as a SLAPP should not have been granted because plaintiff had nonetheless demonstrated a probability of prevailing on her malicious prosecution claim so as to defeat the motion.

[5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 964A; 1 Kiesel et al., Matthew Bender Practice Guide: Cal. Pretrial Civil Procedure (2006) § 13.22C.]

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

#### **Pleading § 90—Motions and Objections—SLAPP Actions—Process for Determining.**

The Legislature enacted [Code Civ. Proc., § 425.16](#), to prevent and deter lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances ([§ 425.16, subd. \(a\)](#)). Because these meritless lawsuits seek to deplete a defendant's energy and drain his or her resources, the Legislature sought to prevent strategic lawsuits against public participation (SLAPP) by ending them early and without great cost to the SLAPP target. [Section 425.16](#) therefore establishes a procedure where a trial court evaluates the merits of a lawsuit using a summary-judgment-like procedure at an early stage of the litigation.

Section 425.16 posits a two-step process for determining whether an [\*262] action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. Only a cause of action that satisfies both prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning and lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.

#### CA(3) [ ] (3)

##### **Pleading § 90—Motions and Objections—Anti-SLAPP Statute—Construction—Operability of Amendments.**

The Legislature's purpose in enacting the anti-SLAPP (strategic lawsuit against public participation) statute ([Code Civ. Proc., § 425.16](#)) is set forth in its findings and declarations. To accomplish this purpose the Legislature has directed that the statute be construed broadly. To this end, when construing the anti-SLAPP statute, where possible, the California Supreme Court follows the Legislature's intent, as exhibited by the plain meaning of the actual words of the law. Where this principle is applied, recourse to extrinsic material like legislative history is unnecessary but, in prior cases interpreting [§ 425.16](#), the court has more than once consulted that history and found in it material that has buttressed its construction of the statutory language. Amendments to the anti-SLAPP statute apply to cases pending before the effective date of the amendments.

#### CA(4) [ ] (4)

##### **Pleading § 90—Motions and Objections—SLAPPback Suits.**

A SLAPPback suit is an action, typically for malicious prosecution filed by the target of a SLAPP (strategic lawsuit against public participation) suit against the SLAPP filer after the dismissal of the SLAPP suit as a result of the target's appropriate use of the SLAPP statute. The purpose of a SLAPPback is to seek compensation for damages beyond the attorney fees and costs awarded to the defendant who prevails on the special motion to strike under the anti-SLAPP statute ([Code Civ. Proc., § 425.16, subd. \(b\)\(3\)](#)). SLAPP victims commonly experience stress-related health issues, strained family relationships, and financial distress or even insolvency. The only way a SLAPP victim can recover for these damages is to pursue a legal claim against the person or entity that filed the original SLAPP. The filing of a SLAPPback does not end the roundelay of special motions to strike under the anti-SLAPP statute. The SLAPPback defendant may in turn file such a motion arguing that the filing and maintenance of the underlying action that is the basis of the SLAPPback was itself activity protected by the anti-SLAPP statute.

#### CA(5) [ ] (5)

##### **Statutes § 5—Operation and Effect—Retroactivity—Changed Procedural Statutes.**

Applying changed procedural statutes to the conduct [\*263] of existing litigation, even though the litigation involves an underlying dispute that arose from conduct occurring before the effective date of the new statute, involves no improper retrospective application because the statute addresses conduct in the future.

#### CA(6) [ ] (6)

##### **Pleading § 90—Motions and Objections—SLAPPback Suits—Malicious Prosecution Claims—Treatment.**

[Code Civ. Proc., § 425.18](#), creates different procedures for SLAPPbacks than those that ordinarily apply to motions to strike under the anti-SLAPP (strategic lawsuit against public participation) statute and also, like [Code Civ. Proc., § 425.17](#), amends [Code Civ. Proc., § 425.16](#), to except certain claims from applicability of the statutorily conferred

remedy of the screening mechanism provided by [§ 425.16](#). In neither event does [§ 425.18](#) impose new, additional or different liabilities based on past conduct or deprive defendants of any substantive defense to the action. [Section 425.18](#) defines a SLAPPback as any cause of action for malicious prosecution or abuse of process arising from the filing or maintenance of a prior cause of action that has been dismissed pursuant to a special motion to strike under [section 425.16](#) ([§ 425.18, subd. \(b\)\(1\)](#)). In its findings and declarations, the Legislature states that a SLAPPback cause of action should be treated differently, as provided in [§ 425.18](#), from an ordinary malicious prosecution action because a SLAPPback is consistent with the Legislature's intent to protect the valid exercise of the constitutional rights of free speech and petition by its deterrent effect on SLAPP (strategic lawsuit against public participation) litigation and by its restoration of public confidence in participatory democracy ([§ 425.18, subd. \(a\)](#)).

#### [CA\(7\)](#) [ ] (7)

##### **Pleading § 90—Motions and Objections—SLAPPback Suits—Different Treatment from Ordinary Malicious Prosecution Actions.**

[Code Civ. Proc., § 425.18](#), treats SLAPPbacks differently from ordinary malicious prosecution actions in two ways. First, it makes inapplicable to special motions to strike a SLAPPback certain procedures that would normally apply to such motions and sets forth different procedures. Thus, the statute states that the provisions of [Code Civ. Proc., § 425.16, subds. \(c\), \(f\), \(g\), and \(i\)](#), and [Code Civ. Proc., § 904.1, subd. \(a\), par. \(13\)](#), shall not apply to a special motion to strike a SLAPPback ([§ 425.18, subd. \(c\)](#)). Instead, [§ 425.18, subd. \(d\)](#), allows a motion to strike a SLAPPback to be brought within 120 days of the service of the complaint or, subject to the court's discretion, as long as six months after the service of the complaint or, in extraordinary cases, at any later time ([§ 425.18, subd. \(d\)\(1\)\(A\)–\(C\)](#)). [Section 425.18, subd. \(e\)](#), permits the plaintiff opposing the special motion to strike to file an ex parte application for a continuance to obtain discovery ([§ 425.18, subd. \(e\)](#)). [Section 425.18, subd. \(f\)](#), allows the plaintiff to **[\*264]** recover costs and attorney fees if the court finds that the motion to strike is frivolous or solely intended to cause unnecessary delay, but makes no provision for such costs and fees to be awarded to the prevailing defendants ([§ 425.18, subd. \(f\)](#)). [Section 425.18, subd. \(g\)](#), limits appellate review of the denial of a motion to strike, in whole or part, to review by peremptory writ ([§ 425.18, subd. \(g\)](#)). These provisions stack the procedural deck in favor of the SLAPPback plaintiff confronted with a special motion to strike by providing the plaintiff with both a longer timeframe, and the means with which, to conduct discovery that might yield evidence to resist the motion to strike, exempting the plaintiff from fees and costs even if the plaintiff's SLAPPback action is stricken and minimizing the delays and expense the plaintiff might otherwise incur while the case is on appeal by limiting the unsuccessful defendant to writ review. The second way in which [§ 425.18](#) treats SLAPPbacks differently from ordinary malicious prosecution actions is to provide a limited exemption for SLAPPbacks from the anti-SLAPP (strategic lawsuit against public participation) statute in [§ 425.18, subd. \(h\)](#).

#### [CA\(8\)](#) [ ] (8)

##### **Pleading § 90—Motions and Objections—Striking SLAPPback Suits.**

An illegal act is an act forbidden by law. By specifying that only those defendants whose filing or maintenance of the underlying action was illegal as a matter of law are barred from bringing a special motion to strike a SLAPPback, it is clear that the Legislature intended to require something more than that the underlying action was dismissed as a SLAPP (strategic lawsuit against public participation) before [Code Civ. Proc., § 425.18, subd. \(h\)](#), applies. Had the Legislature intended to create a categorical rule exempting all SLAPPbacks from the anti-SLAPP statute, it could have done so.

#### [CA\(9\)](#) [ ] (9)

**Pleading § 90—Motions and Objections—Anti-SLAPP Statute—Malicious Prosecution Actions—Invocation of SLAPPback Statute—Burdens of Proof.**

Code Civ. Proc., § 425.18, subd. (h), provides a narrow exception to the rule that malicious prosecution actions are subject to scrutiny under the anti-SLAPP (strategic lawsuit against public participation) statute which applies only if (1) the malicious prosecution action is a SLAPPback and (2) the filing and maintenance of the underlying action was illegal as a matter of law. The burden of establishing that the underlying action was illegal as a matter of law should be shouldered by the plaintiff in such cases. This is because the Legislature's decision not to create a categorical exemption for SLAPPbacks demonstrates a legislative preference that the anti-SLAPP statute operate in the ordinary fashion in most SLAPPback cases, subject to the special procedural rules applicable to all motions to strike a SLAPPback. In the ordinary SLAPP case, the defendant's initial burden in invoking [\*265] the anti-SLAPP statute is to make a threshold showing that the challenged cause of action is one arising from protected activity. There is no further requirement that the defendant initially demonstrate his exercise of constitutional rights of speech or petition was valid as a matter of law. Consistent with these principles, a defendant who invokes the anti-SLAPP statute should not be required to bear the additional burden of demonstrating in the first instance that the filing and maintenance of the underlying action was not illegal as a matter of law.

**CA(10) [↓] (10)**

**Pleading § 90—Motions and Objections—Anti-SLAPP Statute—Shifting Burdens of Proof.**

Once a defendant invoking the anti-SLAPP (strategic lawsuit against public participation) statute has made the required threshold showing that the challenged action arises from assertedly protected activity, the plaintiff may counter by demonstrating that the underlying action was illegal as a matter of law because either the defendant concedes the illegality of the assertedly protected activity or the illegality is conclusively established by the evidence presented in connection with the motion to strike. In doing so, the plaintiff must identify with particularity the statute or statutes violated by the filing and maintenance of the underlying action. This requirement of identifying a specific statute, violation of which the plaintiff contends is illegal as a matter of law, is consistent with the narrow nature of the exemption set forth in Code Civ. Proc., § 425.18, subd. (h), because it prevents a plaintiff from advancing a generalized claim that a defendant's conduct was illegal and therefore subject to the exemption. In this same vein, the requirement of specificity provides notice to both the defendant and the court about the particular statute or statutes the defendant is alleged to have violated as a matter of law so as to allow the defendant to intelligibly respond to, and the court to assess, the claim. Additionally, as part of the plaintiff's burden of demonstrating illegality as a matter of law, the plaintiff must show the specific manner in which the statute or statutes were violated with reference to their elements. A generalized assertion that a particular statute was violated by the filing or maintenance of the underlying action without a particularized showing of the violation will be insufficient to demonstrate illegality as a matter of law.

**CA(11) [↓] (11)**

**Employer and Employee § 9—Employment Relationship—Actions for Wrongful Discharge—Retaliation Against Whistleblower—Burden of Proof.**

*Lab. Code, § 1102.5*, is a whistleblower statute, the purpose of which is to encourage workplace whistleblowers to report unlawful acts without fearing retaliation. To establish a prima facie case of retaliation, a plaintiff must show that she engaged in protected activity, that she was thereafter subjected to adverse employment action by her employer, and there was a causal link between the two. Thus, it [\*266] appears that a prerequisite to asserting a violation of § 1102.5 is the existence of an employer-employee relationship at the time the allegedly retaliatory action occurred.

[CA\(12\)](#) [  ] (12)**Actions and Special Proceedings § 6—Existence of Right of Action—Noerr-Pennington Doctrine.**

The *Noerr-Pennington* doctrine has two prongs. First, the challenged action must have been undertaken with an improper motive. That is, it must have been done not with the hope of securing a favorable governmental result, but solely to harass and hinder another party. The other prong of the doctrine is that the challenged action must have been objectively baseless. Absent such a patent lack of merit, an action protected under the [\*First Amendment\*](#) by the right of petition cannot be the basis for litigation.

[CA\(13\)](#) [  ] (13)**Courts § 3—Powers and Organization—California Supreme Court.**

Where the Legislature has spoken, the California Supreme Court is not at liberty to create a broader exception for sham litigation.

[CA\(14\)](#) [  ] (14)**Malicious Prosecution § 10—Actions—Evidence and Proof—Avoidance of Claim Being Stricken as Strategic Lawsuit Against Public Participation.**

By definition, a malicious prosecution suit alleges that a defendant committed a tort by filing a lawsuit. The filing of lawsuits is an aspect of the [\*First Amendment\*](#) right of petition. If a trial court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. To establish a probability of prevailing, the plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient *prima facie* showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. For purposes of this inquiry, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant ([\*Code Civ. Proc., § 425.16, subd. \(b\)\(2\)\*](#)); though the court does not weigh the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim. In making this assessment it is the court's responsibility to accept as true the evidence favorable to the plaintiff. The plaintiff need only establish that his or her claim has minimal merit to avoid being stricken as a strategic lawsuit against public participation.

[CA\(15\)](#) [  ] (15)**Malicious Prosecution § 10—Actions—Evidence and Proof—Probable Cause and Malice Elements.**

To prevail on a malicious prosecution claim, a plaintiff must show that the prior action: (1) was commenced by or at the direction of the defendant and was pursued to a legal termination favorable to the plaintiff; (2) was brought without [\*267] probable cause; and (3) was initiated with malice. The question of probable cause is whether as an objective matter, the prior action was legally tenable or not. A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him. In a situation of complete absence of supporting evidence, it cannot be adjudged reasonable to prosecute a claim. Probable cause, moreover, must exist for every cause of action advanced in the underlying action. An action for malicious prosecution lies when but one of alternate theories of recovery is maliciously asserted. The malice element relates to the subjective intent or purpose with which a defendant acted in initiating the prior action. The motive of the defendant must have been something other than that of bringing a perceived guilty person to justice or the satisfaction in a civil action of some personal or financial

purpose. The plaintiff must plead and prove actual ill will or some improper ulterior motive. Malice may range anywhere from open hostility to indifference. Malice may also be inferred from the facts establishing lack of probable cause.

## CA(16) [16]

### **Appellate Review § 1—Frivolous Appeals—Attorney’s Liability for Malicious Prosecution.**

The filing of an appeal is the continuation of an action. The maintenance of an appeal by plaintiffs in an action discovered to lack probable cause may expose the plaintiff’s attorney to liability for malicious prosecution. The filing of such an appeal, which stays the litigation, may itself be a tactic that operates to the detriment of the defendant as to whom the action has been found to be a strategic lawsuit against public participation.

**Counsel:** Ronald C. Stock, in pro. per., for Defendant and Appellant.

Law Offices of Herbert Hafif, Greg K. Hafif, Jeanne A. Sterba; Law Offices of James J. Moneer, James J. Moneer; Aitken Aitken & Cohn, Darren O. Aitken and Wylie A. Aitken for Defendants and Appellants Law Offices of Herbert Hafif et al.

Peggy J. Soukup, in pro. per.; Law Offices of Gary L. Tysch, Gary L. Tysch; Dell’Ario & LeBouef and Alan Charles Dell’Ario for Plaintiff and Respondent.

**Judges:** Moreno, J., expressing the unanimous view of the court.

**Opinion by:** Moreno [\*268]

## **Opinion**

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[\*\*\*644] [\*\*35] **MORENO, J.**—In this case, we determine whether a litigant whose action was dismissed under the anti-SLAPP statute ([Code Civ. Proc., § 425.16](#)) may, in turn, invoke that statute as a defense to a subsequent action for malicious prosecution and abuse of process.<sup>1</sup> Peggy J. Soukup was sued by her former employers. She obtained dismissal of their action under the anti-SLAPP statute and then sued them for malicious [\*\*\*2] prosecution and abuse of process. Her former employers moved to strike Soukup’s action as a SLAPP. The superior court denied the motion on the ground that the anti-SLAPP statute did not apply under these circumstances. The Court of Appeal reversed and we granted review.

While this case was pending, the Legislature amended the anti-SLAPP statute to add [section 425.18](#), which defines “any cause of action for malicious prosecution or abuse of process arising from the filing or maintenance of a prior cause of action that has been dismissed pursuant to a special motion to strike under [Section 425.16](#)” as a “SLAPPback.” ([§ 425.18, subd. \(b\)\(1\)](#).) The Legislature declared that SLAPPbacks “should be treated differently ... from an ordinary malicious prosecution action because [\*\*\*3] a SLAPPback is consistent with the Legislature’s intent to protect the valid exercise of the constitutional rights of free speech and petition by its deterrent effect on SLAPP ... litigation and by its restoration of public confidence in participatory democracy.” ([§ 425.18, subd. \(a\)](#).) [Section 425.18](#) exempts SLAPPbacks from certain procedures otherwise applicable to motions to strike under the anti-SLAPP statute and sets forth special procedures that apply only to SLAPPbacks. Additionally, [subdivision \(h\)](#) of the new section precludes the use of [\*\*36] the anti-SLAPP statute to dismiss SLAPPbacks “by a party whose filing or maintenance of the prior cause of action from which the SLAPPback arises was illegal as a matter of law.” ([§ 425.18, subd. \(h\)](#).)

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<sup>1</sup> SLAPP is an acronym for “strategic lawsuit against public participation.” ([Jarrow Formulas, Inc. v. LaMarche \(2003\) 31 Cal.4th 728, 732, fn. 1 \[3 Cal. Rptr. 3d 636, 74 P.3d 737\]](#).) All further unspecified statutory references are to the Code of Civil Procedure.

**CA(1) [↑]** (1) As we explain, [section 425.18](#) applies to pending cases like the one before us. We must determine, therefore, the effect of the amendment, and particularly [subdivision \(h\)](#), on this case.<sup>2</sup> We conclude that the filing and maintenance of defendants' underlying action cannot be characterized as "illegal as a matter of law" so as to exempt Soukup's malicious prosecution [\*269] action from the anti-SLAPP statute. We [\*\*\*645] further conclude that because, as [\*\*\*\*4] demonstrated by its enactment of [section 425.18, subdivision \(h\)](#), the Legislature has decided against a categorical rule exempting SLAPPbacks from the anti-SLAPP statute, we are not at liberty to read such a broader exemption into the statute. However, while we conclude that defendants are not barred from using the anti-SLAPP statute to attempt to strike Soukup's action, there remains the question of whether Soukup has nonetheless demonstrated a probability of prevailing on her malicious prosecution claim so as to defeat defendants' motion. (See [Equilon Enterprises v. Consumer Cause, Inc. \(2002\) 29 Cal.4th 53, 67 \[124 Cal. Rptr. 2d 507, 52 P.3d 685\]](#).) On this question, we conclude, contrary to the Court of Appeal, that she has demonstrated a probability of prevailing. Accordingly, we reverse the Court of Appeal.

## I. FACTS AND PROCEDURAL HISTORY<sup>3</sup>

### [\*\*\*\*5] A. Events Leading to the Filing of the Underlying Action

#### 1. Pension Plan Controversy

Defendant Law Offices of Herbert Hafif (LOHH) is a professional corporation whose sole stockholder is defendant Herbert Hafif (Hafif). Soukup was employed at LOHH from September 1989 until June 1993, first as a legal secretary and then as a paralegal.

Soukup was a participant in the firm's employee pension plan. In October 1992, she and other employees of LOHH were informed that the plan was being terminated and its assets would be distributed. A portion of the distribution was to be in the form of nonregistered privately held stock. Soukup was advised by her stockbroker that this stock could not be deposited into her individual retirement account because it was not publicly traded and the value placed on the stock by the plan administrator could not be verified. She refused to sign the documentation for the transfer of the stock. This led to a confrontation with Hafif in which, according to Soukup, he told her "that [\*270] if I did not sign ... in the next two minutes, he would come across the desk and kick my ass. I refused to sign the documentation and left Herbert Hafif's office shaking [\*\*\*\*6] and returned to my office downstairs."<sup>4</sup>

In June 1993, six weeks after her confrontation with Hafif, Soukup voluntarily terminated her employment with LOHH. On August 31, 1993, she met with an investigator from the United States Department of Labor and explained her concerns about the distribution of the LOHH employee pension assets. She provided the investigator with documents regarding the pension plan. The Department of Labor launched an investigation into LOHH's pension plan but ultimately no action was taken against LOHH.

In September 1995, Soukup filed an action in federal district court under the Employee \*\*37 Retirement Income Security Act of 1974 (ERISA) ([29 U.S.C. §§ 1001 et seq., 1140](#)) for recovery of pension benefits. Similar actions were filed by other former LOHH employees. [\*\*\*646] LOHH filed motions to dismiss the actions, which the district

<sup>2</sup> The parties were given an opportunity to brief the applicability of [section 425.18](#) to the instant case.

<sup>3</sup> Review of an order granting or denying a motion to strike under [section 425.16](#) is de novo. ([Sylmar Air Conditioning v. Pueblo Contracting Services, Inc. \(2004\) 122 Cal.App.4th 1049, 1056 \[18 Cal. Rptr. 3d 882\]](#).) We consider "the pleadings, and supporting and opposing affidavits ... upon which the liability or defense is based." ([§ 425.16, subd. \(b\)\(2\)](#).) However, we neither "weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." ([HMS Capital, Inc. v. Lawyers Title Co. \(2004\) 118 Cal.App.4th 204, 212 \[12 Cal. Rptr. 3d 786\]](#).)

<sup>4</sup> Hafif denied Soukup's version of their exchange.

court then converted into summary judgment motions and granted. On appeal, however, the Ninth Circuit reversed [\*\*\*\*7] the summary judgment for LOHH on claims by Soukup and other employees for plan benefits. Soukup and LOHH eventually settled the federal action.

## *2. Phillip Benson's Departure from LOHH and His Subsequent Wrongful Termination Claim*

Phillip Benson was employed at LOHH as an associate attorney during much of the time that Soukup worked there. Soukup and Benson spoke on almost a daily basis. Soukup became aware that Benson was concerned about certain business practices at the firm. Soukup, too, was starting to question some of the firm's procedures, including the billing of costs and fees. She and Benson shared their concerns.

In March or April 1993, Benson left LOHH, taking some clients with him. Relations between Benson and Hafif quickly deteriorated after he left the firm. In January 1994, Benson telephoned Soukup and told her he had filed a cross-complaint against Hafif alleging wrongful termination in violation of public policy in litigation Hafif had brought against him. He said his cross-complaint referred to two cases that Soukup had worked on while employed at LOHH. Soukup became extremely upset with him because there were confidentiality agreements in those cases that, [\*\*\*\*8] if breached prematurely, [\*271] could put the settlements in jeopardy. Benson assured her that he had not disclosed any of the confidential terms of the settlements. It was not until January 1995 that Soukup became aware of the actual contents of Benson's complaint. She was upset to discover that he had named the clients in two cases and stated there had been settlements. However, to her knowledge, there were no repercussions from Benson's disclosure of this information.

Soukup was served with a deposition subpoena by Hafif in connection with Benson's wrongful termination claim. She attended the deposition and answered Hafif's questions regarding her knowledge of misconduct committed by Hafif or his son, Gregory Hafif, an attorney employed by LOHH.

## *3. Actions Against Hafif by His Former Clients*

Between June 1993 and February 1994, a number of former clients of Hafif's filed a series of State Bar complaints and lawsuits against him generally alleging that Hafif had charged the former clients excessive costs and fees. Among these former clients was Terrie Hutton, whom Hafif had represented in a sex discrimination case against GTE. In June 1993, represented by a lawyer named Sasson [\*\*\*\*9] Sales, Hutton sued Hafif, LOHH and others alleging causes of action for breach of fiduciary duty, fraud and professional negligence. Sales also filed actions against Hafif on behalf of Leo Barajas and Max Killingsworth, whom Hafif had represented in whistleblower suits against Northrup Corporation. Terry Schielke and Clyde Jones, whom Hafif had represented in wrongful termination actions against Lockheed Corporation, also sued Hafif. Schielke and Jones were not represented by Sales, but by another attorney.<sup>5</sup>

[\*\*\*\*10] [\*\*\*647]

On November 20, 1993, two newspaper articles appeared in the Orange County Register about Hafif. One article was about the State Bar complaints and lawsuits. It noted that the complaints and suits were based on [\*\*38] allegations that Hafif had overcharged his former clients, and it reported Benson's [\*272] allegation that he had left the firm for that reason. The article also noted that Hafif vehemently rejected the allegations. The second article reported the Department of Labor's investigation into LOHH's employee pension plan. The pension plan article quoted Soukup's version of her confrontation with Hafif and Hafif's denial that he had ever threatened Soukup.

## *B. The Underlying Action*

### *1. Hafif Files an Action for Malicious Prosecution and Other Claims Against Soukup and Others*

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<sup>5</sup> Hafif successfully demurred to Terrie Hutton's action. It was dismissed without leave to amend and sanctions of \$ 25,000 were imposed upon her and Sales for bringing a frivolous lawsuit. On appeal, however, the judgment was reversed in part, as was the sanctions order. Barajas and Killingsworth voluntarily dismissed their actions against Hafif without prejudice because they had been filed by Sales without their authorization. Hafif prevailed against Schielke and Jones on their complaint and was awarded \$ 31,196.60 on his cross-complaint. Represented by Benson, Schielke later filed a second action against LOHH, Hafif and Attorney Ronald Stock for malpractice. In November 2000, following a court trial, judgment was entered in favor of defendants.

In July 1994, LOHH and Hafif filed an action in Orange County Superior Court against Soukup, Benson, Hutton, Killingsworth, Barajas, Sales, Schielke and Jones. The second amended complaint alleged causes of action for fraud, malicious prosecution, defamation, breach of fiduciary duty, tortious interference with business relationships and invasion of privacy.

In the fourth cause of action, for breach [\*\*\*\*11] of fiduciary duty, it was alleged that Soukup had provided confidential information to Benson that he used to “make false and misleading allegations that the Hafif Office had intentionally charged contingent fees in excess of that to which the Hafif firm was entitled to by retainer agreement; charged excess and fictitious costs to clients to inflate the income received by the Hafif Office from contingent fee cases; failed to provide individual cost breakdowns to certain clients; and assessed arbitrary cost figures against clients' cases.” The complaint further alleged that Soukup told Benson she would “wrongfully assert” that Herbert Hafif had assaulted her, a charge she later “recanted.”

The malicious prosecution claim, against all defendants, alleged that “Defendants Benson, Killingsworth, Hutton, Schielke, Barajas, and Jones, pursuant to their conspiracy to defame, extort, and unlawfully hurt the business and reputation of plaintiffs ... conspired to file a series of unjustified civil actions, initiated without probable cause, and with malice, and with the specific intent to harm plaintiffs by initiating and publicizing several specious lawsuits under an apparent plan of 'where [\*\*\*\*12] there is this much smoke, there must be fire.' ”

The defamation claim, also alleged against all defendants, was based on the publication of the article in the Orange County Register described above in which “defendants ... accused plaintiff of cheating them by overcharging them for costs incurred in their litigation matters.” No allegations were made with respect to the second article involving the Department of Labor's investigation into LOHH's employee pension plan.

[\*273]

The claim for tortious interference with business relationships alleged, in essence, that Benson stole clients from Hafif in part by representing that Hafif engaged in unethical practices, including charging clients inappropriate fees and costs. It was further alleged that Killingsworth, Barajas, Schielke, Jones and Hutton with the assistance of Benson and Soukup “devised a ‘gameplan’ wherein each sought to personally benefit by presenting a united front against plaintiffs to demand unjustified reductions [\*\*\*648] in the fees and costs they owed plaintiffs for their legal services.”<sup>6</sup>

[\*\*\*\*13] Within a week of being served with the original complaint, Soukup called Wylie Aitken, one of Hafif's lawyers, and told him she should not have been named in the action because she had no involvement in the claims asserted in the action nor had she conspired with any of the codefendants. She asked to be dismissed from the action. He did not do so. Later, she asked both Aitken and his son, Darren, why she had been named in the action. They told her they would have to ask Hafif and would get back to her, but neither did. In 1995, during the deposition of Sasson Sales, Soukup approached Ronald Stock, another attorney representing Hafif, and asked him, [\*\*39] “What does Mr. Hafif want from me?” Stock told her, “Well, he doesn't want your money,” and added, “Mr. Hafif wants to make sure that you don't make any trouble for him in the future.”<sup>7</sup>

In discovery, Soukup obtained a seven-column chart prepared by Hafif entitled “Benson Related Litigation.” The fifth column described [\*\*\*\*14] the “Matter Filed Against LOHH” and the final column was captioned “Matter Defeated by LOHH.” For Soukup, the “Matter Filed Against LOHH” stated “Claim for pension plan irregularities,” and the “Matter Defeated by LOHH” stated “Labor Department audits and investigates 20 years of records and LOHH is given a clean bill of health. The investigation is concluded.”

<sup>6</sup> Soukup later filed a cross-complaint for declaratory relief against LOHH and Hafif in the event that the underlying action resulted in suits by former clients against her based on allegations of misconduct by LOHH and Hafif in cases on which Soukup had assisted. Hafif demurred to the cross-complaint and the demurrer was granted without leave to amend, but also without prejudice to refiling in the event that Soukup was sued by a former client.

<sup>7</sup> Stock denied having made this statement.

Responding to interrogatories propounded by Hafif in connection with the underlying action, Soukup stated she had had no contact with her codefendants Killingsworth, Jones, Barajas or Terrie Hutton between July 1992 and May 1994, which encompassed the time period within which they filed the lawsuits against Hafif that were the basis of his malicious prosecution cause of action. She stated further she had had no contact with Terry Schielke after [\*274] June 1993. She also stated that her communication with Benson after June 1993 had related either to the pension plan issue or Benson's wrongful termination claim against Hafif. In her interrogatory responses, she denied conspiring with Benson to "extort money or cases from Mr. Hafif."

In an April 1995 deposition of Hafif, Soukup asked him how she had assisted Hutton in filing her complaint [\*\*\*\*15] against Hafif. Hafif replied, "I don't think you had anything to do with it." Similarly, when she asked him how she had assisted Clyde Jones, he testified, "You may not have been involved in the filing of the complaint. You were involved in the general work of implementing the attack on me for whatever reason." When Soukup asked him whether he would "be producing any witnesses to testify to my assistance in the malicious prosecution," Hafif testified, "No." In the same deposition, while again insisting that Soukup was part of the conspiracy to "extort money from [him] at the threat of [his] reputation," he testified, "I have no idea in her case as to what motivated her."

## *2. Soukup Files a Motion to Strike the Underlying Action as a SLAPP*

On August 15, 1996, Soukup filed a motion to strike the underlying action as a [\*\*\*649] SLAPP. Soukup argued that Hafif brought the action against her in retaliation for her complaint to the Department of Labor about LOHH's employee pension plan, the department's ensuing investigation, and her ERISA lawsuit. She contended that pursuing a complaint to an administrative agency and filing a lawsuit were constitutionally protected activities. She [\*\*\*\*16] contended further that Hafif could not demonstrate a probability of prevailing against her on any of his claims based on a conspiracy theory because the evidence adduced during discovery demonstrated that she had had minimal or no contact with her codefendants in the timeframe during which the alleged conspiracy was planned and carried out.

On December 17, 1996, the trial court granted Soukup's motion to strike.

Hafif appealed. In an unpublished opinion filed on April 27, 2000, the Court of Appeal affirmed. Preliminarily, the Court of Appeal concluded that the action fell within the ambit of the anti-SLAPP statute. "Soukup's allegedly actionable conduct consisted of her complaints to the Department of Labor. Again, such statements are within the protective purview of the statute." Next, the Court of Appeal considered whether Hafif had established a probability of prevailing. It concluded he had not. "The basis for the complaint's allegations against ... Soukup was the newspaper articles. [\*275] The articles accurately reflected that complaints had been made to ... the Department of Labor and the contents of those complaints. The only evidence potentially showing merit in Hafif's claims [\*\*\*\*17] came from [Terrie] Hutton's diaries, which were prepared for transmission to her lawyer. The trial court properly concluded they were inadmissible. Hafif failed to meet their [sic] burden of establishing a probability of succeeding in the claims against ... Soukup."<sup>8</sup>

## *C. The Instant Action*

### *1. Soukup Files the Instant Action*

On April 2, 2001, Soukup filed a complaint against LOHH, Hafif, Cynthia Hafif, an attorney employed by LOHH, the Law Offices of Wylie A. Aitken, Wylie [\*\*\*\*18] A. Aitken, the Law Offices of Ronald C. Stock and Ronald C. Stock in which she alleged causes of action for abuse of process and malicious prosecution based on the underlying action. According to Soukup's complaint: "The underlying litigation was filed in an effort to discourage or deter SOUKUP from the exercise of her legal rights as it related to both her communications with the U.S. Department of Labor, as

<sup>8</sup> The Terrie Hutton "diaries," which figure prominently in this case, were hundreds of pages of handwritten and typed notes made by Hutton documenting her communications with other former clients of Hafif and with her attorney, Sasson Sales, in the period prior to the filing of the former clients' actions against Hafif. The same Court of Appeal opinion that affirmed the order striking the underlying action as a SLAPP against Soukup also affirmed the order striking the underlying action as a SLAPP against Hutton.

well as her role as a witness to the questionable conduct of HAFIF, his son Greg, and the HAFIF OFFICE in connection with any pending or anticipated litigation against HAFIF or the HAFIF OFFICE. The underlying litigation was continued for six years in an effort to punish, annoy, harass or injure SOUKUP because she had exercised her constitutional rights of freedom of speech and freedom to petition the government." Soukup subsequently amended the complaint to add Gregory Hafif as a defendant.

### 2. Defendants File Motions to Strike Soukup's Action as a SLAPP

All defendants except Stock joined Hafif's motion to strike Soukup's complaint as [\*\*\*650] a SLAPP; Stock filed his own motion. Defendants argued that Soukup's action arose from the valid exercise of their constitutionally protected [\*\*\*\*19] right of petition in filing the underlying action.

Defendants maintained that the evidence demonstrated they had had probable cause to bring the underlying lawsuit against Soukup on a conspiracy theory. They cited the following evidence: (1) the lawsuits filed by Hafif's [\*276] former clients to "coerc[e] [LOHH and Hafif] into waiving their right to fees and costs in the lawsuits they had previously worked on," and Soukup's filing of her cross-complaint in the underlying action; (2) the Court of Appeal's reference to Terrie Hutton's diaries as showing potential merit in the underlying action; (3) the denial of Terrie Hutton's motion for summary judgment in the underlying action in which the trial court found that her diaries provided evidence of her participation in the alleged conspiracy against Hafif; and (4) the statement of decision in *Schielke v. LOHH, Herbert Hafif and Ronald Stock*, filed on November 8, 2000, in which the trial court granted judgment for the defendants in Schielke's malicious prosecution action based on a finding the underlying action was supported by probable cause as demonstrated by "the journals or diary of one Terr[ie] Hutton."

Among the exhibits [\*\*\*\*20] attached to Hafif's motion were hundreds of pages of the Hutton diaries. In Hafif's declaration in support of the motion to strike, he cited passages from the diaries as evidence of the alleged conspiracy between the defendants in the underlying action "to have me waive my fees and costs." Those passages documented phone calls between Terrie Hutton, Sasson Sales, Terry Schielke and Max Killingsworth regarding the filing of State Bar complaints and actions against Hafif and also asserted that Schielke and Clyde Jones had provided documents to the Orange County Register reporter who wrote the article about Hafif that was the basis of his defamation claim in the underlying action. None of the passages cited by Hafif referred to Soukup.

In her opposition, Soukup argued that defendants should not have the benefit of the anti-SLAPP statute given that the underlying action had itself been dismissed as a SLAPP because it was "by definition a lawsuit to chill [her] valid exercise of constitutional rights of freedom of speech [and] not brought for the valid redress of grievances and an abuse of judicial process." "Therefore, [\*\*40] there can be no basis for the [defendants'] special motion to strike [\*\*\*\*21] in the instant case since they are not capable of meeting the first prong of the statute which requires a showing that their underlying action was valid or legitimate."

Soukup alternatively contended that, even if the anti-SLAPP statute applied, defendants' motions should be dismissed because she could demonstrate a probability of prevailing on the merits. She averred in her declaration that she had had little or no contact with her codefendants during the timeframe in which Hafif had alleged in the underlying action she had conspired with them. Barajas and Killingsworth filed declarations stating that they had never met Soukup prior to the filing of the underlying action. Terrie [\*277] Hutton filed a declaration that stated the only time she had met Soukup prior to the filing of the underlying action was when Soukup screened her as a client for Hafif. All three denied that they had conspired with Soukup against Hafif or that she had encouraged them to file the lawsuits against him that were the basis of his malicious prosecution claim.

In their reply, defendants argued: "In the present case, it is undisputed that defendants' acts in furtherance of their constitutional right of petition [\*\*\*\*22] consisted of nothing more than the filing and maintenance [\*\*\*651] of the underlying civil action out of which Soukup's malicious prosecution and abuse of process claims directly arise . . . . Although Hafif's claims were found to be potentially without merit, that does not mean that Hafif has done anything illegal or that those claims were brought without probable cause."

### 3. Stock's Motion to Strike Soukup's Action

Stock filed his own motion to strike Soukup's claim under the anti-SLAPP statute. In addition to repeating arguments advanced by Hafif, Stock argued that, as to him, the motion should be granted because he had "no role or participation in the decision to file, or the filing of the underlying action" nor had Soukup shown that "Stock had knowledge that the factual allegations of the underlying complaint were false." In her opposition, Soukup argued that the filing and prosecution of the underlying action was not a valid exercise of protected rights for purposes of the anti-SLAPP action and that Stock's participation in the prosecution of the underlying action was more significant than he admitted.

On July 27, 2001, the trial court denied Hafif's motion to strike Soukup's [\*\*\*\*23] complaint and, on September 4, 2001, also denied Stock's motion.

Following denial of the motions to dismiss, the trial court sustained a demurrer to the cause of action for abuse of process without leave to amend.

#### *4. Proceedings in the Court of Appeal and This Court*

Hafif and his fellow defendants appealed the denial of their motion to strike Soukup's actions. Stock separately appealed. The Court of Appeal affirmed the denial of Hafif's motion to strike. In a separate opinion, the Court of Appeal also affirmed the denial of Stock's motion to strike. Hafif and Stock then sought review in this court. We granted their petitions and held their cases for *Jarrow Formulas, Inc. v. LaMarche, supra, 31 Cal.4th* [\*278] 728, which was then pending before this court. Following our decision in *Jarrow* and *Navellier v. Sletten (2002) 29 Cal.4th 82 [124 Cal. Rptr. 2d 530, 52 P.3d 703]*, we dismissed review and transferred the cases back to the Court of Appeal to reconsider its decisions in light of *Jarrow* and *Navellier*. The Court of Appeal summarily reversed its earlier rulings and held that the motions to strike should have been granted. Soukup petitioned for review [\*\*\*\*24] and we granted her petition.

## II. DISCUSSION

### A. Are Defendants Barred from Using the Anti-SLAPP Statute to Strike Soukup's Complaint?

#### 1. Introduction

**CA(2)[↑] (2)** [Section 425.16](#) provides in relevant part that: **HN1[↑]** "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition [\*\*41] or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." ([§ 425.16, subd. \(b\)\(1\).](#)) **HN2[↑]** "The Legislature enacted [section 425.16](#) to prevent and deter 'lawsuits ... brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.' ([§ 425.16, subd. \(a\).](#)) Because these meritless lawsuits seek to deplete 'the defendant's energy' and drain 'his or her resources' [citation], the Legislature sought 'to prevent SLAPPs by ending them early and without great cost to the SLAPP target.' [Citation.] [Section 425.16](#) therefore establishes a procedure [\*\*\*652] where the trial [\*\*\*\*25] court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation." (*Varian Medical Systems, Inc. v. Delfino (2005) 35 Cal.4th 180, 192 [25 Cal. Rptr. 3d 298, 106 P.3d 958]*; see *Jarrow Formulas, Inc. v. LaMarche, supra, 31 Cal.4th* at p. 737 [[section 425.16](#) "is a procedural device for screening out meritless claims"].)

"[Section 425.16](#) posits ... a two-step process for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. ... If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Navellier v. Sletten, supra, 29 Cal.4th* at p. 88.) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning and lacks even [\*279] minimal merit—is a SLAPP, subject to being stricken under the statute." (*Id.* at p. 89.)

**CA(3) [↑]** (3) **HN3 [↑]** The Legislature's purpose in enacting the anti-SLAPP statute is set forth in its findings [\*\*\*\*26] and declarations. "The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process." (§ 425.16, subd. (a).) Furthermore, to accomplish this purpose the Legislature has directed that the statute "be construed broadly." (*Ibid.*) To this end, when construing the anti-SLAPP statute, "[w]here possible, 'we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law . . .' [Citation.]" (Jarrow Formulas, Inc. v. LaMarche, supra, 31 Cal.4th at p. 733, quoting California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist. (1997) 14 Cal.4th 627, 632 [59 Cal. Rptr. 2d 671, 927 P.2d 1175].) Where this principle is applied, recourse to extrinsic material like legislative history is unnecessary, but in our prior cases interpreting section 425.16, we have more than once consulted that history and found in it material that has buttressed our construction of the statutory language. (Briggs v. Eden Council for Hope & Opportunity (1999) 19 Cal.4th 1106, 1120 [81 Cal. Rptr. 2d 471, 969 P.2d 564]; Equilon Enterprises v. Consumer Cause, Inc., supra, 29 Cal.4th at p. 61; [\*\*\*\*27] Jarrow, supra, 31 Cal.4th at p. 736.) We apply these principles as we take up the question on which we granted review in this case involving the latest twist in anti-SLAPP law—the SLAPPback.

**CA(4) [↑]** (4) The SLAPPback phenomenon is concisely explained in the legislative material accompanying Assembly Bill No. 1158 (2005–2006 Reg. Sess.), the bill ultimately enacted by the Legislature as section 425.18.<sup>9</sup> **HN4 [↑]** A SLAPPback [\*\*\*\*653] suit is an action, typically for malicious prosecution "filed by the target of a SLAPP suit against [\*\*42] the SLAPP filer after the dismissal of the SLAPP suit as a result of the target's appropriate use of the SLAPP statute." (Assem. Com. on [\*280] Judiciary, Rep. on Assem. Bill No. 1158 (2005–2006 Reg. Sess.) as introduced Feb. 22, 2005, p. 1.) The purpose of a SLAPPback is to seek compensation for damages beyond the attorney fees and costs awarded to the defendant who prevails on the special motion to strike under the anti-SLAPP statute. (See § 425.16, subd. (b)(3).) "SLAPP victims . . . commonly experience stress-related health issues, strained family relationships, and financial distress or even insolvency. The only way a SLAPP victim can recover for these damages is to pursue a legal claim [\*\*\*\*28] against the person or entity that filed the original SLAPP." (Assem. Com. on Judiciary, Rep. on Assem. Bill No. 1158 (2005–2006 Reg. Sess.) as introduced Feb. 22, 2005, p. 4.)

[\*\*\*\*29] **HN5 [↑]** The filing of a SLAPPback does not end the roundelay of special motions to strike under the anti-SLAPP statute. The SLAPPback defendant may in turn file such a motion arguing, as do defendants here, that the filing and maintenance of the underlying action that is the basis of the SLAPPback was itself activity protected by the anti-SLAPP statute. (Briggs v. Eden Council for Hope & Opportunity, supra, 19 Cal.4th at p. 1115 ["' '[t]he constitutional right to petition . . . includes the basic act of filing litigation or otherwise seeking administrative action.' ' ''].) We granted review to examine whether permitting such defendants to avail themselves of the anti-SLAPP statute is consistent with the legislative intent behind section 425.16. While the case was pending before us, however, the Legislature itself addressed the issue by enacting section 425.18, to which we now turn.

## 2. Section 425.18

### a. Applicability of Section 425.18 to Pending Cases

<sup>9</sup> Defendants request that we take judicial notice of the legislative history surrounding Assembly Bill No. 1158 (2005–2006 Reg. Sess.). (Martin v. Szeto (2004) 32 Cal.4th 445, 452, fn. 9 [9 Cal. Rptr. 3d 687, 84 P.3d 374].) Soukup objects to the extent that some of the legislative history reflects the views of individual legislators or advocates of the legislation rather than the Legislature as a whole. (See Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc. (2005) 133 Cal.App.4th 26, 38–39 [34 Cal. Rptr. 3d 520].) The legislative history in this case is relatively brief and our citation to it is limited to various versions of the legislation and committee reports, all of which are indisputably proper subjects of judicial notice. (Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal.4th 26, 45, fn. 9 [77 Cal. Rptr. 2d 709, 960 P.2d 513].) Therefore, we grant defendants' request for judicial notice of the legislative history material. Defendants also request that we take judicial notice of materials in the case of Hutton v. Hafif (May 11, 2004, B162572) (nonpub. opn.) review denied, July 28, 2004, S125728, including the Court of Appeal's opinion in that case and in proceedings that followed our denial of review. These materials are not relevant to any issue in this case and the request is denied.

**CA(5) [↑]** (5) Before we substantively discuss [section 425.18](#), we address the preliminary question of whether it applies to pending cases, like the one before us, that originated prior to [section 425.18](#)'s effective date. [\*\*\*\*30] The anti-SLAPP statute is a procedural statute, the purpose of which is to screen out meritless claims. ([Jarrow Formulas, Inc. v. LaMarche, supra, 31 Cal.4th at p. 737](#).) It is well settled that [HN6 \[↑\]](#) “applying changed procedural statutes to the conduct of existing litigation, even though the litigation involves an underlying dispute that arose from conduct occurring before the effective date of the new statute, involves no improper retrospective application because the statute addresses conduct in the future.” ([Brenton v. Metabolife Internat., Inc. \(2004\) 116 Cal.App.4th 679, 689 \[10 Cal. Rptr. 3d 702\]](#); see [Tapia v. Superior Court \(1953\) 53 Cal.3d 282, 288-291 \[279 Cal.Rptr. 592, 807 P.2d 434\]](#); [Aetna Cas. & Surety Co. v. Ind. Acc. Com. \(1947\) 30 Cal.2d 388, 394 \[182 P. 2d 159\]](#).) Both we and the Court of Appeal have applied this principle to hold that [HN7 \[↑\]](#) amendments to the anti-SLAPP statute apply to cases pending before the effective date of the amendments. [\*\*\*654] ([Briggs v. Eden Council for Hope & \[\\*281\] Opportunity, supra, 19 Cal.4th at p. 1119, fn. 7](#) [language added to [section 425.16, subdivision \(a\)](#) requiring broad construction of the statute applies to pending cases because [section 425.16](#) “is a procedural [\*\*\*\*31] statute that properly is applied prospectively to an existing cause of action”]; [Brenton v. Metabolife Internat., Inc., supra, 116 Cal.App.4th at pp. 687-691](#) [enactment of [section 425.17](#) exempting certain claims from the ambit of the anti-SLAPP statute applies to pending cases]; accord, [Physicians Com. for Responsible Medicine v. Tyson Foods \(2004\) 119 Cal.App.4th 120, 125-130 \[13 Cal. Rptr. 3d 926\]](#); [Metcalf v. U-Haul International, Inc. \(2004\) 118 Cal.App.4th 1261, 1265-1266 \[13 Cal. Rptr. 3d 686\]](#).)

**CA(6) [↑]** (6) [HN8 \[↑\]](#) [Section 425.18](#) creates different procedures for SLAPPbacks than those that ordinarily [\*\*43] apply to motions to strike under the anti-SLAPP statute and also, like [section 425.17](#), “amend[s] [section 425.16](#) to except certain claims from applicability of the statutorily conferred remedy of the screening mechanism provided by [section 425.16](#).” ([Brenton v. Metabolife Internat., Inc., supra, 116 Cal.App.4th at pp. 689-690](#).) In neither event does [section 425.18](#) “impose new, additional or different liabilities based on past conduct or deprive [defendants] of any substantive defense to the action.” ([Brenton v. Metabolife Internat., Inc., supra, 116 Cal.App.4th at p. 690](#).) [\*\*\*\*32] We conclude, therefore, that [section 425.18](#) applies to the case before us.<sup>10</sup>

#### b. Substantive Provisions of Section 425.18

**HN9 [↑]** [Section 425.18](#) defines a SLAPPback as “any cause of action for malicious prosecution or abuse of process arising from the filing or maintenance of a prior cause of action that has been dismissed pursuant to a special motion [\*\*\*\*33] to strike under [Section 425.16](#).<sup>11</sup> ([§ 425.18, subd. \(b\)\(1\)](#).) In its findings and declarations, the Legislature states “that a SLAPPback cause of action should be treated differently, as provided in this section, from an ordinary malicious prosecution action because a SLAPPback is consistent with the Legislature's intent to protect the valid exercise of the constitutional rights of free speech and petition by its deterrent effect on SLAPP (strategic lawsuit against public participation) litigation and by its restoration of public confidence in participatory democracy.” ([§ 425.18, subd. \(a\)](#).)

**CA(7) [↑]** (7) [HN10 \[↑\]](#) [Section 425.18](#) treats SLAPPbacks differently from ordinary malicious prosecution actions in two ways. First, it makes inapplicable to special [\*282] motions to strike a SLAPPback certain procedures that would normally apply to such motions and sets forth different procedures. Thus, the statute states that the “provisions of [subdivisions \(c\)](#) [prevailing defendants entitled to attorney fees and costs], [\(f\)](#) [motion to strike ordinarily to be filed within 60 days of the service of complaint], [\(g\)](#) [discovery ordinarily stayed upon filing of notice of motion to strike], and [\(l\)](#) [providing [\*\*\*\*34] for appeal of order granting or denying special motion] of [Section 425.16](#), and [paragraph \(13\) of subdivision \(a\) of Section 904.1](#) [appeal [\*\*\*655] of order granting or denying special motion to strike], shall not apply to a special motion to strike a SLAPPback.” ([§ 425.18, subd. \(c\)](#).) Instead,

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<sup>10</sup> The parties do not contend to the contrary, except for Stock who purports to find in the legislative history of Assembly Bill No. 1158 (2005–2006 Reg. Sess.) an indication that the Legislature considered, but rejected, prospective application of the section by deleting language that stated an intent “to apply this amendment to cases pending at the time this act is adopted.” This language, however, was in the context of an amendment to [section 425.16, subdivision \(f\)](#), not to [section 425.18](#). (Assem. Com. on Judiciary, Rep. on Assem. Bill No. 1158 (2005–2006 Reg. Sess.) as introduced, Feb. 22, 2005, p. 7.) Therefore, it has no bearing on whether [section 425.18](#) applies to pending cases.

**HN11**[] [section 425.18, subdivision \(d\)](#) allows a motion to strike a SLAPPback to be brought within 120 days of the service of the complaint or, subject to the court's discretion, as long as six months after the service of the complaint or, "in extraordinary cases" "at any later time." ([§ 425.18, subd. \(d\)\(1\)\(A\)–\(C\)](#).) [Subdivision \(e\)](#) permits the plaintiff opposing the special motion to strike to file an ex parte application for a continuance to obtain discovery. ([§ 425.18, subd. \(e\)](#).) [Subdivision \(f\)](#) allows the plaintiff to recover costs and attorney fees if the court finds that the motion to strike "is frivolous or solely intended to cause unnecessary delay," but makes no provision for such costs and fees to be awarded to the prevailing defendants. ([§ 425.18, subd. \(f\)](#).) [Subdivision \(g\)](#) limits appellate review of the denial of a motion to strike, in whole or part, to review by peremptory writ. ([§ 425.18, subd. \(g\)](#).)

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The import of these provisions is to stack the procedural deck in favor of the SLAPPback plaintiff confronted with a special motion to strike. They do so by providing the plaintiff with both a longer timeframe—and the means with which—to conduct discovery that might yield evidence to resist the motion to strike, exempting the plaintiff from fees and costs even if the plaintiff's SLAPPback action is stricken and minimizing the delays and expense the plaintiff might otherwise incur while the case is on appeal by limiting the unsuccessful defendant to writ review. (See [Varian Medical Systems, Inc. v. Delfino, I\\*\\*441 supra, 35 Cal.4th at p. 195](#) [because appeal of order denying special motion to strike stays all further trial court proceedings "some anti-SLAPP appeals will undoubtedly delay litigation even though the appeal is frivolous or insubstantial"].)

**HN12**[] The second way in which [section 425.18](#) treats SLAPPbacks differently from ordinary malicious prosecution actions is to provide a limited exemption for SLAPPbacks from the anti-SLAPP statute in [subdivision \(h\)](#). That subdivision provides: "A special motion to strike may not be filed against a SLAPPback by a party whose [\*\*\*\*36] filing or maintenance of the prior cause of action from which the SLAPPback arises was illegal as a matter of law" ([§ 425.18, subd. \(h\)](#).) It is the applicability of this provision to the instant case that concerns us and it is that question we now address.

[\*283]

### 3. Applicability of Subdivision (h)

Soukup's malicious prosecution action fits the definition of a SLAPPback set forth in [section 425.18](#).<sup>11</sup> She contends that the filing and maintenance of the underlying action violated state and federal labor laws, specifically *Labor Code section 1102.5* and [29 United States Code section 1140](#) and, therefore, [section 425.18, subdivision \(h\)](#) bars defendants from seeking to strike her action as a SLAPP. Since a motion to strike a SLAPPback is prohibited only if the "prior cause of action from which the SLAPPback arises was illegal as a matter of law" ([§ 425.18, subd. \(h\)](#)), we must determine the meaning of the phrase "illegal as a matter of law." As in our prior anti-SLAPP jurisprudence, we begin by construing the statute "strictly by its terms," [\*\*\*656] to ascertain the "Legislature's intent, as exhibited by the plain meaning of the actual words of the law." [\*\*\*\*37] ([Equilon Enterprises v. Consumer Cause, Inc., supra, 29 Cal.4th at p. 59](#).)

**CA(8)**[] (8) **HN13**[] An illegal act is an act "[f]orbidden by law." (Black's Law Dict. (7th ed. 1999), p. 750.)<sup>12</sup> By specifying that only those defendants whose filing or maintenance of the underlying action was illegal as a matter of law are barred from bringing a special motion to strike a SLAPPback, it is clear that the Legislature intended to require something more than that the underlying action was dismissed as a SLAPP before [section 425.18, subdivision \(h\)](#) applies. Had the Legislature intended to create [\*\*\*\*38] a categorical rule exempting all SLAPPbacks from the anti-SLAPP statute, it could have done so. ([Jarrow Formulas, Inc. v. LaMarche, supra, 31](#)

<sup>11</sup> Indeed, the legislative history reveals that early versions of Assembly Bill No. 1158 (2005–2006 Reg. Sess.) specifically stated that one object of the SLAPPback amendments to [section 425.16](#) was to overrule the Court of Appeal's opinion in *Soukup v. Stock*; this language did not survive into the final version of [section 425.18](#). (Assem. Com. on Judiciary, Rep. on Assem. Bill No. 1158 (2005–2006 Reg. Sess.) as introduced Feb. 22, 2005, p. 7.)

<sup>12</sup> Stock asserts that the law in question must be a criminal statute, but he fails to provide any support for his premise that "illegal" refers only to criminal acts or that the Legislature, in enacting [section 425.18](#), intended to refer only to criminal violations.

Cal.4th at p. 735 (“[t]he Legislature clearly knows how to create an exemption from the anti-SLAPP statute when it wishes to do so”.) Instead, it created the narrower exemption set forth in section 425.18, subdivision (h).

Our conclusion is buttressed by the relevant legislative history surrounding Assembly Bill No. 1158 (2005–2006 Reg. Sess.), which shows the Legislature explicitly considered and rejected a categorical rule exempting all SLAPPbacks from section 425.16. The Senate Committee on the Judiciary report on Assembly Bill No. 1158 noted that “[a]s passed by the Assembly, [Assembly Bill No.] 1158 proposed to make the anti-SLAPP motion inapplicable [\*\*\*\*39] in any SLAPPback action (any malicious prosecution claim or any other cause of action arising from the filing or maintenance of a prior cause [of action] that has been dismissed pursuant to the granting of an anti-SLAPP motion.)” (Sen. [\*284] Com. on Judiciary, Analysis of Assem. Bill No. 1158 (2005–2006 Reg. Sess.) as amended Apr. 25, 2005, p. 13.) But, as the committee report explained, a number of concerns led to the rejection of a categorical exemption. First, referring to prior court decisions that had followed the Legislature’s mandate to broadly construe [\*45] the anti-SLAPP statute, the report suggested that continued broad construction of the statute might “result in cases of first impression where the ‘little-guy’ plaintiff was truly not engaging in SLAPP litigation but is nonetheless found to be a SLAPPer. That person would be precluded from using the anti-SLAPP law to defend him or herself against the follow-up SLAPPback SLAPP suit. … [¶] … [Thus] a categorical exemption seemed fraught with the risk of unintended consequences. Can every future SLAPPback claim be presumed to not be a SLAPP case itself?” (*Id.* at p. 15.) Second, the report expressed the concern that a categorical [\*\*\*\*40] exemption would abrogate our holding in *Jarrow* that malicious prosecution actions are not exempt from scrutiny under the anti-SLAPP law. (*Ibid.*) It was evidently in light of these concerns that the Legislature crafted the narrower exemption based on the illegality of the underlying action.

The Legislature further narrowed the exemption in section 425.18, subdivision (h) by requiring that the illegality be established “as a matter of law.” In adding this proviso, the Legislature appears to have had in mind decisions by the Court of Appeal that have held that the anti-SLAPP statute is not available to a defendant who claims that the plaintiff’s cause of action arises from assertedly protected activity when that activity is illegal as a matter of law and, for that reason, not [\*\*\*657] protected by the First Amendment. (See, e.g., Paul for Council v. Hanyecz (2001) 85 Cal.App.4th 1356 [102 Cal. Rptr. 2d 864] (*Paul*), disapproved on other grounds in Equilon Enterprises v. Consumer Cause, Inc., supra, 29 Cal.4th at p. 68, fn. 5.)<sup>13</sup>

[\*\*\*\*41] In *Paul*, the plaintiff sued the defendants, alleging that they had interfered with his candidacy for city council by making illegal contributions to one of his opponents, in violation of the Political Reform Act of 1974 (Gov. Code, § 81000 et seq.). The defendants moved to strike the suit under the anti-SLAPP statute on the grounds that the campaign contributions were in furtherance of their free speech rights and thus protected by the statute. Their moving papers, however, “show[ed] that they in fact did violate the Political Reform Act when they laundered campaign contributions to persons running for local and state offices.” (*Paul, supra, 85 Cal.App.4th at p. 1361.*) In reversing the trial court’s order granting the motion to strike, the Court of Appeal held that because the “defendants have effectively conceded the illegal nature of their election campaign finance activities for which they claim constitutional protection … as a matter of law … such activities [\*285] [were] not a valid exercise of constitutional rights as contemplated by section 425.16.” (*Id. at p. 1367.*) The court emphasized that “there [\*\*\*\*42] was no dispute on the point” but “had there been a factual dispute as to the legality of defendants’ actions, then we could not so easily have disposed of defendants’ motion.” (*Ibid.*)

In Governor Gray Davis Com. v. American Taxpayers Alliance (2002) 102 Cal.App.4th 449 [125 Cal. Rptr. 2d 534], the plaintiffs, a group organized to support the reelection of former Governor Davis, brought an action against defendant taxpayer group alleging that, by producing and running a television advertisement critical of the Governor, the taxpayer group had violated certain provisions of the Political Reform Act. The taxpayer group filed a special motion to strike the complaint as a SLAPP. The trial court denied the motion. On appeal, the plaintiffs argued, as had the plaintiff in *Paul*, that the defendant was not entitled to use the anti-SLAPP statute because the

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<sup>13</sup> We address the viability of this exception in the companion to this case, Flatley v. Mauro (2006) 39 Cal.4th 299 [46 Cal.Rptr.3d 606, 139 P.3d 2].

conduct for which it claimed constitutional protection was illegal. The Court of Appeal distinguished *Paul*. “Here in contrast, appellant neither has conceded nor does the evidence conclusively establish the illegality of its communications made during the course of debate on political issues. [Citations.] Appellant claims its advertisement [\*\*\*\*43] constitutes protected speech that cannot be regulated by the Political Reform Act, and consequently no violation of law occurred.” (*Id. at p. 459.*) [\*\*46] Because the issue of the legality of the taxpayer group’s conduct was disputed, the Court of Appeal found that “the threshold element in a [section 425.16](#) inquiry has been established” and the “asserted violation of the Political Reform Act … is an issue we must examine in the context … of the respondent’s burden to construct a *prima facie* showing of the merits of its case.” (*Id. at p. 460*; see also *Kashian v. Harriman* (2002) [98 Cal.App.4th 892, 910–911 \[120 Cal. Rptr. 2d 576\]](#) [“i]n short, conduct that would otherwise [\*\*\*658] come within the scope of the anti-SLAPP statute does not lose its coverage … simply because it is *alleged* to have been unlawful or unethical”]; *Chavez v. Mendoza* (2001) [94 Cal.App.4th 1083, 1090 \[114 Cal. Rptr. 2d 825\]](#) [the *Paul* exception applies “where the defendant indisputably concedes the claim arose from illegal or constitutionally unprotected activity”].)

Under these decisions, if a defendant’s assertedly protected constitutional activity is alleged to have been illegal and, therefore, [\*\*\*\*44] outside the ambit of the anti-SLAPP statute, the illegality must be established as a matter of law either through the defendant’s concession or because the illegality is conclusively established by the evidence presented in connection with the motion to strike. Although the legislative history surrounding Assembly Bill No. 1158 (2005–2006 Reg. Sess.) does not expressly refer to these cases, nonetheless, a Senate Committee on the Judiciary analysis notes that an early version of the bill would have incorporated “indisputably illegal conduct” as the standard by which to evaluate whether the filing and maintenance of the underlying action [\*286] was illegal as a matter of law. (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1158 (2005–2006 Reg. Sess.) as amended Apr. 25, 2005, p. 10.) In language echoing the *Paul* decision, the analysis states that “if there is a genuine issue of material fact that turns on the credibility of [a] witness or on proper inferences to be drawn from indisputable facts, then the matter is not indisputable.” (*Ibid.*) While the final version of [section 425.18, subdivision \(h\)](#) substituted the phrase “illegal as a matter of law” for “indisputably illegal conduct,” there is no indication [\*\*\*\*45] in the legislative history that a different meaning was intended.<sup>14</sup>

**CA(9)<sup>†</sup> (9)** In summary, [section 425.18, subdivision \(h\)](#) [HN14<sup>†</sup>](#) provides a narrow exception to the rule that malicious prosecution actions are subject to scrutiny under the anti-SLAPP statute, which applies only if (1) the malicious prosecution action is a SLAPPback and (2) the filing and maintenance of the underlying action was illegal as a matter of law. The burden of establishing that the underlying action [\*\*\*\*46] was illegal as a matter of law should be shouldered by the plaintiff in such cases. This is because the Legislature’s decision not to create a categorical exemption for SLAPPbacks demonstrates a legislative preference that the anti-SLAPP statute operate in the ordinary fashion in most SLAPPback cases, subject, of course, to the special procedural rules applicable to all motions to strike a SLAPPback. In the ordinary SLAPP case, the defendant’s initial burden in invoking the anti-SLAPP statute is to make “‘a threshold showing that the challenged cause of action is one arising from protected activity.’” (*Jarrow Formulas, Inc. v. LaMarche, supra, 31 Cal.4th at p. 733.*) There is no further requirement that the defendant initially demonstrate his or her exercise of constitutional rights of speech or petition was valid as a matter of law. (*Navellier v. Sletten, supra, 29 Cal.4th at pp. 94–95.*) Consistent with these principles, a defendant who invokes the anti-SLAPP statute should not be required to bear the additional burden of demonstrating in the first instance that the filing and maintenance of the underlying action was not illegal as a matter of law. Moreover, [\*\*\*\*47] placing this burden on the defendant would be impractical and inefficient because [\*\*\*659] [\*\*47] it would require the defendant to identify and address every conceivable statute that might have had some bearing on the underlying action and then prove a negative—that the underlying action did not violate any of these laws.

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<sup>14</sup> Further support for our conclusion that the Legislature’s adoption of the phrase “illegal as a matter of law” referred to the *Paul* decision comes in the form of a subsequent Senate Committee on the Judiciary analysis of Assembly Bill No. 1158 (2005–2006 Reg. Sess.) that explains that this concept was drawn in part from the amicus curiae brief filed by the Attorney General in *Flatley v. Mauro, supra, 39 Cal.4th 299* wherein the Attorney General argues that the *Paul* exception is consistent with the Legislature’s intent in enacting [section 425.16](#).

**CA(10)[<sup>15</sup>] (10)** Accordingly, [HN15\[<sup>15</sup>\]](#) once the defendant has made the required threshold showing that the challenged action arises from assertedly protected activity, the plaintiff may counter by demonstrating that the underlying action was [\*287] illegal as a matter of law because either the defendant concedes the illegality of the assertedly protected activity or the illegality is conclusively established by the evidence presented in connection with the motion to strike. In doing so, the plaintiff must identify with particularity the statute or statutes violated by the filing and maintenance of the underlying action. (See [Paul, supra, 85 Cal.App.4th at pp. 1360–1361.](#)) [HN16\[<sup>15</sup>\]](#) This requirement of identifying a specific statute, violation of which the plaintiff contends is illegal as a matter of law, is consistent with the narrow nature of the exemption set forth in [section 425.18, subdivision \(h\)](#) [\*\*\*\*48] because it prevents a plaintiff from advancing a generalized claim that a defendant's conduct was illegal and therefore subject to the exemption. In this same vein, the requirement of specificity provides notice to both the defendant and the court about the particular statute or statutes the defendant is alleged to have violated as a matter of law so as to allow the defendant to intelligibly respond to, and the court to assess, the claim. Additionally, as part of the plaintiff's burden of demonstrating illegality as a matter of law, the plaintiff must show the specific manner in which the statute or statutes were violated with reference to their elements. A generalized assertion that a particular statute was violated by the filing or maintenance of the underlying action without a particularized showing of the violation will be insufficient to demonstrate illegality as a matter of law.

In light of this analysis of [section 425.18, subdivision \(h\)](#), we turn to Soukup's claim that defendants' filing and maintenance of the underlying action was illegal as a matter of law because it violated *Labor Code section 1102.5, subdivision (b)* and [29 United States Code section 1140.](#) [\*\*\*\*49] To reiterate our earlier discussion with reference to Soukup's specific claim, she bears the burden of making a particularized showing that defendants' initiation and maintenance of the underlying action violated these statutes as a matter of law. For the reasons we set forth below, we conclude that she has failed to carry this burden.

*Labor Code section 1102.5, subdivision (b)* provides: [HN17\[<sup>15</sup>\]](#) "An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation."

**CA(11)[<sup>15</sup>] (11)** [HN18\[<sup>15</sup>\]](#) *Labor Code section 1102.5* is a whistleblower statute, the purpose of which is to "encourag[e] workplace whistle-blowers to report unlawful acts without fearing retaliation." ([Green v. Ralee Engineering Co. \(1998\) 19 Cal.4th 66, 77 \[78 Cal. Rptr. 2d 16, 960 P.2d 1046\].](#)) "'To establish a prima facie case of retaliation, a plaintiff must show that she engaged in protected activity, that she was thereafter subjected to adverse employment action by [\*288] her [\*\*\*\*50] employer, and there was a causal link between the two.''" ([Morgan v. Regents of University of California \(2000\) 88 Cal.App.4th 52, 69 \[105 Cal. Rptr. 2d 652\].](#))

Thus, it appears that a prerequisite to asserting a violation of *Labor Code section 1102.5* [\*\*\*660] is the existence of an employer-employee relationship at the time the allegedly retaliatory action occurred. In this case, however, as Soukup's counsel conceded at argument, Soukup was not an employee of LOHH at the time she complained to the Department of Labor about LOHH's pension plan distribution or when the underlying action was filed. Accordingly, she fails to demonstrate how defendants' filing and maintenance of the underlying action, even if it was in some broad sense retaliatory, violated the specific provisions of *Labor Code section 1102.5*, much less that the statute rendered defendants' conduct illegal as a matter of law.

[\*\*48] [Title 29 United States Code section 1140](#) states in pertinent part that it is "unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary" of an employee benefit plan either for [\*\*\*\*51] "exercising any right to which he is entitled" or "because he has given information or has testified or is about to testify in any inquiry or proceeding" relating to such plans.<sup>15</sup> "The latter part of [\[section 1140\]](#) is a whistleblower provision ... designed to encourage individuals with knowledge of potential ERISA violations to share information in order that such violations may be redressed. To this end, [section 1140] prohibits

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<sup>15</sup> This section is part of the ERISA statute. ([29 U.S.C. § 1001 et seq.](#))

employers from retaliating against those who provide information or testimony in ‘any inquiry or proceeding related to [ERISA].’ ” ([Klein v. Banknorth Group, Inc. \(D.Vt. 1997\) 977 F. Supp. 302, 304](#); see [Teumer v. General Motors Corp. \(7th Cir. 1994\) 34 F.3d 542, 550](#) “[a] plaintiff seeking relief under [section 1140] must establish that the complained of action affecting his employment situation was taken by his employer with the specific intent of interfering with his benefit rights”].)

[\*\*\*\*52] Accordingly, it appears that a claim that this statute was violated can be made either by an employee-participant of an employee benefit plan or a beneficiary of such plan. For the same reason that Soukup is unable to show that defendants' filing of the underlying action violated *Labor Code section 1102.5*—the absence of an employer-employee relationship at the time the allegedly retaliatory action was taken—she is unable to show a violation of the federal statute based on her status as an employee of LOHH. Moreover, Soukup does not contend, much less demonstrate, that she can assert a violation of the federal statute as a beneficiary of the pension plan. Here, too, then, she fails to show that defendants' filing and maintenance of the underlying action violated the federal statute as to her, much less that [\*289] defendants' conduct was illegal as a matter of law for purposes of [29 United States Code section 1140](#).<sup>16</sup>

[\*\*\*\*53] [CA\(12\)](#)<sup>↑</sup> (12) Soukup alternatively argues that, even if the underlying action was not illegal as a matter of law, it was nonetheless a sham suit and on this ground defendants should be barred from recourse to the anti-SLAPP statute. Soukup relies on United States Supreme Court decisions that, in various contexts, have concluded that litigation undertaken without a reasonable basis, but merely to harass or hinder another party is sham litigation undeserving of the [First Amendment](#) protection that ordinarily immunizes petitioning [\*\*\*661] activity. ([Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc. \(1993\) 508 U.S. 49, 60–61 \[123 L. Ed. 2d 611, 113 S. Ct. 1920\]](#); [Bill Johnson's Restaurants, Inc. v. NLRB \(1983\) 461 U.S. 731, 743 \[76 L. Ed. 2d 277, 103 S. Ct. 2161\]](#) (*Bill Johnson's Restaurants*).) This doctrine derives from decisions reached in the context of [antitrust law](#) and is often referred to as the *Noerr-Pennington* doctrine. ([United Mine Workers v. Pennington \(1965\) 381 U.S. 657, 670 \[14 L. Ed. 2d 626, 85 S. Ct. 1585\]](#); [Eastern R. Conf. v. Noerr Motors \(1961\) 365 U.S. 127, 144 \[5 L. Ed. 2d 464, 81 S. Ct. 523\]](#).) [HN19](#)<sup>↑</sup> “The *Noerr-Pennington* doctrine, [\*\*\*\*54] as refined and explained in *Real Estate Investors*, has two prongs. First, ... the challenged action must have been undertaken with an improper motive. That is, it must have been done not with the hope of securing a favorable governmental result, but solely to harass and hinder another party. The other prong of the doctrine is that the challenged action must have been objectively baseless. Absent such a patent lack of merit, an action protected under the [First Amendment](#) by the right of petition cannot be the basis for litigation.” ([Ludwig v. Superior Court \(1995\) 37 Cal.App.4th 8, 22 \[43 Cal. Rptr. 2d 350\]](#).)

Invoking this doctrine, Soukup cites language from the *Bill Johnson* decision in [\*\*49] which the Supreme Court stated that “baseless litigation is not immunized by the [First Amendment](#) right to petition.” ([Bill Johnson's Restaurants, supra, 461 U.S. at p. 743](#).) Equating baselessness with lack of probable cause ([Wilson v. Parker, Covert & Chidester \(2002\) 28 Cal.4th 811, 820 \[123 Cal. Rptr. 2d 19, 50 P.3d 733\]](#)), she contends that the absence of probable cause to support the underlying action renders it sham litigation unprotected by the [First Amendment](#). Therefore, she reasons, defendants [\*\*\*\*55] were not entitled to avail themselves of the anti-SLAPP statute because the purpose of that statute is to promote the exercise of protected speech and petition rights.

[\*290]

We disagree. First, *Bill Johnson's Restaurants* is not directly controlling, nor does Soukup argue that it is, because that case involved the National Labor Relations Act ([29 U.S.C. § 151 et seq.](#)) rather than a statute in any way analogous to the anti-SLAPP statute. In *Bill Johnson's Restaurants*, the Supreme Court held that it is an “enjoinable unfair labor practice to prosecute a baseless lawsuit with the intent of retaliating against an employee for the exercise of rights” protected by the act relating to union organizing. ([Bill Johnson's Restaurants, supra, 461 U.S. at p. 744](#).) Second, the sham suit exemption urged upon us by Soukup would be significantly broader than that which

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<sup>16</sup> Soukup also argues that the illegality of the underlying action is established by the finding of the Court of Appeal that her complaint to the Department of Labor was the basis for the underlying action when it affirmed the dismissal of the action as a SLAPP. This finding, however, is not the equivalent of a finding that the underlying action was illegal.

the Legislature created in [section 425.18, subdivision \(h\)](#). Third, the legislative history surrounding the enactment of [section 425.18, subdivision \(h\)](#) demonstrates that the Legislature was aware of the principle articulated in the *Bill Johnson's Restaurants* decision to which Soukup refers and adopted it only to the [\*\*\*\*56] extent it supported the narrow exemption from the anti-SLAPP statute for SLAPPbacks set forth in [subdivision \(h\)](#).

**CA(13)↑ (13)** In a comment addressing [subdivision \(h\) of section 425.18](#), the Senate Committee on the Judiciary report states: “In [Bill Johnson's Restaurants, Inc. v. National Labor Relations Board, 461 U.S. 731 \[76 L. Ed. 2d 277, 103 S. Ct. 2161\] \(1983\)](#), the U.S. Supreme Court held that ‘baseless litigation is not immunized by the [First Amendment](#) right to petition.’ [¶] [Assembly Bill No.] 1158’s proposed [Section 425.18\(h\)](#) … adopts this principle in the SLAPPback context and provides that ‘a special motion to strike may not be filed against a SLAPPback by a party whose filing or maintenance of the prior cause of action from which the SLAPPback arises was illegal as a matter of [\*\*\*662] law.’ … [¶] Thus, where a person whose prior SLAPP lawsuit was illegal as a matter of law, as shown by being thrown out on a special motion to strike, and the SLAPP victim files a subsequent malicious prosecution action, that bad actor cannot use the anti-SLAPP law to defend against the lawsuit or to vex and harass the SLAPP victim.” (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1158 (2005–2006 Reg. Sess.) as amended [\*\*\*\*57] Aug. 15, 2005, pp. 11–12.) Thus, the Legislature concluded that, for purposes of the anti-SLAPP statute, underlying actions illegal as a matter of law are a species of “baseless litigation” undeserving of [First Amendment](#) protection, as that general principle was articulated in the *Bill Johnson's Restaurants* decision, but it declined to apply that principle to fashion the kind of categorical exemption for SLAPPbacks that Soukup, citing the same principle, urges upon us. **HN20↑** Where the Legislature has spoken we are not at liberty to create a broader exception for sham litigation.

**CA(14)↑ (14) HN21↑** We therefore conclude that Soukup has failed to show that the filing and maintenance of the underlying action were illegal as a matter of law for purposes of [section 425.18, subdivision \(h\)](#). Therefore, defendants are not barred from proceeding with their motions to strike Soukup’s action under the anti-SLAPP statute. As such, the motions are subject to the usual analysis [\*291] under which defendants are required to make a threshold showing that Soukup’s malicious prosecution claim arises from protected activity. “By definition, a malicious prosecution suit alleges that the defendant committed a tort by filing a lawsuit.” [\*\*\*\*58] ([Jarrow Formulas, Inc. v. LaMarche, supra, 31 Cal.4th at p. 735](#).) The filing of lawsuits is an aspect of the [First Amendment](#) right of petition. (*Id. at p. 736, fn. 5*.) Accordingly, defendants have fulfilled the required threshold showing. This does not end our analysis, however. “If the court [\*\*50] finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.” ([Equilon Enterprises v. Consumer Cause, Inc., supra, 29 Cal.4th at p. 67](#).) The Court of Appeal concluded that Soukup had not done so. Soukup contends that the court erred. We agree and on this ground reverse the Court of Appeal.

#### B. Has Soukup Shown a Probability of Prevailing on Her Malicious Prosecution Claim?

**HN22↑** To establish a probability of prevailing, the plaintiff “must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.” ([Matson v. Dvorak \(1995\) 40 Cal.App.4th 539, 548 \[46 Cal.Rptr.2d 880\]](#); accord, [Rosenaur v. Scherer \(2001\) 88 Cal.App.4th 260, 274 \[105 Cal. Rptr. 2d 674\]](#).) [\*\*\*\*59] For purposes of this inquiry, “the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant ([§ 425.16, subd. \(b\)\(2\)](#)); though the court does not weigh the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant’s evidence supporting the motion defeats the plaintiff’s attempt to establish evidentiary support for the claim.” ([Wilson v. Parker, Covert & Chidester, supra, 28 Cal.4th at p. 821](#).) In making this assessment it is “the court’s responsibility … to accept as true the evidence favorable to the plaintiff … .” ([HMS Capital, Inc. v. Lawyers Title Co., supra, 118 Cal.App.4th at p. 212](#).) The plaintiff need only establish that his or her claim has “minimal merit” ([Navellier v. Sletten, supra, 29 Cal.4th at p. 89](#)) [\*\*\*663] to avoid being stricken as a SLAPP. ([Jarrow Formulas, Inc. v. LaMarche, supra, 31 Cal.4th at p. 738](#) [“the

anti-SLAPP statute requires only ‘a minimum level of legal sufficiency and triability’ [citation]”, quoting [Linder v. Thrifty Oil Co. \(2000\) 23 Cal.4th 429, 438, fn. 5 \[97 Cal. Rptr. 2d 179, 2 P.3d 27\].](#) [\*\*\*\*60] <sup>17</sup>

[\*292]

[CA\(15\)](#) (15) [HN23](#) To prevail on a malicious prosecution claim, the plaintiff must show that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination favorable to the plaintiff; (2) was brought without probable cause; and (3) was initiated with malice. ([Sheldon Appel Co. v. Albert & Oliker \(1989\) 47 Cal.3d 863, 871 \[254 Cal. Rptr. 336, 765 P.2d 498\].](#))

The question of probable cause is “whether, as an objective matter, [\*\*\*\*61] the prior action was legally tenable or not.” ([Sheldon Appel Co. v. Albert & Oliker, supra, 47 Cal.3d at p. 868.](#)) “A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him.” ([Sangster v. Paetkau \(1998\) 68 Cal.App.4th 151, 164–165 \[80 Cal. Rptr. 2d 66\].](#)) “In a situation of complete absence of supporting evidence, it cannot be adjudged reasonable to prosecute a claim.” ([Mabie v. Hyatt \(1998\) 61 Cal.App.4th 581, 597 \[71 Cal. Rptr. 2d 657\].](#)) Probable cause, moreover, must exist for every cause of action advanced in the underlying action. “[A]n action for malicious prosecution lies when but one of alternate theories of recovery is maliciously asserted . . . .” ([Bertero v. National General Corp. \(1974\) 13 Cal.3d 43, 57, fn. 5 \[118 Cal. Rptr. 184, 529 P.2d 608\];](#) see [Crowley v. Katleman \(1994\) 8 Cal.4th 666, 679, 695 \[34 Cal. Rptr. 2d 386, 881 P.2d 1083\].](#))

[HN24](#) “The ‘malice’ element . . . relates to the *subjective intent or purpose* with which the defendant acted in initiating the prior action. [Citation.] The motive of the defendant [\*\*\*\*62] must have been something other [\*\*51] than that of bringing a perceived guilty person to justice or the satisfaction in a civil action of some personal or financial purpose. [Citation.] The plaintiff must plead and prove actual ill will or some *improper* ulterior motive.” ([Downey Venture v. LMI Ins. Co. \(1998\) 66 Cal.App.4th 478, 494 \[78 Cal. Rptr. 2d 142\];](#) see [Albertson v. Raboff \(1956\) 46 Cal.2d 375, 383 \[295 P.2d 405\]](#) “[t]he malice required in an action for malicious prosecution is not limited to actual hostility or ill will toward plaintiff but exists when the proceedings are instituted primarily for an improper purpose”.) Malice “may range anywhere from open hostility to indifference. [Citations.] Malice may also be inferred from the facts establishing lack of probable cause.” ([Grindle v. Lorbeer \(1987\) 196 Cal. App. 3d 1461, 1465–1466 \[242 Cal. Rptr. 562\].](#))

The parties do not dispute that the underlying action in this case was terminated in Soukup’s favor when it was dismissed as a SLAPP. With respect to the remaining elements of her malicious prosecution claim—lack of probable cause and malice—[\*\*\*664] we conclude that Soukup’s evidentiary showing [\*293] is sufficient to [\*\*\*\*63] demonstrate a probability of prevailing for purposes of the anti-SLAPP statute.

Soukup was named as a defendant in four causes of action in the underlying lawsuit; malicious prosecution, defamation, breach of fiduciary duty, and tortious interference with business relationships. To prevail on her malicious prosecution claim she is required to show only that defendants lacked probable cause for one of these causes of action. Soukup can show that Hafif lacked probable cause for his malicious prosecution claim in the underlying action because her evidence demonstrates that she did not initiate any of the lawsuits against him that were the basis of that claim; that she had minimal or no contact with any of her codefendants in the time period during which those actions were filed; and that Hafif, while maintaining that Soukup was “involved in the general

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<sup>17</sup> The parties made various evidentiary objections to each other’s affidavits and the attachments thereto in the trial court, but the trial court declined to rule on the objections and neither side pressed for a ruling. Therefore, the objections are deemed to be forfeited. ([Gallant v. City of Carson \(2005\) 128 Cal.App.4th 705, 710 \[27 Cal. Rptr. 3d 318\].](#)), and “in reviewing the trial court’s order denying the motion, we consider all the evidence presented by the parties.” ([Slauson Partnership v. Ochoa \(2003\) 112 Cal.App.4th 1005, 1014, fn. 4 \[5 Cal. Rptr. 3d 668\].](#))

work of implementing the attack on me" conceded at his deposition that he would not be producing any witnesses to testify that she assisted her codefendants in filing their complaints.<sup>18</sup>

[\*\*\*\*64] Hafif's defamation cause of action was based on the Orange County Register article in which his former clients accused him of overcharging them for costs and fees. No allegations were made with respect to the second article involving the Department of Labor's investigation into LOHH's employee pension plan in which Soukup was quoted. Again, Soukup presented evidence that she had had minimal or no contact with Hafif's dissatisfied clients and Benson at the time the allegedly defamatory newspaper article appeared. No evidence was presented that she was the source of the information provided to the reporter who wrote the first article.

The breach of fiduciary duty cause of action was based on allegations that Soukup provided confidential information to Benson regarding certain cases on which she worked as a paralegal. Soukup presented uncontested evidence that her discussions with Benson about cases at LOHH occurred while both of them were employed at LOHH and, she therefore argues, were privileged under the qualified privilege for communications between interested parties. (Civ. Code, § 47, subd. (c); [Coastal Abstract Service v. First American Title \(1999\) 173 F.3d 725, 735](#) [\*\*\*\*65] ["California's common interest privilege, Cal. Civ. Code § 47(c), immunizes a person's statement to others on matters of common interest from liability in tort, provided that the person did not act with malice" (fn. omitted)]; [Kelly v. General Telephone Co. \(1982\) 136 Cal. App. 3d 278, 285 \[186 Cal. Rptr. 184\]](#) [communications between a [\*294] company's employees may fall within the privilege].) Moreover, she also presented evidence that, to the extent he used this information in his wrongful termination actions against Hafif, it was without her knowledge or consent, and she denied having conspired with him to extort money or cases from Hafif. No evidence was presented that the qualified privilege did not apply to Soukup's communications with Benson during the course of their mutual employment at LOHH or that Soukup had disclosed confidential information to [\*\*52] Benson after Benson had left LOHH in furtherance of the alleged conspiracy against Hafif.<sup>19</sup>

[\*\*\*\*66] [\*\*\*665]

Hafif's cause of action for tortious interference with business relationships was premised on allegations that Soukup had conspired with other defendants to "devise[] a 'gameplan' [sic] wherein each sought to personally benefit by presenting a united front against plaintiffs to demand unjustified reductions in the fees and costs they owed plaintiffs for their legal services." Again, Soukup presented evidence that she had no or minimal contact with her codefendant in the timeframe during which the conspiracy was alleged to have been planned and carried out. She also pointed out that she would not have personally benefited from the alleged conspiracy, a point seemingly conceded by Hafif who, during a deposition, while insisting Soukup was part of the conspiracy, acknowledged he had no idea why she was involved in it.

As against this evidence tending to demonstrate lack of probable cause, defendants generally assert that probable cause existed to support their claims against Soukup without making a specific evidentiary showing as to each claim.<sup>20</sup> [\*\*\*\*69] The general showing, moreover, consists primarily of rulings in other cases involving parties other

<sup>18</sup> Defendants assert that Hafif "withdrew" his malicious claim against Soukup, but fail to show where in the record that cause of action was dismissed against her.

<sup>19</sup> Defendants cite a declaration from O.J. Freed, a mutual friend of Hafif and Benson's, in which he states that Benson said Soukup had told him that Hafif had accepted bribes "to sell out clients." Even accepting the declaration at face value, it fails to set forth the time, place and circumstances of this conversation between Benson and Soukup nor does it, on its face, support the specific causes of action alleged against Soukup by Hafif.

<sup>20</sup> In their briefs, defendants also repeatedly purport to incorporate by reference arguments from briefs they filed in the Court of Appeal and here in this case and in the *Hutton* case. They offer no authority that permits such incorporation and nothing in the California Rules of Court allows this practice. To the contrary, the relevant rule requires [HN25](#)↑ briefs filed in this court to conform to rule 14 which governs the content and form of briefs filed in the Court of Appeal. (Cal. Rules of Court, rule 28.1(a).) It is well settled that the Court of Appeal does not permit incorporation by reference of documents filed in the trial court. ([Colores v. Board of Trustees \(2003\) 105 Cal.App.4th 1293, 1301, fn. 2 \[130 Cal. Rptr. 2d 347\]](#) ["it is not appropriate to incorporate by reference, into a brief, points and authorities contained in trial court papers, even if such papers are made a part of the appellate

than Soukup; for example, the [\*\*\*\*67] denial of a summary adjudication motion brought by Terrie Hutton in the underlying [\*295] action. But Hutton was not named in the cause of action for breach of fiduciary duty. Thus, even if the denial of her summary adjudication motion could be construed as a generalized finding of probable cause as to those counts in which both she and Soukup were named, Soukup could still prevail on her malicious prosecution claim based on the malicious prosecution of the cause of action for breach of fiduciary duty. ([Crowley v. Katileman, supra, 8 Cal.4th at p. 695.](#)) Defendants cite other rulings as disparate as the judgment in favor of Hafif and Stock in Terry Schielke's malicious prosecution action, and the order granting Stock's motion to strike Terrie Hutton's malicious prosecution action as a SLAPP. But defendants do not contend, much less demonstrate, that these rulings have collateral estoppel effect on the issue of whether probable cause existed to support the four causes of action in the underlying suit in which Soukup was named as a defendant. Absent such effect, they are irrelevant to that issue.<sup>21</sup> Equally irrelevant are the opinions of the Court of Appeal in this case as [\*\*\*666] to [\*\*\*68] which we have granted review, and are, therefore, no longer published or citable. ([Quintano v. Mercury Casualty Co. \(1995\) 11 Cal.4th 1049, 1067, fn. 6 \[48 Cal. Rptr. 2d 1, 906 P.2d 1057\]; Cal. Rules of Court, rule 976\(d\).](#))

[\*\*53] Finally, defendants repeatedly argue that Terrie Hutton's diaries demonstrate that they had probable cause to proceed against Soukup in the underlying action. Preliminarily, defendants did not obtain these diaries until after they had filed the underlying action and, therefore, the diaries could not have provided them with probable cause for filing the action and naming Soukup as a defendant in it.<sup>22</sup> Even more crucially, in all the hundreds of pages of Hutton's diaries that appear in the appellate record, defendants fail to cite a single passage that specifically would lend support to their theory that Soukup actively conspired with any of her codefendants in the underlying action.

[\*\*\*70] With respect to malice, Soukup argues that the fact the underlying action was dismissed as a SLAPP—that is, that it was brought primarily to chill the exercise of her constitutional rights of speech and petition—establishes a prima facie showing of malice because interference with the exercise of those rights is, by definition, an improper purpose to initiate and maintain litigation. We do not agree with the premise of Soukup's claim that an action eventually [\*296] adjudicated to be a SLAPP was necessarily initiated and maintained with malice. However, Soukup also cites evidence of attitudes ranging from "open hostility to indifference" ([Grindle v. Lorbeer, supra, 196 Cal. App. 3d at p. 1465](#)) that satisfies the requirement of a showing of minimal merit to her malicious prosecution claim so as to defeat defendants' motions. For example, she cites evidence that Hafif physically threatened her when she refused to accept unregistered stock as part of LOHH's distribution of its pension plan, the event she alleges ultimately resulted in her having been named as a defendant in the underlying action; that Stock told her Hafif had named her in the underlying action to prevent [\*\*\*\*71] her from making trouble for him in the future; that Hafif admitted at a deposition he had no witnesses to testify to her involvement in the malicious prosecution cause of action in the underlying action; that Gregory Hafif threatened the lawyer Soukup retained to look into the pension plan matter with lawsuits and attorney fee claims; that Aitken failed to provide her with an explanation as to why she had been named a defendant in the underlying action and refused her request to be dismissed from the action; and that Stock refused to dismiss Hafif's appeal of the dismissal of the underlying action after she prevailed on her anti-SLAPP motion. Moreover, malice can also be inferred from the evidence that defendants lacked probable cause to initiate and maintain the underlying action against Soukup. (See [id. at p.](#)

record"]; [Estate of Wiedemann \(1964\) 228 Cal. App. 2d 362, 370–371 \[39 Cal. Rptr. 496\]](#) [incorporation by reference of points and authorities filed in the trial court violates Cal. Rules of Court, rule 14].) The same principle bars defendants' attempts to incorporate by reference arguments advanced in other appellate briefs. We therefore disregard these purported incorporations by reference.

<sup>21</sup> Accordingly we deny defendants' request to judicially notice the statement of decision in the Schielke case. ([People v. Rowland \(1992\) 4 Cal.4th 238, 268, fn. 6 \[14 Cal. Rptr. 2d 377, 841 P.2d 897\]](#) [reviewing court need not take judicial notice of irrelevant court records].)

<sup>22</sup> Moreover, as the Court of Appeal concluded in the appeal affirming the dismissal of the underlying action as a SLAPP against Soukup and Hutton, those diaries were properly held to be *inadmissible*. Defendants make no showing that these diaries would be admissible against Soukup on any theory of admissibility. Therefore, no matter how often or insistently defendants attempt to rely on these diaries, the inescapable fact is that, as to Soukup, they are and remain inadmissible.

1466.) We conclude that Soukup's showing is sufficient to establish malice for the limited purpose of defeating defendants' motions to strike.

Stock separately argues that Soukup cannot show a probability of prevailing on her malicious prosecution claim as to him because his role in the underlying action was limited to that of appellate counsel and there is no tort of [\*\*\*\*72] malicious [\*\*\*667] prosecution of an appeal. In the context of this case, we disagree.

In Zamos v. Stroud (2004) 32 Cal.4th 958 [12 Cal. Rptr. 3d 54, 87 P.3d 802], we held that "an attorney may be held liable for continuing to prosecute a lawsuit discovered to lack probable cause." (Id. at p. 960.) Therefore, we concluded that the malicious prosecution plaintiff in *Zamos*, by demonstrating that the defendant attorneys continued to prosecute the underlying action after discovering it was without probable cause, had made a sufficient showing to defeat defendants' anti-SLAPP motion to dismiss. In so finding, we expressly distinguished Coleman v. Gulf Ins. Group (1986) 41 Cal.3d 782 [226 Cal. Rptr. 90, 718 P.2d 77], on which Stock principally relies for the proposition that there is no malicious prosecution claim against an attorney who did not [\*\*54] initiate the underlying action, but participated only in the appeal.

"In *Coleman*, the underlying action was commenced by the *plaintiffs* in the malicious prosecution action. Therefore, in order to establish their cause of [\*297] action against the defendant's insurer for malicious prosecution, the plaintiffs argued that the insurer, in maliciously causing [\*\*\*73] the defendant to file a frivolous appeal, caused the initiation of a *separate action*. This is the argument the *Coleman* court rejected. [¶] ... [¶] The operative distinction ... is between continuing a prosecution and continuing a defense. In *Coleman*, the defendant in the malicious prosecution action had merely continued its defense of the underlying wrongful death action by causing the filing of the appeal in that action. Here, according to the evidence presented in opposition to the anti-SLAPP motion, defendants in the malicious prosecution action continued their prosecution of the underlying fraud action after learning it was baseless." (Zamos v. Stroud, supra, 32 Cal.4th at pp. 968–969, fn. omitted.)

**CA(16)[↑] (16) HN26[↑]** The filing of an appeal is " 'the continuation of an action.' " (Zamos v. Stroud, supra, 32 Cal.4th at p. 969.) Under our reasoning in *Zamos*, therefore, the maintenance of an appeal by plaintiffs in an action discovered to lack probable cause may expose the plaintiff's attorney to liability for malicious prosecution. We therefore agree with Soukup that Stock cannot insulate himself from such liability, as a matter of [\*\*\*74] law, simply because he asserts that his role in the underlying action was limited to that of appellate counsel. As we have observed in another context, the filing of such an appeal, which stays the litigation, may itself be a tactic that operates to the detriment of the defendant as to whom the action has been found to be a SLAPP. (See Varian Medical Systems, Inc. v. Delfino, supra, 35 Cal.4th at p. 195.) Nor are we persuaded that the denial of Soukup's request for sanctions against Stock in the appeal of the underlying action demonstrates that the underlying action was supported by probable cause; that denial merely represented a finding that the argument advanced on appeal—that the trial court abused its discretion by entertaining Soukup's belated motion to strike—was not frivolous. (§ 907.)

Soukup also maintains that Stock's participation in the underlying action was greater than simply appearing as appellate counsel. The record appears to bear this out. For example, in the declaration Stock filed in support of his motion to strike Soukup's action, he states that he was involved in attempting to settle the action and personally communicated the settlement offer [\*\*\*75] to her. In an earlier declaration he stated he made appearances on behalf of Hafif in the underlying action [\*\*\*668] and assisted in the preparation of motions including preparing "a demurrer to [Soukup's] cross-complaint against Mr. Hafif." Soukup also presented evidence that Stock appeared in at least one deposition in the underlying action.

Based on the respective showings of the parties, we conclude that Soukup has shown a probability of prevailing on her malicious prosecution claim. Accordingly, on this ground we reverse the judgment of the Court of Appeal.

[\*298]

### III. JUDGMENT

39 Cal. 4th 260, \*298 139 P.3d 30, \*\*54 46 Cal. Rptr. 3d 638, \*\*\*668 2006 Cal. LEXIS 9073, \*\*\*\*75

We reverse the judgment of the Court of Appeal and remand the case for further proceedings consistent with our opinion.

George, C. J., Kennard, J., Baxter, J., Werdegar, J., Chin, J., and Corrigan, J., concurred.

The petition of appellants Law Offices of Herbert Hafif et al., for a rehearing was denied October 11, 2006.

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## Clayworth v. Pfizer, Inc.

Supreme Court of California

July 12, 2010, Filed

S166435

**Reporter**

49 Cal. 4th 758 \*; 233 P.3d 1066 \*\*; 111 Cal. Rptr. 3d 666 \*\*\*; 2010 Cal. LEXIS 6620 \*\*\*\*; 2010-2 Trade Cas. (CCH) P77,088

JAMES CLAYWORTH et al., Plaintiffs and Appellants, v. PFIZER, INC., et al., Defendants and Respondents.

**Subsequent History:** Reported at [Clayworth \(James\) v. Pfizer, Inc., 2010 Cal. LEXIS 7262 \(Cal., July 12, 2010\)](#)

Decision reached on appeal by [Clayworth v. Pfizer, Inc., 2012 Cal. App. Unpub. LEXIS 6173 \(Cal. App. 1st Dist., Aug. 22, 2012\)](#)

On remand at, Decision reached on appeal by [Clayworth v. Abbott Labs., 2014 Cal. App. Unpub. LEXIS 3832 \(Cal. App. 1st Dist., May 29, 2014\)](#)

**Prior History:** [\*\*\*\*1] Superior Court of Alameda County, No. RG04172428, Ronald M. Sabraw and Harry R. Sheppard, Judges. Court of Appeal, First Appellate District, Division Two, No. A116798.

[Clayworth v. Pfizer, Inc., 165 Cal. App. 4th 209, 83 Cal. Rptr. 3d 45, 2008 Cal. App. LEXIS 1151 \(Cal. App. 1st Dist., July 25, 2008\)](#)

## Core Terms

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damages, purchaser, Shoe, pass-on, overcharge, Cartwright Act, Pharmacies, Manufacturers, antitrust, indirect, prices, suits, consumers, anti trust law, measured, cases, antitrust violation, violators, injunctive relief, restitution, buyer, legislative history, price-fixing, duplicative, tertiary, drugs, summary judgment, lost profits, Hart-Scott-Rodino Act, wholesalers

## LexisNexis® Headnotes

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Governments > Legislation > Interpretation

### [HN1\[ Legislation, Interpretation](#)

In construing a statute, a court begins with the language of the statute. If the text is sufficiently clear to offer conclusive evidence of the statute's meaning, the court need look no further. If it is susceptible of multiple interpretations, however, the court will divine the statute's meaning by turning to a variety of extrinsic sources, including the legislative history, the nature of the overall statutory scheme, and consideration of the sorts of problems the legislature was attempting to solve when it enacted the statute.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

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

## **HN2** **Regulated Practices, Price Fixing & Restraints of Trade**

Bus. & Prof. Code, § 16750, subd. (a), of the Cartwright Act, Bus. & Prof. Code, § 16700 et seq., authorizes anyone injured in his or her business or property by actions forbidden under the Cartwright Act to recover three times the damages sustained.

Governments > Legislation > Effect & Operation > Amendments

Governments > Legislation > Interpretation

## **HN3** **Effect & Operation, Amendments**

In the absence of textual guidance, a court must turn elsewhere. The court thus looks to the legislature's subsequent amendments to related parts of an act, and the court considers as well the object which the act seeks to achieve and the evil which it seeks to prevent.

Governments > Legislation > Interpretation

## **HN4** **Legislation, Interpretation**

A court may presume that when the legislature borrows a federal statute and enacts it into state law, it has considered and is aware of the legislative history behind that enactment.

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

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

## **HN5** **Private Actions, Purchasers**

Under the Cartwright Act, Bus. & Prof. Code, § 16700 et seq., a pass-on defense generally may not be asserted. Instead, in an antitrust price-fixing case, the presumptive measure of damages is the amount of the overcharge paid by the plaintiff. While a pass-on defense is generally precluded, a few instances remain in which it will still be available.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Torts > Business Torts > Unfair Business Practices > General Overview

## **HN6** **Standing, Injury in Fact**

49 Cal. 4th 758, \*758 233 P.3d 1066, \*\*1066 111 Cal. Rptr. 3d 666, \*\*\*666 2010 Cal. LEXIS 6620, \*\*\*\*1

Private standing under California's unfair competition law, [Bus. & Prof. Code, § 17200 et seq.](#), is limited to any person who has suffered injury in fact and has lost money or property as a result of unfair competition. [Bus. & Prof. Code, § 17204](#).

Civil Procedure > ... > Justiciability > Standing > General Overview

Contracts Law > Remedies > Restitution

Torts > Business Torts > Unfair Business Practices > Remedies

Civil Procedure > Remedies > Damages > General Overview

## [HN7](#) Justiciability, Standing

That a party may ultimately be unable to prove a right to damages or restitution does not demonstrate that it lacks standing to argue for its entitlement to them. The doctrine of mitigation, where it applies, is a limitation on liability for damages, not a basis for extinguishing standing. This is so because mitigation, while it might diminish a party's recovery, does not diminish the party's interest in proving it is entitled to recovery. Nothing in the text of [Bus. & Prof. Code, § 17204](#), which is part of California's unfair competition law (UCL), [Bus. & Prof. Code, § 17200 et seq.](#), suggests the voters intended to provide otherwise when they remade the UCL's standing requirements.

Civil Procedure > ... > Justiciability > Standing > General Overview

Torts > Business Torts > Unfair Business Practices > Remedies

Civil Procedure > Remedies > Injunctions > General Overview

## [HN8](#) Justiciability, Standing

If a party has standing under [Bus. & Prof. Code, § 17204](#), it may seek injunctive relief under [Bus. & Prof. Code, § 17203](#).

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

## [HN9](#) Standards of Review, De Novo Review

A pure issue of law is reviewed de novo.

Civil Procedure > Remedies > Injunctions > General Overview

Contracts Law > Remedies > Restitution

Torts > Business Torts > Unfair Business Practices > Remedies

## [HN10](#) Remedies, Injunctions

Bus. & Prof. Code, § 17203, which is part of California's unfair competition law (UCL), Bus. & Prof. Code, § 17200 et seq., makes injunctive relief the primary form of relief available under the UCL, while restitution is merely ancillary. Nothing in the statute's language conditions a court's authority to order injunctive relief on the need in a given case to also order restitution. Accordingly, the right to seek injunctive relief under § 17203 is not dependent on the right to seek restitution; the two are wholly independent remedies.

## Headnotes/Summary

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### Summary

#### CALIFORNIA OFFICIAL REPORTS SUMMARY

Retail pharmacies sued pharmaceutical manufacturers under the Cartwright Act (Bus. & Prof. Code, § 16700 et seq.), alleging the manufacturers had unlawfully conspired to fix the prices of their brand-name pharmaceuticals. The pharmacies also alleged that they had been injured by the manufacturers' unfair business practices and were entitled to relief under the unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.). The trial court granted the manufacturers' motion for summary judgment, concluding that a pass-on defense was available under the Cartwright Act. The trial court further concluded that the pharmacies lacked standing to pursue the UCL claim because, having recouped the overcharge, they had not lost money or property, as required under Bus. & Prof. Code, § 17204. (Superior Court of Alameda County, No. RG04172428, Ronald M. Sabraw and Harry R. Sheppard, Judges.) The Court of Appeal, First District, Division Two, No. A116798, affirmed the trial court's judgment.

The Supreme Court reversed the judgment of the Court of Appeal and remanded the matter for further proceedings. The court held that under the Cartwright Act, as under federal law, generally no pass-on defense is permitted. Instead, in an antitrust price-fixing case, the presumptive measure of damages is the amount of the overcharge paid by the plaintiff. The court found that no exception to the general rule applied in this case. Accordingly, the trial court erred in granting summary judgment for the manufacturers on the basis of a pass-on defense. The pharmacies had standing to pursue their UCL claim. Bus. & Prof. Code, § 17204, requires only that a party have lost money or property, and the pharmacies indisputably lost money when they paid an allegedly illegal overcharge. The court declined the manufacturers' invitation to turn this facially simple threshold condition into a requirement that the pharmacies prove compensable loss at the outset. The pharmacies' claim for injunctive relief was sufficient to preclude summary judgment. The manufacturers identified no obstacle that would preclude the pharmacies from obtaining injunctive relief if they established the manufacturers were engaged [\*759] in an unfair business practice. (Opinion by Werdegar, J., with George, C. J., Baxter, Moreno, JJ., Ruvolo, J., \* Robie, J., † and Miller, J., ‡ concurring.)

### Headnotes

#### CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1)[] (1)

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\* Presiding Justice of the Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

† Associate Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

‡ Associate Justice of the Court of Appeal, Fourth Appellate District, Division Two, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

**Statutes § 29—Construction—Language—Legislative Intent.**

In construing a statute, a court begins with the language of the statute. If the text is sufficiently clear to offer conclusive evidence of the statute's meaning, the court need look no further. If it is susceptible of multiple interpretations, however, the court will divine the statute's meaning by turning to a variety of extrinsic sources, including the legislative history, the nature of the overall statutory scheme, and consideration of the sorts of problems the Legislature was attempting to solve when it enacted the statute.

**CA(2) [ ] (2)****Monopolies and Restraints of Trade § 10—Cartwright Act—Remedies—Treble Damages.**

Bus. & Prof. Code, § 16750, subd. (a), part of the Cartwright Act (Bus. & Prof. Code, § 16700 et seq.), authorizes anyone injured in his or her business or property by actions forbidden under the Cartwright Act to recover three times the damages sustained.

**CA(3) [ ] (3)****Statutes § 29—Construction—Legislature's Objective.**

In the absence of textual guidance, a court must turn elsewhere. The court thus looks to the Legislature's subsequent amendments to related parts of an act, and the court considers as well the object which the act seeks to achieve and the evil which it seeks to prevent.

**CA(4) [ ] (4)****Statutes § 28—Construction—Legislative History of Federal Statute.**

A court may presume that when the Legislature borrows a federal statute and enacts it into state law, it has considered and is aware of the legislative history behind that federal enactment.

**CA(5) [ ] (5)****Monopolies and Restraints of Trade § 10—Cartwright Act—Pass-on Defense—Presumptive Measure of Damages—Amount of Overcharge.**

Under the Cartwright Act (Bus. & Prof. Code, § 16700 et seq.), a pass-on defense generally may not be asserted. Instead, in an [\*760] antitrust price-fixing case, the presumptive measure of damages is the amount of the overcharge paid by the plaintiff. While a pass-on defense is generally precluded, a few instances remain in which it will still be available.

**CA(6) [ ] (6)****Monopolies and Restraints of Trade § 6—Cartwright Act—Price-fixing—Pass-on Defense.**

In a case in which retail pharmacies alleged that pharmaceutical manufacturers had unlawfully conspired to fix the prices of their brand-name pharmaceuticals in violation of the Cartwright Act (Bus. & Prof. Code, § 16700 et seq.), the trial court erred in granting summary judgment for the manufacturers on the basis of a pass-on defense, as such a defense is generally not permitted, and no exception to the general rule applied.

[Cal. Forms of Pleading and Practice (2010) ch. 565, Unfair Competition, § 565.71; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 554; 13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, §§ 124, 125.]

#### CA(7) [ ] (7)

##### **Unfair Competition § 8—Actions—Standing—Injury in Fact—Loss of Money or Property.**

Private standing under the unfair competition law ([Bus. & Prof. Code, § 17200 et seq.](#)) is limited to any person who has suffered injury in fact and has lost money or property as a result of unfair competition ([Bus. & Prof. Code, § 17204](#)).

#### CA(8) [ ] (8)

##### **Unfair Competition § 8—Actions—Standing—Damages—Mitigation.**

That a party may ultimately be unable to prove a right to damages or restitution does not demonstrate that it lacks standing to argue for its entitlement to them. The doctrine of mitigation, where it applies, is a limitation on liability for damages, not a basis for extinguishing standing. This is so because mitigation, while it might diminish a party's recovery, does not diminish the party's interest in proving it is entitled to recovery. Nothing in the text of [Bus. & Prof. Code, § 17204](#), which is part of the unfair competition law (UCL) ([Bus. & Prof. Code, § 17200 et seq.](#)), suggests the voters intended to provide otherwise when they remade the UCL's standing requirements.

#### CA(9) [ ] (9)

##### **Unfair Competition § 10—Actions—Standing—Injunctive Relief.**

If a party has standing under [Bus. & Prof. Code, § 17204](#), it may seek injunctive relief under [Bus. & Prof. Code, § 17203](#).

#### CA(10) [ ] (10)

##### **Unfair Competition § 10—Actions—Injunctive Relief—Restitution.**

[Bus. & Prof. Code, § 17203](#), which is part of the unfair competition law (UCL) ([Bus. & Prof. Code, § 17200 et seq.](#)), makes injunctive relief the primary form of relief available under the UCL, [\*761] while restitution is merely ancillary. Nothing in the statute's language conditions a court's authority to order injunctive relief on the need in a given case to also order restitution. Accordingly, the right to seek injunctive relief under [§ 17203](#) is not dependent on the right to seek restitution; the two are wholly independent remedies.

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**Judges:** Opinion by Werdegar, J., with George, C. J., Baxter, Moreno, Ruvolo, Robie, and Miller, JJ., concurring.

**Opinion by:** Werdegar

## **Opinion**

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[\*\*1069] [\*\*\*670] **WERDEGAR, [\*\*\*\*5] J.**—When a group of companies conspires to fix prices at higher than a competitive level, the resulting overcharge is paid in the first instance by the direct purchaser of the cartel's goods. In markets where the direct purchaser is not also the ultimate purchaser, but an intermediary between the cartel and the consumer (the indirect purchaser), several questions arise: First, who should be permitted to sue for price fixing, the direct purchaser, the indirect purchaser, or both? Second, how should damages be allocated? Should an antitrust conspirator be permitted to raise as a defense that the direct purchaser passed on some or all of the overcharge to indirect purchasers downstream in the chain of distribution?

Under federal **antitrust law**, the answer to these questions is settled. In *Hanover Shoe v. United Shoe Mach. (1968) 392 U.S. 481 [20 L. Ed. 2d 1231, 88 S. Ct. 2224]* (*Hanover Shoe*), the United States Supreme Court held antitrust violators ordinarily could not assert as a defense that any illegal overcharges had been passed on by a plaintiff direct purchaser to indirect purchasers. Instead, the full measure of the overcharge is recoverable by the direct purchaser. In a related decision nine years later, the Supreme [\*\*\*6] Court concluded only direct purchasers, not indirect purchasers, could sue for price fixing. (*Illinois [\*\*1070] Brick Co. v. Illinois (1977) 431 U.S. 720 [52 L. Ed. 2d 707, 97 S. Ct. 2061]*) (*Illinois Brick*).

Under state **antitrust law**, only the first question—who may sue—is settled. In 1978, in direct response to *Illinois Brick*, the Legislature amended the state's Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*)<sup>1</sup> [\*\*\*671] to provide that unlike federal law, state law permits indirect purchasers as well as direct purchasers to sue (*§ 16750, subd. (a)*). This left open the further question how damages should be allocated. Does the Cartwright Act permit a pass-on defense, or in this respect are state and federal law the same?

We conclude that under the Cartwright Act, as under federal law, generally no pass-on defense is permitted. While the text of the Cartwright Act does not answer the question, the Legislature's actions in response to *Illinois Brick* and related federal statutory amendments reveal a clear legislative preference for the *Hanover Shoe* rule. As well, that rule is the one most closely in accord [\*764] with the Legislature's overarching goals [\*\*\*7] of maximizing effective deterrence of antitrust violations, enforcing the state's antitrust laws against those violations that do occur, and ensuring disgorgement of any ill-gotten proceeds. Accordingly, we reverse the Court of Appeal, which held that a pass-on defense was available and that it entitled the alleged price-fixing defendants here to summary judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

On appeal from a grant of summary judgment, we review and recite the evidence in the light most favorable to the nonmoving party (here, plaintiffs). (*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843 [107 Cal. Rptr. 2d 841, 24 P.3d 493]*.)

Plaintiffs (hereafter Pharmacies) are retail pharmacies located in California.<sup>2</sup> Defendants (hereafter Manufacturers) are, with two exceptions, companies that manufacture, market, and/or distribute brand-name pharmaceutical products throughout the United States.<sup>3</sup> Manufacturers also manufacture, market, and/or distribute similar brand-

<sup>1</sup> All further unlabeled statutory references are to the Business and Professions Code.

<sup>2</sup> Plaintiffs are James Clayworth, R.Ph., an individual, doing business as Clayworth Pharmacy and Clayworth Healthcare; Marin Apothecaries, [\*\*\*8] Inc., doing business as Ross Valley Pharmacy; Golden Gate Pharmacy Services, Inc., doing business as Golden Gate Pharmacy; Pediatric Care Pharmacy, Inc.; Chimes Pharmacy, Inc.; Mark Horne, R.Ph., an individual, doing business as Burton's Pharmacy; Meyers Pharmacy, Inc.; Benson Toy, R.Ph., an individual, doing business as Marin Medical Pharmacy; Seventeen Fifty Medical Center Pharmacy, Inc.; Tony Mavrantonis, R.Ph., an individual, doing business as Jack's Drug; Julian Potashnick, R.Ph., an individual, doing business as Leo's Pharmacies; Jerry Shapiro, R.Ph., an individual, doing business as Uptown Drug, Co.; Tilley Apothecaries, Inc., doing business as Zweber's Apothecary; RP Healthcare, Inc.; Rohner Park Drugs, Inc.; and JGS Pharmacies, Inc., doing business as Dollar Drugs.

<sup>3</sup> Defendants are Abbott Laboratories; AstraZeneca LP; Novartis Pharmaceuticals Corporation; Allergan, Inc.; Boehringer Ingelheim Pharmaceuticals, Inc.; Eli Lilly & Company; Johnson & Johnson; Janssen Pharmaceutical PLC Inc.; Ortho-McNeil

name pharmaceutical products in Canada where, unlike in the United States, the products are subject to government pricing restrictions.

Pharmacies filed suit under section 1 of the Cartwright Act (Stats. 1907, ch. 530, § 1, pp. 984–985, as amended; [§§ 16720, 16726](#)) and the unfair competition law (UCL) ([§ 17200 et seq.](#)), alleging Manufacturers had unlawfully conspired to fix the prices of their brand-name pharmaceuticals in the United States market, including in California. The complaint alleged [**\*765**] Manufacturers [**\*\*\*672**] had agreed to set artificially high prices for their products, and had acted in concert to restrain reimportation of their lower priced foreign drugs into the United States and to restrict price competition from generics. As a result, the complaint alleged, Manufacturers were able to maintain prices for their drugs in California, as elsewhere in the United States, at levels 50 to 400 percent higher than for the same drugs sold outside the United States. Pharmacies alleged they consequently had been [**\*\*1071**] forced to pay an overcharge, the differential between the conspiracy-inflated prices set by Manufacturers and the prices Pharmacies would have paid in a competitive market. They sought [**\*\*\*\*10**] treble damages, restitution, and injunctive relief.

Each Manufacturer answered, denying Pharmacies' allegations and asserting as an affirmative defense that Pharmacies' claims were barred on the ground Pharmacies passed on any alleged overcharge to third parties and therefore did not suffer a compensable injury.

Pharmacies filed a motion for summary adjudication of Manufacturers' pass-on defense, arguing that the defense was unavailable under the Cartwright Act in light of [Hanover Shoe, supra, 392 U.S. 481](#), the subsequent legislative history of the Cartwright Act, and public policy. Manufacturers responded with a cross-motion for summary judgment, arguing that under the plain language of the Cartwright Act, a pass-on defense was available and defeated both the Cartwright Act and UCL claims.<sup>4</sup>

Evidence presented in connection with the cross-motions established the following essentially undisputed facts. Manufacturers sell their drugs to wholesalers at a price referred to as the wholesale acquisition cost. In turn, various independent entities use the wholesale acquisition [**\*\*\*\*11**] cost to calculate and publish benchmark drug prices, termed the average wholesale price, for use in the industry. Wholesalers resell the drugs to Pharmacies at prices based on a percentage of the average wholesale price. Because the published average wholesale price is a fixed percentage above the price charged by Manufacturers to wholesalers, any price increases by Manufacturers will increase the average wholesale price proportionally. As a result, when Manufacturers increase their prices, the costs of drugs to Pharmacies increase by the same percentage amount.

In turn, Pharmacies sell the drugs to two groups of consumers: (1) those with third party insurance or a drug benefit plan offered by either a private entity or the government, which in turn pays customers' claims on their behalf, and (2) uninsured (or cash-paying) consumers. For the first group, [**\*766**] those covered by third party payers, Pharmacies are reimbursed at a contractually or statutorily fixed amount, predetermined as a percentage of the average wholesale price, plus a dispensing fee; this reimbursement is greater than Pharmacies' acquisition costs. For the second group, the cash-paying consumers, Pharmacies establish the [**\*\*\*\*12**] retail prices unilaterally. Though not required to be, these prices traditionally have been based on a set percentage of the average wholesale price as well, plus in some instances an additional dispensing fee.

Currently, consumers covered by third party payers comprise the bulk of Pharmacies' customers. It appears the percentage of cash-paying consumers has declined over time, with the consequence that the degree of price-setting discretion Pharmacies have has fallen as well.

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Pharmaceutical, Inc.; Ortho Biotech, Inc.; GlaxoSmithKline PLC; Pfizer, Inc.; Hoffmann-La Roche Inc.; Aventis Pharmaceuticals, Inc.; Amgen, Inc.; Merck & Co., Inc.; Bristol-Myers Squibb Company; Wyeth; Johnson & Johnson Health Care Systems Inc., which apparently does not manufacture, market, or distribute [**\*\*\*\*9**] pharmaceutical products; and Pharmaceutical Research and Manufacturers of America, a United States-based nonprofit trade association.

<sup>4</sup>This motion assumed arguendo that Manufacturers had engaged in price fixing. For purposes of this appeal, we do likewise.

[\*\*\*673] In light of this evidence, the trial court granted Manufacturers' summary judgment cross-motion and denied as moot Pharmacies' summary adjudication motion. It held a pass-on defense was available under the Cartwright Act: A defendant could reduce or eliminate its liability upon proof that the plaintiff had passed on the alleged price overcharge and thereby limited its damages or suffered no injury. The trial court interpreted the evidence before it as showing that Pharmacies had passed on all of Manufacturers' overcharges to consumers and had thus sustained no damages under the Cartwright Act. The pass-on defense similarly defeated Pharmacies' UCL claim; the trial court concluded Pharmacies lacked standing to pursue [\*\*\*13] the claim because, having recouped the overcharge, they had not "lost money or property," as required under [section 17204](#).

The Court of Appeal affirmed. It rejected the argument that the Legislature had approved application to the Cartwright Act of [Hanover Shoe, supra, 392 U.S. 481](#), and its bar against pass-on defenses. [\*\*1072] Relying instead on its reading of the plain meaning of the Cartwright Act's damages provision ([§ 16750, subd. \(a\)](#)), the Court of Appeal concluded a pass-on defense was available and was fatal to Pharmacies' claims because they could show no "damages sustained" (*ibid.*). It likewise rejected Pharmacies' UCL claims on the grounds that Pharmacies were not entitled to restitution and lacked standing to challenge Manufacturers' alleged unfair business practices.

We granted review to address a significant issue of first impression: whether under the Cartwright Act an antitrust defendant can defeat liability by asserting a pass-on defense. (See [Global Minerals & Metals Corp. v. Superior Court \(2003\) 113 Cal.App.4th 836, 852, fn. 10 \[7 Cal. Rptr. 3d 28\]](#) ["[T]his issue of the availability of a 'pass-on defense' in **antitrust law** still remains an open question in California . . . ."]; [J. P. Morgan & Co., Inc. v. Superior Court \(2003\) 113 Cal.App.4th 195, 213, fn. 10 \[6 Cal. Rptr. 3d 214\]](#) [\*\*\*14] [\*767] [same]; [B.W.I. Custom Kitchen v. Owens-Illinois, Inc. \(1987\) 191 Cal. App. 3d 1341, 1353 \[235 Cal. Rptr. 228\]](#) [same].)

## DISCUSSION

### I. Hanover Shoe and Its Antecedents

In [Hanover Shoe, supra, 392 U.S. 481](#), the United States Supreme Court considered whether the pass-on defense should be available to defendants found to have charged excess prices under federal **antitrust law**. The United States had obtained a judgment against United Shoe Machinery Corporation (United Shoe) under section 4 of the Sherman Act ([15 U.S.C. § 4](#)) for monopolizing the market for shoe manufacturing machinery. Relying on this judgment, shoe manufacturer Hanover Shoe, Inc. (Hanover Shoe), sought to recover the "damages by him sustained" under [section 4](#) of the Clayton Act ([15 U.S.C. § 15](#)); United Shoe argued in response that Hanover Shoe had likely incorporated any overcharge it paid United Shoe into the prices it charged its customers for shoes, and accordingly had sustained no damage.

In a seven-to-one decision authored by Justice White, the United States Supreme Court rejected United Shoe's assertion of a pass-on defense.<sup>5</sup> It held that "when a buyer shows that the price paid by him for [\*\*\*674] materials purchased for use in his business is illegally [\*\*\*15] high and also shows the amount of the overcharge, he has made out a *prima facie* case of injury and damage within the meaning of [§ 4](#) of the Clayton Act ([15 U.S.C. § 15](#)). ([Hanover Shoe, supra, 392 U.S. at p. 489](#).)

Explaining this conclusion, the Supreme Court pointed out that however a buyer responds to illegal overcharges, he inevitably will be damaged. First, if the buyer does nothing and absorbs the loss, he suffers lost profits because, while revenue is static, his costs have been increased by the amount of the overcharge. ([Hanover Shoe, supra, 392 U.S. at p. 489](#).) Second, "if the buyer, responding to the illegal price, maintains his own price but takes steps to increase his volume or to decrease other costs, his right to damages is not destroyed. Though he may manage to

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<sup>5</sup> Justice Stewart dissented on the threshold question whether United Shoe had been shown to violate the antitrust laws and accordingly did not reach the issue of how to determine damages. (See [Hanover Shoe, supra, 392 U.S. at p. 513](#) (dis. opn. of Stewart, J.).) The seven members of the Supreme Court to consider the pass-on defense thus were unanimous in rejecting it.

maintain his profit level, he would have made [\*\*\*\*16] more if his purchases from the defendant had cost him less." (*Ibid.*) Third, "the buyer is equally entitled to damages if he raises the price for his own product." (*Ibid.*) In this last scenario, to the extent the higher price costs the buyer sales, he is injured by his loss of sales; to the extent it does not cost [\*768] him sales, because demand for his product is inelastic, his marginal profit would have been higher had his costs, illegally enhanced, been lower. In sum: "As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows. At whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower." (*Ibid.*)

[\*\*1073] The Supreme Court offered two additional reasons why acceptance of the pass-on defense would be problematic. First, it would require a fact finder to decide a host of imponderables: whether in the absence of the illegal overcharge the plaintiff would have priced his product differently, what impact such a different price would have had on total sales "in the real economic world rather than an economist's hypothetical model" (*Hanover Shoe, supra, 392 U.S. at p. 493*), [\*\*\*\*17] and whether the price change might have been pursued anyway even in the absence of the initial overcharge. "Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable." (*Ibid.*) Proof of such factors would depend on massive and complex showings and rebuttals, potentially sidetracking every antitrust trial in a host of issues collateral to the central claim—whether the defendant had engaged in illegal anticompetitive conduct. (*Ibid.*)

Second, broad acceptance of the defense would create a risk that no one would be left with a sufficiently significant injury to be motivated to seek relief; individual end consumers, each harmed to the tune of a few pennies or dollars only, might have insufficient motivation even to pursue a class action. Consequently, "those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them" (*Hanover Shoe, supra, 392 U.S. at p. 494*), and enforcement of the antitrust laws would be compromised.

*Hanover Shoe*'s view of how [\*\*\*\*18] properly to measure damages was not novel; as Justice White pointed out, a long line of Holmes and Brandeis opinions had adopted the same understanding. (See *Hanover Shoe, supra, 392 U.S. at pp. 489–490*.) Writing for the court in *Chattanooga Foundry v. Atlanta* (1906) 203 U.S. 390 [51 L. Ed. 241, 27 S. Ct. 65], Justice Holmes explained why a pass-on defense was inconsistent with the law's [\*\*\*675] general take on damages: "A man is injured in his property when his property is diminished. ... [W]hen a man is made poorer by an extravagant bill we do not regard his wealth as a unity, or the tort, if there is one, as directed against that unity as an object. We do not go behind the person of the sufferer. We say that he has been defrauded or subjected to duress, or whatever it may be, and stop there." (*Id. at p. 399*.) Several years later, he explained again why a pass-on defense [\*769] should not stand as a bar to allegations of excessive rate charges under federal transportation law: "The only question before us is ... whether the fact that the plaintiffs were able to pass on the damage ... prevents their recovering the overpayment ... . The answer is not difficult. The general tendency of the law, in regard to damages at [\*\*\*\*19] least, is not to go beyond the first step. ... The plaintiffs suffered losses ... when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events." (*Southern Pac. Co. v. Darnell-Taenzer Co.* (1918) 245 U.S. 531, 533–534 [62 L. Ed. 451, 38 S. Ct. 186].) To similar effect in rejecting a pass-on defense in the context of an illegal overcharge by railroad yards, Justice Brandeis wrote for the court: "Neither the fact of subsequent reimbursement ... , nor the disposition which may hereafter be made of the damages recovered, is of any concern to the wrongdoers." (*Adams v. Mills* (1932) 286 U.S. 397, 407 [76 L. Ed. 1184, 52 S. Ct. 589].) To allow a pass-on defense would undermine the enforcement of the statutory scheme (there, the Interstate Commerce Act (49 U.S.C. former § 8)): "[T]he purpose of that section would be defeated if the tortfeasors were permitted to escape reparation by a plea that the ultimate incidence of the injury was not upon those who were compelled in the first instance to pay the unlawful charge." (*Adams v. Mills, at p. 408*.)

This rejection of using overcharge pass-ons as a defense occurs not because the law is blind to their existence, but rather because its eyes are open to their [\*\*\*\*20] ubiquity. Justice Holmes, again: The disregard of pass-ons is in part a recognition of "the endlessness and futility of the effort to follow every transaction to its ultimate result. [Citation.] Probably in the end the public pays the damages [\*\*1074] in most cases of compensated torts." (*Southern Pac. Co. v. Darnell-Taenzer Co., supra, 245 U.S. at p. 534*.) The *Hanover Shoe* court certainly

acknowledged that a buyer faced with an overcharge might seek to pass on that overcharge. (*Hanover Shoe, supra, 392 U.S. at pp. 489, 493*.) What the court also recognized, however, was how much deeper down the rabbit hole one could go. Price fixing has primary consequences: the overcharge to direct purchasers. It may have secondary consequences: the pass-on to indirect purchasers. It may have tertiary consequences: the price increase may result in lost sales or profits, or lost market share for a buyer forced to compete with sellers not subject to the overcharge. (*Id. at pp. 489–493*.)<sup>6</sup> To trace every consequence of a monopoly or a price-fixing conspiracy is to encounter Holmes's "futility of the effort to follow every transaction to its ultimate result." (*Southern Pac. Co., at p. 534*.) *Hanover Shoe* recognized [\*\*\*\*21] fully the difficulties inherent in tracing an antitrust violation to its ultimate [\*770] consequences. (See *Hanover Shoe, at p. 493*.) The rule it [\*\*\*676] adopted, which accounts only for the primary consequence (the overcharge), recognizes that to stop after consideration of primary and secondary consequences (the overcharge and any pass-on) would fail to properly account for a host of tertiary consequences and thus underestimate the impact of the overcharge, but that attempting to actually account for those tertiary consequences would often be both impractical, given the difficulties of proving "in the real economic world" (*ibid.*) the ultimate impacts of a price change, and a severe impairment to deterrence (*id. at p. 494*).

With this background, we turn to the issue in this case. Does the rule of *Hanover Shoe*, that a defensive pass-on theory may not be used to defeat an antitrust damages [\*\*\*\*22] claim, apply under the Cartwright Act?

## II. The Cartwright Act and the Pass-on Defense

### A. The Cartwright Act's Text and Early History

**HN1**[] **CA(1)**[] (1) We begin with the language of the statute. If the text is sufficiently clear to offer conclusive evidence of the statute's meaning, we need look no further. (*Microsoft Corp. v. Franchise Tax Bd. (2006) 39 Cal.4th 750, 758 [47 Cal. Rptr. 3d 216, 139 P.3d 1169]*.) If it is susceptible of multiple interpretations, however, we will divine the statute's meaning by turning to a variety of extrinsic sources, including the legislative history (e.g., *Lexin v. Superior Court (2010) 47 Cal.4th 1050, 1080–1081 [103 Cal. Rptr. 3d 767, 222 P.3d 214]*), the nature of the overall statutory scheme (e.g., *Tonya M. v. Superior Court (2007) 42 Cal.4th 836, 844–845 [69 Cal. Rptr. 3d 96, 172 P.3d 402]*), and consideration of the sorts of problems the Legislature was attempting to solve when it enacted the statute (e.g., *Burris v. Superior Court (2005) 34 Cal.4th 1012, 1018 [22 Cal. Rptr. 3d 876, 103 P.3d 276]*).

**HN2**[] **CA(2)**[] (2) *Section 16750, subdivision (a)* authorizes anyone "injured in his or her business or property" by actions forbidden under the Cartwright Act (*§ 16700 et seq.*) to recover three times the "damages sustained." Aside from an increase in the multiplier, to treble damages from the original double damages, this language has been [\*\*\*\*23] carried forward essentially without change from the original version of the act.<sup>7</sup>

[\*771]

We reject at the outset Manufacturers' contention that the choice of the words "damages sustained" (*§ 16750, subd. (a)*) or "damages by him sustained" (Stats. 1907, ch. 530, § 11, p. 987) establishes a particular legislative intent on the question whether a [\*1075] pass-on defense should be available. The express text says only that a party must have been "injured" by a Cartwright Act violation and may recover the resulting "damages sustained"; it says nothing about how the injury or damages are to be quantified. In the antitrust context, one might measure the damages from a violation any number of ways: e.g., the excess amount a party paid the [\*\*\*\*24] violator (the overcharge) (see *Hanover Shoe, supra, 392 U.S. at pp. 487–490*); the sales a party lost as a result of the overcharge (lost sales) (see *Hanover Shoe, at p. 493; Kansas v. UtiliCorp United Inc. (1990) 497 U.S. 199, 224 [111 L. Ed. 2d 169, 110 S. Ct. 2807]* (dis. opn. of White, J.); *B.W.I. Custom Kitchen* [\*\*\*677] *v. Owens-Illinois, Inc.*

<sup>6</sup> One can imagine still more remote consequences as well, such as changes in the value of a business as a going concern, or changes in buying patterns by consumers who substitute purchases of other products, with consequent positive and negative effects on the various distributors in the market. And so on, and so on.

<sup>7</sup> As originally enacted, the Cartwright Act's private damages provision read: "In addition to the criminal and civil penalties herein provided, any person who shall be injured in his business 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 ... to recover twofold the damages by him sustained, and the costs of suit." (Stats. 1907, ch. 530, § 11, p. 987.)

supra, 191 Cal. App. 3d at p. 1353); the lost profit opportunity a party suffered due to increased costs (lost profits) (see Hanover Shoe, at p. 493 & fn. 9); or the impact on the value of a business as a going concern due to lost market share (see B.W.I. Custom Kitchen, at p. 1353). Put another way, one could in theory measure injury by considering only the primary consequences of a price conspiracy (the overcharge), as *Hanover Shoe* did; by considering only the primary and secondary consequences (the overcharge and pass-on), as Manufacturers argue; or by considering the primary, secondary, and tertiary consequences (as, for instance, B.W.I. Custom Kitchen, at p. 1353, theorized one might have to). The words of the statute themselves dictate no particular choice among these options, nor any particular conclusion as to whether a pass-on defense should be available.

That the text of the [\*\*\*\*25] Cartwright Act is ambiguous on this point is further illustrated by the fact the United States Supreme Court, interpreting the essentially identical language of the federal Clayton Act (15 U.S.C. § 12 et seq.), reached a conclusion diametrically opposite to that of the Court of Appeal in this case. Construing the Clayton Act's damages provision ("damages by him sustained"),<sup>8</sup> the Supreme Court concluded defensive use of a pass-on theory was prohibited (Hanover Shoe, *supra*, 392 U.S. at pp. 489–494); construing the Cartwright Act's damages provision ("damages sustained"),<sup>9</sup> the Court of Appeal here concluded such use of a pass-on theory was permitted, indeed compelled. Nor is *Hanover Shoe* an anomaly; addressing a federal damages provision mirroring that of the Cartwright Act, the Supreme Court in Adams v. Mills, *supra*, 286 U.S. at pages 406–408, likewise rejected the defendants' pass-on theory.<sup>10</sup> This divergence illustrates not that [\*772] either conclusion must be wrong, only that reasonable jurists may—from a text as opaque as "damages sustained"—arrive at widely differing conclusions, and that that text is thus susceptible of being read as supporting more than one rule for measuring damages. [\*\*\*\*26]<sup>11</sup> The question we face is how to measure "damages sustained," and nothing in the Cartwright Act's language, [\*\*1076] as enacted in 1907 or thereafter amended, resolves that question. Insofar as the text of the Cartwright [\*\*\*678] Act is concerned, the question is an open one.

We reject as well a second interpretive argument pressed by Manufacturers and adopted by the Court of Appeal: that at the beginning of the 20th century there was an existing, generally understood meaning for "damages by him sustained," and we therefore should presume the Legislature intended that meaning when it used the phrase in the Cartwright Act.

The general principle that we should assume the Legislature uses words in accordance with their commonly understood meaning is sound. In State of California ex rel. Van de Kamp v. Texaco, Inc. (1988) 46 Cal.3d 1147 [252 Cal. Rptr. 221, 762 P.2d 385], for example, we interpreted ambiguous [\*\*\*\*28] provisions of the Cartwright Act by considering whether extant law established an accepted meaning for the chosen terms. Because our research disclosed an accepted understanding that a prohibition against a "combination" did not extend to mergers, we

<sup>8</sup> Title 15 United States Code section 15(a).

<sup>9</sup> Section 16750, subdivision (a).

<sup>10</sup> At issue was a claim under section 8 of the Interstate Commerce Act (49 U.S.C. former § 8), which created liability for "the full amount of damages sustained" because of overcharges and other violations.

<sup>11</sup> Manufacturers argue that Hanover Shoe, *supra*, 392 U.S. 481, is not evidence of textual ambiguity because it was not a statutory interpretation case. We disagree. The United States Supreme Court itself has indicated *Hanover Shoe* resolved "a question of statutory interpretation," namely, the "proper construction of § 4 of the Clayton Act [15 U.S.C. § 15]." (California v. ARC America Corp. (1989) 490 U.S. 93, 103 [104 L. Ed. 2d 86, 109 S. Ct. 1661]) More fundamentally, while it is true *Hanover Shoe* did not discuss how best to interpret the phrase "damages by him sustained," that omission implicitly acknowledges that an exegesis of those few words would have yielded no answers. Tasked [\*\*\*\*27] with interpreting a statute, courts resort to all manner of tools to divine intent. Where in one case the text or legislative history may produce a clear answer, in another it may lead only to a dead end. Courts do not often catalogue every blind alley; that *Hanover Shoe* did not address the statutory text's opacity is of no significance. That the Supreme Court relied on nontextual tools to construe the Clayton Act is significant; it demonstrates the court's conclusion that the text itself was not restrictive enough to specify a unique measure of damages—that it was, in short, ambiguous.

concluded the Legislature surely knew of and adopted that understanding when it passed the Cartwright Act. ([State of California ex rel. Van de Kamp v. Texaco, Inc., at pp. 1160–1163](#).)

That principle has no similar application here. We can discern no contemporaneous consensus with respect to the phrase “damages by him sustained.” The Cartwright Act was passed in 1907 as part of a wave of turn-of-the-century state and federal legislation intended to stem the power of monopolies and cartels. (Landry & Hornbeck, *One Hundred Years in the Making: The Cartwright Act in Broad Outline* (2008) 17, No. 2, J. Antitrust and Unfair Competition Section of State Bar 7, 7–8; [State of California ex rel. Van de Kamp v. Texaco, Inc., supra, 46 Cal.3d at pp. 1154–1156](#); see generally Limbaugh, *Historic Origins of Anti-trust Legislation* (1953) 18 Mo. L.Rev. 215.) It was based in part on other recently enacted state laws aimed at the same problems. ([State of California ex rel. Van de Kamp v. Texaco, Inc., at pp. 1160–1162](#) [\*\*\*\*29] & fn. 14; Hibner & Cooper, *The Cartwright Act at 100—A History of Complementary Antitrust Enforcement—A Celebration* (2008) 17, No. 2, J. Antitrust and Unfair Competition Section of State Bar 81, 91–92.) The phrase “damages sustained” or “damages by him sustained” was routinely employed in the remedial provisions of the antitrust statutes of the time.<sup>12</sup> However, our review of out-of-state and federal decisions in the years preceding the Cartwright Act’s 1907 adoption discloses nothing (never mind a consensus) speaking to how the “damages by him sustained” should be measured or allocated between direct and indirect purchasers who seek to sue for antitrust loss.

Certainly the California cases relied on by Manufacturers and the Court of Appeal do not establish any consensus as to how damages were to be measured. In [De Costa v. Mass. Mining Co. \(1861\)](#) 17 Cal. 613, 617, a nuisance case, we explained that the damages for creating an unwanted ditch on another’s property were confined to the injury sustained, the diminution in the value of the property in its [\*\*\*679] present condition, rather than the full cost of remediation (filling in the ditch). In [Utter v. Chapman \(1869\)](#) 38 Cal. 659, 664–666, a breach of contract case, we explained that the plaintiff steamship operator could not automatically recover the full contract price for shipping grain the defendant failed to provide. The plaintiff had a duty to mitigate by finding substitute employment for his steamer, such as transporting grain for other parties, and, to the extent he was able to do so, his damages were thereby diminished. In [Hicks \[\\*\\*1077\] v. Drew \(1897\)](#) 117 Cal. 305, 314–315 [49 P. 189], a tort action for injury to real property, we indicated damages should be measured based [\*\*\*31] on the net impact of the defendant’s actions, offsetting any benefit to the plaintiff against any loss.

These contract and tort cases are unhelpful on the question of how to measure the “damages sustained” in an antitrust case. They express in a variety of contexts the truism that damages are to compensate for actual loss, but this, again, begs the question before us: *how to measure actual loss in the context of an intermediary-purchaser antitrust action for price fixing.*

[\*774]

Notably as well, in 1907 an antitrust claim for civil money damages was a wholly new kind of claim, part of the “dramatically enhanced sanctions imposed by the [Cartwright] Act.” ([State of California ex rel. Van de Kamp v. Texaco, Inc., supra, 46 Cal.3d at p. 1167](#).) At common law, no such private claim existed; remedies for illegal agreements and restraints on trade were confined to proceedings to hold the agreements void and unenforceable and to revoke corporate privileges. (*Ibid.*) Thus, no reason exists to assume the Legislature intended to incorporate

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<sup>12</sup> E.g., [Sherman Antitrust Act of 1890](#) (Act of July 2, 1890, ch. 647, § 7, 26 Stat. 209, 210) (“damages by him sustained”); 1899 Michigan Public Acts, No. 255, section 11, page 412 (“damages by him sustained”); 1907 Missouri Laws, page 380 (Mo. Rev. Stat., former § 8972) (“damages by him sustained”); 1905 Nebraska Laws, chapter 162, section 18, page 644 (“damages by him sustained”); [1898 Ohio Laws, section 11](#), page 146 (former Ohio Gen. Code, § 6397) (“damages by him sustained”); 1893 Oklahoma Revised Statutes, chapter 83, [\*\*\*\*30] section 4, page 1163 (“damages sustained”); 1898 Utah Revised Statutes, title 54, section 1761, page 424 (“damages sustained”).

any particular existing method of measuring damages derived from statutory or common law precedent, including the common law contract and tort damage measures on which [\*\*\*\*32] Manufacturers rely.<sup>13</sup>

More generally, we consider it implausible that the Legislature had any specific intent on the question we face. Certainly nothing in what minimal legislative history has survived from the Cartwright Act's 1907 enactment sheds any direct light on the question. The economic theories that underlie an antitrust claim are sufficiently complex that we may safely surmise the fine points of whether enforcement by direct and indirect purchasers should be permitted or preferred, and what precise proof of passed-on costs, lost sales, and lost profits should become the grist of an antitrust trial, were not at the forefront of the Legislature's mind when enacting what was then a pioneering law. Certainly by its choice of the generic phrases "damages by him sustained" and "injured in his business or property," [\*\*\*\*33] the Legislature did not presume to resolve these complex questions.

Two early Court of Appeal Cartwright Act cases relied on by Manufacturers do not lead us to a different conclusion. *Krigbaum v. Sbarbaro* (1913) 23 Cal.App. 427 [138 P. 364] is a case about antitrust causation, i.e., the notion that to have an antitrust claim one must establish a causal nexus between one's injury and the alleged unlawful restraint of trade. (See *Associated General Contractors v. Carpenters* (1983) 459 U.S. 519, 540–542 [74 L. Ed. 2d 723, 103 S. Ct. 897]; *Vinci v. Waste Management, Inc.* (1995) 36 Cal.App.4th 1811, 1814 [43 Cal. Rptr. 2d 337].) In *Krigbaum*, the plaintiff alleged the defendants had [\*\*\*680] conspired to monopolize the market for vineyard-quality land, but his injury arose not from any restraints on trade accomplished by the alleged trust; rather, it arose from specific actions the defendants took to interfere with a particular real estate transaction he had brokered. (*Krigbaum*, [\*775] at pp. 433–434.) Because the plaintiff had not alleged causation, a demurrer to his Cartwright Act claim was properly sustained. (*Ibid.*) *Krigbaum* has nothing to say on the general topic that concerns us: when (as here) causation has [\*\*\*\*34] been properly alleged, how are antitrust damages to be measured?

Equally unilluminating is *Overland P. Co. v. Union L. Co.* (1922) 57 Cal.App. 366 [207 P. 412], another antitrust causation case. The plaintiff, a printing and publishing company, alleged the defendant printing trade association had agreed to limit bidding for certain printing jobs, thereby driving up prices. As the Court of Appeal there correctly explained, nothing about this arrangement caused the plaintiff injury; instead, the decision of the plaintiff's competitors not to bid for work reduced the competition for the plaintiff and likely benefited it. (*Id.* at pp. 374–375.) Here, in contrast, Pharmacies are not Manufacturers' competitors but their indirect customers, and they [\*\*1078] have properly alleged that Manufacturers' price-fixing conspiracy caused them injury in the form of higher prices. As with *Krigbaum v. Sbarbaro*, *supra*, 23 Cal.App. 427, nothing in the *Overland P.* court's discussion speaks to how we should measure the damages of those plaintiffs who have alleged causation.

**HN3** [↑] **CA(3)** [↑] (3) In the absence of textual guidance, we must turn elsewhere. We thus look to the Legislature's subsequent amendments to related parts of the Cartwright Act, and [\*\*\*\*35] we consider as well "the object which [the Cartwright Act] seeks to achieve and the evil which it seeks to prevent . . ." (*Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 658, 669 [150 Cal. Rptr. 250, 586 P.2d 564]; see also *Burris v. Superior Court*, *supra*, 34 Cal.4th at p. 1018 ["we must consider the human problems the Legislature sought to address in adopting [the statute]"].)

Consideration of these sources leads us to conclude the federal *Hanover Shoe* rule (*Hanover Shoe*, *supra*, 392 U.S. at p. 494) is most consistent with legislative intent and applies equally to state claims under the Cartwright Act. Every indication available from the Legislature demonstrates that, given a choice, it would prefer an enforcement regime in which *Hanover Shoe* is the law. In particular, the Legislature's actions at two closely related points in time are telling: (1) in 1977, following Congress's passage of the Hart-Scott-Rodino amendments to the federal Clayton Act (15 U.S.C. § 12 et seq.); and (2) in 1978, in the immediate aftermath of the United States Supreme Court's decision in *Illinois Brick*, *supra*, 431 U.S. 720.

[\*776]

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<sup>13</sup> Nor do generic contract and tort damage cases address the significant antitrust-only policy concerns that have motivated the United States Supreme Court in its reading of the Sherman and Clayton Acts (15 U.S.C. § 1 et seq.; *id.*, § 12 et seq.) and that must influence our reading of the Cartwright Act.

## B. The Cartwright Act's Amendment History

### 1. Cartwright Act amendment in response to federal legislation [\*\*\*\*36]

#### a. The Hart-Scott-Rodino Act

Congress amended the Clayton Act ([15 U.S.C. § 12 et seq.](#)) by passing the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the Hart-Scott-Rodino Act). The Hart-Scott-Rodino Act authorized state attorneys general to file *parens patriae* suits<sup>14</sup> on behalf of injured [\[\\*\\*681\]](#) consumers for violations of the Sherman Act ([15 U.S.C. § 1 et seq.](#)). ([15 U.S.C. § 15c\(a\)\(1\)](#).) Congress created the remedy out of concern that consumers, the indirect purchasers who typically bear the brunt of antitrust violations in the form of higher prices, had no existing effective redress because the small amounts of their injuries made individual suits impracticable, and consumer class actions had proven a disappointing vehicle for antitrust enforcement. (H.R. Rep. No. 94-499, 2d Sess. (1976), reprinted in 1976 U.S. Code Cong. & Admin. News, pp. 2573–2577.) The Hart-Scott-Rodino Act was designed to fill the remedial gap that “sometimes result[ed] in the unjust enrichment of antitrust violators and undermine[d] the deterrent effect of the treble damage action.” (*Id.* at pp. 2573–2574.) The remedial provisions of the Hart-Scott-Rodino Act focused on achieving full disgorgement of all illegal [\[\\*\\*\\*37\]](#) antitrust profits, using fluid recovery and the *cy près* doctrine if necessary, because “[t]he only alternative—retention of the profits by the adjudicated wrongdoer—is unconscionable and unacceptable.” (*Id.* at pp. 2585–2586; see also *id.* at p. 2585 “[T]he premise of § 4D [codified at [15 U.S.C. § 15d](#)] is that defendants should be made to disgorge all measurable profits from an antitrust violation . . . ”.)

Notably, the Hart-Scott-Rodino Act originally contained no language to address the possibility that indirect purchasers might recover damages (through their respective attorneys general) when in some instances those same damages might already have been recovered by direct purchasers under the *Hanover Shoe* rule prohibiting a pass-on defense (see [Hanover Shoe, supra, 392 U.S. at p. 494](#)). [\[\\*\\*\\*38\]](#) The problem of [\[\\*\\*1079\]](#) potential double recovery under *Hanover Shoe* was solved by a Senate amendment excluding from *parens patriae* damage awards any amount that “Duplicates amounts which have been awarded for the same injury.” ([15 U.S.C. § 15c\(a\)\(1\)](#); see Sen. Rep. [\[\\*777\]](#) No. 94-803, 2d Sess., p. 44 (1976).) As the Senate Report accompanying the amendment explained, the proviso was inserted to “assure that defendants are not subjected to duplicative liability, particularly in a chain-of-distribution situation where it is claimed that middlemen absorbed all or part of the illegal overcharge,” and to thereby eliminate any perceived tension between authorizing indirect purchaser suits and following *Hanover Shoe*. (Sen. Rep. No. 94-803, *supra*, at p. 44.)<sup>15</sup> Specifically, the amendment was intended to codify [In re Western Liquid Asphalt Cases \(9th Cir. 1973\) 487 F.2d 191](#), a case that relied on the sufficiency of consolidation, interpleader, compulsory joinder, and the like, rather than a bar on indirect purchaser suits, to eliminate double recovery problems. (*Id. at p. 201*.) “Where the choice is between a windfall to intermediaries or letting guilty defendants go free, liability is imposed.” (Sen. Rep. No. [\[\\*\\*\\*39\]](#) 94-803, *supra*, at p. 44, citing [Hanover Shoe, supra, 392 U.S. at p. 494](#).)

[\[\\*\\*\\*682\]](#) The Hart-Scott-Rodino Act was thus of a piece with *Hanover Shoe*. First, consistent with the policies spelled out by the United States Supreme Court, it reflected Congress’s belief that it was better to overdeter antitrust violations than to underdeter them, as well as Congress’s desire to create a remedial framework that maximized the likelihood violators would be required to fully disgorge price-fixing profits. (See H.R. Rep. No. 94-499,

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<sup>14</sup> “ ‘*Parens patriae*,’ literally ‘parent of the country,’ refers traditionally to [the] role of [the] state as sovereign and guardian of persons under legal disability [¶] . . . [¶] State attorney generals [*sic*] have *parens patriae* authority to bring actions on behalf of state residents for anti-trust offenses and to recover on their behalf.’ ” ([Pacific Gas & Electric Co. v. County of Stanislaus \(1997\) 16 Cal.4th 1143, 1148, fn. 6 \[69 Cal. Rptr. 2d 329, 947 P.2d 291\]](#).)

<sup>15</sup> Bill author Representative Peter Rodino made the same point, explaining on the House floor that the Hart-Scott-Rodino Act had been specifically tailored, through Senate amendments to the bill that became new section 4C(a)(1) of the Clayton Act ([15 U.S.C. § 15c\(a\)\(1\)](#)), to allow the *Hanover Shoe* no pass-on defense rule to coexist hand in hand with the bill’s new *parens patriae* suits on behalf of indirect purchasers. (Remarks of Rep. Rodino, Debate on H.R. No. 8532, 94th Cong., 2d Sess., 122 Cong. Rec. H30878–H30879 (daily ed. Sept. 16, 1976).)

*supra*, reprinted in 1976 U.S. Code Cong. & Admin. News, pp. 2573–2586.) Second, the Hart-Scott-Rodino Act expressly contemplated that antitrust [\*\*\*\*40] violators might be sued by both direct and indirect purchasers, and that rather than limiting direct purchaser recoveries—by repudiating *Hanover Shoe*—or limiting indirect purchaser suits, the problem of duplicative recoveries could be addressed by allowing damages already paid to be offset against subsequent damages claims. (See [15 U.S.C. § 15c\(a\)\(1\)](#).)

b. *The legislative response to the Hart-Scott-Rodino Act*

The Legislature moved quickly to incorporate the remedial framework of the Hart-Scott-Rodino Act into the Cartwright Act, enacting a statute that precisely tracked the federal act and authorized the Attorney General to sue for Cartwright Act violations on behalf of consumers. ([§ 16760](#), added by [\[\\*778\]](#) Stats. 1977, ch. 543, § 1, p. 1747.)<sup>16</sup> Notably for our purposes, the Legislature adopted as well the Hart-Scott-Rodino Act's damages provision. (Compare [§ 16760, subd. \(a\)\(1\)](#) [any award must exclude damages “which duplicate”] amounts which have been awarded for the same injury] with [15 U.S.C. § 15c\(a\)\(1\)](#) [same].) As we have discussed, that provision was specifically designed to account for duplicative damage awards resulting from allowing indirect purchasers to recover damages when, under [\[\\*\\*\\*\\*41\]](#) the *Hanover Shoe* no pass-on defense rule ([Hanover Shoe, supra, 392 U.S. at p. 494](#)), direct purchasers might already have been [\[\\*\\*1080\]](#) awarded those same damages. [Section 16760, subdivision \(a\)\(1\)](#), in parallel with the corresponding provision in the Hart-Scott-Rodino Act, thus took as its premise that under the Cartwright Act direct purchasers could themselves recover overcharges that might in theory have been passed on to indirect purchasers, that is, the *Hanover Shoe* rule. Evidently, then, the Legislature presumed that such a rule would apply to the Cartwright Act as well.

**CA(4)[↑]** (4) Two additional factors suggest the Legislature took as a given the application of *Hanover Shoe*'s no pass-on defense rule to the Cartwright Act. First, [HN4\[↑\]](#) we may presume that when the Legislature borrows a federal statute and enacts it into state law, it has considered and is aware of the legislative history behind that enactment. ([People v. Butler \(1996\) 43 Cal.App.4th 1224, 1244 \[51 Cal. Rptr. 2d 150\]](#); see also [American Civil Liberties Union Foundation v. Deukmejian \(1982\) 32 Cal.3d 440, 447 \[186 Cal. Rptr. 235, 651 P.2d 822\]](#) [the [\[\\*\\*\\*683\]](#) legislative history of a federal statute may be used to interpret a state statute based on it].) Second, Assembly Bill No. 1162's legislative history indicates members of the Legislature were in fact aware of the legislative history behind, and the import of, the various portions of the Hart-Scott-Rodino Act they incorporated into state law. The Assembly Judiciary Committee's materials for Assembly Bill No. 1162 include by way of [\[\\*\\*\\*\\*43\]](#) explanation for the bill and its purpose excerpts from the Hart-Scott-Rodino Act's legislative history, including remarks from Representative Rodino describing at length how the no-duplicative-recovery provision of title [15 United States Code section 15c\(a\)\(1\)](#) was adopted to accommodate the effects of applying the *Hanover Shoe* rule. (See Assem. [\[\\*779\]](#) Com. on Judiciary, Worksheet on Assem. Bill No. 1162 (1977–1978 Reg. Sess.) as introduced Mar. 29, 1977 [attachments excerpting Sept. 16, 1976 remarks of Rep. Rodino].)

Manufacturers argue it would be absurd to conclude the Legislature that passed Assembly Bill No. 1162 (1977–1978 Reg. Sess.), strengthening consumer antitrust protections, also approved the *Hanover Shoe* rule, which might in a hypothetical case impair consumer recoveries. Manufacturers posit a scenario in which an intermediary purchaser (such as Pharmacies here) sues first, recovers the full measure of any overcharge under *Hanover Shoe*, and leaves nothing for the ultimate consumers (because [§ 16760](#)'s duplicative-liability language would exclude the previous recovery from an antitrust defendant's future liability).

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<sup>16</sup> See Assembly Office of Research, third reading analysis of Assembly Bill No. 1162 (1977–1978 Reg. Sess.) as amended May 17, 1977, page 1 (“The bill is modeled directly on federal law”); Senate Committee on Judiciary, Analysis of Assembly Bill No. 1162 (1977–1978 Reg. Sess.) as amended May 17, 1977, page 2 (“This bill would enact into California law essentially the same provisions which were enacted last year by Congress and put into Federal law”). Notably, the text of [section 16760](#) shows the Legislature shared Congress's preference for maximizing deterrence and ensuring full disgorgement of profits generated by antitrust [\[\\*\\*\\*\\*42\]](#) violations: [section 16760](#) expressly authorizes the use of *cy près* and fluid recovery to maximize distribution to those harmed, with any excess to go to the Attorney General as costs or to the state as unclaimed property, rather than reverting to the wrongdoer. ([§ 16760, subd. \(e\)\(1\)–\(3\)](#).)

We have no difficulty reconciling Assembly Bill No. 1162's consumer-protecting [\*\*\*\*44] provisions with tacit approval of the *Hanover Shoe* rule. In the abstract, both rules are intended to achieve the same goal: maximum deterrence and disgorgement. If the *Hanover Shoe* rule enhances enforcement and deters to some degree future antitrust violations, consumers benefit. As for the specific hypothetical, it posits a scenario in which an antitrust suit is filed, a full award is made against the defendants, and the case becomes final, all before the four-year statute of limitations expires and before the Attorney General has any opportunity to file suit. The Legislature could easily have assumed that this would be a rare scenario indeed, and that the short statute of limitations (at least in comparison with the time it takes to resolve an antitrust case), combined with the availability of devices such as joinder, interpleader, and case consolidation, would make such a scenario the exception rather than the rule. (See *Union Carbide Corp. v. Superior Court* (1984) 36 Cal.3d 15, 24 [201 Cal. Rptr. 580, 679 P.2d 14] [noting that where suits are pending at the same time, consolidation can be employed, and the practical likelihood of sequential suits is " 'remote' " because "[t]he extended nature of antitrust actions, [\*\*\*\*45] often involving years of discovery, combines with the short four-year statute of limitations to make it impractical for potential plaintiffs to sit on their rights until after entry of judgment in the earlier suit" ].) <sup>17</sup>

[\*\*1081] In short, the Legislature decided to include in its new *parens patriae* statute a protection against the occasional potential for double recovery that arises when indirect purchasers can sue but direct purchasers are not subject [\*780] to a pass-on [\*\*\*684] defense, a provision created under the specific belief that *Hanover Shoe* would apply. From this, we may infer the Legislature approved application of *Hanover Shoe* to the Cartwright Act.

## 2. Cartwright Act amendment in response to Illinois Brick

### a. The sequel to Hanover Shoe: Illinois Brick

Nine years after *Hanover Shoe, supra, 392 U.S. 481*, [\*\*\*\*46] the United States Supreme Court was pressed to decide whether the bar on defensive use of a pass-on theory (the claim a direct purchaser could not sue because it had passed on any overcharge) should be extended to the offensive use of a pass-on theory (the claim by an indirect purchaser that it, too, had suffered antitrust injury because overcharges had been passed on to it by the direct purchaser and perhaps additional intermediary indirect purchasers). In *Illinois Brick, supra, 431 U.S. 720*, a sharply divided court concluded that just as defendants could not raise a pass-on theory as a defense, so indirect purchasers could not use a pass-on theory to sue for overcharges arising from antitrust violations.

Plaintiff the State of Illinois sued concrete block manufacturers for price fixing in violation of the Sherman Act ([15 U.S.C. § 1 et seq.](#)), alleging that the manufacturers had illegally increased prices and those increases were passed on to masonry contractors, who passed them on to general contractors, who charged more in their bids to build buildings for the State of Illinois and other government entities. (*Illinois Brick, supra, 431 U.S. at pp. 726–727*.) Again writing for the majority, [\*\*\*\*47] Justice White explained that the availability of a pass-on defense should be symmetric. First, allowing offensive but not defensive pass-on claims would create a risk of double recovery in those cases where both direct and indirect purchasers sued, with a defendant paying the entirety of any overcharge to the direct purchaser and some additional amount to the indirect purchaser. (*Id. at pp. 730–731*.) Second, the uncertainties involved in tracing overcharges and the risk of overcomplicating antitrust trials extended equally to offensive pass-on cases as to defensive pass-on cases. (*Id. at pp. 731–732*.) Third, *Hanover Shoe* "rest[ed] on the judgment that the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." (*Illinois Brick, at p. 735*.) Because no exception applied that would have allowed defensive use of a pass-on theory—and because *Hanover Shoe* was still sound law and should not be overruled—Illinois could not use a pass-on theory offensively and, as an indirect purchaser, [\*\*\*\*48] could recover nothing.

[\*781]

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<sup>17</sup> This case is perhaps far more typical. Pharmacies, intermediary purchasers, filed suit in 2004; had any consumers sought recovery of the same amounts Pharmacies seek (i.e., recovery for the years 2000–2004), they would have had to file suit long before now, and their actions could have been consolidated or coordinated without any risk of an award in this case impairing relief in any such hypothetical other case.

The dissenters agreed fully that *Hanover Shoe* was good law, but concluded the same considerations that animated it dictated a rule allowing indirect purchaser suits. (See *Illinois Brick, supra, 431 U.S. at pp. 749–750* (dis. opn. of Brennan, J.).) In *Hanover Shoe*, the court had chosen to run the risk of overcompensating a plaintiff rather than underdeterring antitrust violations and allowing antitrust violators to retain their ill-gotten gains. In an offensive pass-on case, there was no danger that recognizing pass-on charges would allow a defendant to escape liability; rather, allowing a pass-on claim would advance the goal of preventing wrongdoers from escaping punishment. (*Illinois Brick, at pp. 752–753*.) The dissenters asserted that “[t]he attempt to transform a rejection of a defense because it unduly hampers antitrust [\*\*\*685] enforcement into a reason for a complete refusal to entertain the claims of a certain class of plaintiffs seems an ingenious attempt to turn the decision [in *Hanover Shoe*] and its underlying rationale on its head.” (*Id. at pp. 753–754*.) The majority’s [\*\*1082] concerns about double recovery, the dissenters argued, could be addressed fully through [\*\*\*49] procedural devices (joinder, interpleader, and the like) in instances where double recovery was a risk, without resort to the majority’s blanket ban on indirect purchaser suits. (*Id. at pp. 761–764*.)

b. *The legislative response to Illinois Brick*

*Illinois Brick, supra, 431 U.S. 720*, evoked an immediate legislative response. Within months of the decision, Assembly Bill No. 3222 (1977–1978 Reg. Sess.) was introduced to prevent *Illinois Brick* from having any effect on judicial interpretation of the Cartwright Act.<sup>18</sup> This “*Illinois Brick repealer*” bill passed both houses unanimously and wrote into the Cartwright Act a repudiation of *Illinois Brick*’s ban on indirect purchaser suits, allowing suit by any injured person “regardless of whether such injured person dealt directly or indirectly with the defendant.” (*§ 16750, subd. (a)*, added by Stats. 1978, ch. 536, § 1, p. 1693; see *Union Carbide Corp. v. Superior Court, supra, 36 Cal.3d at pp. 19–20* [explaining that *§ 16750* was [\*782] amended to repudiate the *Illinois Brick* bar against indirect purchaser recovery].)<sup>19</sup> Reviewing the legislative history behind this enactment, we find indications the Legislature fully embraced the *Illinois Brick* dissent, [\*\*\*50] including—critically for our purposes—its view that *Hanover Shoe, supra, 392 U.S. 481*, was a sound rule of law.

Passage of the *Illinois Brick* repealer statute was driven by the fear that indirect purchasers might be stripped of their standing to sue under the Cartwright Act because, under the reasoning of the *Illinois Brick* majority, application of the *Hanover Shoe* rule under the Cartwright Act could be interpreted as dictating that outcome. Rejecting that reasoning, the Assembly Judiciary Committee’s summary of Assembly Bill No. 3222 (1977–1978 Reg. Sess.) cited with approval *Illinois Brick*’s “vigorous dissent.” (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 3222 (1977–1978 Reg. Sess.) as introduced Mar. 27, 1978, p. 1.) It spelled out the dissent’s critique of the [\*\*\*686] majority’s bar on indirect purchaser suits and indicated that as the “dissent noted … the implementation problems cited [\*\*\*52] by the majority<sup>20</sup> could be addressed by the application of existing procedural requirements, e.g.,

<sup>18</sup> At the time, federal antitrust cases were treated as “applicable” (*Chicago Title Ins. Co. v. Great Western Financial Corp. (1968) 69 Cal.2d 305, 315 [70 Cal. Rptr. 849, 444 P.2d 481]*) and “authoritative” (*Shasta Douglas Oil Co. v. Work (1963) 212 Cal. App. 2d 618, 625 [28 Cal. Rptr. 190]*) on Cartwright Act questions. Consequently, the Legislature feared *Illinois Brick*’s rule would be applied equally to the Cartwright Act. (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 3222 (1977–1978 Reg. Sess.) as introduced Mar. 27, 1978, p. 1 [bill introduced to “prevent a federal case interpretation of the Sherman Act precluding an indirect purchaser’s standing to sue in antitrust actions [i.e., *Illinois Brick*] being applied to actions under the Cartwright Act”]; *id.* at p. 2 [explaining the bill was needed because federal antitrust decisions like *Illinois Brick* were “considered ‘persuasive’ in interpreting the provisions of the Cartwright Act”].)

<sup>19</sup> California was not alone in this. To date, 25 states and the District of Columbia have passed *Illinois Brick* repealer statutes; numerous others have interpreted existing state law to [\*\*\*51] allow indirect purchaser suits. (Karon, “Your Honor, Tear Down that *Illinois Brick Wall!*” *The National Movement Toward Indirect Purchaser Antitrust Standing and Consumer Justice* (2004) *30 Wm. Mitchell L.Rev.* 1351, 1361–1362.) The Cartwright Act amendment and other like *Illinois Brick* repealer statutes have subsequently been upheld against preemption challenges. (*California v. ARC America Corp., supra, 490 U.S. at pp. 105–106*.)

<sup>20</sup> These implementation problems were those that would arise if indirect purchaser suits were permitted at the same time that *Hanover Shoe*’s bar on a pass-on defense remained in place. (See *Illinois Brick, supra, 431 U.S. at pp. 737?747* (maj. opn.); *id. at pp. 761–764* (dis. opn.).)

mandatory joinder of the direct purchaser, interpleader, *parens patriae*.” (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 3222 (1977–1978 Reg. Sess.) as introduced Mar. 27, 1978, pp. 1–2.) The Judiciary Committee’s analysis thus accepted that allowing indirect purchaser suits would require courts to reconcile the existence of such suits with the *Hanover Shoe* no pass-on defense rule, and cited with approval the *Illinois Brick* dissent’s proposed methods for reconciliation.

[\*\*1083] Nowhere in this or any other committee report did the Legislature suggest reconciliation could or should instead occur by repudiating *Hanover Shoe* under the Cartwright Act. Rather, the existence of the *Hanover Shoe* rule was taken as a given; the relevant debate was whether indirect purchaser suits could be accommodated in a world where [\*\*\*\*53] *Hanover Shoe* was the law. The Legislature, like the *Illinois Brick* dissent, apparently preferred procedural devices to a blanket ban on indirect purchaser suits and passed Assembly Bill No. 3222 (1977–1978 Reg. Sess.) to clarify that that preference was part of [\*783] existing Cartwright Act law. (See Assem. Com. on Judiciary, Analysis of Assem. Bill No. 3222 (1977–1978 Reg. Sess.) as introduced Mar. 27, 1978, p. 2 [measure is “declarative of existing law”].) As with the passage of Assembly Bill No. 1162 (1977–1978 Reg. Sess.) the previous year, the Legislature’s adoption of this amendment indicates acceptance of *Hanover Shoe, supra, 392 U.S. 481*.

### *C. Broader Legislative Policy Considerations*

In divining the Legislature's intent, we consider as well overarching legislative goals evident from the Legislature's adoption and amendment of the Cartwright Act over the years.

From its inception, the Cartwright Act has always been focused on the punishment of violators for the larger purpose of promoting free competition. (See Stats. 1907, ch. 530, p. 984 [the Cartwright Act is “An act to define trust and to provide for criminal penalties and civil damages, and punishment of [entities connected with trusts], and to promote [\*\*\*\*54] free competition in commerce and all classes of business in this state”].) It is, like antitrust laws generally, about “ ‘ ‘ ‘ the protection of *competition*, not *competitors*.’ ” ” ” ([Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. \(1999\) 20 Cal.4th 163, 186 \[83 Cal. Rptr. 2d 548, 973 P.2d 527\]](#).) Private damage awards are just a tool by which these procompetitive purposes are carried out: “ ‘The main purpose of the anti-trust laws is to protect the public from monopolies and restraints of trade, and the individual right of action for treble damages is incidental and subordinate to that main purpose.’ ” ([Milton v. Hudson Sales Corp. \(1957\) 152 Cal. App. 2d 418, 443 \[313 P.2d 936\]](#); see also [Bruce's Juices v. Amer. Can Co. \(1947\) 330 U.S. 743, 751 \[91 L. Ed. 1219, 67 S. Ct. 1015\]](#)) [private damage remedies provide “a strong and reliable motive for enforcement”]; [Cianci v. Superior Court \(1985\) 40 Cal.3d 903, 913 \[221 Cal. Rptr. 575, 710 P.2d 375\]](#) [private treble damages are designed “to serve as well the high purpose of enforcing the antitrust laws’ ”].)

[\*\*\*687] As the Cartwright Act's primary concern is with the elimination of restraints of trade and impairments of the free market, we can and should select the damages rule most consistent with that focus. The goal of deterring antitrust violations [\*\*\*\*55] and concerns that a given private party may receive a windfall are not of equal weight. The Legislature's adoption of a double damages remedy (Stats. 1907, ch. 530, § 11, p. 987), later amended to treble damages (S. 16750, subd. (a)), demonstrates as much: double and treble damages may overcompensate injured plaintiffs, but they do so in order to maximize deterrence.

These relative priorities offer useful guidance. In cases where no consumers have come forward and the choice is between allowing an antitrust [\*784] violator to retain the full measure of profits from its violation or requiring their disgorgement to an innocent direct or intermediary purchaser who paid those monies and was forced to cope with the violation, the Legislature surely would prefer the latter, thereby maximizing deterrence and the probability of full disgorgement.<sup>21</sup> To allow defendants universally to assert a [\*1084] pass-on defense, even in cases such as this

<sup>21</sup> In a closely related vein, we previously have approved the use of fluid recovery funds under the Cartwright Act precisely because they [\*\*\*\*56] might be the only way to “ensure that the policies of disgorgement or deterrence are realized” and because Cartwright Act defendants should not be “permitted to retain ill gotten gains simply because their conduct harmed large numbers of people in small amounts instead of small numbers of people in large amounts.” (*State of California v. Levi Strauss &*

that present no risk of duplicative recovery, would hamper enforcement by reducing incentives to sue and police antitrust violations.

As *Hanover Shoe* itself recognized, a universal pass-on defense would hamper enforcement in a second way. Allowing a pass-on defense would plunge parties and courts into minitrials attempting to trace every penny of an initial overcharge, as well as seeking to measure the further ramifications that an overcharge might have in the form of lost sales and other tertiary consequences. (*Hanover Shoe, supra, 392 U.S. at pp. 492–493*.) “[T]he task of disentangling overlapping damages claims is not lightly to be imposed upon potential antitrust litigants, or upon the judicial system.” (*Kansas v. UtiliCorp United Inc., supra, 497 U.S. at p. 211*.) While the Legislature [\*\*\*\*57] when it enacted the *Illinois Brick* repealer statute imposed that task for the small universe of cases in which multiple levels of purchasers might sue, rejection of the *Hanover Shoe* rule would extend that burden to nearly every case. Accepting the rule, in contrast, streamlines antitrust trials, renders the process of proving antitrust damages less daunting, and ultimately enhances enforcement.

Manufacturers raise one overarching policy concern of their own. They object that Pharmacies simply were not damaged by the alleged price-fixing conspiracy and the law should not countenance a rule that permits a windfall to undamaged plaintiffs.

This objection misconceives both the nature of the *Hanover Shoe* rule in general and its potential application here. The *Hanover Shoe* court recognized that a purchaser forced by a monopoly or price-fixing cartel to pay higher prices might well be injured by that antitrust violation even *in instances where it appeared the purchaser could pass on some or all of that overcharge downstream to others*. (*Hanover Shoe, supra, 392 U.S. at p. 493, fn. 9* “[The mere fact that a [\*\*\*688] price rise followed an unlawful cost increase does not show [\*785] that the sufferer of the cost [\*\*\*\*58] increase was undamaged.”]; see also *Kansas v. UtiliCorp United Inc., supra, 497 U.S. at pp. 208–211*) A purchaser might lose profits or sales, and perhaps market share as well, vis-à-vis another purchaser/distributor not subject to the same overcharge. Recognizing the difficulty of proving the precise amount of other forms of injury, the *Hanover Shoe* court selected the amount of the initial overcharge as the measure of damages, not because the initial overpayment was the only injury, but because it was the most readily measured, and because measuring damages in this way would, in the long run, best serve the various goals of **antitrust law**. (See *Hanover Shoe, at pp. 492–494*; cf. 2A Areeda et al., **Antitrust Law** (3d ed. 2007) ¶ 395, p. 377 “[T]he most commonly used measure of damages, *viz.*, the overcharge, is an ambiguous proxy for the actual damages suffered.”].)

Some or all of the injuries identified in *Hanover Shoe, supra, 392 U.S. 481*, and *Kansas v. UtiliCorp United Inc., supra, 497 U.S. 199*, are in play here. Evidence in the record indicates Pharmacies' contracts with third party payers were sometimes negotiable, and rates changed over time. Given an opportunity to do so, Pharmacies [\*\*\*\*59] might have been able to prove lost profits on third party payer sales, that is, that in the absence of overcharges they could have negotiated reimbursement rates that would have increased the gap between their acquisition costs and reimbursement rates. Evidence in the record also indicated Pharmacies had seen fewer and fewer cash-paying customers over time and thus had unilateral pricing discretion for a smaller percentage of their sales. Given an opportunity to do so, Pharmacies might have been able to prove lost profits (because they could have maintained the same retail prices for cash-paying customers, while obtaining their drugs from wholesalers at a lower acquisition cost (see *Kansas v. UtiliCorp United Inc., at p. 209; Hanover Shoe, at p. 493, fn. 9*) or lost sales (due to cash-paying customers, who are sensitive to higher prices, filling fewer prescriptions than they would have if both acquisition costs and corresponding retail prices [\*\*1085] were lower).<sup>22</sup> Finally, Pharmacies alleged the value of their businesses as going concerns had declined due to lost sales, lost profits, and competition from foreign distributors not subject to Manufacturers' overcharges. As the cross-motions [\*\*\*\*60] below focused on the pass-on defense, Pharmacies were not called on to bring forward evidence in support of this allegation. Of course, the rule of *Hanover Shoe* obviates the need for the parties and the trial court to develop and consider proof of these other

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*Co. (1986) 41 Cal.3d 460, 472 [224 Cal. Rptr. 605, 715 P.2d 564]*.) The same considerations are in play here, where rejection of the *Hanover Shoe* rule would allow alleged antitrust violators to escape without sanction.

<sup>22</sup>Indeed, the possibility that in this latter scenario Pharmacies did *not* lose sales as a result of the alleged price-fixing conspiracy rests on the rather unlikely proposition that cash-paying customers' demand for drugs is wholly inelastic to price.

forms of injury, not because they do not exist, but because, as noted, enforcement of the antitrust laws works better if the initial amount of the overcharge is [\*786] chosen as a default measure of all the injuries a price-fixing conspiracy may engender for a given purchaser.<sup>23</sup>

[\*\*\*689] At its core, Manufacturers' argument is that the Cartwright Act should be read to go beyond the primary consequence of the price conspiracy (the overcharge) to consider the secondary consequence of the conspiracy (the pass-on), but that it should blind itself to the tertiary consequences (lost sales, lost profits, and so on). The Court of Appeal as well implicitly accepted *Hanover Shoe*'s focus on overcharges as the measure of damages and its corresponding disregard for tertiary consequences, but rejected that case insofar as it disregarded secondary consequences (the pass-on). But these two aspects of *Hanover Shoe* go hand in hand: *Hanover Shoe* found it acceptable to ignore tertiary consequences only because it also disregarded secondary consequences.

[\*\*\*\*62] Put differently, *Hanover Shoe* is not a case about what constitutes injury, but about how to measure damages. That a purchaser passes on an overcharge does *not* mean it lacks for injury or damages. The *Hanover Shoe* court disregarded all tertiary damages for measurement purposes because, and only because, it also disregarded the secondary pass-on for measurement purposes. Conversely, one cannot rationally admit evidence of a pass-on, under a theory of mitigation, while also excluding evidence that the pass-on in fact failed to mitigate fully the loss occasioned by the original overcharge. (See *Hanover Shoe, supra, 392 U.S. at pp. 491–494; B.W.I. Custom Kitchen v. Owens-Illinois, Inc., supra, 191 Cal. App. 3d at p. 1353*.)<sup>24</sup> Instead, the choice in [\*1086] measuring damages is between a rule that for policy reasons considers only the overcharge (the *Hanover Shoe* rule) and one that considers *all* the consequences of the overcharge.

[\*787]

#### D. Conclusion

**CA(5)[↑]** (5) The inferences we draw from the Legislature's actions and responses to developments in federal **antitrust law**, as well as its actions in enacting and amending the Cartwright Act over the years, all point in the same direction: For state antitrust purposes, the *Hanover Shoe* rule [\*690] should apply even as indirect purchasers are allowed to sue. We therefore conclude, **HN5[↑]** under the Cartwright Act as under federal law, that

<sup>23</sup> Manufacturers argue, and the Court of Appeal agreed, that Pharmacies waived these other forms of injury. The record does not support this claim. Pharmacies expressly did not concede that they had suffered no other injuries as a result of the alleged price-fixing conspiracy. Rather, they waived any attempt to prove other injuries because those injuries' existence and measure were legally irrelevant under *Hanover* [\*\*\*\*61] *Shoe*, the rule Pharmacies contended applied under the Cartwright Act. As we agree that *Hanover Shoe* applies, we need not consider whether, had we concluded it did not, Pharmacies should have been permitted to prove injuries other than the overcharge in this case. (Cf. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc., supra, 191 Cal. App. 3d at p. 1353* [if the pass-on defense applies, plaintiffs should have the opportunity to prove other injuries].)

<sup>24</sup> We are aware of no statute or case that adopts such an in-between rule, and Manufacturers have cited none. The irrationality of such a rule is inferable as well from the United States Supreme Court's own precedents. To prevail on a pass-on defense in those rare instances [\*\*\*\*63] where it has been permitted under federal law, a defendant must show the plaintiff could not have raised rates otherwise (*Kansas v. UtiliCorp United Inc., supra, 497 U.S. at p. 209*; *Hanover Shoe, supra, 392 U.S. at p. 493, fn. 9*) and did not lose sales, because the quantity to be purchased was controlled by a preexisting "cost-plus" contract (*Kansas v. UtiliCorp United Inc., at p. 218*; *Illinois Brick, supra, 431 U.S. at p. 736*; *Hanover Shoe, at p. 494*; see also Hovenkamp, *The Indirect-Purchaser Rule and Cost-Plus Sales* (1990) *103 Harv. L.Rev. 1717, 1720* [cost-plus contracts involve both a fixed markup and a fixed quantity to be delivered]). In essence, Supreme Court precedent recognizes that a pass-on defense (based on evidence of secondary consequences) is only presentable in circumstances that foreclose the possibility of tertiary consequences (lost sales and profits). Only then can one fairly say in defense that the plaintiff has suffered no injury as the result of an illegal overcharge.

In contrast, in stable markup cases such as this one, where a purchaser's resale price is fixed as a direct function of its acquisition price so as to pass on any overcharge, the resale market's response [\*\*\*\*64] to that overcharge-inflated resale price is *not* fixed and may be different than it would have been in the absence of the overcharge—and that different response (e.g., lower sales) may injure the plaintiff.

a pass-on defense generally may not be asserted. Instead, in an antitrust price-fixing case, the presumptive measure of damages is the amount of the overcharge paid by the plaintiff.

While a pass-on defense is generally precluded, a few instances remain in which it will still be available. First, *Hanover Shoe* recognized an exception for “cost-plus” contracts (*Hanover Shoe, supra, 392 U.S. at p. 494*) and, given the Legislature’s endorsement of *Hanover Shoe*, that exception would apply to the Cartwright Act as well. Second, in light of the *Illinois Brick* repealer [\*\*\*\*65] statute ([§ 16750, subd. \(a\)](#)), cases may arise where application of the *Hanover Shoe* rule raises the prospect of duplicative recovery. In instances where multiple levels of purchasers have sued, or where a risk remains they may sue, trial courts and parties have at their disposal and may employ joinder, interpleader, consolidation, and like procedural devices to bring all claimants before the court. In such cases, if damages must be allocated among the various levels of injured purchasers, the bar on consideration of pass-on evidence must necessarily be lifted; the defendants may assert a pass-on defense as needed to avoid duplication in the recovery of damages.

**[CA\(6\)↑ \(6\)](#)** We need not address in detail the scope of these two exceptions, for neither applies here. Manufacturers have not sought to establish that any cost-plus contract exception would apply. Nor does it appear any wholesaler, consumer, or *parens patriae* suits have been filed that might pose a risk of duplicative recovery, and the statute of limitations for the period at issue has long since expired. Accordingly, the trial court erred in granting summary judgment for Manufacturers on the basis of a pass-on defense.

### III. *The Unfair Competition [\*\*\*\*66] Law*

In a claim closely related to their Cartwright Act claims, Pharmacies also alleged they had been injured by Manufacturers’ unfair business practices and [\*788] were entitled to relief under the UCL ([§ 17200 et seq.](#)). The Court of Appeal affirmed the trial court’s grant of summary judgment to Manufacturers on the UCL claims, concluding Pharmacies lacked standing and, additionally, were ineligible for any relief. We consider each ground in turn.

#### A. Standing

**[CA\(7\)↑ \(7\)](#)** “The purpose of a standing requirement is to ensure that the courts will decide only actual controversies between parties with a sufficient interest in the subject matter of the dispute to press their case with vigor.” (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 439 [[261 Cal. Rptr. 574, 777 P.2d 610](#)]). In 2004, the electorate substantially revised the UCL’s standing requirement; where once private suits could be brought by “any person acting for the interests of itself, its members or the general public” (former § 17204, as amended by Stats. 1993, ch. 926, § 2, p. 5198), now [HN6↑](#) private standing is limited to any “person who has suffered injury in fact and has lost money or property” as a result of unfair competition ([§ 17204](#), as amended by Prop. 64, as approved [\*\*\*\*67] by voters, Gen. Elec. (Nov. 2, 2004) § 3; see *Californians for Disability Rights v. Mervyn’s, LLC* (2006) 39 Cal.4th 223, 227–228 [[46 Cal. Rptr. 3d 57, 138 P.3d 207](#)]). The intent of this change was to confine standing to those actually injured by a defendant’s business practices and to curtail the prior practice of filing suits on behalf of “‘clients who have not used the defendant’s [\*\*1087] product or service, viewed the defendant’s advertising, or had any other business dealing with the defendant . . . .’” [\*\*\*691] (*Californians for Disability Rights, at p. 228*, quoting Prop. 64, § 1, subd. (b)(3).)

While the voters clearly intended to restrict UCL standing, they just as plainly preserved standing for those who *had* had business dealings with a defendant and had lost money or property as a result of the defendant’s unfair business practices. (Prop. 64, § 1, subds. (b), (d); see [§ 17204](#).) Under that standard, Pharmacies have established standing. To distribute their pharmaceuticals, Manufacturers depend on a network of wholesalers and retailers. Pharmacies acted as retailers for Manufacturers’ drugs and thus had indirect business dealings with Manufacturers. (See *Shersher v. Superior Court* (2007) 154 Cal.App.4th 1491, 1499–1500 [[165 Cal. Rptr. 3d 634](#)] [indirect [\*\*\*\*68] purchases may support UCL standing].) They lost money: the overcharges they paid. (See *Hall v. Time Inc.* (2008) 158 Cal.App.4th 847, 854 [[70 Cal. Rptr. 3d 466](#)] [[§ 17204](#) standard is satisfied when the plaintiff has “expended money due to the defendant’s acts of unfair competition”].) Finally, that loss was the result of an unfair business practice: Pharmacies paid more than they otherwise would have because of a price-fixing conspiracy in

violation of state law. The voters' intent that under Proposition 64 suits be limited to those who suffer injury in fact is satisfied here. (See *Chattanooga Foundry v. Atlanta, supra, [\*789] 203 U.S. at p. 396* ["A person whose property is diminished by a payment of money wrongfully induced is injured in his property."].)

**CA(8) [8]** While Manufacturers argue that ultimately Pharmacies suffered no compensable loss because they were able to mitigate fully any injury by passing on the overcharges, this argument conflates the issue of standing with the issue of the remedies to which a party may be entitled. **HN7** That a party may ultimately be unable to prove a right to damages (or, here, restitution) does not demonstrate that it lacks standing to argue for its entitlement to them. (See *Southern Pac. Co. v. Darnell-Taenzer Co., supra, 245 U.S. at p. 534* [\*\*\*69] ["The plaintiffs suffered losses ... when they [over]paid. Their claim accrued at once in the theory of the law and it does not inquire into later events."]; *Adams v. Mills, supra, 286 U.S. at p. 407* ["In contemplation of law the claim for damages arose at the time the extra charge was paid," notwithstanding any subsequent reimbursement].) The doctrine of mitigation, where it applies, is a limitation on liability for damages, not a basis for extinguishing standing. (See *Pool v. City of Oakland (1986) 42 Cal.3d 1051, 1066 [232 Cal. Rptr. 528, 728 P.2d 1163]* ["The rule of [mitigation of damages] comes into play after a legal wrong has occurred, but while some damages may still be averted . . ." (quoting Prosser & Keeton, Torts (5th ed. 1984) § 65, p. 458)].) This is so because mitigation, while it might diminish a party's recovery, does not diminish the party's interest in proving it is entitled to recovery.

Nothing in the text of *section 17204* or Proposition 64 suggests the voters intended to provide otherwise when they remade the UCL's standing requirements. Rather, *section 17204* requires only that a party have "lost money or property," and Pharmacies indisputably lost money when they paid an allegedly illegal overcharge. [\*\*\*\*70] We decline Manufacturers' invitation to turn this facially simple threshold condition into a requirement that plaintiffs prove compensable loss at the outset.<sup>25</sup>

## [\*\*\*692] B. Remedies

**CA(9) [9]** The Court of Appeal affirmed summary judgment on a second, overlapping ground: Pharmacies were not entitled to any remedy. Pharmacies' complaint seeks two forms of relief: restitution and an injunction. We need consider only the latter. **HN8** If a party has standing under *section 17204* (as Pharmacies [\*\*1088] do here), it may seek injunctive relief under *section 17203*. (See [\*790] § 17204 [authorizing without limitation "[a]ctions for relief pursuant to this chapter" to be brought by parties who satisfy the provision's standing requirement].) Manufacturers' papers identify no obstacle that would preclude Pharmacies from obtaining injunctive relief if they establish Manufacturers were engaged in an unfair business practice. [\*\*\*71]<sup>26</sup>

**CA(10) [10]** The Court of Appeal held Pharmacies were barred from seeking injunctive relief because, it concluded, they had suffered no monetary loss. To the extent this holding rests on the conclusion Pharmacies lacked standing under *section 17204*, it is erroneous; [\*\*\*72] as discussed *ante*, Pharmacies have standing. To the extent the holding rests on the conclusion that even if Pharmacies had standing, they could not seek injunctive

<sup>25</sup> Doing so would render the UCL's standing requirement substantially *more* stringent than other state unfair competition statutes such as the Cartwright Act, under which Pharmacies' standing is undisputed. Again, we see nothing in the text or history of Proposition 64 that suggests the voters intended such a result.

<sup>26</sup> In this court, Manufacturers argue that Pharmacies have waived reliance on their complaint's request for injunctive relief to defeat summary adjudication. This argument misplaces the relevant burden. If Manufacturers sought summary judgment on the ground Pharmacies could obtain no relief on their UCL claim, it was incumbent on Manufacturers, as the moving party, to show that each form of relief sought by Pharmacies was unavailable. While Manufacturers attempted that showing with respect to the request for restitution, their moving papers simply ignored Pharmacies' request for injunctive relief.

In any event, the issue whether the availability of injunctive relief bars summary adjudication was decided by the Court of Appeal and fully briefed before us by the parties. It involves **HN9** a pure issue of law, reviewable de novo. We may exercise our discretion to consider it. (See *People v. Superior Court (Laff) (2001) 25 Cal.4th 703, 712, fn. 3 [107 Cal. Rptr. 2d 323, 23 P.3d 563]*.)

relief unless they could also seek restitution, it similarly is erroneous.[HN10](#) [↑] [Section 17203](#) makes injunctive relief “the primary form of relief available under the UCL,” while restitution is merely “ancillary.” ([In re Tobacco II Cases \(2009\) 46 Cal.4th 298, 319 \[93 Cal. Rptr. 3d 559, 207 P.3d 20\]](#).) Nothing in the statute’s language conditions a court’s authority to order injunctive relief on the need in a given case to also order restitution. Accordingly, the right to seek injunctive relief under [section 17203](#) is not dependent on the right to seek restitution; the two are wholly independent remedies. (See [ABC Internat. Traders, Inc. v. Matsushita Electric Corp. \(1997\) 14 Cal.4th 1247, 1268 \[61 Cal. Rptr. 2d 112, 931 P.2d 290\]](#) [§ 17203 “contains … no language of condition linking injunctive and restitutionary relief”]; [Prata v. Superior Court \(2001\) 91 Cal.App.4th 1128, 1139 \[111 Cal. Rptr. 2d 296\]](#) [plaintiff could pursue injunctive relief even though restitution was unavailable].)

As the claim for injunctive relief is sufficient to preclude summary judgment, we need not decide, and express no opinion on, the further [\*\*\*\*73] question whether Pharmacies may eventually be entitled to restitution.

[\*791]

## DISPOSITION

For the foregoing reasons, we reverse the Court of Appeal’s judgment and remand for further proceedings not inconsistent with this opinion.

George, C. J., Baxter, J., Moreno, J., Ruvolo, J.,\* Robie, J.,† and Miller, J.,‡ concurred.

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\* Presiding Justice of the Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).

† Associate Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).

‡ Associate Justice of the Court of Appeal, Fourth Appellate District, Division Two, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).



## In re Cipro Cases I & II

Supreme Court of California

May 7, 2015, Filed

S198616

**Reporter**

61 Cal. 4th 116 \*; 348 P.3d 845 \*\*; 187 Cal. Rptr. 3d 632 \*\*\*; 2015 Cal. LEXIS 2486 \*\*\*\*; 2015-1 Trade Cas. (CCH) P79,156

IN RE CIPRO CASES I & II. [Nine coordinated cases\*]

**Subsequent History:** Reported at [In re Cipro Cases I & II, 2015 Cal. LEXIS 6556 \(Cal., May 7, 2015\)](#)

Time for Granting or Denying Rehearing Extended [In re Cipro Cases I & II, 2015 Cal. LEXIS 6583 \(Cal., May 21, 2015\)](#)

Rehearing denied by [In re Cipro Cases I & II, 2015 Cal. LEXIS 4886 \(Cal., July 8, 2015\)](#)

Dismissed by [In re Cipro Cases I & II, 2018 Cal. App. Unpub. LEXIS 3258 \(Cal. App. 4th Dist., May 14, 2018\)](#)

Dismissed by [In re Cipro Cases I & II, 2018 Cal. App. Unpub. LEXIS 3984 \(Cal. App. 4th Dist., June 13, 2018\)](#)

**Prior History:** [\*\*\*\*1] Superior Court of San Diego County, Nos. JCCP 4154/4220, Richard E. L. Strauss, Judge. Court of Appeal, Fourth Appellate District, Division One No. D056361

[In re Cipro Cases I & II, 200 Cal. App. 4th 442, 134 Cal. Rptr. 3d 165, 2011 Cal. App. LEXIS 1353 \(Cal. App. 4th Dist., Oct. 31, 2011\)](#)

## **Core Terms**

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patent, settlement, generic, antitrust, monopoly, invalid, brand, anti trust law, anticompetitive, challenger, Cartwright Act, patent law, rule of reason, patentee, parties, innovation, settle, litigation costs, effects, restraint of trade, infringement, courts, manufacturer, settlement agreement, profits, procompetitive, collateral, expiration, cases, consumers

## **LexisNexis® Headnotes**

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\* *McGaughey v. Bayer Corp.* (Super. Ct. San Diego County, No. GIC752290); *Relles v. Bayer Corp.* (Super. Ct. L.A. County, No. BC239083); *Samole v. Bayer AG* (Super. Ct. S.F. City and County, No. 316349); *Garber v. Bayer AG* (Super. Ct. S.F. City and County, No. 316518); *Lee v. Bayer AG* (Super. Ct. S.F. City and County, No. 316670); *Patane v. Bayer AG* (Super. Ct. S.F. City and County, No. 318457); *Moore v. Bayer Corp.* (Super. Ct. Sonoma County, No. SCZ228356); *Moore v. Bayer Corp.* (Super. Ct. Sonoma County, No. 228384); *Senior Action Network v. Bayer AG* (Super. Ct. S.F. City and County, No. 400750).

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

## **HN1** Agriculture & Food, Federal Food, Drug & Cosmetic Act

Congress wrote into the Hatch-Waxman Act ([21 U.S.C. § 355](#)) a substantial incentive for generic drug manufacturers to enter markets earlier by offering a 180-day exclusivity period to the first generic filer, and only that filer, to challenge a patent ([21 U.S.C. § 355\(j\)\(5\)\(B\)\(iv\)](#)).

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

## **HN2** Regulated Practices, Price Fixing & Restraints of Trade

The legislature enacted the state's principal antitrust law, the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)), to rein in the burgeoning power of monopolies and cartels. The act's principal goal is the preservation of consumer welfare. The Act, like antitrust law in general, rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of 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 democratic political and social institutions. At its heart is a prohibition against agreements that prevent the growth of healthy, competitive markets for goods and services and the establishment of prices through market forces. The Act generally outlaws any combinations or agreements that restrain trade or competition or that fix or control prices, and declares that, with certain exceptions, every trust is unlawful, against public policy and void.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Governments > Courts > Common Law

## **HN3** Regulated Practices, Price Fixing & Restraints of Trade

The trusts the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)) prohibits include any combination by two or more persons to create or carry out restrictions in trade or commerce ([Bus. & Prof. Code, § 16720, subd. \(a\)](#)) or to prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity ([§ 16720, subd. \(c\)](#)). Also prohibited is any contract by which two or more entities agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale of any such article or commodity, that its price might in any manner be affected. ([§ 16720, subd. \(e\)\(4\)](#)). Agreements in violation of the Act are absolutely void and not enforceable at law or in equity ([Bus. & Prof. Code, §§ 16722, 16726](#)). Though the Cartwright Act is written in absolute terms, in practice not every agreement within the four corners of its prohibitions has been deemed illegal. [Bus. & Prof. Code, §§ 16720, 16722, and 16726](#), draw upon the common law prohibition against restraints of trade.

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

Governments > Legislation > Interpretation

Patent Law > Jurisdiction & Review > General Overview

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

Antitrust & Trade Law > Exemptions & Immunities > General Overview

#### [\*\*HN4\*\*](#) [down] Regulated Practices, Intellectual Property

The patent laws are in pari materia with the antitrust laws and modify them pro tanto to that extent. To promote investment in invention and the public disclosure of new discoveries, Congress has seen fit to grant inventors limited statutory monopolies and the right to exclude competition in the manufacture, use, or sale of the patent's subject ([35 U.S.C. § 154\(a\)](#)). Accordingly, the issuance of a federal patent creates an exception to the general rule against monopolies and to the right of access to a free and open market. While the limited monopolies granted to patent owners do not exempt them from the prohibitions of **antitrust law**, in a given case, possession of a patent may provide a defense to liability. Courts thus must reconcile the two bodies of law, making an adjustment between the lawful restraint on trade of the patent monopoly and the illegal restraint prohibited broadly by **antitrust law**.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Governments > Legislation > Interpretation

#### [\*\*HN5\*\*](#) [down] Regulated Practices, Price Fixing & Restraints of Trade

Interpretations of federal **antitrust law** are at most instructive, not conclusive, when construing the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)), given that the Cartwright Act was modeled not on federal antitrust statutes but instead on statutes enacted by California's sister states around the turn of the twentieth century.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Governments > Courts > Judicial Precedent

Patent Law > Jurisdiction & Review > General Overview

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

#### [\*\*HN6\*\*](#) [down] Regulated Practices, Price Fixing & Restraints of Trade

The United States Supreme Court is the final arbiter of questions of patent law and the extent to which interpretations of **antitrust law**--whether state or federal--must accommodate patent law's requirements, and Actavis is its latest word on the subject. If, under Actavis, patent law demands extensive deference to patents' presumed validity and the consecration of a broad range of agreements otherwise facially illegal under state law, the California Supreme Court must abide by that judgment. Conversely, if the accommodation necessitated by patent policy is somewhat narrower than previously understood, the California Supreme Court again must treat that determination as conclusive and reconsider the proper domain of state **antitrust law** in light of that cession of territory.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > Preclusion > Collateral Estoppel

Patent Law > ... > Defenses > Patent Invalidity > Presumption of Validity

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

## **HN7** Inequitable Conduct, Anticompetitive Conduct

A finding that a patent is invalid operates in rem and estops the patentee from asserting validity against the world. In contrast, a finding that a patent is valid operates only on the parties and does not extend from one infringement case to the next. A future challenger with new or better information may subsequently raise, and succeed on, an invalidity defense to a charge of infringement. If the assertion of patent rights leads to a court injunction excluding a competitor from the marketplace, there is no antitrust problem. If instead the assertion leads to a private settlement agreement, there is a potential antitrust problem. With a settlement, any restraint arises directly from the private agreement and only indirectly from the patent, which remains in the background, motivating the parties' actions according to their assessments of its strength. That a patent has not (yet) been invalidated may allow some confidence about its fundamental enforceability, but does not allow a court to skip entirely an antitrust analysis of competitive restraints within the patent's scope on the assumption that its validity has been established. The scope of the patent test is flawed precisely because it assumes away whatever level of uncertainty a given patent may be subject to.

[Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview](#)

[Governments > Legislation > Interpretation](#)

[Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview](#)

[Patent Law > Infringement Actions > Exclusive Rights > General Overview](#)

[Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview](#)

## **HN8** Regulated Practices, Price Fixing & Restraints of Trade

The scope of the patent test insulates from antitrust scrutiny virtually any agreement that restrains trade no more than the patent itself would have, if valid. State law must yield to federal, but courts cannot under the guise of patent law carve into the legislature's enactments a larger exception than federal law dictates, and Actavis shows such a broad exemption is not required. Accordingly, the scope of the patent test is inapplicable to Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)) claims.

[Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview](#)

[Evidence > ... > Testimony > Expert Witnesses > General Overview](#)

## **HN9** Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Under the traditional rule of reason, inquiry is limited to whether the challenged conduct promotes or suppresses competition. To determine whether an agreement harms competition more than it helps, a court may consider the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption. In a typical case, this may entail expert testimony on such matters as the definition of the relevant market and the extent of a defendant's market power. Rule of reason inquiry is not required in every case; the California Supreme Court and the United States Supreme Court have partially simplified the analysis by identifying categories of agreements or practices that can be said to always lack redeeming value and thus qualify as per se illegal. The per se rule reflects an irrebuttable presumption that, if the court were to subject the conduct in question to a full-blown inquiry, a violation would be found under the traditional rule of reason.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Evidence > Burdens of Proof > Allocation

#### **HN10** [💡] Per Se Rule Tests, Manifestly Anticompetitive Effects

Under the quick look rule of reason analysis, applicable to cases where an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets, a defendant may be asked to come forward with procompetitive justifications for a challenged restraint without the plaintiff having to introduce elaborate market analysis first. There is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an inquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The emergence of quick look rule of reason analysis did not signal the supplanting of the traditional per se/rule of reason dichotomy with a new trichotomy, but rather a shift to something of a sliding scale in antitrust analysis.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Governments > Courts > Common Law

Governments > Legislation > Interpretation

#### **HN11** [💡] Per Se Rule Tests, Manifestly Anticompetitive Effects

Nothing in the text of the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) dictates the precise details of the per se and rule of reason approaches; these are but useful tools the courts have developed over time to carry out the broad purposes and give meaning to the general phrases of the antitrust statutes. It is consistent with the common law tradition at the root of the antitrust laws to describe, as the United States Supreme Court now has, the analytic approach as involving a continuum, with the circumstances, details, and logic of a particular restraint dictating how the courts that confront the restraint should analyze it. In lieu of an undifferentiated one-size-fits-all rule of reason, courts may devise rules for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones. It follows that courts must consider not simply whether per se or rule of reason analysis applies to reverse payment patent settlements. To the extent rule of reason analysis applies, courts must also consider how the analysis should be structured to most efficiently differentiate between reasonable and unreasonable restraints of trade in this context.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

#### **HN12** [💡] Price Fixing & Restraints of Trade, Horizontal Market Allocation

Agreements to establish or maintain a monopoly are restraints of trade made unlawful by the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*). Under general antitrust principles, a business may permissibly develop monopoly power, i.e., the power to control prices or exclude competition, through the superiority of its product or business acumen. To acquire or maintain that power through agreement and combination with others, however, is quite a

different matter. Pursuant to this rule, businesses may not engage in a horizontal allocation of markets, with would-be competitors dividing up territories or customers. Such allocations afford each participant an enclave, free from the danger of outside incursions, in which to exercise monopoly power and extract monopoly premiums. Similarly, a firm may not pay its only potential competitor not to compete in return for a share of the profits that firm can obtain by being a monopolist.

[Antitrust & Trade Law](#) > ... > [Price Fixing & Restraints of Trade](#) > [Cartels & Horizontal Restraints](#) > [Price Fixing](#)

[Business & Corporate Compliance](#) > ... > [Defenses](#) > [Inequitable Conduct](#) > [Anticompetitive Conduct](#)

### [\*\*HN13\*\*](#) [blue icon] **Cartels & Horizontal Restraints, Price Fixing**

***Antitrust law*** condemns a patentee's payment to maintain supracompetitive prices to be shared among the patentee and the challenger rather than face what might have been a competitive market. This is so even when the patent is likely valid: The owner of a particularly valuable patent might contend that even a small risk of invalidity justifies a large payment. But, be that as it may, the payment (if otherwise unexplained) likely seeks to prevent the risk of competition. That consequence constitutes the relevant anticompetitive harm.

[Antitrust & Trade Law](#) > ... > [Actual Monopolization](#) > [Anticompetitive & Predatory Practices](#) > [General Overview](#)

[Business & Corporate Compliance](#) > ... > [Defenses](#) > [Inequitable Conduct](#) > [Anticompetitive Conduct](#)

[Patent Law](#) > [Infringement Actions](#) > [Exclusive Rights](#) > [Limitations](#)

[Patent Law](#) > ... > [Defenses](#) > [Patent Invalidity](#) > [Presumption of Validity](#)

### [\*\*HN14\*\*](#) [blue icon] **Actual Monopolization, Anticompetitive & Predatory Practices**

For antitrust purposes, patents are no longer to be treated as presumptively ironclad. This means the period of exclusion attributable to a patent is not its full life, but its expected life had enforcement been sought. This expected life represents the baseline against which the competitive effects of any agreement must be measured. Because the relevant baseline is the result that would have occurred in the absence of any agreement, it is not a cognizable harm simply to show the parties might have elected a different settlement agreement more favorable to competition and consumers. There is no statutory right to have parties enter the agreement most favorable to competition, only a prohibition against entering agreements that harm competition. If an agreement only replicates the likely average result of litigation, any exclusion is a function of the underlying patent strength; if it extends exclusion beyond that point, this further exclusion from the marketplace-and the attendant anticompetitive effect-is attributable to the agreement. A patent owner cannot extend his statutory grant by contract or agreement. A patent affords no immunity for a monopoly not fairly or plainly within the grant. The measure of the statutory grant, and the limit on the monopoly that may be preserved by agreement, is the average expected duration that would have resulted from judicial testing.

[Antitrust & Trade Law](#) > [Regulated Practices](#) > [Price Fixing & Restraints of Trade](#) > [General Overview](#)

[Business & Corporate Compliance](#) > ... > [Defenses](#) > [Inequitable Conduct](#) > [Anticompetitive Conduct](#)

### [\*\*HN15\*\*](#) [blue icon] **Regulated Practices, Price Fixing & Restraints of Trade**

Every antitrust case involves a comparison of a challenged agreement against a prediction about--a probabilistic assessment of--the expected competition that would have arisen in its absence. Every restraint of trade condemned for suppressing market entry involves uncertainties about the extent to which competition would have come to pass. No matter; the law does not condone the purchase of protection from uncertain competition any more than it condones the elimination of actual competition. The antitrust laws foreclose agreements eliminating the risk of competition--the competitive market that might have been. Purchasing freedom from the possibility of competition, whether done by a patentee or anyone else, is illegal. An agreement to exchange consideration for elimination of any portion of the period of competition that would have been expected had a patent been litigated is a violation of the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)).

[Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview](#)

[Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct](#)

[Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof](#)

[Evidence > Burdens of Proof > Allocation](#)

[Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation](#)

#### **[HN16](#)[] Regulated Practices, Price Fixing & Restraints of Trade**

A third-party plaintiff challenging a reverse payment patent settlement must show four elements: (1) the settlement includes a limit on the settling generic challenger's entry into the market; (2) the settlement includes cash or equivalent financial consideration flowing from the brand to the generic challenger; and the consideration exceeds (3) the value of goods and services other than any delay in market entry provided by the generic challenger to the brand, as well as (4) the brand's expected remaining litigation costs absent settlement. That a plaintiff challenging a reverse payment settlement must establish the settlement limits the challenging generic's entry is self-evident. If the settlement contains no component of delay and permits the generic to enter the market and compete fully and immediately, there is no restraint of trade and no potential for antitrust concern.

[Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview](#)

[Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct](#)

[Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof](#)

[Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation](#)

[Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements](#)

#### **[HN17](#)[] Regulated Practices, Price Fixing & Restraints of Trade**

A third-party plaintiff challenging a reverse payment patent settlement must establish a reverse payment--financial consideration flowing from the brand to the generic challenger. In the absence of payment, one would expect rational parties that settle to select a market entry point roughly corresponding to their joint expectation as to when entry would have occurred, on average, if the patent's validity and infringement had been fully litigated. If market entry were substantially later than the generic thought it could obtain through litigation, the generic would be unwilling to settle and forgo the additional profits it thought it could earn from an earlier entry; conversely, if the entry were substantially earlier than the brand thought it could obtain through litigation, the brand would not settle and forgo an additional period of monopoly. Absent payment, one can accept an agreement to postpone market

entry as a fair approximation of the expected level of competition that would have obtained had the parties litigated; absent payment, any delay in entry may be attributed to the effective strength of the challenged patent, rather than the settlement agreement.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

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

#### **HN18** [blue icon] **Regulated Practices, Price Fixing & Restraints of Trade**

The concern that a reverse payment raises will depend in part on its independence from other services for which it might represent payment. A payment may reflect compensation for other services that the generic has promised to perform—such as distributing the patented item or helping to develop a market for that item. If payment is no more than would be expected as compensation for additional products or services, then the reverse payment patent agreement includes no additional consideration for delay and courts can trust that any limit on competition is a legitimate consequence of the patent's strength and the contracting parties' expectations concerning its exclusionary power. Considerable caution is in order in evaluating settlements that include side agreements for generic products or services. A side agreement involving difficult-to-value assets might conceivably be added to a patent settlement to provide cover for the purchase of additional freedom from competition. Side deals should not be permitted to serve as fig leaves for agreements to eliminate competition.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Evidence > Burdens of Proof > Allocation

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

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

#### **HN19** [blue icon] **Regulated Practices, Price Fixing & Restraints of Trade**

A third-party plaintiff challenging a reverse payment patent settlement must establish the amount of the payment, over and above the value of collateral products or services from the generic, also exceeds the brand's anticipated future litigation costs. In some cases, a reverse payment may amount to no more than a rough approximation of the litigation expenses saved through the settlement. Where a reverse payment reflects traditional settlement considerations, such as avoided litigation costs or fair value for services, there is not the same concern that a patentee is using its monopoly profits to avoid the risk of patent invalidation or a finding of noninfringement. In such cases, the parties may have provided for a reverse payment without having sought or brought about anticompetitive consequences. A rational brand might be indifferent as between (1) actually litigating or (2) settling, with market entry at the point expected, on average, from asserting its patent in litigation and a payment to the generic in an amount up to what would have been spent in that litigation. It is thus necessary to evaluate the reverse payment's scale in relation to the payor's anticipated future litigation costs.

61 Cal. 4th 116, \*116 348 P.3d 845, \*\*845 187 Cal. Rptr. 3d 632, \*\*\*632 2015 Cal. LEXIS 2486, \*\*\*\*1

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

Evidence > Burdens of Proof > Allocation

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

## **HN20**[ **Private Actions, State Regulation**

Unless a challenged reverse payment patent settlement agreement includes both a restraint on generic competition and a reverse payment to the generic in excess of both brand litigation costs and generic collateral products and services, there is no reason to assume the settlement includes any element of purchased freedom from competition, as opposed to a limit on competition flowing naturally, and lawfully, from the perceived strength of the brand's patent. Accordingly, the burden of proof as to these elements rests with the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) plaintiff.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Evidence > Burdens of Proof > Allocation

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

Evidence > Burdens of Proof > Ultimate Burden of Persuasion

## **HN21**[ **Regulated Practices, Price Fixing & Restraints of Trade**

Where the evidence necessary to establish a fact essential to a claim lies peculiarly within the knowledge and competence of one of the parties, that party has the burden of going forward with the evidence on the issue although it is not the party asserting the claim. This is so with regard to both a settling party's own litigation costs and the existence and value of any collateral products or services provided as part of a patent settlement; these are matters about which the settling parties will necessarily have superior knowledge. Accordingly, once a plaintiff has shown an agreement involving a reverse payment and delay, the defendants have the burden of coming forward with evidence of litigation costs and the value of collateral products and services. If the defendants fail to do so, because, e.g., there was no side agreement or because they do not dispute the collective amounts fall short of any payment to the generic, the plaintiff has satisfied its burden on these points. If instead the defendants do so, the plaintiff must carry the ultimate burden of persuasion that any reverse payment exceeds litigation costs and the value of collateral products or services.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

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

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

## [\*\*HN22\*\*](#) [blue icon] Regulated Practices, Price Fixing & Restraints of Trade

A showing of the four elements for challenging a reverse payment patent settlement is not only necessary but also sufficient to make out a *prima facie* case that the settlement is anticompetitive. If a brand is willing to pay a generic more than the costs of continued litigation, and more than the value of any collateral benefits, in order to settle and keep the generic out of the market, there is cause to believe some portion of the consideration is payment for exclusion beyond the point that would have resulted, on average, from simply litigating the case to its conclusion. Otherwise, the brand would have had little incentive to settle at such a high price. Moreover, the larger the gap, the stronger the inference one can draw.

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

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

## [\*\*HN23\*\*](#) [blue icon] Private Actions, State Regulation

Ordinarily, the fact that a large, unjustified reverse payment risks antitrust liability does not prevent litigating parties from settling their lawsuit. Parties can still use financial considerations to bridge small gaps arising from differing subjective perceptions of their probabilities of success in litigation; what they cannot do is use money to bridge their differences over the point when competitive entry is economically desirable, for that gap is not one **antitrust law** permits would-be competitors to bridge by agreement: If the basic reason the parties prefer a reverse payment settlement is a desire to maintain and to share patent-generated monopoly profits, then, in the absence of some other justification, the antitrust laws are likely to forbid the arrangement. That some settlements might no longer be possible absent a payment in excess of litigation costs is no concern if the ones now barred would simply have facilitated the sharing of monopoly profits.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Evidence > Inferences & Presumptions > Presumptions > Creation

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

## [\*\*HN24\*\*](#) [blue icon] Regulated Practices, Price Fixing & Restraints of Trade

Proof of a reverse payment in excess of litigation costs and collateral products and services raises a presumption that the settling patentee has market power sufficient for the reverse payment patent settlement to generate significant anticompetitive effects.

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

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

Evidence > Burdens of Proof > Burden Shifting

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

## **HN25** [blue icon] Private Actions, State Regulation

Once a plaintiff has made out a *prima facie* case that a reverse payment patent settlement has anticompetitive effects, a court must weigh these anticompetitive effects against the possible justifications for the challenged restraint. At this point, it is appropriate to shift the burden to the defendants to offer legitimate justifications and come forward with evidence that the challenged settlement is in fact procompetitive. [Bus. & Prof. Code, § 16725](#), provides that it is not unlawful to enter an agreement to promote, encourage, or increase competition. An antitrust defendant cannot argue a settlement is procompetitive simply because it allows competition earlier than would have occurred if the brand had won the patent action; the relevant baseline is the average period of competition that would have obtained in the absence of settlement.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

## **HN26** [blue icon] Regulated Practices, Price Fixing & Restraints of Trade

Reverse payment patent agreements must be assessed as of the time they are made, at which point the patent's validity is unknown and unknowable. Just as later invalidation of a patent does not prove an agreement when made was anticompetitive, later evidence of validity will not automatically demonstrate an agreement was procompetitive.

**Antitrust law** condemns the purchase of freedom from competition; what matters is whether a settlement postpones market entry beyond the average point that would have been expected at the time in the absence of agreement. To determine whether such a settlement has occurred under state law, as under federal law, it is normally not necessary to litigate patent validity. An unexplained large reverse payment itself would normally suggest that the patentee has serious doubts about the patent's survival. And that fact, in turn, suggests that the payment's objective is to maintain supracompetitive prices to be shared among the patentee and the challenger rather than face what might have been a competitive market-the very anticompetitive consequence that underlies the claim of antitrust unlawfulness. In a word, the size of the unexplained reverse payment can provide a workable surrogate for a patent's weakness, all without forcing a court to conduct a detailed exploration of the validity of the patent itself.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Evidence > Burdens of Proof > Allocation

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

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

## **HN27** [blue icon] Regulated Practices, Price Fixing & Restraints of Trade

The ultimate burden throughout rests with the plaintiff to show that a challenged reverse payment patent settlement agreement is anticompetitive. Once the plaintiff has made out a *prima facie* case that a reverse payment patent settlement is anticompetitive, however, the plaintiff thereafter need only show that any procompetitive justifications proffered by the defendants are unsupportable. The ultimate question in reverse payment settlement cases is whether an agreement involves significant unjustified anticompetitive consequences. The *prima facie* case requires the plaintiff to eliminate the possibility that litigation costs or other products or services could explain the consideration paid the generic. If a plaintiff does so and thereafter can dispel each additional justification the defendants put forward to explain the consideration, the conclusion follows that the settlement payment must include, in part, consideration for additional delay in entering the market. That payment for delay is condemned by the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)), as by federal **antitrust law**, and its purchase as part of a settlement agreement is an unlawful restraint of trade.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Rule Tests

Evidence > Burdens of Proof > Allocation

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

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

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

#### **HN28** [blue icon] Per Se Rule & Rule of Reason, Per Se Rule Tests

Under the structure of the rule of reason applicable to reverse payment patent settlements, to make out a *prima facie* case that a challenged reverse payment patent agreement is an unlawful restraint of trade, a plaintiff must show the agreement contains both a limit on the generic challenger's entry into the market and compensation from the patentee to the challenger. The defendants bear the burden of coming forward with evidence of litigation costs or valuable collateral products or services that might explain the compensation; if the defendants do so, the plaintiff has the burden of demonstrating the compensation exceeds the reasonable value of these. If a *prima facie* case has been made out, the defendants may come forward with additional justifications to demonstrate the settlement agreement nevertheless is procompetitive. A plaintiff who can dispel these justifications has carried the burden of demonstrating the settlement agreement is an unreasonable restraint of trade under the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)).

Constitutional Law > Supremacy Clause > Federal Preemption

#### **HN29** [blue icon] Supremacy Clause, Federal Preemption

Obstacle preemption arises when, under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Constitutional Law > Supremacy Clause > Federal Preemption

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

## [HN30](#) [blue icon] Trade Practices & Unfair Competition, State Regulation

State antitrust law ordinarily is fully compatible with federal law. States have regulated against monopolies and unfair competition for longer than the federal government, and federal law is intended only to supplement, not displace, state antitrust remedies. The Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)) is broader in range and deeper in reach than the federal Sherman Act ([15 U.S.C. § 1 et seq.](#)); this greater domain has never been thought to pose Supremacy Clause problems. To the contrary, in light of the established state role, a presumption against preemption applies.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Rule Tests

Constitutional Law > Supremacy Clause > Federal Preemption

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

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

## [HN31](#) [blue icon] Per Se Rule & Rule of Reason, Per Se Rule Tests

Where the choice of a test rests solely on economic analysis, no patent law preemption concerns arise. Instead, the issue reduces to a problem in the relation between federal and state antitrust law, and there the United States Supreme Court has been quite clear that states may depart from federal rules--or accept an invitation to develop a gap in the law explicitly left by the Supreme Court--absent evidence of a clear congressional purpose to the contrary. The structured rule of reason applicable to reverse payment patent settlements adopted by the California Supreme Court is consistent with, not an obstacle to, congressional patent and health care goals in two specific ways. First, considerable research and analysis suggests the broad availability of reverse payment settlements favors weak patents and channels investment resources toward suboptimal innovation prospects. To the extent careful scrutiny of such settlements promotes the very innovation the patent laws were intended to promote, it cannot stand as an obstacle to congressional objectives. Second, a fundamental goal of the Hatch-Waxman Act ([21 U.S.C. § 355](#)) is to enhance generic competition and thereby lower prices. By ferreting out anticompetitive agreements that limit generic market entry and sustain costly monopolies, a structured rule of reason serves those goals and poses no obstacle to congressional objectives.

## Headnotes/Summary

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### Summary

#### CALIFORNIA OFFICIAL REPORTS SUMMARY

A reverse payment settlement between a brand-name drug manufacturer and a would-be generic competitor relating to a patent on the active ingredient in one of the manufacturer's antibiotic drugs resulted in nine coordinated class action suits brought against them by indirect purchasers of the drug in California. The purchasers alleged the settlement violated the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)), the unfair competition law ([Bus. & Prof. Code, § 17200 et seq.](#)), and the common law prohibition against monopolies. The trial court granted a defense summary judgment. (Superior Court of San Diego County, Nos. JCCP 4154 and 4220, Richard E. L. Strauss, Judge.) The Court of Appeal, Fourth Dist., Div. One, No. D056361, affirmed, holding that agreements restraining competition within the scope of a patent are lawful unless the patent was procured by fraud or the suit to enforce it was objectively baseless.

The Supreme Court reversed the Court of Appeal's judgment and remanded for further proceedings. The court held that the scope of the patent test is inapplicable to Cartwright Act claims. The patent test accords excess weight to the policies motivating patent law and gives insufficient consideration to the concerns animating **antitrust law**. The court observed that, under federal **antitrust law**, reverse payment settlements, under which brand-name drug manufacturers make reverse payments to generic drug manufacturers in exchange for the generics dropping their patent challenges and consenting to stay out of the market, are not immune from scrutiny, even if they limit competition no more than a valid patent would have. The court concluded the [\*117] same is true under state **antitrust law**. Some patents are valid; some are not. Sometimes competition would infringe; sometimes it would not. A third party plaintiff challenging a reverse payment patent settlement must show four elements: (1) the settlement includes a limit on the settling generic challenger's entry into the market; (2) the settlement includes cash or equivalent financial consideration flowing from the brand to the generic challenger; and the consideration exceeds (3) the value of goods and services other than any delay in market entry provided by the generic challenger to the brand, as well as (4) the brand's expected remaining litigation costs absent settlement.

Parties illegally restrain trade when they privately agree to substitute consensual monopoly in place of potential competition that would have followed a finding of invalidity or noninfringement. The court concluded that the structured rule of reason it adopted was consistent with, not an obstacle to, congressional patent and health care goals. Accordingly, the trial court and the Court of Appeal erred in treating the patent at issue as ironclad and using the entire period until its expiration as the relevant benchmark in order to assess whether the parties' settlement agreement had anticompetitive effects. (Opinion by Werdegar, J., expressing the unanimous view of the court.)

## Headnotes

### CALIFORNIA OFFICIAL REPORTS HEADNOTES

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

##### Patents § 1—Hatch-Waxman Act—Generic Filer.

Congress wrote into the Hatch-Waxman Act ([21 U.S.C. § 355](#)) a substantial incentive for generic drug manufacturers to enter markets earlier by offering a 180-day exclusivity period to the first generic filer, and only that filer, to challenge a patent ([21 U.S.C. § 355\(j\)\(5\)\(B\)\(iv\)](#)).

#### CA(2) [down arrow] (2)

##### Monopolies and Restraints of Trade § 6—Cartwright Act—Scope.

The Legislature enacted the state's principal **antitrust law**, the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)), to rein in the burgeoning power of monopolies and cartels. The act's principal goal is the preservation of consumer welfare. The act, like **antitrust law** in general, rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of 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 democratic political and social institutions. At its heart is a prohibition against agreements that prevent the growth of healthy, competitive markets for goods and services and the establishment of prices through market forces. The act generally outlaws any combinations or agreements that restrain trade or competition or that fix or control prices, and declares that, with certain exceptions, every trust is unlawful, against public policy and void.

#### [\*118]

#### CA(3) [down arrow] (3)

**Monopolies and Restraints of Trade § 7—Cartwright Act—Prohibited Agreements and Combinations, Generally.**

The trusts the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)) prohibits include any combination by two or more persons to create or carry out restrictions in trade or commerce ([Bus. & Prof. Code, § 16720, subd. \(a\)](#)) or to prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity ([§ 16720, subd. \(c\)](#)). Also prohibited is any contract by which two or more entities agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale of any such article or commodity, that its price might in any manner be affected. ([§ 16720, subd. \(e\)\(4\)](#)). Agreements in violation of the act are absolutely void and not enforceable at law or in equity ([Bus. & Prof. Code, §§ 16722, 16726](#)). Though the Cartwright Act is written in absolute terms, in practice not every agreement within the four corners of its prohibitions has been deemed illegal. [Bus. & Prof. Code, §§ 16720, 16722](#), and [16726](#), draw upon the common law prohibition against restraints of trade.

[CA\(4\)](#) [  ] (4)

**Patents § 1—Construction With Antitrust Laws.**

The patent laws are in pari materia with the antitrust laws and modify them pro tanto to that extent. To promote investment in invention and the public disclosure of new discoveries, Congress has seen fit to grant inventors limited statutory monopolies and the right to exclude competition in the manufacture, use, or sale of the patent's subject ([35 U.S.C. § 154\(a\)](#)). Accordingly, the issuance of a federal patent creates an exception to the general rule against monopolies and to the right to access to a free and open market. While the limited monopolies granted to patent owners do not exempt them from the prohibitions of [antitrust law](#), in a given case, possession of a patent may provide a defense to liability. Courts thus must reconcile the two bodies of law, making an adjustment between the lawful restraint on trade of the patent monopoly and the illegal restraint prohibited broadly by [antitrust law](#).

[CA\(5\)](#) [  ] (5)

**Monopolies and Restraints of Trade § 1—Federal [Antitrust Law](#) Interpretations—Effect on State Law.**

Interpretations of federal [antitrust law](#) are at most instructive, not conclusive, when construing the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)), given that the Cartwright Act was modeled not on federal antitrust statutes but instead on statutes enacted by California's sister states around the turn of the twentieth century.

[CA\(6\)](#) [  ] (6)

**Courts § 39—Doctrine of Stare Decisis—Opinions of United States Supreme Court—Patent Law—Interpretations of [Antitrust Law](#).**

The United States Supreme Court is the final arbiter of questions of [\*119] patent law and the extent to which interpretations of [antitrust law](#)—whether state or federal—must accommodate patent law's requirements, and *Actavis* is its latest word on the subject. If, under *Actavis*, patent law demands extensive deference to patents' presumed validity and the consecration of a broad range of agreements otherwise facially illegal under state law, the California Supreme Court must abide by that judgment. Conversely, if the accommodation necessitated by patent policy is somewhat narrower than previously understood, the California Supreme Court again must treat that determination as conclusive and reconsider the proper domain of state [antitrust law](#) in light of that cession of territory.

[CA\(7\)](#) [  ] (7)

**Patents § 1—Validity—Antitrust Issues—Patent Test.**

A finding that a patent is invalid operates in rem and estops the patentee from asserting validity against the world. In contrast, a finding that a patent is valid operates only on the parties and does not extend from one infringement case to the next. A future challenger with new or better information may subsequently raise, and succeed on, an invalidity defense to a charge of infringement. If the assertion of patent rights leads to a court injunction excluding a competitor from the marketplace, there is no antitrust problem. If instead the assertion leads to a private settlement agreement, there is a potential antitrust problem. With a settlement, any restraint arises directly from the private agreement and only indirectly from the patent, which remains in the background, motivating the parties' actions according to their assessments of its strength. That a patent has not (yet) been invalidated may allow some confidence about its fundamental enforceability, but does not allow a court to skip entirely an antitrust analysis of competitive restraints within the patent's scope on the assumption that its validity has been established. The scope of the patent test is flawed precisely because it assumes away whatever level of uncertainty a given patent may be subject to.

**CA(8) [ ] (8)****Monopolies and Restraints of Trade § 7—Cartwright Act—Applicability of Patent Test.**

The scope of the patent test insulates from antitrust scrutiny virtually any agreement that restrains trade no more than the patent itself would have, if valid. State law must yield to federal, but courts cannot under the guise of patent law carve into the Legislature's enactments a larger exception than federal law dictates, and *FTC v. Actavis* shows such a broad exemption is not required. Accordingly, the scope of the patent test is inapplicable to Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) claims.

**CA(9) [ ] (9)****Monopolies and Restraints of Trade § 2—Rule of Reason.**

Under the traditional rule of reason, inquiry is limited to whether the challenged conduct promotes or suppresses competition. To determine whether an [\*120] agreement harms competition more than it helps, a court may consider the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption. In a typical case, this may entail expert testimony on such matters as the definition of the relevant market and the extent of a defendant's market power. Rule of reason inquiry is not required in every case; the California Supreme Court and the United States Supreme Court have partially simplified the analysis by identifying categories of agreements or practices that can be said to always lack redeeming value and thus qualify as per se illegal. The per se rule reflects an irrebuttable presumption that, if the court were to subject the conduct in question to a full-blown inquiry, a violation would be found under the traditional rule of reason.

**CA(10) [ ] (10)****Monopolies and Restraints of Trade § 2—Quick Look Rule of Reason.**

Under the quick look rule of reason analysis, applicable to cases where an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets, a defendant may be asked to come forward with procompetitive justifications for a challenged restraint without the plaintiff having to introduce elaborate market analysis first. There is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an inquiry meet for the case,

looking to the circumstances, details, and logic of a restraint. The emergence of quick look rule of reason analysis did not signal the supplanting of the traditional per se/rule of reason dichotomy with a new trichotomy, but rather a shift to something of a sliding scale in antitrust analysis.

### CA(11) [ ] (11)

#### **Monopolies and Restraints of Trade § 7—Cartwright Act—Antitrust Analysis—Reverse Payment Patent Settlements.**

Nothing in the text of the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) dictates the precise details of the per se and rule of reason approaches; these are but useful tools the courts have developed over time to carry out the broad purposes and give meaning to the general phrases of the antitrust statutes. It is consistent with the common law tradition at the root of the antitrust laws to describe, as the United States Supreme Court now has, the analytic approach as involving a continuum, with the circumstances, details, and logic of a particular restraint dictating how the courts that confront the restraint should analyze it. In lieu of an undifferentiated one-size-fits-all rule of reason, courts may devise rules for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones. It follows that courts must consider not [\*121] simply whether per se or rule of reason analysis applies to reverse payment patent settlements. To the extent rule of reason analysis applies, courts must also consider how the analysis should be structured to most efficiently differentiate between reasonable and unreasonable restraints of trade in this context.

### CA(12) [ ] (12)

#### **Monopolies and Restraints of Trade § 7—Cartwright Act—Prohibited Agreements and Combinations.**

Agreements to establish or maintain a monopoly are restraints of trade made unlawful by the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*). Under general antitrust principles, a business may permissibly develop monopoly power, i.e., the power to control prices or exclude competition, through the superiority of its product or business acumen. To acquire or maintain that power through agreement and combination with others, however, is quite a different matter. Pursuant to this rule, businesses may not engage in a horizontal allocation of markets, with would-be competitors dividing up territories or customers. Such allocations afford each participant an enclave, free from the danger of outside incursions, in which to exercise monopoly power and extract monopoly premiums. Similarly, a firm may not pay its only potential competitor not to compete in return for a share of the profits that firm can obtain by being a monopolist.

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

#### **Monopolies and Restraints of Trade § 3—Agreements Between Patentees and Challengers.**

**Antitrust law** condemns a patentee's payment to maintain supracompetitive prices to be shared among the patentee and the challenger rather than face what might have been a competitive market. This is so even when the patent is likely valid: The owner of a particularly valuable patent might contend that even a small risk of invalidity justifies a large payment. But, be that as it may, the payment (if otherwise unexplained) likely seeks to prevent the risk of competition. That consequence constitutes the relevant anticompetitive harm.

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

#### **Patents § 1—Period of Exclusion—Antitrust Analysis.**

For antitrust purposes, patents are no longer to be treated as presumptively ironclad. This means the period of exclusion attributable to a patent is not its full life, but its expected life had enforcement been sought. This expected

life represents the baseline against which the competitive effects of any agreement must be measured. If an agreement only replicates the likely average result of litigation, any exclusion is a function of the underlying patent strength; if it extends exclusion beyond that point, this further exclusion from the marketplace-and the attendant anticompetitive effect-is attributable to the agreement. *FTC v. Actavis* thus represents an application of the settled principle that the owner of a patent cannot extend the owner's statutory grant by contract or agreement. A patent affords no [\*122] immunity for a monopoly not fairly or plainly within the grant. The measure of the statutory grant, and the limit on the monopoly that may be preserved by agreement, is the average expected duration that would have resulted from judicial testing.

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

##### **Monopolies and Restraints of Trade § 7—Cartwright Act—Agreements Eliminating Risk of Competition—Patents.**

Every antitrust case involves a comparison of a challenged agreement against a prediction about—a probabilistic assessment of—the expected competition that would have arisen in its absence. Every restraint of trade condemned for suppressing market entry involves uncertainties about the extent to which competition would have come to pass. No matter; the law does not condone the purchase of protection from uncertain competition any more than it condones the elimination of actual competition. The antitrust laws foreclose agreements eliminating the risk of competition—the competitive market that might have been. Purchasing freedom from the possibility of competition, whether done by a patentee or anyone else, is illegal. An agreement to exchange consideration for elimination of any portion of the period of competition that would have been expected had a patent been litigated is a violation of the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)).

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

##### **Monopolies and Restraints of Trade § 3—Reverse Payment Patent Settlements—Anticompetition Challenges—Elements.**

A third party plaintiff challenging a reverse payment patent settlement must show four elements: (1) the settlement includes a limit on the settling generic challenger's entry into the market; (2) the settlement includes cash or equivalent financial consideration flowing from the brand to the generic challenger; and the consideration exceeds (3) the value of goods and services other than any delay in market entry provided by the generic challenger to the brand, as well as (4) the brand's expected remaining litigation costs absent settlement. That a plaintiff challenging a reverse payment settlement must establish the settlement limits the challenging generic's entry is self-evident. If the settlement contains no component of delay and permits the generic to enter the market and compete fully and immediately, there is no restraint of trade and no potential for antitrust concern. As well, plaintiff must establish a reverse payment-financial consideration flowing from the brand to the generic challenger. In the absence of payment, one would expect rational parties that settle to select a market entry point roughly corresponding to their joint expectation as to when entry would have occurred, on average, if the patent's validity and infringement had been fully litigated. If market entry were substantially later than the generic thought it could obtain through litigation, the generic would be unwilling to settle and forgo the additional profits it thought it could earn from an earlier entry; conversely, if the [\*123] entry were substantially earlier than the brand thought it could obtain through litigation, the brand would not settle and forgo an additional period of monopoly. Absent payment, one can accept an agreement to postpone market entry as a fair approximation of the expected level of competition that would have obtained had the parties litigated; absent payment, any delay in entry may be attributed to the effective strength of the challenged patent, rather than the settlement agreement.

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

##### **Monopolies and Restraints of Trade § 3—Reverse Payment Patent Settlements—Consideration—Side Agreements.**

The concern that a reverse payment raises will depend in part on its independence from other services for which it might represent payment. A payment may reflect compensation for other services that the generic has promised to perform—such as distributing the patented item or helping to develop a market for that item. If payment is no more than would be expected as compensation for additional products or services, then the agreement includes no additional consideration for delay and courts can trust that any limit on competition is a legitimate consequence of the patent's strength and the contracting parties' expectations concerning its exclusionary power. Considerable caution is in order in evaluating settlements that include side agreements for generic products or services. A side agreement involving difficult to value assets might conceivably be added to a patent settlement to provide cover for the purchase of additional freedom from competition. Side deals should not be permitted to serve as fig leaves for agreements to eliminate competition.

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

##### **Monopolies and Restraints of Trade § 3—Reverse Payment Patent Settlements—Amount of Payment—Anticompetition Challenges.**

A third party plaintiff challenging a reverse payment patent settlement must establish the amount of the payment, over and above the value of collateral products or services from the generic, also exceeds the brand's anticipated future litigation costs. In some cases, a reverse payment may amount to no more than a rough approximation of the litigation expenses saved through the settlement. Where a reverse payment reflects traditional settlement considerations, such as avoided litigation costs or fair value for services, there is not the same concern that a patentee is using its monopoly profits to avoid the risk of patent invalidation or a finding of noninfringement. In such cases, the parties may have provided for a reverse payment without having sought or brought about anticompetitive consequences. A rational brand might be indifferent as between (1) actually litigating or (2) settling, with market entry at the point expected, on average, from asserting its patent in litigation and a payment to the generic in an amount up to what would have been spent in that litigation. It is thus necessary to evaluate the reverse payment's scale in relation to the payor's anticipated future litigation costs.

#### [\*124] CA(19) [ ] (19)

##### **Monopolies and Restraints of Trade § 3—Reverse Payment Patent Settlements—Anticompetition Challenges—Burden of Proof.**

Unless a challenged reverse payment patent settlement agreement includes both a restraint on generic competition and a reverse payment to the generic in excess of both brand litigation costs and generic collateral products and services, there is no reason to assume the settlement includes any element of purchased freedom from competition, as opposed to a limit on competition flowing naturally, and lawfully, from the perceived strength of the brand's patent. Accordingly, the burden of proof as to these elements rests with the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) plaintiff.

#### CA(20) [ ] (20)

##### **Monopolies and Restraints of Trade § 3—Reverse Payment Patent Settlements—Anticompetition Challenges—Burden of Proof.**

Where the evidence necessary to establish a fact essential to a claim lies peculiarly within the knowledge and competence of one of the parties, that party has the burden of going forward with the evidence on the issue although it is not the party asserting the claim. This is so with regard to both a settling party's own litigation costs and the existence and value of any collateral products or services provided as part of a patent settlement; these are matters about which the settling parties will necessarily have superior knowledge. Accordingly, once a plaintiff has shown an agreement involving a reverse payment and delay, the defendants have the burden of coming forward

with evidence of litigation costs and the value of collateral products and services. If the defendants fail to do so, because, e.g., there was no side agreement or because they do not dispute the collective amounts fall short of any payment to the generic, the plaintiff has satisfied its burden on these points. If instead the defendants do so, the plaintiff must carry the ultimate burden of persuasion that any reverse payment exceeds litigation costs and the value of collateral products or services.

#### [CA\(21\)](#) [↓] (21)

##### **Monopolies and Restraints of Trade § 3—Reverse Payment Patent Settlements—Anticompetition Challenges—Prima Facie Case.**

A showing of the four elements for challenging a reverse payment patent settlement is not only necessary but also sufficient to make out a prima facie case that the settlement is anticompetitive. If a brand is willing to pay a generic more than the costs of continued litigation, and more than the value of any collateral benefits, in order to settle and keep the generic out of the market, there is cause to believe some portion of the consideration is payment for exclusion beyond the point that would have resulted, on average, from simply litigating the case to its conclusion. Otherwise, the brand would have had little incentive to settle at such a high price. Moreover, the larger the gap, the stronger the inference one can draw.

#### [\*125] [CA\(22\)](#) [↓] (22)

##### **Monopolies and Restraints of Trade § 7—Cartwright Act—Reverse Payment Patent Settlements.**

Ordinarily, the fact that a large, unjustified reverse payment risks antitrust liability does not prevent litigating parties from settling their lawsuit. Parties can still use financial considerations to bridge small gaps arising from differing subjective perceptions of their probabilities of success in litigation; what they cannot do is use money to bridge their differences over the point when competitive entry is economically desirable, for that gap is not one **antitrust law** permits would-be competitors to bridge by agreement: If the basic reason the parties prefer a reverse payment settlement is a desire to maintain and to share patent-generated monopoly profits, then, in the absence of some other justification, the antitrust laws are likely to forbid the arrangement. That some settlements might no longer be possible absent a payment in excess of litigation costs is no concern if the ones now barred would simply have facilitated the sharing of monopoly profits.

#### [CA\(23\)](#) [↓] (23)

##### **Monopolies and Restraints of Trade § 3—Reverse Payment Patent Settlements—Presumptions.**

Proof of a reverse payment in excess of litigation costs and collateral products and services raises a presumption that the settling patentee has market power sufficient for the reverse payment patent settlement to generate significant anticompetitive effects.

#### [CA\(24\)](#) [↓] (24)

##### **Monopolies and Restraints of Trade § 3—Reverse Payment Patent Settlements—Anticompetition Challenges—Burden of Proof—Shifting.**

Once a plaintiff has made out a prima facie case that a reverse payment patent settlement has anticompetitive effects, a court must weigh these anticompetitive effects against the possible justifications for the challenged restraint. At this point, it is appropriate to shift the burden to the defendants to offer legitimate justifications and come forward with evidence that the challenged settlement is in fact procompetitive. [Bus. & Prof. Code, § 16725](#),

provides that it is not unlawful to enter an agreement to promote, encourage or increase competition. An antitrust defendant cannot argue a settlement is procompetitive simply because it allows competition earlier than would have occurred if the brand had won the patent action; the relevant baseline is the average period of competition that would have obtained in the absence of settlement.

#### [CA\(25\)](#) [ ] (25)

##### **Monopolies and Restraints of Trade § 3—Reverse Payment Patent Settlements—Amount of Payment.**

Consideration of whether a reverse payment patent agreement is justified as procompetitive will not turn on whether the patent would ultimately have been proved valid or invalid. Agreements must be assessed as of the time they are made, at which point the patent's validity is unknown and unknowable. Just as later invalidation of a patent does not prove an agreement when made [\*126] was anticompetitive, later evidence of validity will not automatically demonstrate an agreement was procompetitive. **Antitrust law** condemns the purchase of freedom from competition; what matters is whether a settlement postpones market entry beyond the average point that would have been expected at the time in the absence of agreement. To determine whether such a settlement has occurred under state law, as under federal law, it is normally not necessary to litigate patent validity. An unexplained large reverse payment itself would normally suggest that the patentee has serious doubts about the patent's survival. And that fact, in turn, suggests that the payment's objective is to maintain supracompetitive prices to be shared among the patentee and the challenger rather than face what might have been a competitive market—the very anticompetitive consequence that underlies the claim of antitrust unlawfulness. In a word, the size of the unexplained reverse payment can provide a workable surrogate for a patent's weakness, all without forcing a court to conduct a detailed exploration of the validity of the patent itself.

#### [CA\(26\)](#) [ ] (26)

##### **Monopolies and Restraints of Trade § 3—Reverse Payment Patent Settlements—Anticompetition Challenges—Burden of Proof—Prima Facie Case.**

The ultimate burden throughout rests with the plaintiff to show that a challenged reverse payment patent settlement agreement is anticompetitive. Once the plaintiff has made out a prima facie case that a reverse payment patent settlement is anticompetitive, however, the plaintiff thereafter need only show that any procompetitive justifications proffered by the defendants are unsupportable. The ultimate question in reverse payment settlement cases is whether an agreement involves significant unjustified anticompetitive consequences. The prima facie case requires the plaintiff to eliminate the possibility that litigation costs or other products or services could explain the consideration paid the generic. If a plaintiff does so and thereafter can dispel each additional justification the defendants put forward to explain the consideration, the conclusion follows that the settlement payment must include, in part, consideration for additional delay in entering the market. That payment for delay is condemned by the Cartwright Act ([\*Bus. & Prof. Code, § 16700 et seq.\*](#)), as by federal **antitrust law**, and its purchase as part of a settlement agreement is an unlawful restraint of trade.

#### [CA\(27\)](#) [ ] (27)

##### **Monopolies and Restraints of Trade § 7—Cartwright Act—Reverse Payment Patent Settlements—Rule of Reason—Anticompetition Challenges—Burden of Proof—Prima Facie Case.**

Under the structure of the rule of reason applicable to reverse payment patent settlements, to make out a prima facie case that a challenged reverse payment patent agreement is an unlawful restraint of trade, a plaintiff must show the agreement contains both a limit on the generic challenger's entry into the [\*127] market and compensation from the patentee to the challenger. The defendants bear the burden of coming forward with

evidence of litigation costs or valuable collateral products or services that might explain the compensation; if the defendants do so, the plaintiff has the burden of demonstrating the compensation exceeds the reasonable value of these. If a *prima facie* case has been made out, the defendants may come forward with additional justifications to demonstrate the settlement agreement nevertheless is procompetitive. A plaintiff who can dispel these justifications has carried the burden of demonstrating the settlement agreement is an unreasonable restraint of trade under the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*).

#### [CA\(28\)](#) [↓] (28)

##### **Constitutional Law § 34—Distribution of Powers—Between Federal and State Governments—Obstacle Preemption.**

Obstacle preemption arises when, under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

#### [CA\(29\)](#) [↓] (29)

##### **Monopolies and Restraints of Trade § 1—Relation Between Federal and State Law—Presumption Against Preemption.**

State *antitrust law* ordinarily is fully compatible with federal law. States have regulated against monopolies and unfair competition for longer than the federal government, and federal law is intended only to supplement, not displace, state antitrust remedies. The Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) is broader in range and deeper in reach than the federal Sherman Act (*15 U.S.C. § 1 et seq.*); this greater domain has never been thought to pose supremacy clause problems. To the contrary, in light of the established state role, a presumption against preemption applies.

#### [CA\(30\)](#) [↓] (30)

##### **Monopolies and Restraints of Trade § 1—Relation Between Federal and State Law—Obstacle Preemption—Reverse Payment Patent Settlements—Structured Rule of Reason.**

Where the choice of a test rests solely on economic analysis, no patent law preemption concerns arise. Instead, the issue reduces to a problem in the relation between federal and state *antitrust law*, and there the United States Supreme Court has been quite clear that states may depart from federal rules—or accept an invitation to develop a gap in the law explicitly left by the Supreme Court—absent evidence of a clear congressional purpose to the contrary. The structured rule of reason applicable to reverse payment patent settlements adopted by the California Supreme Court is consistent with, not an obstacle to, congressional patent and health care goals in two specific ways. First, considerable research and analysis suggests the broad availability of reverse payment settlements favors weak patents and channels investment resources toward suboptimal innovation prospects. To the [\*128] extent careful scrutiny of such settlements promotes the very innovation the patent laws were intended to promote, it cannot stand as an obstacle to congressional objectives. Second, a fundamental goal of the Hatch-Waxman Act (*21 U.S.C. § 355*) is to enhance generic competition and thereby lower prices. By ferreting out anticompetitive agreements that limit generic market entry and sustain costly monopolies, a structured rule of reason serves those goals and poses no obstacle to congressional objectives.

#### [CA\(31\)](#) [↓] (31)

##### **Monopolies and Restraints of Trade § 3—Reverse Payment Patent Settlements—Anticompetition Challenges.**

The trial court and Court of Appeal treated a drug manufacturer's patent on the active ingredient in one of its antibiotic drugs as ironclad and used the entire period until its expiration as the relevant benchmark in order to assess whether a reverse payment patent settlement agreement between the drug manufacturer and a would-be competitor had anticompetitive effects. That was error.

[Cal. Forms of Pleading and Practice (2015) ch. 411, Patents and Inventions, § 411.55; Simon et al., Matthew Bender Practice Guide: Cal. Unfair Competition and Business Torts (2015) § 5.36; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 592A; 13 Witkin, Summary of Cal. Law (10th ed. 2005) Personal Property, § 76.]

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**Judges:** Opinion by Werdegar, J., expressing the unanimous view of the court.

**Opinion by:** Werdegar

## Opinion

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[\*\*\*638] [\*\*850] **WERDEGAR, J.**—To protect competition in the marketplace, antitrust law prohibits agreements that create or perpetuate monopolies. Patent law, in [\*130] contrast, grants temporary monopolies to inventors to encourage the development of useful innovations. We consider here a crucial question at the intersection of these two bodies of law: What limits, if any, does antitrust law place on the ability of a patent holder to make agreements restricting competition during the life of its patent? In particular, when another entity tries to invalidate a patent and enter the marketplace, can the patentee pay the would-be competitor to withdraw its challenge and refrain from competing until at or near the natural expiration of the potentially invalid patent's life?

The answer to this is of special moment to the pharmaceutical industry, which has seen a raft of [\*\*\*\*4] suits in which generic drug manufacturers (generics), seeking to introduce lower priced alternatives to patented [\*\*\*639] brand-name drugs, raise patent invalidity as a defense to claims of infringement. With increasing frequency these cases have settled, with the plaintiff brand-name drug manufacturer (brand) making a “reverse payment” to the defendant generic in exchange for the generic dropping its patent challenge and consenting to stay out of the market. This case involves just such a settlement agreement.

Under federal antitrust law, these settlements are not immune from scrutiny, even if they limit competition no more than a valid [\*\*851] patent would have. ([FTC v. Actavis, Inc. \(2013\) 570 U.S. \\_\\_\\_\\_\\_. \[186 L. Ed. 2d 343, 356, 133 S. Ct. 2223, 2230\]](#) (Actavis).) We conclude the same is true under state antitrust law. Some patents are valid; some are not. Sometimes competition would infringe; sometimes it would not. Parties illegally restrain trade when they privately agree to substitute consensual monopoly in place of potential competition that would have followed a finding of invalidity or noninfringement. The Court of Appeal ruled to the contrary; we reverse.

## FACTUAL AND PROCEDURAL BACKGROUND

Bayer AG and Bayer Corporation (collectively Bayer) market Cipro, an antibiotic that has been [\*\*\*\*5] among the most prescribed and best-selling drugs in the world. ([Arkansas Carpenters Health & Welfare Fund v. Bayer AG \(2d Cir. 2010\) 604 F.3d 98, 100; In re Ciprofloxacin Hydrochloride Antitrust Litigation \(E.D.N.Y. 2003\) 261 F. Supp. 2d 188, 194; In re Ciprofloxacin Hydrochloride Antitrust Litigation \(E.D.N.Y. 2001\) 166 F. Supp. 2d 740, 743.](#)) In 1987, Bayer was issued a United States patent on the active ingredient in Cipro, ciprofloxacin hydrochloride, a patent that expired in December 2003. (U.S. Patent No. 4,670,444, col. 22, 11. 32–34, claim 12 (the '444 patent); see [In re Ciprofloxacin Hydrochloride Antitrust Litigation \(Fed. Cir. 2008\) 544 F.3d 1323, 1327–1328.](#)) A subsidiary and licensee of Bayer obtained Food and Drug Administration (FDA) approval to market Cipro in the United States. ([In re Ciprofloxacin Hydrochloride Antitrust Litigation, supra, 544 F.3d at p. 1328; In re Ciprofloxacin Hydrochloride Antitrust Litigation, supra, \[\\*\\*131\] 166 F. Supp. 2d at p. 743.](#)) Between 1987 and 2003, Bayer was the sole producer of Cipro in the United States and, between 1997 and 2003 alone, Cipro generated more than \$ 6 billion in gross sales.

At one time, pioneer drugs like Cipro and the generic drugs that followed them were governed by the same FDA approval process.<sup>1</sup> Subjecting generic drugs to the same “cumbersome drug approval process [as pioneer drugs]

\* The nine coordinated cases whose appeals are addressed in this case are: *McGaughey v. Bayer Corp.* (Super. Ct. San Diego County, No. GIC752290); *Relles v. Bayer Corp.* (Super. Ct. L.A. County, No. BC239083); *Samole v. Bayer AG* (Super. Ct. S.F. City and County, No. 316349); *Garber v. Bayer AG* (Super. Ct. S.F. City and County, No. 316518); *Lee v. Bayer AG* (Super. Ct. S.F. City and County, No. 316670); *Patane v. Bayer AG* (Super. Ct. S.F. City and County, No. 318457); *Moore v. Bayer Corp.* (Super. Ct. Sonoma County, No. SCZ228356); *Moore v. Bayer Corp.* (Super. Ct. Sonoma County, No. 228384); *Senior Action Network v. Bayer AG* (Super. Ct. S.F. City and County, No. 400750).

<sup>1</sup> A generic drug is a drug designed to be identical to an already-FDA-approved pioneer drug in active ingredients, safety, and efficacy, and thus therapeutically equivalent to its brand-name counterpart. (See [PLIVA, Inc. v. Mensing \(2011\) 564 U.S. 604, 612, fn. 2 \[180 L. Ed. 2d 580, 588, fn. 2, 131 S. Ct. 2567, 2574, fn. 2\].](#))

delayed the entry of relatively inexpensive generic drugs into the market place," at substantial cost to consumers and the government. (*Mylan Pharmaceuticals, Inc. v. Shalala (D.D.C. 2000) 81 F. Supp. 2d 30, 32*; see H.R. Rep. No. 98-857, 2d Sess., pt. 1, p. 17 (1984), reprinted in 1984 U.S. Code Cong. & Admin. News, p. 2650.) To expedite the availability of low-cost generic drugs, Congress authorized an abbreviated approval process for drugs whose active ingredients had already been proven safe and effective [\*\*\*\*6] in earlier clinical trials. (Drug Price Competition and Patent Term Restoration Act of 1984, *Pub.L. No. 98-417, tit. I, §§ 101–106 (Sept. 24, 1984) 98 Stat. 1585, 1585–1597*, codified as amended at *21 U.S.C. § 355* (the Hatch-Waxman [\*\*\*640] Act); see H.R. Rep. No. 98-857, 2d Sess., pt. 1, pp. 14, 16–17 (1984), reprinted in 1984 U.S. Code Cong. & Admin. News, pp. 2647, 2649–2650.)

Under the *Hatch-Waxman Act*, a prospective generic drug manufacturer may file a streamlined application asserting the generic drug's bioequivalence with an existing pioneer drug, thus piggybacking on the safety and efficacy data already submitted to the FDA in connection with its approval of the original drug. (*21 U.S.C. § 355(j)(2)(A)(ii), (iv)*; see *Actavis, supra, 570 U.S. at p. — [186 L. Ed. 2d at p. 354, 133 S. Ct. at p. 2228]*.) With respect to the patent implications of the application, the generic drug manufacturer must make one of four certifications: There is no patent for the underlying drug, the patent is expired, the patent will expire, or (relevant here) the patent is invalid or will not be infringed by the proposed manufacture and sale [\*\*\*\*7] of the generic drug. (*21 U.S.C. § 355(j)(2)(A)(vii); Actavis, at pp. — — [186 L. Ed. 2d at pp. 353–354, 133 S. Ct. at p. 2228]*.) An applicant that certifies the affected patent is invalid or will not be infringed (a "paragraph IV" certification) must give notice to all affected patent owners. (*21 U.S.C. § 355(j)(2)(B)*.) Submission of an application to manufacture a generic version of a drug covered by a patent is a technical act of infringement (*35 U.S.C. § 271(e)(2)(A); Actavis, at pp. — — [186 L. Ed. 2d at p. 354, 133 S. Ct. at p. 2228]*); [\*\*852] to stay approval of the generic version, a patent owner must file an infringement lawsuit against the generic drug manufacturer [\*132] within 45 days (*21 U.S.C. § 355(j)(5)(B)(iii)*). To provide an incentive to assume the risks of exposure to such litigation, the first generic manufacturer to file an application and prevail is granted a potentially lucrative 180-day exclusivity window in which to market its drug without competition from any other generic manufacturer. (*21 U.S.C. § 355(j)(5)(B)(iv); Actavis, at p. — — [186 L. Ed. 2d at p. 354, 133 S. Ct. at pp. 2228–2229]*.)

In 1991, twelve years before the scheduled expiration of the '444 patent, defendant Barr Laboratories, Inc., filed an application to market a generic version of Cipro. (*In re Ciprofloxacin Hydrochloride Antitrust Litigation, supra, 544 F.3d at p. 1328*.) Barr's application included a paragraph IV certification that the '444 patent was invalid and unenforceable. (*Arkansas Carpenters Health & Welfare Fund v. Bayer AG, supra, 604 F.3d at pp. 101–102*; see *21 U.S.C. § 355(j)(2)(A)(vii)(IV)*.) Barr's statutory notice to Bayer contended Cipro's derivation was obvious in light of prior art, the '444 patent was an invalid double patent, and the patent was the product of inequitable [\*\*\*\*8] conduct based on Bayer's withholding of information about preexisting patents from the patent examiner. (See *35 U.S.C. §§ 102, 103; In re Longi (Fed. Cir. 1985) 759 F.2d 887, 892–893*.) Bayer responded with a patent infringement suit, staying FDA approval, and Barr counterclaimed for a declaratory judgment that the '444 patent was invalid.<sup>2</sup>

In early 1997, Bayer and Barr settled. Under the terms of the settlement, Barr agreed to postpone marketing a generic [\*\*\*641] version of Cipro until the '444 patent expired. It also agreed to a consent judgment affirming the patent's validity and to modification of the certification in its FDA application from a paragraph IV certification, alleging invalidity, to a "paragraph [\*\*\*\*9] III" certification, seeking to market a generic drug upon patent expiration. (*Arkansas Carpenters Health & Welfare Fund v. Bayer AG, supra, 604 F.3d at p. 102*; see *21 U.S.C. § 355(j)(2)(A)(vii)(III); 21 C.F.R. § 314.94(a)(12)(i)(A)(3) (2014)*.) In return, Bayer agreed to make payments to Barr and to supply it with Cipro for licensed resale beginning six months before patent expiration. (See *In re*

<sup>2</sup>While the litigation was ongoing, Barr agreed to accept contribution to its litigation costs from another generic drug manufacturer, defendant The Rugby Group, Inc., a then subsidiary of defendant Hoechst Marion Roussel, Inc., in exchange for a share of the benefits of any settlement, judgment, or sale of generic ciprofloxacin hydrochloride. (*In re Ciprofloxacin Hydrochloride Antitrust Litigation, supra, 544 F.3d at p. 1328*.) In 1998, The Rugby Group, Inc., was acquired by defendant Watson Pharmaceuticals, Inc. Generic defendants Barr Laboratories, Inc., The Rugby Group, Inc., Watson, and Hoechst Marion Roussel, Inc., are referred to collectively as Barr.

*Ciprofloxacin Hydrochloride Antitrust Litigation, supra, 544 F.3d at pp. 1328–1329.*) This head start mirrored the 180-day duopoly the Hatch-Waxman Act would have provided Barr if it had succeeded in showing invalidity or noninfringement of Bayer's patent. ([21 U.S.C. § 355\(j\)\(5\)\(B\)\(iv\)](#).) Barr was to receive Cipro from Bayer at 85 percent of current price. [\*133]

Pursuant to the settlement, between 1997 and 2003, Bayer paid Barr \$ 398.1 million. In that same period, Bayer's profits from sales of Cipro exceeded \$ 1 billion. (*In re Ciprofloxacin Hydrochloride Antitrust Litigation, supra, 261 F. Supp. 2d at p. 194.*)

The 1997 settlement between Bayer and Barr produced a wave of state and federal antitrust suits. ([Arkansas Carpenters Health & Welfare Fund v. Bayer AG, supra, 604 F.3d at p. 102](#).) This case arises from nine such coordinated class action suits brought by indirect purchasers of Cipro in California against Bayer and Barr. (See *In re Cipro Cases I & II (2004) 121 Cal.App.4th 402, fn. \*, 406–407 [17 Cal. Rptr. 3d 1]*.) The operative complaint in these coordinated proceedings alleges the Bayer-Barr reverse payment settlement violated the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)), unfair competition law (*id.*, [§ 17200 et seq.](#)), and common law prohibition against monopolies. The gravamen of the complaint is that the 1997 agreement preserved [\*\*\*\*10] Bayer's monopoly and ability to charge suprareactive [\*\*853] prices at the expense of consumers, and Bayer in turn split these monopoly profits with Barr. Class certification was granted and upheld on appeal. (*In re Cipro Cases I & II, at p. 418.*) Thereafter, the parties stayed this action pending resolution of consolidated federal challenges to the Bayer-Barr settlement.

Following a Federal Circuit ruling in favor of Bayer and Barr on federal antitrust claims (*In re Ciprofloxacin Hydrochloride Antitrust Litigation, supra, 544 F.3d 1323*),<sup>3</sup> the trial court granted a defense summary judgment. It found decisional law under the federal Sherman Act ([15 U.S.C. § 1 et seq.](#)) dispositive and held that because the settlement agreement did not restrain competition longer than the exclusionary scope of the '444 patent, it did not violate the Cartwright Act. The Court of Appeal affirmed, holding that agreements restraining competition within the scope of a patent are lawful unless the patent was procured by fraud or the suit to enforce it was objectively baseless. The court held further that, even if there were a disputed issue of material fact as to whether Bayer's suit to enforce the '444 patent was objectively baseless, litigation [\*\*\*642] of that theory would be foreclosed by exclusive federal court patent jurisdiction.

We granted review to resolve important unsettled issues of state **antitrust law**. While the case was pending before this court, we entered an order formalizing Bayer's dismissal from the proceedings pursuant to an approved settlement. Barr remains as respondent.

[\*134]

## DISCUSSION

### I. Reverse Payment Settlements Under the Hatch-Waxman Act

**CA(1)[↑]** (1) The Hatch-Waxman Act illustrates the law of unintended consequences. **HN1[↑]** Congress wrote into the act a substantial incentive for generics to enter markets earlier by offering a 180-day exclusivity period to the first generic filer, and only that filer, to challenge a patent. ([21 U.S.C. § 355\(j\)\(5\)\(B\)\(iv\)](#); see Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem* (2006) [81 N.Y.U. L.Rev. 1553, 1566, 1578–1579, 1583](#).) The theory was that a generic would be more likely to challenge dubious patents if offered the carrot of an enormously valuable six-month period in which only it and the brand could produce a drug. (Carrier, *Unsettling Drug Patent Settlements: A Framework for Presumptive Illegality* (2009) [108 Mich. L.Rev. 37, 47](#); Bulow,

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<sup>3</sup> As discussed [\*\*\*\*11] below, both *In re Ciprofloxacin Hydrochloride Antitrust Litigation, supra, 544 F.3d 1323* and a second decision rejecting a federal antitrust challenge to the Cipro settlement, *Arkansas Carpenters Health & Welfare Fund v. Bayer AG, supra, 604 F.3d 98*, were decided under principles later rejected by the United States Supreme Court in *Actavis, supra, 570 U.S. [186 L. Ed. 2d 343, 133 S. Ct. 2223]*.

*The Gaming [\*\*\*\*12] of Pharmaceutical Patents in 4 Innovation Policy and the Economy* (Jaffe et al. edits., 2004) 145, 163; Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition* (2009) [109 Colum. L.Rev. 629, 651.](#)) Otherwise, “free rider” problems might arise: every generic would have an incentive to hold back and let some other generic be the one to shoulder the risk and litigation costs associated with challenging a patent. (Lemley & Shapiro, *Probabilistic Patents* (2005) 19 J. Econ. Persp. 75, 88; Hemphill, *Paying for Delay*, at p. 1605.)

This solution may well have encouraged more generics to file patent challenges, but not without creating a series of new problems. In other settings, a patentee might have little incentive to buy off a challenger in order to preserve its monopoly and continue reaping monopoly profits, for the simple reason that paying off the first challenger would simply encourage another challenger, and then another, and then another. (See [Actavis, supra, 570 U.S. at pp. 186 L. Ed. 2d at pp. 361–362, 133 S. Ct. at p. 2235](#).)

Two features of the Hatch-Waxman Act change this dynamic. First, the 180-day exclusivity period created a bottleneck; no one else could receive FDA approval until after its expiration. ([21 U.S.C. § 355\(j\)\(5\)\(B\)\(iv\)\(I\);](#) Hemphill, [Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem, supra, 81 N.Y.U. L.Rev. at pp. 1560–1561, 1586–1587.](#)) Second, other generics tempted to challenge [\*\*\*\*13] a patent in the wake [\*\*854] of a settlement with the first-filing generic would have to wait out an automatic 30-month stay the brand could obtain just by opposing their requests for FDA approval. ([21 U.S.C. § 355\(j\)\(5\)\(B\)\(iii\);](#) [Actavis, at pp. 186 L. Ed. 2d at pp. 361–362, 133 S. Ct. at p. 2235;](#) Bulow, *The Gaming of Pharmaceutical Patents in 4 Innovation Policy and the Economy, supra, at p. 164.*) As a result, the brand could effectively pick off “the most motivated challenger, and the one closest to introducing competition” [\*135] ([Actavis, at pp. 186 L. Ed. 2d at pp. 361–362, 133 S. Ct. at p. 2235,](#) quoting Hemphill, [Paying for Delay, at p. 1586](#)), with all others stuck in line behind that generic (Cotter, *Refining the “Presumptive Illegality” Approach to Settlements of Patent Disputes Involving Reverse Payments: A Commentary on Hovenkamp, Janis & Lemley (2003) 87 Minn. L.Rev. 1789, 1801.*)<sup>4</sup>

[\*\*\*643] This legal regime means that, regardless of the degree of likely validity of a patent, the brand and first-filing generic have an incentive to effectively establish a cartel through a reverse [\*\*\*\*14] payment settlement. (12 Areeda & Hovenkamp, *Antitrust Law, supra, ¶ 2046*, pp. 341–345; Hovenkamp, *Anticompetitive Patent Settlements and the Supreme Court’s Actavis Decision (2014) 15 Minn. J. L. Sci. & Tech. 3, 8–13*; see Carrier, *Unsettling Drug Patent Settlements: A Framework for Presumptive Illegality, supra, 108 Mich. L.Rev. at p. 73* [under Hatch-Waxman, “[g]enerics have powerful incentives to file the first patent challenge but little incentive to pursue the litigation”].) Rather than expend litigation costs on either side, the brand and generic can reach a settlement that reflects the likely validity or invalidity of the patent (stronger patent, smaller settlement; weaker patent, bigger settlement), grants the generic a share of monopoly profits, and leaves the brand the sole manufacturer of the product. (Hovenkamp, *Anticompetitive Patent Settlements and the Supreme Court’s Actavis Decision, at pp. 12–13.*)

It is likely for this reason that reverse payment settlements, practically unheard of before the *Hatch-Waxman Act*, have proliferated in the years since its enactment. ([Actavis, supra, 570 U.S. at p. 186 L. Ed. 2d at p. 362, 133 S. Ct. at p. 2235;](#) Hovenkamp, *Anticompetitive Patent Settlements and the Supreme Court’s Actavis Decision, supra, 15 Minn. J. L. Sci. & Tech. at pp. 13–16;* Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition, supra, 109 Colum. L.Rev. at pp. 647–656.*) This is probably not what Congress intended. ([Actavis, at p. 186 L. Ed. 2d at p. 362, 133 S. Ct. at p. 2235](#)) [the Hatch-Waxman Act’s provisions have “no doubt unintentionally … created special incentives for collusion”]; [570 U.S. at p. 186 L. Ed. 2d at p. 360, 133 S. Ct. at p. 2234](#)] [quoting remarks of Sen. Hatch and Rep. Waxman decrying as an

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<sup>4</sup> Amendments to the Hatch-Waxman Act postdating the settlement in this case may have partially alleviated the complete bottleneck problem (Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem, supra, 81 N.Y.U. L.Rev. at p. 1587*), although not issues arising from the 30-month stay or the reduced incentives for other generics, without the carrot of 180 days of duopoly, to bring patent challenges (12 Areeda & Hovenkamp, *Antitrust Law* (3d ed. 2012) ¶ 2046, p. 341).

unintended consequence of their legislation collusive agreements to delay competition].) The issue for us is what, if anything, state antitrust law has to say about these [\*\*\*15] problems.

[\*136]

## II. The Intersection Between Antitrust and Patent Law

### A. The Cartwright Act

**HN2** [↑] **CA(2)** [↑] (2) The Legislature enacted the state's principal antitrust law, the Cartwright Act, to rein in the burgeoning power of monopolies and cartels. (*Clayworth v. Pfizer, Inc. (2010) 49 Cal.4th 758, 772 [111 Cal. Rptr. 3d 666, 233 P.3d 1066]*.) The act's principal goal is the preservation of consumer welfare. (*Cianci v. Superior Court (1985) 40 Cal.3d 903, 918 [221 Cal. Rptr. 575, 710 P.2d 375]*; *Marin County Bd. of Realtors, Inc. v. Palsson (1976) 16 Cal.3d 920, 935 [130 Cal. Rptr. 1, 549 P.2d 833]*.) The act, like antitrust law in general, "rest[s] 'on the premise 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 [\*\*855] democratic political and social institutions.'" (*Marin County Bd., at p. 935*; see *National Soc. of Professional Engineers v. U. S. (1978) 435 U.S. 679, 695 [55 L. Ed. 2d 637, 98 S. Ct. 1355]*.) [\*\*\*644] At its heart is a prohibition against agreements that prevent the growth of healthy, competitive markets for goods and services and the establishment of prices through market forces. (See *Speegle v. Board of Fire Underwriters (1946) 29 Cal.2d 34, 44 [172 P.2d 867]*.) "The act 'generally outlaws any combinations or agreements which restrain trade or competition or which fix or control prices' [citation], and declares that, with certain exceptions, 'every trust is unlawful, against public policy and void ... .'" (*Pacific Gas & Electric Co. v. County of Stanislaus (1997) 16 Cal.4th 1143, 1147 [69 Cal. Rptr. 2d 329, 947 P.2d 291]*.)

**HN3** [↑] **CA(3)** [↑] (3) The "trust[s]" the act prohibits include any "combination ... by [\*\*\*\*16] two or more persons" to "create or carry out restrictions in trade or commerce" (*Bus. & Prof. Code, § 16720, subd. (a)*) or to "prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity" (*id., subd. (c)*). Also prohibited is any contract by which two or more entities "[a]gree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale ... of any such article or commodity, that its price might in any manner be affected." (*Id., subd. (e)(4)*.) Agreements in violation of the act are "absolutely void and ... not enforceable at law or in equity." (*Id., § 16722*; see *id., § 16726*.)

Though the Cartwright Act is written in absolute terms, in practice not every agreement within the four corners of its prohibitions has been deemed illegal. (*Morrison v. Viacom, Inc. (1998) 66 Cal.App.4th 534, 540 [78 Cal. Rptr. 2d 133]*.) Business and Professions Code sections 16720, 16722, and 16726 draw upon the common law prohibition against restraints of trade. [\*137] (*Corwin v. Los Angeles Newspaper Service Bureau, Inc. (1971) 4 Cal.3d 842, 852 [94 Cal. Rptr. 785, 484 P.2d 953]*; *People v. Building Maintenance etc. Assn. (1953) 41 Cal.2d 719, 727 [264 P.2d 31]*; *Speegle v. Board of Fire Underwriters, supra, 29 Cal.2d at p. 44*.) The earliest common law decisions imposed an absolute rule, voiding "all contracts ... which in any degree tended to the restraint of trade." (*Wright v. Ryder (1868) 36 Cal. 342, 357*.) But the common law rule was soon modified and "as relaxed, tolerated such [restraints of trade] as were restricted in their operations within reasonable limits." (*Ibid.*; see *Vulcan Powder Co. v. Hercules Powder Co. (1892) 96 Cal. 510, 512 [31 P. 581]*.) [\*\*\*17] The United States Supreme Court looked to the common law in embracing a rule of reason for determining which agreements violated federal antitrust law (see *Standard Oil Co. v. United States (1911) 221 U.S. 1, 60 [55 L. Ed. 619, 31 S. Ct. 502]*), and this court thereafter followed suit: "[I]t 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." (*Building Maintenance etc. Assn., at p. 727*; see *Marin County Bd. of Realtors, Inc. v. Palsson, supra, 16 Cal.3d at p. 930*; *Corwin, at p. 853*.)<sup>5</sup> What was true under the common law, [\*\*\*645] however, is true today: "[T]he difficulty lies in determining what are reasonable and what unreasonable restrictions ... ." (*Wright, at p. 358*.)

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<sup>5</sup> As we noted in *People v. Building Maintenance etc. Assn., supra, 41 Cal.2d at pages 726–727*, a separate section of the Cartwright Act effectively codifies this principle: "It is not unlawful to enter into agreements or form associations or combinations,

## B. Patent Law

**CA(4)↑ (4)** That difficulty is all the greater because **antitrust law** does not exist in a vacuum. **HN4↑** The patent laws “are *in pari materia* with the antitrust laws and modify them *pro tanto* [(to that extent)].” ([Simpson v. Union Oil Co. \(1964\) 377 U.S. 13, 24 \[12 L. Ed. 2d 98, 84 S. Ct. 1051\]](#).) To promote investment in invention and the public [\*\*\*\*18] disclosure of new discoveries, Congress has seen fit to grant inventors limited statutory monopolies and the right to exclude competition in the [\*\*856] manufacture, use, or sale of the patent’s subject. ([35 U.S.C. § 154\(a\)](#); see [Bonito Boats, Inc. v. Thunder Craft Boats, Inc. \(1989\) 489 U.S. 141, 150–151 \[103 L. Ed. 2d 118, 109 S. Ct. 971\]](#); [Dawson Chemical Co. v. Rohm & Haas Co. \(1980\) 448 U.S. 176, 215 \[65 L. Ed. 2d 696, 100 S. Ct. 2601\]](#); [Sears, Roebuck & Co. v. Stiffel Co. \(1964\) 376 U.S. 225, 229 \[11 L. Ed. 2d 661, 84 S. Ct. 784\]](#).) Accordingly, the issuance of a federal patent creates “an exception to the general rule against monopolies and to the right to access to a free and open market.” ([Precision Co. v. Automotive Co. \(1945\) 324 U.S. 806, 816 \[89 L. Ed. 1381, 65 S. Ct. 993\]](#).) While “[t]he limited [\*138] monopolies granted to patent owners do not exempt them from the prohibitions” of **antitrust law** ([Standard Oil Co. v. United States \(1931\) 283 U.S. 163, 169 \[75 L. Ed. 926, 51 S. Ct. 421\]](#); see [United Shoe Mach. Co. v. United States \(1922\) 258 U.S. 451, 463–464 \[66 L. Ed. 708, 42 S. Ct. 363\]](#)) [“the rights secured by a patent do not protect the making of contracts in restraint of trade”]), in a given case possession of a patent may provide a defense to liability ([United States v. Gen. Elec. Co. \(1926\) 272 U.S. 476, 488–490 \[71 L. Ed. 362, 47 S. Ct. 192\]](#); [Valley Drug Co. v. Geneva Pharmaceuticals \(11th Cir. 2003\) 344 F.3d 1294, 1307](#)). Courts thus must reconcile the two bodies of law, making “an adjustment between the lawful restraint on trade of the patent monopoly and the illegal restraint prohibited broadly by” **antitrust law**. ([United States v. Line Material Co. \(1948\) 333 U.S. 287, 310 \[92 L. Ed. 701, 68 S. Ct. 550\]](#).)

At the extremes, this is easy. If a patent were known to be invalid, a private agreement nevertheless giving it effect would be plainly illegal. (See [Bus. & Prof. Code, §§ 16720, 16722, 16726](#).) Conversely, if a patent were known to be valid, an agreement foreclosing competition no more than the statutory monopoly would not restrain trade beyond what federal law permitted, [\*\*\*\*19] and the rights patent law affords the patentee would supersede any state law prohibition. Difficulties emerge when we move from a hypothetical patent known to be determinately valid or invalid to the real world, where validity may be unclear. When assessing the antitrust implications of an agreement arising from a patent, the truth about the patent’s validity cannot always be known. The issue is how antitrust and patent law should accommodate each other under these conditions of uncertainty.

## III. The Scope of the Patent Test

### A. The Court of Appeal and the Scope of the Patent Approach

The particular accommodation this case calls for arises from an issue of virtual first impression under the Cartwright Act: how to apply the statutory bar against restraints of trade to patent settlement agreements that limit competition, but no more broadly than an injunction enforcing the patent would have, had one been obtained. (Cf. [In re Cardizem CD Antitrust Litigation \(6th Cir. 2003\) 332 F.3d 896, 904, fn. 8, 906–909](#) [\*\*\*646] [deciding the issue under both federal law and the Cartwright Act, but without independently analyzing state law].) Rejecting plaintiffs’ argument that agreements of this sort should be deemed uniformly illegal, the Court of Appeal resolved the issue by adopting one of several [\*\*\*\*20] competing approaches courts had developed [\*139] to solve the problem under federal **antitrust law**, the scope of the patent test.<sup>6</sup> Under that test, the Court of Appeal held, “a settlement of a lawsuit to enforce a patent does not violate the Cartwright Act if the settlement restrains competition only within the scope of the patent, unless the patent was procured by fraud or the suit for its enforcement was objectively baseless.” The scope of the patent test thus gives wide effect to patents by essentially presuming their validity in most cases. We conclude, as more recent United States Supreme Court authority has now made clear, that this

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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.” ([Bus. & Prof. Code, § 16725](#).)

<sup>6</sup> See [In re Tamoxifen Citrate Antitrust Litigation \(2d Cir. 2006\) 466 F.3d 187](#); cf. [In re Cardizem CD Antitrust Litigation, supra, 332 F.3d at pages 907–909](#) (adopting per se rule); [In re K-Dur Antitrust Litigation \(3d Cir. 2012\) 686 F.3d 197](#) (adopting quick look rule of reason analysis).

test accords excess weight to the policies motivating patent law, gives insufficient consideration to the concerns animating ***antitrust law***, and must be rejected.

The federal cases the Court of Appeal followed identify three core rationales for [\*\*857] concluding a patent litigation settlement restricting competition no more than a valid patent would be generally lawful. First, patents are presumed valid. ([35 U.S.C. § 282\(a\)](#).) Given this presumption, many lower federal courts reasoned, an agreement that [\*\*\*\*21] does not extend monopoly beyond what a patent grants imposes no additional injury to competition and, in the absence of anticompetitive effects, generally survives antitrust scrutiny. (See [\*In re Ciprofloxacin Hydrochloride Antitrust Litigation, supra, 544 F.3d at p. 1337\*](#); [\*In re Tamoxifen Citrate Antitrust Litigation, supra, 466 F.3d at pp. 212–213\*](#); [\*Schering-Plough Corp. v. FTC \(11th Cir. 2005\) 402 F.3d 1056, 1066–1068\*](#).)

[\*\*858] Second, the fundamental purpose of patent law is to promote innovation and the disclosure of inventions so that ultimately new discoveries may benefit the public at large. ([\*Bonito Boats, Inc. v. Thunder Craft Boats, Inc., supra, 489 U.S. at pp. 150–151\*](#).) To subject exclusions within the scope of a patent to scrutiny and potential liability would, lower courts feared, chill innovation and give inventors pause in deciding whether to share their creations with the public. (See [\*In re Tamoxifen Citrate Antitrust Litigation, supra, 466 F.3d at p. 203\*](#); [\*Schering-Plough Corp. v. FTC, supra, 402 F.3d at p. 1075\*](#); [\*Valley Drug Co. v. Geneva Pharmaceuticals, supra, 344 F.3d at p. 1308\*](#).)

Third, there is a general policy in favor of settlement, perhaps more so in patent litigation. ([\*In re Ciprofloxacin Hydrochloride Antitrust Litigation, supra, 544 F.3d at p. 1333\*](#); [\*In re Tamoxifen Citrate Antitrust Litigation, supra, 466 F.3d at p. 202\*](#); [\*Schering-Plough Corp. v. FTC, supra, 402 F.3d at pp. 1072–1073\*](#).) Patent litigation settlements “may benefit the public by introducing a new rival into the market, facilitating competitive production, [\*140] and encouraging further innovation.” ([\*Schering-Plough Corp., at p. 1075\*](#).) Conversely, a legal regime that hampers settlement “may actually decrease product innovation by amplifying the period of uncertainty around a drug manufacturer’s ability to research, develop, and market the patented product or allegedly infringing product.” (*Ibid.*; see [\*In re Tamoxifen Citrate Antitrust \[\\*\\*\\*\\*221\] Litigation, at p. 203\*](#).)

#### [\*\*\*647] B. Federal Trade Commission v. Actavis

The Court of Appeal’s adoption of the scope of the patent test was the product not of an analysis of the Cartwright Act’s text, policy, or history, but of an assessment of procedural and policy-based aspects of patent law. The soundness of its choice of test thus depends on the extent to which that patent law assessment was sound. In [\*Actavis, supra, 570 U.S. \[186 L. Ed. 2d 343, 133 S. Ct. 2223\]\*](#), issued after the Court of Appeal’s decision and after our grant of review, the Supreme Court reversed a federal decision holding Hatch-Waxman reverse payment settlement agreements “immune from antitrust attack so long as [their] anticompetitive effects fall within the scope of the exclusionary potential of the patent.” ([\*570 U.S. at p. \[186 L. Ed. 2d at p. 353, 133 S. Ct. at p. 2227\]\*](#).) In the course of its opinion, the Supreme Court dismantled the underpinning of each of the cases the Court of Appeal had found persuasive.

First, the Supreme Court rejected the scope of the patent test’s foundational presumption that the holder of a challenged patent enjoys all the rights attendant to ownership of a valid patent: “to refer … simply to what the holder of a valid patent could do does not by itself answer the antitrust question. The patent here may or may not be [\*\*\*\*23] valid, and may or may not be infringed.” ([\*Actavis, supra, 570 U.S. at pp. – \[186 L. Ed. 2d at p. 356, 133 S. Ct. at pp. 2230–2231\]\*](#).) To be sure, a valid patent allows the patentee to exclude others from the market, “[b]ut an invalidated patent carries with it no such right.” (*Id. at p. [186 L. Ed. 2d at p. 356, 133 S. Ct. at p. 2231]*) Patent litigation “put[s] the patent’s validity at issue, as well as its actual preclusive scope”; simply because a settlement curtails testing and ultimate resolution of that issue, courts should not thereafter treat patent law and its presumptions as conclusively establishing the challenged patent’s legitimate scope. ([\*Id. at p. \[186 L. Ed. 2d at p. 357, 133 S. Ct. at p. 2231\]\*](#).)

Second, the core policies underlying patent law are more nuanced than the cases applying a scope of the patent test had recognized, and the incentives to innovate far sturdier than those courts had feared. Patents carry with

them a frequent cost—monopoly premiums the public must bear. (See *Lear, Inc. v. Adkins* (1969) 395 U.S. 653, 670 [23 L. Ed. 2d 610, 89 S. Ct. 1902].) The willingness to pay that cost depends upon a quid pro quo: “[T]he public [\*141] interest in granting patent monopolies’ exists only to the extent that ‘the public is given a novel and useful invention’ in ‘consideration for its grant.’” (*Actavis, supra*, 570 U.S. at p. [186 L. Ed. 2d at p. 358, 133 S. Ct. at p. 2232].) Accordingly, patent policy does not support unquestioned protection of every inventor’s rights, but instead favors “eliminating unwarranted patent grants so the [\*\*\*24] public will not ‘continually be required to pay tribute to would-be monopolists without need or justification.’” (*Id. at p.* [186 L. Ed. 2d at p. 359, 133 S. Ct. at p. 2233].) Vigorous testing for validity is thus desirable in order to weed out patents that shield a monopoly without offering corresponding public benefits. (See *Aronson v. Quick Point Pencil Co.* (1979) 440 U.S. 257, 264 [59 L. Ed. 2d 296, 99 S. Ct. 1096]; *United States v. Glaxo Group Ltd.* (1973) 410 U.S. 52, 58 [35 L. Ed. 2d 104, 93 S. Ct. 861]; *Katzinger Co. v. Chicago Mfg. Co.* (1947) 329 U.S. 394, 400–401 [91 L. Ed. 374, 67 S. Ct. 416].)<sup>7</sup>

Third, the Supreme Court explained that while the policy favoring settlement of [\*\*\*648] patent litigation offers some support for limiting scrutiny of agreements restraining competition only within the scope of a patent, it ultimately is not dispositive. (*Actavis, supra*, 570 U.S. at pp. [186 L. Ed. 2d at pp. 360, 364, 133 S. Ct. at pp. 2234, 2238].) Settlements are generally a positive good, but not always; settlements of the sort challenged in *Actavis*, the court observed, can amount to “payment in return for staying out of the market” and permit [\*\*\*25] monopoly premiums still to be charged and simply divided up between the patent holder and patent challenger; “[t]he patentee and the challenger gain; the consumer loses.” (*Id. at pp.* [186 L. Ed. 2d at p. 361, 133 S. Ct. at pp. 2234, 2235].) Such anticompetitive effects will not always be justified, and an antitrust action to test a settlement’s legality may be warranted and feasible. (*Id. at pp.* [186 L. Ed. 2d at pp. 361–364, 133 S. Ct. at pp. 2235–2237].) Fears of chilling even legitimate settlements are overstated; all that allowing antitrust scrutiny does is remove the incentive to settle as a way to split monopoly profits. (*Id. at p.* [186 L. Ed. 2d at p. 363, 133 S. Ct. at p. 2237].) Because the scope of the patent test overvalues the policies underlying patent law at the expense of the equally relevant policies underlying **antitrust law**, the court concluded, it cannot stand under federal law. (*Id. at p.* [186 L. Ed. 2d at p. 357, 133 S. Ct. at p. 2231].) [\*142]

### C. The Scope of the Patent Test’s Validity Under State Law

Barr contends *Actavis* is distinguishable because it involved a public prosecution under the Federal Trade Commission Act ([15 U.S.C. § 45 et seq.](#)), not a private antitrust suit, and this court should embrace the scope of the patent test as a matter of state **antitrust law**.

**CA(5)** (5) We agree *Actavis* is not dispositive on matters of state law. Indeed, even if *Actavis* had been a private Sherman Act case, its conclusions would not dictate how the Cartwright [\*\*\*26] Act must be read. **HNS** (5) “Interpretations of federal **antitrust law** are at most instructive, not conclusive, when construing the Cartwright Act, given that the Cartwright Act was modeled not on federal antitrust statutes but instead on statutes enacted by California’s sister states around the turn of the 20th century.” (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1195 [151 Cal. Rptr. 3d 827, 292 P.3d 871]; [\*\*859] see *State of California ex rel. Van de Kamp v. Texaco, Inc.* (1988) 46 Cal.3d 1147, 1164 [252 Cal. Rptr. 221, 762 P.2d 385].) That said, nothing in the United States Supreme Court’s discussion of the legal rules at the boundary between antitrust and patent law hinged on the happenstance that the case under review involved a public prosecutor. Accordingly, that circumstance neither adds to nor detracts from the persuasive force the discussion would otherwise have.

**CA(6)** (6) What does affect the weight to be accorded *Actavis* is the extent to which its analysis establishes the metes and bounds of patent law and policy. Patent law is federal law. (*U.S. Const., art. I, § 8, cl. 8*; see *Bonito*

<sup>7</sup> As commentators have noted, an excess of invalid patents is one of the principal problems in modern patent law. (See Ford, *Patent Invalidity Versus Noninfringement* (2013) [99 Cornell L.Rev. 71, 74](#) & fn. 11 [discussing substantial scholarship on the point].) The pro-patent-challenge policy is particularly strong in the Hatch-Waxman Act setting, given the 180-day exclusivity bounty Congress adopted as an incentive to bring such challenges. (See [21 U.S.C. § 355\(j\)\(5\)\(B\)\(iv\)](#); 12 Areeda & Hovenkamp, **Antitrust Law**, *supra*, ¶ 2046, p. 340; Carrier, *Unsettling Drug Patent Settlements: A Framework for Presumptive Illegality*, *supra*, [108 Mich. L.Rev. at pp. 43, 64](#); *ante*, at p. 134.)

*Boats, Inc. v. Thunder Craft Boats, Inc., supra, 489 U.S. at pp. 146–157.) HN6* [\*\*\*649] The United States Supreme Court is the final arbiter of questions of patent law and the extent to which interpretations of antitrust law—whether state or federal—must accommodate patent law's requirements, and *Actavis* is its latest word on the subject. If under *Actavis* patent law demands extensive deference to patents' presumed validity and the consecration [\*\*\*27] of a broad range of agreements otherwise facially illegal under state law, we must abide by that judgment. Conversely, if the accommodation necessitated by patent policy is somewhat narrower than previously understood, we again must treat that determination as conclusive and reconsider the proper domain of state antitrust law in light of that cession of territory.

Barr asserts *Actavis* is alternatively distinguishable on the ground the underlying patent there was far weaker than the underlying patent here.<sup>8</sup> But [\*143] *Actavis*'s analysis was not contingent on a particular level of uncertainty surrounding the patent before it. Instead, the court simply recognized that any patent might, or might not, be valid. (*Actavis, supra, 570 U.S. at p. 186 L. Ed. 2d at p. 356, 133 S. Ct. at p. 2231*; see *id. at p. 186 L. Ed. 2d at p. 367, 133 S. Ct. at p. 2240* (dis. opn. of Roberts, C. J.) [recognizing the problem "that we're not quite certain if the patent is actually valid, or if the competitor is infringing it," a problem "that is always the case" in patent disputes].) Indeed, a critical insight undergirding *Actavis* is that patents are in a sense probabilistic, rather than ironclad: they grant their holders a potential but not certain right to exclude.

The uncertainty concerning a patent's validity is a by-product of the realities surrounding patent issuance and the legal regime Congress and the courts have established for patent enforcement. In the first instance, a patent "simply represents a legal conclusion reached by the Patent Office. Moreover, the legal conclusion is predicated on factors as to which reasonable men can differ widely. Yet the Patent Office is often obliged to reach its decision in an *ex parte* proceeding, without the aid of the arguments which could be advanced by parties interested in proving patent invalidity." (*Lear, Inc. v. Adkins, supra, 395 U.S. at p. 670*.) That decision is constrained by time and resource pressures; facing an enormous backlog, patent examiners may average less than 20 hours spent on each application. (Ford, *Patent Invalidity Versus Noninfringement, supra, 99 Cornell L.Rev. at pp. 87–89*; Lemley & Shapiro, *Probabilistic Patents, supra, 19 J. Econ. Persp. at p. 79*; Lemley, *Rational Ignorance at the Patent Office (2001) 95 Nw.U. L.Rev. 1495, 1499–1500*.) Given this underlying reality, Congress has elected not to make the issuance of a patent conclusive but, rather, subject to validation or invalidation in court proceedings. (*35 U.S.C. § 282*; see, e.g., [\*\*\*29] *Alice Corp. v. CLS Bank Int'l (2014) 573 U.S. 189 L. Ed. 2d 296, 134 S. Ct. 2347*; *Walker, Inc. v. Food Machinery (1965) 382 U.S. 172, 176 [15 L. Ed. 2d 247, 86 S. Ct. 347]*.) A patent is, in effect, a right to ask the government to exercise its power to keep others from [\*\*860] using an invention without consent. (*Zenith Corp. v. Hazeltine (1969) 395 U.S. 100, 135 [23 L. Ed. 2d 129, 89 S. Ct. 1562]*.) Whether a court will do [\*\*\*650] so—whether it will issue an injunction—will depend on actual proof of validity.

**CA(7)** [7] (7) The non-uniform application of collateral estoppel adds another layer of uncertainty. *HN7* [7] A finding that a patent is invalid operates in rem and estops the patentee from asserting validity against the world. (*Blonder-Tongue v. University Foundation (1971) 402 U.S. 313, 349–350 [28 L. Ed. 2d 788, 91 S. Ct. 1434]*.) In contrast, a finding that a patent is valid operates only on the parties and does not extend from one infringement case to the next. A future challenger with new or better information may subsequently raise, and succeed on, an invalidity defense to a charge of infringement. (*In re Swanson (Fed. Cir. 2008) 540 F.3d 1368, 1377*; *Ethicon, Inc. v. Quigg (Fed. Cir. 1988) \*144 849 F.2d 1422, 1429, fn. 3* ["A patent is not held valid for all purposes but, rather, not invalid on the record before the court" and "simply remains valid until another challenger carries" the burden of showing invalidity].) Each case may show only that a patent has not been invalidated, yet.

If the assertion of patent rights leads to a court injunction excluding a competitor from the marketplace, there is no antitrust problem. If instead the assertion leads to a private settlement [\*\*\*30] agreement, there is a potential antitrust problem. With a settlement, any restraint arises directly from the private agreement and only indirectly from the patent, which remains in the background, motivating the parties' actions according to their assessments of its

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<sup>8</sup> After the settlement, Bayer submitted the '444 patent to the Patent and Trademark [\*\*\*28] Office for reexamination and obtained reaffirmation that it was not invalid. (See *35 U.S.C. § 302*.) Later patent challenges by litigants other than Barr were unsuccessful. (See *In re Ciprofloxacin Hydrochloride Antitrust Litigation (E.D.N.Y. 2005) 363 F. Supp. 2d 514, 519–520*.)

strength. That a patent has not (yet) been invalidated may allow some confidence about its fundamental enforceability, but does not allow a court to skip entirely an antitrust analysis of competitive restraints within the patent's scope on the assumption that its validity has been established. The scope of the patent test is flawed precisely because it assumes away whatever level of uncertainty a given patent—the '444 patent here, no less than the one at issue in *Actavis*—may be subject to.<sup>9</sup>

Aside from its attempts to distinguish *Actavis*, Barr argues a 1953 California decision predating the recent federal *Hatch-Waxman Act* decisions favors the scope of the patent test for Cartwright Act challenges to patent settlements. (See *Fruit Machinery Co. v. F. M. Ball & Co.* (1953) 118 Cal. App. 2d 748, 758 [258 P.2d 852].) We do not read that opinion so broadly.

In *Fruit Machinery*, six canning companies formed a corporation and licensed to it rights under a fruit pitter patent owned by one of the companies. In turn, the licensee contracted with each of the six, sublicensing to them the right to build and own a specified number of pitters and to lease additional pitters in exchange for payment of royalties. A dispute over nonpayment [\*\*\*651] of royalties arose between the licensee and one of the six companies. The company raised as a defense to payment that the contractual arrangements [\*145] gave the six companies an unlawful [\*\*\*\*32] monopoly on pitter ownership and were thus unenforceable. The Court of Appeal found no antitrust violation, explaining: “Defendant has not shown that the parties, in executing and carrying out the sublicense agreement in suit, exercised rights or powers not accorded them by the patent law or abused any rights or powers accorded them by that law.” [\*\*861] (*Fruit Machinery Co. v. F. M. Ball & Co., supra*, 118 Cal. App. 2d at p. 762, italics added.) The Court of Appeal distinguished other cases involving antitrust violations as involving a “patentee or his assignee [who] went beyond that which was necessary or incidental to the scope of his patent and brought himself within the proscription of the antitrust laws.” (*Id. at p. 763*.)

*Fruit Machinery* does not stand for the proposition that any restraints of trade within the scope of a patent are valid. Rather, it recognizes trade restraints that exceed those authorized by a patent may be invalid and, moreover, that the “abuse[]” of patent rights may also run afoul of *antitrust law*. (*Fruit Machinery Co. v. F. M. Ball & Co., supra*, 118 Cal. App. 2d at p. 762.) The court responded to the concern that the corporate licensee might use its exclusive patent rights to charge far higher royalties for leased than owned pitters not by saying such a differential would automatically be lawful, as within the scope of [\*\*\*\*33] any patent rights, but by saying only “that such has not happened yet” and it would not presume a “[f]uture violation … of the antitrust laws.” (*Ibid.*)

**CA(8)↑ (8)** No other California authority Barr has cited, nor any we have found, establishes the scope of the patent test is applicable under the Cartwright Act. Even if such precedent existed, we would be forced to reexamine it in light of *Actavis*. **HN8↑** The scope of the patent test insulates from antitrust scrutiny virtually any agreement that restrains trade no more than the patent itself would have, if valid. State law must yield to federal, but we cannot under the guise of patent law carve into the Legislature's enactments a larger exception than federal law dictates, and *Actavis* shows such a broad exemption is not required. Accordingly, we conclude the scope of the patent test is inapplicable to Cartwright Act claims.

#### IV. Analysis of Reverse Payment Patent Settlements

<sup>9</sup>The *Actavis* treatment of patents as in some sense probabilistic rests on a substantial body of scholarship suggesting patents are best understood this way. (See, e.g., Lemley & Shapiro, *Probabilistic Patents*, *supra*, 19 J. Econ. Persp. at pp. 75–76, 95; Shapiro, *Antitrust Analysis of Patent Settlements Between Rivals* (Summer 2003) 17 Antitrust 70, 75; Leffler & Leffler, *The Probabilistic Nature of Patent Rights: In Response to Kevin McDonald* (Summer 2003) 17 Antitrust 77; Shapiro, *Antitrust limits to patent settlements* (2003) 34 RAND J. Econ. 391, 395.) Others, including the *Actavis* dissenters, have disagreed, insisting a patent ultimately is always only valid or invalid, whether we know it yet [\*\*\*\*31] or not. (*Actavis, supra*, 570 U.S. at p. [186 L. Ed. 2d at p. 372, 133 S. Ct. at p. 2244] (dis. opn. of Roberts, C. J.); Schildkraut, *Patent-Splitting Settlements and the Reverse Payment Fallacy* (2004) 71 Antitrust L.J. 1033; McDonald, *Hatch-Waxman Patent Settlements and Antitrust: On “Probabilistic” Patent Rights and False Positives* (Spring 2003) 17 Antitrust 68.) The Supreme Court majority's views are conclusive as to which side of this philosophical divide over the proper treatment of patents is correct, and we follow them.

Having joined the United States Supreme Court in rejecting the scope of the patent test, we consider what rubric courts should instead apply under state law to reverse payment patent settlements.

#### A. Antitrust Analysis Under the Cartwright Act

As discussed, although the prohibitions of the [\*\*\*\*34] Cartwright Act are framed in superficially absolute language, deciding antitrust illegality is not as simple as [\*146] identifying whether a challenged agreement involves a restraint of trade. (See [Chicago Board of Trade v. United States \(1918\) 246 U.S. 231, 238 \[62 L. Ed. 683, 38 S. Ct. 242\]](#) [pointing out that “[e]very agreement concerning trade … restrains” (italics added).] Instead, the Cartwright Act and Sherman Act carry forward the common law understanding that “only unreasonable restraints of trade are prohibited.” ([Marin County Bd. of Realtors, Inc. v. Palsson, supra, 16 Cal.3d at p. 930.](#))

**HN9** [↑] **CA(9)** [↑] (9) Under the traditional rule of reason, “inquiry is limited to whether the challenged conduct promotes or suppresses [\*\*\*652] competition.” ([Fisher v. City of Berkeley \(1984\) 37 Cal.3d 644, 672 \[209 Cal. Rptr. 682, 693 P.2d 261\]](#), affd. *sub nom.* [Fisher v. Berkeley \(1986\) 475 U.S. 260 \[89 L. Ed. 2d 206, 106 S. Ct. 1045\]](#).) To determine whether an agreement harms competition more than it helps, a court may consider “the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption.” ([United States v. Topco Associates \(1972\) 405 U.S. 596, 607 \[31 L. Ed. 2d 515, 92 S. Ct. 1126\]](#); see [Corwin v. Los Angeles Newspaper Service Bureau, Inc., supra, 4 Cal.3d at p. 854.](#)) In a typical case, this may entail expert testimony on such matters as the definition of the relevant market ([Corwin, at p. 855](#)) and the extent of a defendant’s market power ([Fisherman’s Wharf Bay Cruise Corp. v. Superior Court \(2003\) 114 Cal.App.4th 309, 334–339 \[7 Cal. Rptr. 3d 628\]](#); [Roth v. Rhodes \(1994\) 25 Cal.App.4th 530, 542–543 \[30 Cal. Rptr. 2d 706\]](#)).

Rule of reason inquiry is not required in every case; we and the United States Supreme Court have partially simplified [\*\*862] the analysis by identifying categories of agreements [\*\*\*\*35] or practices that can be said to always lack redeeming value and thus qualify as per se illegal. (See [Northern Pac. R. Co. v. United States \(1958\) 356 U.S. 1, 5 \[2 L. Ed. 2d 545, 78 S. Ct. 514\]](#); [Marin County Bd. of Realtors, Inc. v. Palsson, supra, 16 Cal.3d at pp. 930–931](#); [Oakland-Alameda County Builders’ Exchange v. F. P. Lathrop Constr. Co. \(1971\) 4 Cal.3d 354, 360–362 \[93 Cal. Rptr. 602, 482 P.2d 226\]](#).) “The per se rule reflects an irrebuttable presumption that, if the court were to subject the conduct in question to a full-blown inquiry, a violation would be found under the traditional rule of reason.” ([Fisher v. City of Berkeley, supra, 37 Cal.3d at p. 666.](#))

**CA(10)** [↑] (10) More recently, a third category, quick look rule of reason analysis, has emerged. ([California Dental Assn. v. FTC \(1999\) 526 U.S. 756, 769–770 \[143 L.Ed.2d 935, 119 S.Ct. 1604\]](#); see [FTC v. Indiana Federation of Dentists \(1986\) 476 U.S. 447, 459–460 \[90 L. Ed. 2d 445, 106 S. Ct. 2009\]](#); [NCAA v. Board of Regents of Univ. of Okla. \(1984\) 468 U.S. 85, 109–110 \[82 L.Ed.2d 70, 104 S.Ct. 2948\]](#).) **HN10** [↑] Under the quick look approach, applicable to cases where “an observer with even a rudimentary understanding of economics [\*147] could conclude that the arrangements in question would have an anticompetitive effect on customers and markets,” a defendant may be asked to come forward with procompetitive justifications for a challenged restraint without the plaintiff having to introduce elaborate market analysis first. ([California Dental Assn., at p. 770.](#))

There was a time when this court and the United States Supreme Court treated the choice between per se and rule of reason analysis as a necessary threshold inquiry involving rigidly distinct analytic boxes. In more recent years, however, the Supreme Court has explained, “[t]he truth is that our categories of analysis of anticompetitive effect are less fixed [\*\*\*\*36] than terms like ‘per se,’ ‘quick look,’ and ‘rule of reason’ tend to make them appear.” ([California Dental Assn. v. FTC, supra, 526 U.S. at p. 779.](#)) “[T]here is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.” ([Id. at pp. 780–781.](#)) [\*\*\*653] The emergence of quick look rule of reason analysis did not signal the supplanting of the traditional per se/rule of reason dichotomy with a new trichotomy ([Polygram Holding, Inc. v. FTC \(D.C. Cir. 2005\) 416 F.3d 29, 35](#)), but rather a shift to ““something of a sliding scale”” in antitrust analysis. ([Actavis, supra, 570 U.S. at p. \[186 L. Ed. 2d at p. 364, 133 S. Ct. at p. 2237\].](#))

**CA(11) [↑]** (11) This more nuanced approach makes equal sense for claims under the Cartwright Act. Like the federal antitrust statutes, **HN11 [↑]** nothing in the text of the Cartwright Act dictates the precise details of the per se and rule of reason approaches; these are but useful tools the courts have developed over time to carry out the broad purposes and give meaning to the general phrases of the antitrust statutes. (See *National Soc. of Professional Engineers v. U. S., supra, 435 U.S. at p. 688*.) It is consistent with the common law tradition at the root of our antitrust laws to describe, as the United States Supreme Court now has, [\*\*\*\*37] the analytic approach as involving a continuum, with the “the circumstances, details, and logic” of a particular restraint (*California Dental Assn. v. FTC, supra, 526 U.S. at p. 781*) dictating how the courts that confront the restraint should analyze it. In lieu of an undifferentiated one-size-fits-all rule of reason, courts may “devise rules … for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones.” (*Leegin Creative Leather Products, Inc. v. PSKS, Inc. (2007) 551 U.S. 877, 898–899 [168 L. Ed. 2d 623, 127 S. Ct. 2705]*; see *Fisher v. City of Berkeley, supra, 37 Cal.3d at pp. 671–677* [tailoring the rule of reason to account for differences between private and municipal government actions].) [\*148]

[\*\*863] It follows that we must consider not simply whether per se or rule of reason analysis applies to reverse payment patent settlements. To the extent rule of reason analysis applies, as we will conclude it does, we must also consider how the analysis should be structured to most efficiently differentiate between reasonable and unreasonable restraints of trade in this context. (See *California Dental Assn. v. FTC, supra, 526 U.S. at p. 781*.)

#### B. The Competitive Harm from Purchasing an Extension of Monopoly

**CA(12) [↑]** (12) We begin with the proposition that **HN12 [↑]** agreements to establish or maintain a monopoly are restraints of trade made unlawful by the Cartwright Act. (*Lowell v. Mother's [\*\*\*\*38] Cake & Cookie Co. (1978) 79 Cal. App. 3d 13, 23 [144 Cal. Rptr. 664]*; *Dimidowich v. Bell & Howell (9th Cir. 1986) 803 F.2d 1473, 1478*.) Under general antitrust principles, a business may permissibly develop monopoly power, i.e., “the power to control prices or exclude competition” (*United States v. du Pont & Co. (1956) 351 U.S. 377, 391 [100 L. Ed. 1264, 76 S. Ct. 994]*), through the superiority of its product or business acumen. To acquire or maintain that power through agreement and combination with others, however, is quite a different matter. (*United States v. Grinnell Corp. (1966) 384 U.S. 563, 570–571 [16 L. Ed. 2d 778, 86 S. Ct. 1698]*.)

Pursuant to this rule, businesses may not engage in a horizontal allocation of markets, with would-be competitors dividing up territories or customers. (*United States v. Topco Associates, supra, 405 U.S. at pp. 608, 612*; *Vulcan Powder Co. v. Hercules Powder Co., supra, 96 Cal. at pp. 514–515*; [\*\*\*654] *Guild Wineries & Distilleries v. J. Sosnick & Son (1980) 102 Cal. App. 3d 627, 633–635 [162 Cal. Rptr. 87]*.) Such allocations afford each participant an “enclave … , free from the danger of outside incursions,” in which to exercise monopoly power and extract monopoly premiums. (*United States v. Sealy, Inc. (1967) 388 U.S. 350, 356 [18 L. Ed. 2d 1238, 87 S. Ct. 1847]*.)

Similarly, a firm may not “pay[] its only potential competitor not to compete in return for a share of the profits that firm can obtain by being a monopolist.” (*Valley Drug Co. v. Geneva Pharmaceuticals, supra, 344 F.3d at p. 1304*.) In *Palmer v. BRG of Georgia, Inc. (1990) 498 U.S. 46 [112 L. Ed. 2d 349, 111 S. Ct. 401]*, for example, two competing bar review course providers did just that. One provider agreed to withdraw from a particular state market in exchange for the second provider paying the withdrawing provider a share of subsequent profits and agreeing in return not to compete outside that state market. In a *per curiam* opinion, the United States Supreme Court [\*\*\*\*39] summarily declared the agreement unlawful on its face. (*Id. at pp. 49–50*; see *Getz Bros. & Co. v. Federal Salt Co. (1905) 147 Cal. 115, 119 [81 P. 416]* [payment for [\*149] agreement not to compete and to discourage others from competing is illegal]; *Wright v. Ryder, supra, 36 Cal. at p. 359* [agreement not to compete in Cal. market violates common law prohibition on restraints of trade].)

**CA(13) [↑]** (13) Second, these principles extend into the patent arena to prohibit a patentee's purchase of a potential competitor's consent to stay out of the market. **HN13 [↑]** **Antitrust law** condemns a patentee's payment “to maintain supracompetitive prices to be shared among the patentee and the challenger rather than face what might have been a competitive market.” (*Actavis, supra, 570 U.S. at p. [186 L. Ed. 2d at p. 363, 133 S. Ct. at p. 2236]*.) This is so even when the patent is likely valid: “The owner of a particularly valuable patent might contend, of

course, that even a small risk of invalidity justifies a large payment. But, be that as it may, the payment (if otherwise unexplained) likely seeks to prevent the risk of competition. And, as we have said, that consequence constitutes the relevant anticompetitive harm.” (*Ibid.*)

*Actavis* embraces the insights of Professor Carl Shapiro and others that the relevant benchmark in evaluating reverse payment patent settlements should be no different from the benchmark in evaluating [\*\*\*\*40] any other challenged agreement: What would the state of competition have been without the agreement? In the case of a reverse payment [\*\*864] settlement, the relevant comparison is with the average level of competition that would have obtained absent settlement, i.e., if the parties had litigated validity/invalidity and infringement/noninfringement to a judicial determination. (Shapiro, *Antitrust limits to patent settlements*, *supra*, 34 RAND J. Econ. at p. 396; see Addanki & Butler, *Activating Actavis: Economic Issues in Applying the Rule of Reason to Reverse Payment Settlements* (2014) 15 Minn. J. L. Sci. & Tech. 77, 93; Lemley & Shapiro, *Probabilistic Patents*, *supra*, 19 J. Econ. Persp. at p. 94; Willig & Bigelow, *Antitrust policy toward agreements that settle patent litigation* (2004) 49 Antitrust Bull. 655, 664, 677–679.) Consider a patent with a 50 percent chance of being upheld. After litigation, on average, consumers would be subject to a monopoly for half the remaining life of the patent. A settlement that allowed a generic market entry at the midpoint of the time remaining until expiration would replicate the expected level of competition; the period of exclusion would reflect the patent's [\*\*\*655] strength. But a settlement that delayed entry still longer would extend the elimination of competition beyond what the patent's strength warranted; to the extent it did, the additional elimination of the possibility of [\*\*\*\*41] competition would constitute cognizable anticompetitive harm. (See *Actavis*, *supra*, 570 U.S. at p. [186 L. Ed. 2d at p. 363, 133 S. Ct. at p. 2236].)

**CA(14)[↑]** (14) Barr argues that the procompetitive or anticompetitive effects of a settlement must be measured by comparison to the entire remaining life of a patent. We disagree. *Actavis* makes clear that **HN14[↑]** for antitrust purposes patents are no longer to be treated as presumptively ironclad. This means the period [\*150] of exclusion attributable to a patent is not its full life, but its expected life had enforcement been sought. This expected life represents the baseline against which the competitive effects of any agreement must be measured.<sup>10</sup> If an agreement only replicates the likely average result of litigation, any exclusion is a function of the underlying patent strength; if it extends exclusion beyond that point, this further exclusion from the marketplace—and the attendant anticompetitive effect—is attributable to the agreement. *Actavis* thus represents an application of the settled principle that “[t]he owner of a patent cannot extend his statutory grant by contract or agreement. A patent affords no immunity for a monopoly not fairly or plainly within the grant.” (*U. S. v. Masonite Corp.* (1942) 316 U.S. 265, 277 [86 L.Ed. 1461, 62 S.Ct. 1070].) The measure of the statutory grant, and the limit on the monopoly that [\*\*\*\*42] may be preserved by agreement, is the average expected duration that would have resulted from judicial testing.

**CA(15)[↑]** (15) This method of analysis, and of assessing anticompetitive harm, is not materially different from that applied in any other garden-variety antitrust case. **HN15[↑]** Every case involves a comparison of a challenged agreement against a prediction about—a probabilistic assessment of—the expected competition that would have arisen in its absence. (Shapiro, *Antitrust Analysis of Patent Settlements Between Rivals*, *supra*, 17 Antitrust at p. 70.) Every restraint of trade condemned for suppressing market entry involves uncertainties about the extent to which competition would have come to pass. (Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition*, *supra*, 109 Colum. L.Rev. at p. 637.) No matter; as the leading antitrust treatise notes, “the law does not condone the purchase of protection from uncertain competition any more [\*\*\*\*43] than it condones the elimination of actual competition.” (12 Areeda & Hovenkamp, *Antitrust Law*, *supra*, ¶ 2030b, p. 220; see *U.S. v. Microsoft Corp.* (D.C. Cir. 2001) 253 F.3d 34, 79 (en banc) [“it would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will ...”].) The antitrust laws foreclose agreements eliminating “the risk of competition”—the competitive market that “might [\*\*865] have been.” (*Actavis*, *supra*, 570 U.S. at p. [186 L. Ed. 2d at p. 363, 133 S. Ct. at p. 2236].) Purchasing freedom from the possibility of competition, whether done by a patentee or anyone else, is illegal. An

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<sup>10</sup> To be clear, because the relevant baseline is the result that would have occurred in the absence of any agreement, it is not a cognizable harm simply to show that the parties might have elected a different settlement agreement more favorable to competition and consumers. There is no statutory right to have parties enter the agreement most favorable to competition, only a prohibition against entering agreements that harm competition.

agreement to exchange consideration for elimination of any portion of the period of [\*\*\*656] competition that would have been expected had a patent been litigated is a violation of the Cartwright Act.

[\*151]

### C. The Structure of the Rule of Reason as Applied to Patent Settlements

We consider next how to identify whether the parties' settlement agreement eliminates competition beyond the point at which competition would have been expected in the absence of an agreement. Only if the agreement limits competition beyond that point, the point the strength of the patent would have justified, is there an antitrust issue.

#### 1. Plaintiff's Prima Facie Case

**CA(16)[<sup>16</sup>]** (16) We conclude **HN16[<sup>16</sup>]** a third party plaintiff challenging a reverse payment patent settlement [\*\*\*\*44] must show four elements: (1) the settlement includes a limit on the settling generic challenger's entry into the market; (2) the settlement includes cash or equivalent financial consideration flowing from the brand to the generic challenger; and the consideration exceeds (3) the value of goods and services *other* than any delay in market entry provided by the generic challenger to the brand, as well as (4) the brand's expected remaining litigation costs absent settlement. We explain these elements in turn.

That a plaintiff challenging a reverse payment settlement must establish the settlement limits the challenging generic's entry is self-evident. If the settlement contains no component of delay and permits the generic to enter the market and compete fully and immediately, there is no restraint of trade and no potential for antitrust concern.

As well, **HN17[<sup>17</sup>]** a plaintiff must establish a reverse payment—financial consideration flowing from the brand to the generic challenger.<sup>11</sup> In the absence of payment, one would expect rational parties that settle to select a market entry point roughly corresponding to their joint expectation as to when entry would have occurred, on average, if the patent's [\*\*\*\*45] validity and infringement had been fully litigated. (Hovenkamp et al., *Anticompetitive Settlement of Intellectual Property Disputes* (2003) [87 Minn. L.Rev. 1719, 1762](#).) If market entry were substantially later than the generic thought it could obtain through litigation, the generic would be unwilling to settle and forgo the additional profits it thought it could earn from an earlier entry; conversely, if the entry were [\*152] substantially earlier than the brand thought it could obtain through litigation, the brand would not settle and forgo an additional period of monopoly. Absent payment, one can accept an agreement to postpone market entry as a fair approximation of the expected level of competition that would have obtained had the parties litigated; absent payment, any delay in entry may be attributed to the effective strength of the challenged patent, rather than the settlement agreement. (See *ibid.*; Carrier, *Payment After Actavis* (2014) [100 Iowa L.Rev. 7, 17](#).)

**CA(17)[<sup>17</sup>]** (17) [\*\*\*657] Third, a plaintiff must establish the consideration to the generic challenger exceeds the value of any other collateral products or services provided by the generic to the brand. As the Supreme Court noted, **HN18[<sup>18</sup>]** the concern that a reverse payment raises will depend in part on "its independence from other services for which it might represent payment." (*Actavis, supra*, 570 U.S. at p. [186 L. Ed. 2d at p. 364, 133 S. Ct. at p. 2237](#).) A "payment may reflect compensation for other services that the generic has promised to perform—such as distributing the patented item or helping to develop a market for that item." (*Id. at p.* [186 L. Ed. 2d at p. 362, 133 S. Ct. at p. 2236](#).) [\*\*866] If payment is no more than would be expected as compensation for additional products or services, then the agreement includes no additional consideration for delay and we can trust that any limit on competition is a legitimate consequence of the patent's strength and the contracting parties' expectations concerning its exclusionary power.

<sup>11</sup> To some extent, the settlement agreement challenged here is a relic. Cash reverse payments were not uncommon in the 1990s, but shortly thereafter brands and generics began using a wide range of other forms of consideration to accomplish reverse payment. (See Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition, supra*, 109 Colum. L.Rev. at pp. 647–658.) Because [\*\*\*\*46] the Cipro settlement involved cash, we need not define precisely what noncash forms of consideration will qualify, but courts considering Cartwright Act claims should not let creative variations in the form of consideration result in the purchase of freedom from competition escaping detection.

Considerable caution is in [\*\*\*\*47] order in evaluating settlements that include side agreements for generic products or services. Historically, it appears brands and generics have engaged in business dealings outside the settlement context far less often than in it. (Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition, supra, 109 Colum. L.Rev. at pp. 663–668.*) A side agreement involving difficult to value assets might conceivably be added to a patent settlement to provide cover for the purchase of additional freedom from competition. (*Id. at pp. 632–633, 669;* Bulow, *The Gaming of Pharmaceutical Patents in 4 Innovation Policy and the Economy, supra, at pp. 169–171;* Carrier, *Unsettling Drug Patent Settlements: A Framework for Presumptive Illegality, supra, 108 Mich. L.Rev. at p. 79.*) This court long ago established that side deals should not be permitted to serve as fig leaves for agreements to eliminate competition. In *Getz Bros. & Co. v. Federal Salt Co., supra, 147 Cal. 115*, the parties entered an agreement to exchange money for (1) an agreement not to compete and to discourage competition in the salt trade and (2) more than 1,000 pounds of salt. Precisely how much of the payment was attributable to the actual provision of salt we could not say, but so long as any portion of the payment was attributable to the covenant not to compete—and we viewed it as “plain … that part of it, at least, was”—the deal as a whole was an illegal restraint of trade. (*Id. at p. 118.*)

[\*153]

**HN19** [↑] **CA(18)** [↑] (18) Fourth, a plaintiff must establish that the amount of the payment, over and above the [\*\*\*\*48] value of collateral products or services from the generic, also exceeds the brand's anticipated future litigation costs. In some cases, a “reverse payment … may amount to no more than a rough approximation of the litigation expenses saved through the settlement. … Where a reverse payment reflects traditional settlement considerations, such as avoided litigation costs or fair value for services, there is not the same concern that a patentee is using its monopoly profits to avoid the risk of patent invalidation or a finding of noninfringement. In such cases, the parties may have provided for a reverse payment without having sought or brought about the anticompetitive consequences we mentioned above.” (*Actavis, supra, 570 U.S. at p. 186 L. Ed. 2d at p. 362, 133 S. Ct. at p. 2236.*) A rational brand might be indifferent as between (1) actually litigating or (2) settling, with market entry at the point expected, on average, from asserting its patent in litigation and a payment to the generic in an amount up to what would have been spent in that litigation. [\*\*\*658] It is thus necessary to evaluate the reverse payment’s “scale in relation to the payor’s anticipated future litigation costs.” (*Id. at p. 186 L. Ed. 2d at p. 364, 133 S. Ct. at p. 2237.*)

**CA(19)** [↑] (19) We consider briefly the allocation of burdens of proof and production. [\*\*\*\*49] **HN20** [↑] Unless a challenged settlement agreement includes both a restraint on generic competition and a reverse payment to the generic in excess of both brand litigation costs and generic collateral products and services, there is no reason to assume the settlement includes any element of purchased freedom from competition, as opposed to a limit on competition flowing naturally, and lawfully, from the perceived strength of the brand's patent. Accordingly, the burden of proof as to these elements rests with the Cartwright Act plaintiff. (See *Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 861 [107 Cal. Rptr. 2d 841, 24 P.3d 493].*)

**CA(20)** [↑] (20) The burden of producing evidence (see *Evid. Code, §§ 110, 550*) is a slightly different matter. **HN21** [↑] “Where the evidence necessary to establish a fact essential to a claim lies peculiarly within the knowledge and competence of one of the parties, that party has the burden of going forward with the evidence on the issue although it is not the party asserting the claim.” (*Sanchez v. Unemployment Ins. Appeals Bd. (1977) 20 Cal.3d 55, 71 [141 Cal. Rptr. 146, 569 P.2d 740].*) [\*\*867] This is so with regard to both a settling party's own litigation costs and the existence and value of any collateral products or services provided as part of a patent settlement; these are matters about which the settling parties will necessarily have superior knowledge.<sup>12</sup> Accordingly, [\*154] once a plaintiff has shown [\*\*\*\*50] an agreement involving a reverse payment and delay, the defendants have the burden of coming forward with evidence of litigation costs and the value of collateral products and services.<sup>13</sup> If the defendants fail to do so, because, e.g., there was no side agreement or because they do not

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<sup>12</sup> We do not suggest a defendant's testimony concerning the value conveyed in side agreements is entitled to any more weight than the plaintiff's, only that the defendants have the initial burden of introducing evidence of agreements for the purchase of other products or services sufficiently valuable to explain any payment.

dispute the collective amounts fall short of any payment to the generic, the plaintiff has satisfied its burden on these points. If instead the defendants do so, the plaintiff must carry the ultimate burden of persuasion that any reverse payment exceeds litigation costs and the value of collateral products or services.

**CA(21)** (21) We further conclude that **HN22** a [\*\*\*\*51] showing of the above elements is not only necessary but also sufficient to make out a *prima facie* case that the settlement is anticompetitive. If a brand is willing to pay a generic more than the costs of continued litigation, and more than the value of any collateral benefits, in order to settle and keep the generic out of the market, there is cause to believe some portion of the consideration is payment for exclusion beyond the point that would have resulted, on average, from simply litigating the case to its conclusion. Otherwise, the brand would have had little incentive to settle at such a high price. Moreover, the larger the gap, the stronger the inference one can draw.

A wealth of economic scholarship and analysis supports this inference. Because [\*\*\*659] the profit that can be earned under monopoly conditions is greater than the combined profit that can be earned under duopoly conditions,<sup>14</sup> a brand and a generic have a substantial incentive to settle at the latest market entry date possible, with the brand paying a portion of monopoly profits to compensate the generic for what it would have earned with an earlier entry.<sup>15</sup> If the parties can share monopoly profits through a reverse payment [\*\*\*\*52] from the [\*155] brand to the generic, the generic no longer has motivation to hold out for its best estimate of the average entry point it could obtain through litigation. Instead, the parties' interests align in favor of maximizing their combined wealth by extending the monopoly for as long as possible. Once payment to the generic exceeds what the brand is otherwise receiving from it in [\*\*868] products and services or would have spent to litigate, a court may fairly presume the settling parties have engaged in such conduct and should be put to the burden of coming forward with a procompetitive justification for their settlement. (Elhauge & Krueger, *Solving the Patent Settlement Puzzle*, *supra*, [91 Tex. L.Rev. at pp. 297–304](#); see Edlin et al., *Activating Actavis* (2013) 28 Antitrust 16, 22, appen.; Lemley & Shapiro, *Probabilistic Patents*, *supra*, 19 J. Econ. Persp. at p. 93; Shapiro, *Antitrust limits to patent settlements*, *supra*, 34 RAND J. Econ. at p. 408.)

Barr argues this degree of scrutiny will stifle innovation. But Congress was not authorized to, and did not, grant inventors eternal monopolies; instead, it approved a scheme that presumptively represents the appropriate balance between promoting innovation and allowing competition. Reverse payment patent settlements may enable the parties to extend the monopoly beyond that point. (Elhauge & Krueger, *Solving the Patent Settlement Puzzle*, *supra*, [91 Tex. L.Rev. at pp. 295–304](#); Lemley & Shapiro, *Probabilistic Patents*, *supra* [\*\*\*\*54], 19 J. Econ. Persp. at p. 93; Leffler & Leffler, *Efficiency Trade-Offs in Patent Litigation Settlements: Analysis Gone Astray?* (2004) [39 U.S.F. L.Rev. 33, 37–38](#); Shapiro, *Antitrust Analysis of Patent Settlements Between Rivals*, *supra*, 17 Antitrust at p.

<sup>13</sup> Here, the brand, Bayer, settled out of the antitrust case, and Barr would not be in a superior position with regard to knowledge of Bayer's future patent litigation costs, so the burden of production on this point would remain with plaintiffs.

<sup>14</sup> While this is a broadly shared economic tenet, it has also been empirically demonstrated by the FDA in the current context. (See FDA, Center for Drug Evaluation and Research, Generic Competition and Drug Prices (2010) online at <http://www.fda.gov/AboutFDA/CentersOffices/Officeofmedicalproductsandtobacco/CDER/ucm129385.htm> [as of May 7, 2015].) Indeed, in its briefing Barr effectively concedes this is the case here: “[E]ach day of early entry would have cost [\*\*\*\*53] Bayer more given the price of its branded product than it would have benefitted Barr given the price of its generic product.”

<sup>15</sup> *Actavis*, *supra*, 570 U.S. at pages — [186 L. Ed. 2d at pages 361–362, 133 S. Ct. at pages 2234–2235]; see, e.g., Hovenkamp, *Anticompetitive Patent Settlements and the Supreme Court's Actavis Decision*, *supra*, [15 Minn. J. L. Sci. & Tech. at pages 8–13](#); Mungan, *Reverse Payments, Perverse Incentives* (2013) [27 Harv. J. Law & Tech. 1, 5–6, 27, 34](#); Elhauge & Krueger, *Solving the Patent Settlement Puzzle* (2012) [91 Tex. L.Rev. 283, 289](#); Kades, *Whistling Past the Graveyard: The Problem with the Per Se Legality Treatment of Pay-for-Delay Settlements* (2009) 5 Competition Pol'y Int'l 143, 148–150; Leffler & Leffler, *Settling the Controversy over Patent Settlements: Payments by the Patent Holder Should Be Per Se Illegal in Antitrust Law* and Economics (Kirkwood edit., 2004) 475, 480–484; Willig & Bigelow, *Antitrust policy toward agreements that settle patent litigation*, *supra*, 49 Antitrust Bull. at page 659; Bulow, *The Gaming of Pharmaceutical Patents in 4 Innovation Policy and the Economy*, *supra*, at page 166; Shapiro, *Antitrust limits to patent settlements*, *supra*, 34 RAND J. Econ. at pages 394–395.

73.) Indeed, insufficient scrutiny of such settlements has the potential to hamper innovation by allowing weak patents to offer the exact same exclusionary potential and monopoly possibilities as [\*\*\*660] strong ones,<sup>16</sup> thus steering innovator incentives away from more costly true innovation and toward cheaper, less socially valuable pseudoinnovation. (See Mungan, *Reverse Payments, Perverse Incentives, supra, 27 Harv. J. Law & Tech. at pp. 42–44*; Elhauge & Krueger, *Solving the Patent Settlement Puzzle, at pp. 294–295.*)

[\*156]

Relatedly, Barr expresses concern that close scrutiny of reverse payment settlements will chill some generics from challenging patents, to the detriment of consumers. But any challenge that results in the brand simply paying the generic not to compete—a potentially common outcome absent scrutiny—does nothing to enhance competition, and deterring such challenges accordingly represents no loss to consumers. Moreover, standard economic theory suggests reducing unfettered access to reverse payment settlements would chill generic challenges to strong, [\*\*\*\*55] likely valid patents more than challenges to weak patents. The effect would be to increase the value of strong patents, while still leaving generics incentives to challenge weak patents. (Mungan, *Reverse Payments, Perverse Incentives, supra, 27 Harv. J. Law & Tech. at p. 7.*) This consequence presents no reason to scale back scrutiny of these settlements.

**CA(22)** [22] Finally, Barr argues that in some cases only a reverse payment can bridge the differences between the brand and the generic challenger and make settlement possible. Perhaps; but as the Supreme Court has made clear, **HN23** [ordinarily “the fact that a large, unjustified reverse payment risks antitrust liability does not prevent litigating parties from settling their lawsuit.” (*Actavis, supra, 570 U.S. at p. 186 L. Ed. 2d at p. 363, 133 S. Ct. at p. 2237*.) Parties can still use financial considerations to bridge small gaps arising from differing subjective perceptions of their probabilities of success in litigation; what they cannot do is use money to bridge their differences over the point when competitive entry is economically desirable, for that gap is not one **antitrust law** permits would-be competitors to bridge by agreement: “If the basic reason [the parties prefer a reverse payment settlement] is a desire to maintain and to share patent-generated monopoly [\*\*\*\*56] [\*\*869] profits, then, in the absence of some other justification, the antitrust laws are likely to forbid the arrangement.” (*Ibid.*) That some settlements might no longer be possible absent a payment in excess of litigation costs is no concern if the ones now barred would simply have facilitated the sharing of monopoly profits.

Barr relies on one commentary showing that some theoretically possible settlements involving payments exceeding the sum of expected litigation costs and the value of other products and services might enhance consumer welfare. (Harris et al., *Activating Actavis: A More Complete Story* (2014) 28 Antitrust 83.) The principal conclusion is that introducing brand risk aversion into the settlement model opens up a region of possible settlements involving supralitigation cost payments that nevertheless increase consumer welfare by enabling [\*\*\*661] earlier generic market entry dates.<sup>17</sup> What is not shown is that such [\*157] settlements are at all likely in practice. Although a brand and generic may through payment of money be able to settle on an earlier entry date than would arise from litigation, their incentive (if left undeterred by the antitrust regime) remains to settle on a far later entry date for still larger sums of money, as even some of the leading [\*\*\*\*57] economists highlighting the relevance of risk aversion

<sup>16</sup> See *In re Tamoxifen Citrate Antitrust Litigation, supra, 466 F.3d at page 211* (noting the “troubling dynamic” that “[t]he less sound the patent or the less clear the infringement, and therefore the less justified the monopoly enjoyed by the patent holder, the more a rule permitting settlement is likely to benefit the patent holder by allowing it to retain the patent”); Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition, supra, 109 Colum. L. Rev. at page 638* (treating patents as conclusively valid until expiration “produces the absurd result that an ironclad patent and a trivial patent have the same exclusionary force”); Bulow, *The Gaming of Pharmaceutical Patents in Innovation Policy and the Economy*, volume 4, *supra*, at page 167.

<sup>17</sup> The Harris model also addresses the effects of asymmetric information, but different perspectives on the likelihood of success are unlikely to alone render it possible for a supralitigation costs reverse payment settlement to be efficient. (Elhauge & Krueger, *Solving the Patent Settlement Puzzle, supra, 91 Tex. L. Rev. at pp. 300–303, 325–329.*) Money may be needed to bridge the gap between the parties’ expectations, but a rational brand asked to pay more than its litigation costs to persuade a generic with different perceptions would, in the ordinary case, presumably just litigate.

recognize. (Willig & Bigelow, *Antitrust policy toward agreements that settle patent litigation*, *supra*, 49 Antitrust Bull. at p. 659.) Attempts to quantitatively estimate the frequency with which risk aversion would produce an efficient settlement despite payment in excess of litigation costs suggest such occurrences would be exceedingly rare. (Leffler & Leffler, *The Probabilistic Nature of Patent Rights: In Response to Kevin McDonald*, *supra*, 17 Antitrust at pp. 79–80; Leffler & Leffler, *Settling the Controversy over Patent Settlements: Payments by the Patent Holder Should Be Per Se Illegal* in *Antitrust Law* and Economics, *supra*, at p. 504; see Bulow, *The Gaming of Pharmaceutical Patents* in 4 Innovation Policy and the Economy, *supra*, at p. 167.) Thus, while we do not discount the possibility, it affords no reason to expand plaintiff's *prima facie* case beyond the elements discussed.

**CA(23)↑** (23) We also observe that the outlined *prima facie* showing will suffice, without more, [\*\*\*\*58] to raise a presumption of the patentee's market power. Proving that a restraint has anticompetitive effects often requires the plaintiff to “delineate a relevant market and show that the defendant plays enough of a role in that market to impair competition significantly,” i.e., has market power. (*Roth v. Rhodes*, *supra*, 25 Cal.App.4th at p. 542.) Here, proof of a sufficiently large payment is a surrogate: “the ‘size of the payment from a branded drug manufacturer to a prospective generic is itself a strong indicator of power’—namely, the power to charge prices higher than the competitive level.” (*Actavis*, *supra*, 570 U.S. at p. [186 L. Ed. 2d at p. 362, 133 S. Ct. at p. 2236].) Logically, a patentee would not pay others to stay out of the market unless it had sufficient market power to recoup its payments through supracompetitive pricing. (*Ibid.*) Consequently, **HN24↑** proof of a reverse payment in excess of litigation costs and collateral products and services raises a presumption that the settling patentee has market power sufficient for the settlement to generate significant anticompetitive effects.

## 2. Defendants' Rebuttal

**HN25↑ CA(24)↑** (24) Once a plaintiff has made out a *prima facie* case that a reverse payment patent settlement has anticompetitive effects, a court “must weigh these anticompetitive effects against the possible justifications” [\*\*\*\*59] for the challenged restraint. (*Marin County Bd. of Realtors, Inc. v. Palsson*, *supra*, 16 Cal.3d at p. 937.) At this point, we deem it appropriate to shift the burden to the defendants to offer legitimate justifications and come forward with [\*158] evidence that the challenged settlement [\*\*870] is in fact procompetitive. (See *Bus. & Prof. Code, § 16725* “[i]t is not unlawful to enter” an agreement “to promote, encourage or increase [\*\*\*662] competition”); *Actavis*, *supra*, 570 U.S. at p. [186 L. Ed. 2d at p. 362, 133 S. Ct. at p. 2236] [“An antitrust defendant may show in the antitrust proceeding that legitimate justifications are present … .”].)<sup>18</sup>

Plaintiffs argue we should declare every reverse payment in excess of litigation costs and collateral products and services a *per se* violation of the Cartwright Act. We are unwilling to declare every settlement payment of a certain size illegal. Like the United States Supreme Court, we cannot say with reasonable certainty—yet—that we have posited every possible justification that might render a particular reverse payment settlement procompetitive. (See *Actavis*, *supra*, 570 U.S. at p. [186 L. Ed. 2d at p. 362, 133 S. Ct. at p. 2236].) The theoretical possibility that a settlement in excess of litigation costs and collateral services could be procompetitive, while insufficient to alter the plaintiff's *prima facie* case, is nevertheless [\*\*\*\*60] sufficient for us to reject a categorical rule and instead afford defendants the opportunity to demonstrate a given settlement is the exception.

This does not mean any justification will do. An antitrust defendant cannot argue a settlement is procompetitive simply because it allows competition earlier than would have occurred if the brand had won the patent action; as *Actavis* and our previous discussion make clear, the relevant baseline is the average period of competition that would have obtained in the absence of settlement. (See *Actavis*, *supra*, 570 U.S. at p. [186 L. Ed. 2d at p. 363, 133 S. Ct. at p. 2236].)<sup>19</sup>

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<sup>18</sup> See *FTC v. Indiana Federation of Dentists*, *supra*, 476 U.S. at pages 459–461; *National Soc. of Professional Engineers v. U. S.*, *supra*, 435 U.S. at page 693; 7 Areeda & Hovenkamp, *Antitrust Law* (3d ed. 2010) ¶¶ 1504b, 1507c, pages 402–403, 430.

<sup>19</sup> This point also addresses Barr's argument that causation is lacking in reverse payment cases because absent a settlement, the parties would have litigated, the patentee would likely or surely have won, and consumers would have been no better off. At the time of settlement, the outcome of future litigation is uncertain, and an agreement that “seeks to prevent the risk of

**CA(25)↑ (25)** Likewise, consideration of whether the agreement is justified as procompetitive will not turn on whether the patent would ultimately have been proved valid or invalid. **HN26↑** Agreements must be assessed [\*\*\*\*61] as of the time they are made (*Valley Drug Co. v. Geneva Pharmaceuticals, supra, 344 F.3d at p. 1306*), at which point the patent's validity is unknown and unknowable. Just as later invalidation of a patent does not prove an agreement when made was anticompetitive (*id. at pp. 1306–1307*), later evidence of validity will not [\*159] automatically demonstrate an agreement was procompetitive.<sup>20</sup> **Antitrust law** condemns the purchase of freedom from competition; what matters is whether a settlement postpones market entry beyond the average point that would have been expected at the time in the absence of agreement. (See *In re Aggrenox Antitrust Litigation (D.Conn. 2015) 94 F.Supp.3d 224, 241* ["The salient question is not whether the fully-litigated patent would ultimately be found valid or invalid—that may never be known—but whether the settlement included a large and unjustified reverse payment leading to the [\*\*\*663] inference of profit-sharing to avoid the risk of competition."].)

To determine whether such a settlement has occurred under state law, as under federal [\*\*\*\*62] law, "it is normally not necessary to litigate patent validity ... ." (*Actavis, supra, 570 U.S. at p. [186 L. Ed. 2d at p. 363, 133 S. Ct. at p. 2236]*.) "An unexplained large reverse payment itself would normally suggest that the patentee has serious doubts about the patent's survival. And that fact, in turn, suggests that the payment's objective is to maintain supracompetitive prices to be shared among the patentee and the challenger [\*\*871] rather than face what might have been a competitive market—the very anticompetitive consequence that underlies the claim of antitrust unlawfulness. ... In a word, the size of the unexplained reverse payment can provide a workable surrogate for a patent's weakness, all without forcing a court to conduct a detailed exploration of the validity of the patent itself." (*Id. at pp. – [186 L. Ed. 2d at p. 363, 133 S. Ct. at pp. 2236–2237]*.)

### 3. The Plaintiff's Ultimate Burden

**HN27↑ CA(26)↑ (26)** The ultimate burden throughout rests with the plaintiff to show that a challenged settlement agreement is anticompetitive. (*Bert G. Gianelli Distributing Co. v. Beck & Co. (1985) 172 Cal. App. 3d 1020, 1048 [219 Cal. Rptr. 203]*.) Once the plaintiff has made out a prima facie case that a reverse payment patent settlement is anticompetitive, however, the plaintiff thereafter need only show that any procompetitive justifications proffered by the defendants are unsupportable. (See *Polygram Holding, Inc. v. FTC, supra, 416 F.3d at pp. 37–38*.)

The ultimate question in reverse payment settlement cases [\*\*\*\*63] is whether an agreement involves "significant unjustified anticompetitive consequences." (*Actavis, supra, 570 U.S. at p. [186 L. Ed. 2d at p. 364, 133 S. Ct. at p. 2238]*.) The prima facie case requires the plaintiff to eliminate the possibility that litigation costs or other products or services could explain the consideration paid the generic. If a plaintiff does so and thereafter can dispel each additional justification the defendants put forward to explain the consideration, the conclusion follows that the settlement payment must include, in [\*160] part, consideration for additional delay in entering the market. That payment for delay is condemned by the Cartwright Act, as by federal **antitrust law**, and its purchase as part of a settlement agreement is an unlawful restraint of trade.

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**CA(27)↑ (27)** We summarize **HN28↑** the structure of the rule of reason applicable to reverse payment patent settlements. To make out a prima facie case that a challenged agreement is an unlawful restraint of trade, a plaintiff must show the agreement contains both a limit on the generic challenger's entry into the market and compensation from the patentee to the challenger. The defendants bear the burden of coming forward with evidence of litigation costs or valuable collateral products or services that [\*\*\*\*64] might explain the compensation; if the defendants do so, the plaintiff has the burden of demonstrating the compensation exceeds the reasonable value of these. If a prima facie case has been made out, the defendants may come forward with additional justifications to demonstrate

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competition" causes, i.e., has as a "consequence ... the relevant anticompetitive harm." (*Actavis, supra, 570 U.S. at p. [186 L. Ed. 2d at p. 363, 133 S. Ct. at p. 2236]*.)

<sup>20</sup> Some kinds of evidence may also be suspect: Once a brand and a generic challenger settle, their incentives align in favor of arguing that the patent was stronger and more clearly infringed than it may have appeared at the time.

the settlement agreement nevertheless is procompetitive. A plaintiff who can dispel these justifications has carried the burden of demonstrating the settlement agreement is an unreasonable restraint of trade under the Cartwright Act.

#### D. Preemption

**CA(28)** (28) Barr argues federal preemption concerns narrowly constrain how reverse [\*\*\*664] payment patent settlements must be analyzed under state law. According to Barr, any rule more stringent than the traditional, unstructured rule of reason would fall prey to **HN29** obstacle preemption, which “arises when “under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”” (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 936 [63 Cal. Rptr. 3d 50, 162 P.3d 569].) We disagree; the rule we adopt is in harmony with *Actavis*, which offered only broad outlines and explicitly left to other courts the task of developing a framework for analyzing the anticompetitive effects [\*\*\*\*65] of reverse payment patent settlements. (*Actavis, supra*, 570 U.S. at p. [186 L. Ed. 2d at p. 364, 133 S. Ct. at p. 2238].)

**HN30** **CA(29)** (29) State **antitrust law** ordinarily is fully compatible with federal law. States have regulated against monopolies and unfair competition for longer than the federal government, and federal law is intended only “to supplement, not displace, state antitrust remedies.” (*California v. ARC America Corp.* (1989) 490 U.S. 93, 102 [104 L. Ed. 2d 86, 109 S. Ct. 1661]; see *id.* at pp. 101–102 & fn. 4; *Partee v. San Diego Chargers Football Co.* (1983) 34 Cal.3d 378, 382 [194 Cal. Rptr. 367, 668 P.2d 674].) [\*\*872] “[T]he Cartwright Act is broader in range and deeper in reach than the Sherman Act.” (*Cianci v. [\*161] Superior Court, supra*, 40 Cal.3d at p. 920); this greater domain has never been thought to pose supremacy clause problems. To the contrary, in light of the established state role, a presumption against preemption applies. (*ARC America Corp., at p. 101*.)

Barr argues that to avoid conflicting with federal patent law, state **antitrust law** must cohere with the federal rule that patents are presumed valid. (See *35 U.S.C. § 282*.) But as we have discussed, the patent act’s allocation of a burden of proof is no more than a procedural device. It does not insulate settlements of patent disputes from federal antitrust scrutiny (*Actavis, supra*, 570 U.S. at pp. — [186 L. Ed. 2d at p. 356, 133 S. Ct. at pp. 2230–2231]), nor does it insulate them from state antitrust scrutiny. The agnostic stance toward patent validity our structured rule of reason adopts is identical to that embraced by the United States Supreme Court under federal **antitrust law**: a [\*\*\*\*66] patent may or may not be valid or infringed. (*Ibid.*) What matters instead is simply whether a payoff to eliminate the possibility of competition has occurred. (*Id. at p.* [186 L. Ed. 2d at p. 363, 133 S. Ct. at p. 2236].) If federal **antitrust law** can conduct that inquiry without offense to patent law, so too can the state **antitrust law** it was designed to supplement.

Additionally, Barr argues the rule we adopt must be no more favorable to reverse payment patent settlement challenges than would be the case under *Actavis*. The supposed rationale is that *Actavis* identifies precisely the accommodation patent law requires of **antitrust law**, such that deviation would pose an obstacle to congressional patent objectives.

If *Actavis* had established a special rule limiting antitrust scrutiny of reverse payment settlements in order to preserve the incentives created by the patent system, we might agree. But the lesson of *Actavis* is that nothing in the patent laws or the Hatch-Waxman Act dictates such a special rule; that a settlement resolves a patent dispute does not “immunize the agreement from antitrust attack.” (*Actavis, supra*, 570 U.S. at p. [186 L. Ed. 2d at p. 356, 133 S. Ct. at p. 2230].) [\*\*665] Instead, such agreements may, like any other form of agreement restraining trade, be examined for unjustified anticompetitive effects. (*Id. at p.* [186 L. Ed. 2d at p. 364, 133 S. Ct. at p. 2238] [\*\*\*\*67].) As for how such an examination is to be conducted, *Actavis* reverts solely to antitrust considerations. (*Id. at pp.* — [186 L. Ed. 2d at p. 364, 133 S. Ct. at pp. 2237–2238].) In selecting a test to apply—to the extent the Supreme Court does, as opposed to “leav[ing] to the lower courts the structuring of the present rule-of-reason antitrust litigation” (*id. at p.* [186 L. Ed. 2d at p. 364, 133 S. Ct. at p. 2238])—the court looks to whether its experience with the economics of reverse payment settlements is sufficient to allow it, yet, to require particular modifications to rule of reason analysis (*id. at p.* [186 L. Ed. 2d at p. 363, 133 S. Ct. at p. 2237]).

[\*162]

**HN31** [CA(30)] (30) Where the choice of a test rests solely on economic analysis, no patent law preemption concerns arise. Instead, the issue reduces to a problem in the relation between federal and state **antitrust law**, and there the Supreme Court has been quite clear that states may depart from federal rules—or, here, accept an invitation to develop a gap in the law explicitly left by the Supreme Court—absent evidence of a clear congressional purpose to the contrary. (*California v. ARC America Corp., supra, 490 U.S. at p. 103.*)

We note as well that the structured rule of reason we adopt is consistent with, not an obstacle to, congressional patent and health care goals in two specific ways. First, considerable research and analysis suggests the broad availability of reverse payment settlements favors weak patents and channels investment resources toward suboptimal innovation prospects. (See *ante*, at p. 155.) To the extent careful scrutiny of such settlements promotes the very innovation the patent laws were intended to promote, it cannot stand as an obstacle to congressional objectives.

[[\*\*873] Second, a fundamental goal of the Hatch-Waxman Act is to enhance generic competition and thereby lower prices. [\*\*\*\*68] Congress rued the “serious anti-competitive effects” of existing rules for generic drug approval, rules that resulted in “the practical extension of the monopoly position of the patent holder beyond the expiration of the patent.” (H.R. Rep. No. 98-857, 2d Sess., pt. 2, p. 4 (1984), reprinted in 1984 U.S. Code Cong. & Admin. News, p. 2688.) The substantial reworking of those rules to ease generic approval was designed to “make available more low cost generic drugs” (*Id.*, pt. 1, at p. 14, reprinted in 1984 U.S. Code Cong. & Admin. News, at p. 2647) and reduce costs for consumers and government-funded health care alike (*id.* at p. 17, reprinted in 1984 U.S. Code Cong. & Admin. News, at p. 2650). By ferreting out anticompetitive agreements that limit generic market entry and sustain costly monopolies, a structured rule of reason serves those goals and poses no obstacle to congressional objectives.<sup>21</sup>

#### [\*\*\*666] E. Application

**CA(31)** (31) The trial court and Court of Appeal treated the '444 patent as ironclad and used the entire period until its expiration as the relevant [\*163] benchmark in order to assess whether the parties' settlement agreement had anticompetitive effects. This was error.

Barr argues we nevertheless should affirm because in the course of their respective opinions the trial court and Court of Appeal purported to apply the rule of reason in addition to the scope of the patent test. But the rule of reason these courts applied is not the structured rule of reason for reverse payment patent settlements we articulate today to effectuate the purposes of the Cartwright Act. Rather, in each instance the courts simply concluded that because the agreement did not exclude competition beyond what the '444 patent would have permitted (assuming it were valid), the agreement necessarily had no anticompetitive effect and was not unlawful under the rule of reason. The same misapprehension underlying the lower courts' scope of the patent analysis, that for antitrust purposes patents are ironclad, also underlay their rule of reason analysis. Accordingly, we must reverse.

#### V. Unfair Competition Law and Common Law Monopoly [\*\*\*\*70] Claims

<sup>21</sup> A second federalism concern raised by the Court of Appeal, that state antitrust scrutiny would intrude on the exclusivity of federal court patent jurisdiction (see [28 U.S.C. § 1338\(a\)](#)), likewise presents no issue. This exclusive jurisdiction does not prevent state courts from deciding state law claims incidentally touching on the validity [\*\*\*\*69] of a patent. (*Caldera Pharmaceuticals, Inc. v. Regents of University of California* (2012) 205 Cal.App.4th 338, 353–356 [[140 Cal. Rptr. 3d 543](#).]) Moreover, the “slim category” of state law claims subject to exclusive federal patent jurisdiction includes only those that “necessarily raise” a federal patent issue. (*Gunn v. Minton* (2013) 568 U.S. \_\_\_, \_\_\_ [185 L.Ed.2d 72, 79, 133 S.Ct. 1059, [1065](#).]) As we have discussed, it is entirely possible to resolve an antitrust challenge to a reverse payment patent settlement without adjudicating the patent's validity.

The trial court entered judgment against plaintiffs on their unfair competition and common law monopoly claims using the same reasoning it applied to the Cartwright Act claim. Because that reasoning was erroneous, we reverse on these claims as well.

**DISPOSITION**

We reverse the Court of Appeal's judgment and remand for further proceedings consistent with this opinion.

Cantil-Sakauye, C. J., Chin, J., Corrigan, J., Liu, J., Cuéllar, J., and Kruger, J., concurred.

The petition of respondent Watson Pharmaceuticals, Inc., for a rehearing was denied July 8, 2015.

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## Nationwide Biweekly Administration, Inc. v. Superior Court

Supreme Court of California

April 30, 2020, Opinion Filed

S250047

### **Reporter**

9 Cal. 5th 279 \*; 462 P.3d 461 \*\*; 261 Cal. Rptr. 3d 713 \*\*\*; 2020 Cal. LEXIS 2751 \*\*\*\*

NATIONWIDE BIWEEKLY ADMINISTRATION, INC., et al., Petitioners, v. THE SUPERIOR COURT OF ALAMEDA COUNTY, Respondent; THE PEOPLE, Real Party in Interest.

**Subsequent History:** Reported at [Nationwide Biweekly Administration, Inc. v. Superior Court, 2020 Cal. LEXIS 3154 \(Cal., Apr. 30, 2020\)](#)

Writ denied by, Remanded by [Nationwide Biweekly Admin. v. Superior Court of Alameda, 2020 Cal. App. Unpub. LEXIS 4402 \(Cal. App. 1st Dist., July 14, 2020\)](#)

**Prior History:** [\*\*\*\*1] First Appellate District, Division One, A150264. Alameda County Superior Court, RG15770490.

[Nationwide Biweekly Administration, Inc. v. Superior Court, 24 Cal. App. 5th 438, 234 Cal. Rptr. 3d 468, 2018 Cal. App. LEXIS 541, 2018 WL 2947922 \(June 13, 2018\)](#)

## **Core Terms**

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civil penalty, equitable, jury trial, cause of action, advertising, injunctive relief, right to a jury trial, consumer, unfair, cases, misleading, gist, common law, decisions, business practice, endorsements, trial court, unfair competition, restitution, injunction, civil action, deceptive, practices, remedies, provisions, violates, factors, equitable issues, equitable relief, court of equity

## **LexisNexis® Headnotes**

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Civil Procedure > Trials > Jury Trials > Right to Jury Trial

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

### [HN1](#) Jury Trials, Right to Jury Trial

Under California law, the right to a jury trial in a civil action may be afforded either by statute or by the California Constitution. As a general matter, the California Legislature has authority to grant the parties in a civil action the right to a jury trial by statute, either when the Legislature establishes a new cause of action or with respect to a cause of action that rests on the common law or a constitutional provision. Given the Legislature's broad general legislative authority under the California Constitution and in the absence of any constitutional prohibition, the

Legislature may extend the right to a jury trial to instances in which the state constitutional jury trial provision does not itself mandate a right to a jury trial. But even when the language and legislative history of a statute indicate that the Legislature intended that a cause of action established by the statute is to be tried by the court rather than a jury, if the California constitutional jury trial provision itself guarantees a right to a jury trial in such a cause of action, the Constitution prevails and a jury trial cannot be denied.

Civil Procedure > Remedies > Injunctions

Civil Procedure > Preliminary Considerations > Equity > Relief

## **HN2** [] Remedies, Injunctions

Actions seeking injunctive relief are equitable in nature.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Torts > Business Torts > Unfair Business Practices > Remedies

## **HN3** [] Deceptive & Unfair Trade Practices, State Regulation

The language of [Bus. & Prof. Code, § 17206, subd. \(b\)](#), clearly indicates that the amount of civil penalties is intended to be determined by the court.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Torts > Business Torts > Unfair Business Practices > Elements

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

## **HN4** [] Deceptive & Unfair Trade Practices, State Regulation

The exceedingly broad and general language that the Legislature incorporated in California's unfair competition law, [Bus. & Prof. Code, § 17200 et seq.](#), to define the business practices that are proscribed by the statute — in the original language, "unfair or fraudulent business practice and unfair, untrue, or misleading advertising" — was adopted with the specific understanding that this broad language would be applied by a court of equity in determining whether a challenged business practice violated the statutory prohibition.

Civil Procedure > ... > Equity > Maxims > Remedy Principle

## **HN5** [] Maxims, Remedy Principle

When a scheme is evolved which on its face violates the fundamental rules of honesty and fair dealing, a court of equity is not impotent to frustrate its consummation because the scheme is an original one. There is a maxim as old as law that there can be no right without a remedy, and in searching for a precise precedent, an equity court must not lose sight, not only of its power, but of its duty to arrive at a just solution of the problem.

Civil Procedure > Preliminary Considerations > Equity

## **HN6** [down] **Preliminary Considerations, Equity**

Equity is much more elastic and capable of expansion and extension to new cases than the common law. Its very central principles, its foundation upon the eternal verities of right and justice, its resting upon the truths of morality rather than arbitrary customs and rigid dogmas, necessarily gave it this character of flexibility, and permitted its doctrines to be enlarged so as to embrace new cases as they constantly arose. It has, therefore, as an essential part of its nature, a capacity of orderly and regular growth, — a growth not arbitrary, according to the will of individual judges, but in the direction of its already settled principles. It is ever reaching out and expanding its doctrines so as to cover new facts and relations, but still without any break or change in the principles or doctrines themselves. The tradition and heredity of the flexible equitable powers of the modern trial judge derive from the role of the trained and experienced chancellor and depend upon skills and wisdom acquired through years of study, training and experience which are not susceptible of adequate transmission through instructions to a lay jury.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Torts > Business Torts > Unfair Business Practices

Governments > Courts > Judicial Precedent

## **HN7** [down] **Deceptive & Unfair Trade Practices, State Regulation**

In view of the similarity of language and obvious identity of purpose of [15 U.S.C. § 45\(a\)](#) and [Bus. & Prof. Code, § 17200](#), decisions of the federal courts on the subject of unfair competition are more than ordinarily persuasive.

Torts > Business Torts > Unfair Business Practices > Elements

## **HN8** [down] **Unfair Business Practices, Elements**

Any finding of unfairness to competitors under [Bus. & Prof. Code, § 17200](#), must be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition. Thus, when a plaintiff who claims to have suffered injury from a direct competitor's unfair act or practice invokes [§ 17200](#), the word "unfair" in that section means conduct that threatens an incipient violation of an [antitrust law](#), or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Torts > Business Torts > Unfair Business Practices > Elements

## **HN9** [down] **Jury Trials, Province of Court & Jury**

It is clear from both the language and nature of the test for unfairness to competitors under [Bus. & Prof. Code, § 17200](#) — that is, whether the challenged business practice threatens an incipient violation of an [antitrust law](#) or violates the policy or spirit of one of those laws — that such a standard is one that may reasonably be applied only by a court. This standard is too indeterminate to be adequately conveyed by jury instructions or applied by a jury.

This test is limited to the context of an action by a competitor alleging anticompetitive practices and does not apply to actions by consumers or by competitors alleging other kinds of violations of California's unfair competition law, [Bus. & Prof. Code, § 17200 et seq.](#)

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Torts > Business Torts > Unfair Business Practices > Elements

Governments > State & Territorial Governments > Claims By & Against

#### [\*\*HN10\*\*](#) **Jury Trials, Province of Court & Jury**

Both (1) the fact that the cause of action under California's unfair competition law (UCL), [Bus. & Prof. Code, § 17200 et seq.](#), originated solely as an action to enjoin an unfair or misleading business practice — an equitable action triable only by a court and not a jury — and (2) the fact that the broad and general standard of unfair competition that was incorporated into the statute contemplated that the standard would be applied by a court exercising its traditional, flexible equitable authority rather than by a jury, support the conclusion that the Legislature, in enacting the UCL, intended that a cause of action under the UCL would be tried by the court and not a jury, even when the government seeks civil penalties as well as injunctive relief.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Torts > Business Torts > Unfair Business Practices > Elements

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

#### [\*\*HN11\*\*](#) **Deceptive & Unfair Trade Practices, State Regulation**

The nature of the principal issue presented in a great many actions under California's unfair competition law (UCL), [Bus. & Prof. Code, § 17200 et seq.](#), supports the conclusion that such causes of action were intended to be decided by the court rather than a jury. Such cases often concern a nuanced and qualitative determination regarding whether a business practice should properly be considered unfair or deceptive within the meaning of the UCL. This type of qualitative determination — often requiring the consideration of a variety of factors or circumstances identified in prior cases in California or other jurisdictions or in administrative guidelines developed by the Federal Trade Commission or other consumer protection administrative agencies — is the type of decision that has traditionally been viewed as the province of courts rather than juries. Moreover, the overarching legislative concern in enacting the UCL is to provide a streamlined procedure for the prevention of ongoing or threatened acts of unfair competition, an objective that is inconsistent with the unavoidable delays and increased costs inherent in a jury, as compared to a court, trial.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Torts > Business Torts > Unfair Business Practices

Governments > State & Territorial Governments > Claims By & Against

#### [\*\*HN12\*\*](#) **Jury Trials, Province of Court & Jury**

The Legislature intended that a cause of action under California's unfair competition law, [Bus. & Prof. Code, § 17200 et seq.](#) — including an action brought by the government that seeks both injunctive relief and civil penalties — is to be tried by the court rather than by a jury.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

### [HN13](#) [blue icon] False Advertising, State Regulation

California's false advertising law (FAL), [Bus. & Prof. Code, § 17500 et seq.](#), has been accurately described as the major California legislation designed to protect consumers from false or deceptive advertising. The procedures set forth in the FAL and in California's unfair competition law (UCL), [Bus. & Prof. Code, § 17200 et seq.](#), are in many respects parallel to one another, and the UCL specifically provides that any practice that violates the FAL is also prohibited by the UCL.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Civil Procedure > Preliminary Considerations > Equity > Relief

### [HN14](#) [blue icon] False Advertising, State Regulation

In the absence of a restriction as to the power of the trial court to order restitution, a court of equity may exercise the full range of its inherent powers in order to accomplish complete justice between the parties, restoring if necessary the status quo ante as nearly as may be achieved. In an action by the California Attorney General under [Bus. & Prof. Code, § 17535](#), a trial court has the inherent power to order, as a form of ancillary relief, that the defendants make or offer to make restitution to the customers found to have been defrauded. A civil action under California's false advertising law ([Bus. & Prof. Code, § 17500 et seq.](#)) is an equitable action triable to the court.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

Civil Procedure > ... > Jury Trials > Right to Jury Trial > Actions in Equity

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

### [HN15](#) [blue icon] False Advertising, State Regulation

The California Attorney General has only one cause of action against a defendant for violating [Bus. & Prof. Code, § 17500](#), but the amount of civil penalties which may be imposed under [Bus. & Prof. Code, § 17536](#), is dependent upon the number of violations committed by a defendant. Because the cause of action for violating [§ 17500](#) is an equitable action, the clear implication is that even when the Attorney General or a district attorney seeks civil penalties as well as injunctive relief in such an action, the action under California's false advertising law (FAL), [Bus. & Prof. Code, § 17500 et seq.](#), remains an equitable action, and, as such, is to be tried by the court, rather than by a jury. The amount of civil penalties under the FAL is to be determined by the court, not by a jury.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

## [HN16](#) [💡] False Advertising, State Regulation

Like the choice of the term "unfair" in California's unfair competition law (UCL), [Bus. & Prof. Code, § 17200 et seq.](#), the governing substantive standard of California's false advertising law (FAL), [Bus. & Prof. Code, § 17500 et seq.](#) — prohibiting advertising that is "untrue or misleading" ([§ 17500](#)) — is set forth in broad and open-ended language that is intended to permit a court of equity to reach any novel or creative scheme of false or misleading advertising that a deceptive business may devise. The FAL prohibits not only advertising which is false, but also advertising which, although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public. Thus, to state a claim under either the UCL or the false advertising law, based on false advertising or promotional practices, it is necessary only to show that members of the public are likely to be deceived.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

## [HN17](#) [💡] False Advertising, State Regulation

The broad reach and scope of the "untrue or misleading" standard of California's false advertising law (FAL), [Bus. & Prof. Code, § 17500 et seq.](#), is often framed in language (whether members of the public are likely to be deceived) that is not, on its face, beyond the ken of a jury. As employed in the FAL (as well as in California's unfair competition law (UCL), [Bus. & Prof. Code, § 17200 et seq.](#), however, a determination that advertising poses a sufficient risk or tendency to deceive or confuse the public may potentially result in an injunctive order prohibiting what may be a common and widely utilized advertising, labeling, or promotional practice. In the FAL and UCL settings, this standard — whether members of the public are likely to be deceived — has been understood to call for the exercise of the type of equitable discretion and judgment traditionally employed by a court of equity.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

## [HN18](#) [💡] False Advertising, State Regulation

The crucial issue in cases under California's false advertising law (FAL), [Bus. & Prof. Code, § 17500 et seq.](#), does not typically involve the type of ordinary factfinding assigned to a jury, but rather calls for an equitable judgment to determine whether an often undisputed advertising or promotional practice presents a sufficient tendency to deceive or confuse the public so as to support invocation of the FAL's remedies. As the breadth of the cases arising under the FAL attests, this determination calls for consideration of a wide variety of factors that prior cases and past administrative experience have shown may render an affirmative statement (or a failure to disclose) in a product label, packaging, or in other advertising or promotional practices misleading in a particular context. Given the capacity of the FAL's standard to be applied expansively to encompass all of the novel ways in which advertising or promotional material may be misleading, it is important that trial courts are required to set forth their reasoning for a determination that the FAL has been violated so that a body of precedent can evolve to inform businesses of advertising practices they must avoid.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

Antitrust & Trade Law > Consumer Protection > False Advertising > US Federal Trade Commission

## [HN19](#) [💡] False Advertising, State Regulation

The complexities and nuances that are often involved in the determination whether an advertisement should properly be considered untrue or misleading for purposes of California's false advertising law, [Bus. & Prof. Code, §](#)

17500 et seq., are often ameliorated by judicial reference to the relevant guidelines developed by the U.S. Federal Trade Commission (FTC) regarding deceptive advertising. The great variety and complexity of contexts in which the potentially misleading nature of advertising may arise and must be evaluated can be gleaned from a simple listing of the numerous guidelines that the FTC has published relating to deceptive advertising.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

## HN20[] False Advertising, State Regulation

The determination whether an advertising or promotional practice should properly be found untrue or misleading within the meaning of California's false advertising law, Bus. & Prof. Code, § 17500 et seq., depends upon the exercise of the type of equitable discretion and judgment typically employed by a court of equity.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

## HN21[] False Advertising, State Regulation

Decisions under California's false advertising law, Bus. & Prof. Code, § 17500 et seq., have made clear the propriety and importance of a court's exercise of its equitable authority not only in determining whether an advertisement is untrue or misleading, but also in determining (1) the number of violations for which a defendant may properly be held responsible; and (2) the reasonable amount of civil penalties to be imposed for each violation.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Governments > State & Territorial Governments > Claims By & Against

## HN22[] False Advertising, State Regulation

The Legislature intended that the civil cause of action embodied in California's false advertising law (FAL), Bus. & Prof. Code, § 17500 et seq., would be tried by a court of equity rather than by a jury in all FAL actions, including instances in which the California Attorney General or another governmental entity seeks civil penalties for a violation of the FAL as well as injunctive relief.

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

## HN23[] Fundamental Rights, Trial by Jury in Civil Actions

Cal. Const., art. I, § 16 — the jury trial provision — states in part that trial by jury is an inviolate right and shall be secured to all. This provision was intended to preserve the right to a civil jury as it existed at common law in 1850 when the jury trial provision was first incorporated into the California Constitution. The right to trial by jury guaranteed by the California Constitution is the right as it existed at common law at the time the Constitution was adopted. It is the right to trial by jury as it existed at common law which is preserved; and what that right is, is a purely historical question, a fact which is to be ascertained like any other social, political or legal fact. The right is the historical right enjoyed at the time it was guaranteed by the Constitution. The California Constitution essentially preserves the right to a jury in those actions in which there was a right to a jury trial at common law at the time the Constitution was first adopted.

Civil Procedure > ... > Jury Trials > Right to Jury Trial > Actions in Equity

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

#### **HN24** [blue icon] Right to Jury Trial, Actions in Equity

As a general matter, the California Constitution affords a right to a jury trial in common law actions at law that were triable by a jury in 1850, but not in suits in equity that were not triable by a jury in 1850. In applying this test, the cases have explained that the form or title of a statutory cause of action is not controlling and that if the substance of the cause of action is one that would have been triable by a jury at common law, there is a right to a jury trial even if the statute's designation might suggest that it is an equitable proceeding. In determining whether the action was one triable by a jury at common law, the court is not bound by the form of the action but rather by the nature of the rights involved and the facts of the particular case — the gist of the action. A jury trial must be granted where the gist of the action is legal, where the action is in reality cognizable at law.

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

#### **HN25** [blue icon] Fundamental Rights, Trial by Jury in Civil Actions

The constitutional right of trial by jury is not to be narrowly construed. It is not limited strictly to those cases in which it existed before the adoption of the California Constitution but is extended to cases of like nature as may afterwards arise.

Civil Procedure > ... > Jury Trials > Right to Jury Trial > Actions in Equity

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

#### **HN26** [blue icon] Right to Jury Trial, Actions in Equity

When the legal and equitable causes of action or issues presented in a case are severable, a party retains the right to a jury trial of the severable legal issues and a court trial of the severable equitable issues.

Civil Procedure > ... > Jury Trials > Right to Jury Trial > Actions in Equity

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

#### **HN27** [blue icon] Right to Jury Trial, Actions in Equity

When severable legal and equitable causes of action or issues are present in a single proceeding, the trial court generally has authority to determine in what order the matters should be heard, and if the equitable issue is tried by the court first and if the court's resolution of that issue determines a matter that would otherwise be resolved by a jury with regard to the legal claim or issue, the court's resolution of the matter will generally be binding and may leave nothing for a jury to resolve. And although a trial court retains discretion regarding the order in which the issues should be tried, the governing California cases express a preference that the equitable issues be tried first. This general "equity first preference" is a long standing feature of California law and has always been viewed as fully compatible with the right to jury trial embodied in the California Constitution.

Civil Procedure > ... > Jury Trials > Right to Jury Trial > Actions in Equity

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

### **HN28**[ **Right to Jury Trial, Actions in Equity**

Unlike proceedings in which multiple legal and equitable causes or issues are severable, when a cause of action involves legal and equitable aspects that are not severable California decisions have relied upon the gist of the action standard in determining whether the action should be considered legal or equitable for purposes of the constitutional jury trial issue. Although the legal or equitable nature of a cause of action ordinarily is determined by the mode of relief to be afforded, the prayer for relief in a particular case is not conclusive and the fact that damages is one of a full range of possible remedies does not guarantee the right to a jury.

Civil Procedure > Remedies > Damages > Monetary Damages

### **HN29**[ **Damages, Monetary Damages**

The general rule is that monetary relief is a legal remedy, and an award of statutory damages may serve purposes traditionally associated with legal relief, such as compensation and punishment.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

### **HN30**[ **False Advertising, State Regulation**

In light of the particular nature of the civil causes of action authorized by California's unfair competition law (UCL), *Bus. & Prof. Code, § 17200 et seq.*, and California's false advertising law (FAL), *Bus. & Prof. Code, § 17500 et seq.*, the gist of a civil action under the UCL and FAL is equitable rather than legal in nature. Such causes of action are equitable either when brought by a private party seeking only an injunction, restitution, or other equitable relief or when brought by the California Attorney General, a district attorney, or other governmental official seeking not only injunctive relief and restitution but also civil penalties. Accordingly, there is no right to a jury trial in such actions under the California Constitution.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

Governments > Courts > Common Law

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

### **HN31**[ **False Advertising, State Regulation**

The statutory causes of action established by California's unfair competition law (UCL), *Bus. & Prof. Code, § 17200 et seq.*, and California's false advertising law (FAL), *Bus. & Prof. Code, § 17500 et seq.*, are not of like nature or of the same class as any common law right of action. The UCL and FAL were enacted for the specific purpose of creating new rights and remedies that were not available at common law. The statutes deliberately broaden the types of business practices that can properly be found to constitute unfair competition and eliminate a number of

elements that were required in common law actions for fraud. Furthermore, when the Legislature adopted the civil penalty provisions of the UCL and FAL, permitting government officials, and government officials alone, to seek civil penalties along with injunctive or other equitable relief in the civil actions such officials bring under the UCL and FAL, the causes of action under the UCL and FAL continued to constitute causes of action that were not of like nature or of the same class as any common law action.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

Civil Procedure > Preliminary Considerations > Equity > Relief

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

### **HN32**[ **False Advertising, State Regulation**

The legal and equitable aspects of actions brought under California's unfair competition law (UCL), [Bus. & Prof. Code, § 17200 et seq.](#), and California's false advertising law (FAL), [Bus. & Prof. Code, § 17500 et seq.](#), are nonseverable not only because the determination whether a defendant's alleged conduct constitutes a violation of the statute provides the basis for all of the relief authorized by the statutes, but also because the amount of civil penalties that would be appropriate may well depend on the equitable remedies, including restitution, that are or are not imposed. With respect to the application of the gist of the action standard, the gist of the civil causes of action authorized by the UCL and FAL must properly be considered equitable, rather than legal, in nature. The bulk of the remedies provided for in the statutes — injunctive relief, restitution, and other clearly equitable remedies such as the appointment of a receiver — are clearly equitable in nature. As the legislative history of both the UCL and FAL make clear, the primary objective of both statutes is preventive, authorizing the exercise of broad equitable authority to protect consumers from unfair or deceptive business practices and advertising.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

Governments > State & Territorial Governments > Claims By & Against

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

### **HN33**[ **False Advertising, State Regulation**

Although California's unfair competition law (UCL), [Bus. & Prof. Code, § 17200 et seq.](#), and California's false advertising law (FAL), [Bus. & Prof. Code, § 17500 et seq.](#), authorize in actions brought by the California Attorney General, a district attorney, or other government officials (but not private parties), the imposition of civil penalties — a type of remedy that in some contexts is properly considered legal in nature — the UCL and FAL statutes specify that in assessing the amount of the civil penalty to be imposed under these statutes, the court is afforded broad discretion to consider a nonexclusive list of factors that include the relative seriousness of the defendant's conduct and the potential deterrent effect of such penalties, the type of qualitative evaluation and weighing of a variety of factors that is typically undertaken by a court and not a jury. [Bus. & Prof. Code, §§ 17206, 17536](#). The civil penalties that may be awarded under the UCL and FAL, unlike the classic legal remedy of damages, are noncompensatory in nature; they require no showing of actual harm to consumers and are not based on the amount of losses incurred by the targets of unfair practices or misleading advertising.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

Torts > Business Torts > Unfair Business Practices > Remedies

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

#### **HN34** [ ] False Advertising, State Regulation

Although civil penalties under California's unfair competition law (UCL), [Bus. & Prof. Code, § 17200 et seq.](#), and California's false advertising law (FAL), [Bus. & Prof. Code, § 17500 et seq.](#), may have a punitive or deterrent aspect, their primary purpose is to secure obedience to statutes and regulations imposed to assure important public policy objectives. The focus of both statutory schemes is preventative. And the civil penalties obtained by the government in actions under the UCL and FAL are to be utilized for the enforcement of the statutes in question. The expansive and broadly worded substantive standards that are to be applied in determining whether a challenged business practice or advertising is properly considered violative of the UCL or FAL call for the exercise of the flexibility and judicial expertise and experience that was traditionally applied by a court of equity. Particularly in light of the equitable nature of the substantive standards that apply in UCL and FAL actions — both in actions brought by private parties and by government officials — the gist of the civil causes of action authorized by the UCL and FAL must properly be considered equitable in nature.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

#### **HN35** [ ] False Advertising, State Regulation

Under the California Constitution, there is no right to a jury trial in a cause of action under California's unfair competition law (UCL), [Bus. & Prof. Code, § 17200 et seq.](#), and California's false advertising law (FAL), [Bus. & Prof. Code, § 17500 et seq.](#), including when the action is brought by a government official and seeks both injunctive relief and civil penalties. This conclusion does not deprive a defendant in a UCL or FAL action of any constitutional right afforded by the jury trial provision of the California Constitution. That constitutional provision grants the right to jury trial in actions of like nature or of the same class in which a jury trial was provided at common law in 1850, when the jury trial provision of the California Constitution was first adopted. The consumer protection actions authorized in the UCL and FAL are not of like nature or of the same class as an action that was triable by jury at common law. In actions like those under the UCL and FAL, in which the equitable and legal aspects are nonseverable, there is no constitutional right to a jury trial when the gist of the action is equitable rather than legal. In sum, there is no right to a jury trial under the California Constitution in a cause of action under the UCL or FAL, including an action in which civil penalties as well as an injunction or other equitable relief are sought.

Constitutional Law > State Constitutional Operation

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

#### **HN36** [ ] Constitutional Law, State Constitutional Operation

The federal civil jury trial provision of the Seventh [Amendment, U.S. Const., 7th](#) Amend., applies only to civil trials in federal court; federal decisions explicitly hold that the civil jury trial provision of the Seventh Amendment does not apply to state court proceedings. Instead, the right to jury trial in state court proceedings is governed by the provisions and judicial interpretation of each state's own constitutional jury trial provision.

Constitutional Law > State Constitutional Operation

Governments > Courts > Judicial Precedent

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

### **HN37** Constitutional Law, State Constitutional Operation

In California, the constitutional right to a civil jury trial under the California Constitution is entirely independent of the federal constitutional civil jury trial right under the Seventh Amendment, as indicated in [\*Cal. Const., art. I, § 24\*](#), and California cases have not hesitated to decline to follow the federal interpretation of the Seventh Amendment when the federal interpretation has been found inconsistent with a proper reading of the California provision.

Civil Procedure > ... > Jury Trials > Right to Jury Trial > Actions in Equity

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

### **HN38** Right to Jury Trial, Actions in Equity

When the legal and equitable aspects are severable, there is a preference for trying the equitable issues first. If common facts are resolved in a manner that obviates the need to try the legal issue, there is no right under the California Constitution to have the legal issues submitted to the jury. In cases in which a cause of action contains nonseverable legal and equitable aspects, California cases undertake a qualitative, holistic analysis of the action in its entirety to determine whether the gist of the action is legal or equitable, that is, whether the legal or equitable aspects predominate.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

Civil Procedure > ... > Jury Trials > Right to Jury Trial > Actions in Equity

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

### **HN39** False Advertising, State Regulation

In causes of action under California's unfair competition law, [\*Bus. & Prof. Code, § 17200 et seq.\*](#), and California's false advertising law, [\*Bus. & Prof. Code, § 17500 et seq.\*](#), seeking injunctive relief and civil penalties, the gist of the actions is equitable, and there is no right to a jury trial in such actions under California law either as a statutory or constitutional matter.

## **Headnotes/Summary**

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### **Summary**

#### **[\*279] CALIFORNIA OFFICIAL REPORTS SUMMARY**

The trial court granted the People's motion to strike a jury demand as to causes of action under California's unfair competition law (UCL) ([\*Bus. & Prof. Code, § 17200 et seq.\*](#)) and California's false advertising law (FAL) ([\*Bus. & Prof. Code, § 17500 et seq.\*](#)) in which both civil penalties and injunctive relief were sought. (Superior Court of Alameda County, No. RG15770490, George Hernandez, Jr., Judge.) The Court of Appeal, First Dist., Div. One, No. A150264, granted mandate relief.

The Supreme Court reversed the judgment of the Court of Appeal and remanded. The court held that there is no state constitutional right to a jury trial ([Cal. Const., art. I, § 16](#)) for causes of action under the UCL and the FAL because the gist of these causes of action is equitable and they differ significantly from actions triable by jury at common law. The Legislature intended that the causes of action be tried by the court even when the government seeks both civil penalties and injunctive relief because the UCL and the FAL provide for the exercise of broad equitable authority to protect consumers. Federal case law under [U.S. Const., 7th Amend.](#), did not apply because California's civil jury trial right, construed independently ([Cal. Const., art. I, § 24](#)), requires a different analysis. (Opinion by Cantil-Sakauye, C. J., with Chin, Corrigan, and Groban, JJ., concurring. Concurring opinion by Kruger, J., with Liu and Cuéllar, JJ., concurring (see p. 334).)

## **Headnotes**

### CALIFORNIA OFFICIAL REPORTS HEADNOTES

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

##### **Jury § 7—Right to Jury Trial—Civil Cases—California Constitution and Statutes.**

Under California law, the right to a jury trial in a civil action may be afforded either by statute or by the California Constitution. As a general matter, the California Legislature has authority to grant the parties in a civil action the right to a jury trial by statute, either [\*280] when the Legislature establishes a new cause of action or with respect to a cause of action that rests on the common law or a constitutional provision. Given the Legislature's broad general legislative authority under the California Constitution and in the absence of any constitutional prohibition, the Legislature may extend the right to a jury trial to instances in which the state constitutional jury trial provision does not itself mandate a right to a jury trial. But even when the language and legislative history of a statute indicate that the Legislature intended that a cause of action established by the statute is to be tried by the court rather than by a jury, if the California constitutional jury trial provision itself guarantees a right to a jury trial in such a cause of action, the Constitution prevails and a jury trial cannot be denied.

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

##### **Equity § 5—Scope and Types of Relief—Injunctive Relief.**

Actions seeking injunctive relief are equitable in nature.

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

##### **Unfair Competition § 10—Actions—Civil Penalties—Amount—Determination by Court.**

The language of [Bus. & Prof. Code, § 17206, subd. \(b\)](#), clearly indicates that the amount of civil penalties is intended to be determined by the court.

#### [CA\(4\)](#) [ ] (4)

##### **Unfair Competition § 4—Acts Constituting—Unfair Business Practices—Determination by Court.**

The exceedingly broad and general language that the Legislature incorporated in California's unfair competition law ([Bus. & Prof. Code, § 17200 et seq.](#)) to define the business practices that are proscribed by the statute—in the original language, “unfair or fraudulent business practice and unfair, untrue, or misleading advertising”—was

adopted with the specific understanding that this broad language would be applied by a court of equity in determining whether a challenged business practice violated the statutory prohibition.

**CA(5) [5]****Equity § 6—Principles and Maxims—No Right Without Remedy.**

When a scheme is evolved which on its face violates the fundamental rules of honesty and fair dealing, a court of equity is not impotent to frustrate its consummation because the scheme is an original one. There is a maxim as old as law that there can be no right without a remedy, and in searching for a precise precedent, an equity court must not lose sight, not only of its power, but of its duty to arrive at a just solution of the problem.

**CA(6) [6]****Equity § 1—Flexibility and Expansion.**

Equity is much more elastic and capable of expansion and extension to new cases than the common law. Its very central principles, its foundation upon the eternal verities of right and justice, its resting upon the truths of morality rather than upon [\*281] arbitrary customs and rigid dogmas, necessarily gave it this character of flexibility, and permitted its doctrines to be enlarged so as to embrace new cases as they constantly arose. It has, therefore, as an essential part of its nature, a capacity of orderly and regular growth—a growth not arbitrary, according to the will of individual judges—but in the direction of its already settled principles. It is ever reaching out and expanding its doctrines so as to cover new facts and relations, but still without any break or change in the principles or doctrines themselves. The tradition and heredity of the flexible equitable powers of the modern trial judge derive from the role of the trained and experienced chancellor and depend upon skills and wisdom acquired through years of study, training and experience which are not susceptible of adequate transmission through instructions to a lay jury.

**CA(7) [7]****Unfair Competition § 4—Acts Constituting—Federal Decisions as Persuasive Authority.**

In view of the similarity of language and obvious identity of purpose of [15 U.S.C. § 45\(a\)](#) and [Bus. & Prof. Code, § 17200](#), federal court decisions on the subject of unfair competition are more than ordinarily persuasive but not controlling.

**CA(8) [8]****Unfair Competition § 4—Acts Constituting—Unfair Business Practices—Harm to Competition.**

Any finding of unfairness to competitors under [Bus. & Prof. Code, § 17200](#), must be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition. Thus, when a plaintiff who claims to have suffered injury from a direct competitor's unfair act or practice invokes [§ 17200](#), the word "unfair" in that section means conduct that threatens an incipient violation of an [antitrust law](#), or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

**CA(9) [9]**

**Unfair Competition § 4—Acts Constituting—Unfair Business Practices—Harm to Competition—Determination by Court.**

It is clear from both the language and nature of the test for unfairness to competitors under [Bus. & Prof. Code, § 17200](#)—that is, whether the challenged business practice threatens an incipient violation of an [antitrust law](#) or violates the policy or spirit of one of those laws—that such a standard is one that may reasonably be applied only by a court. This standard is too indeterminate to be adequately conveyed by jury instructions or applied by a jury. This test is limited to the context of an action by a competitor alleging anticompetitive practices and does not apply to actions by consumers or by competitors alleging other kinds of violations of California's unfair competition law ([Bus. & Prof. Code, § 17200 et seq.](#)).

[\*282] [CA\(10\)](#) [  ] (10)

**Unfair Competition § 8—Actions—Equitable Nature—Court Trial—Government Action Seeking Civil Penalties and Injunction.**

Both (1) the fact that the cause of action under California's unfair competition law (UCL) ([Bus. & Prof. Code, § 17200 et seq.](#)) originated solely as an action to enjoin an unfair or misleading business practice—an equitable action triable only by a court and not a jury—and (2) the fact that the broad and general standard of unfair competition that was incorporated into the statute contemplated that the standard would be applied by a court exercising its traditional, flexible equitable authority rather than by a jury, support the conclusion that the Legislature, in enacting the UCL, intended that a cause of action under the UCL would be tried by the court and not a jury, even when the government seeks civil penalties as well as injunctive relief.

[CA\(11\)](#) [  ] (11)

**Unfair Competition § 4—Acts Constituting—Unfair Business Practices—Determination by Court.**

The nature of the principal issue presented in a great many actions under California's unfair competition law (UCL) ([Bus. & Prof. Code, § 17200 et seq.](#)) supports the conclusion that such causes of action were intended to be decided by the court rather than a jury. Such cases often concern a nuanced and qualitative determination regarding whether a business practice should properly be considered unfair or deceptive within the meaning of the UCL. This type of qualitative determination—often requiring the consideration of a variety of factors or circumstances identified in prior cases in California or other jurisdictions or in administrative guidelines developed by the Federal Trade Commission or other consumer protection administrative agencies—is the type of decision that has traditionally been viewed as the province of courts rather than juries. Moreover, the overarching legislative concern in enacting the UCL is to provide a streamlined procedure for the prevention of ongoing or threatened acts of unfair competition, an objective that is inconsistent with the unavoidable delays and increased costs inherent in a jury, as compared to a court, trial.

[CA\(12\)](#) [  ] (12)

**Unfair Competition § 8—Actions—Court Trial—Government Action Seeking Civil Penalties and Injunction.**

The Legislature intended that a cause of action under California's unfair competition law ([Bus. & Prof. Code, § 17200 et seq.](#))—including an action brought by the government that seeks both injunctive relief and civil penalties—is to be tried by the court rather than by a jury.

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

**Advertising § 7—False Advertising—Procedures and Prohibitions.**

California's false advertising law (FAL) ([Bus. & Prof. Code, § 17500 et seq.](#)) has been accurately described as the major California legislation designed to protect consumers from false or deceptive advertising. The [\*283] procedures set forth in the FAL and in California's unfair competition law (UCL) ([Bus. & Prof. Code, § 17200 et seq.](#)), are in many respects parallel to one another, and the UCL specifically provides that any practice that violates the FAL is also prohibited by the UCL.

**[CA\(14\)](#) [Download] (14)****Advertising § 9—False Advertising—Equitable Action Tried by Court—Power to Order Restitution.**

In the absence of a restriction as to the power of the trial court to order restitution, a court of equity may exercise the full range of its inherent powers in order to accomplish complete justice between the parties, restoring if necessary the status quo ante as nearly as may be achieved. In an action by the California Attorney General under [Bus. & Prof. Code, § 17535](#), a trial court has the inherent power to order, as a form of ancillary relief, that the defendants make or offer to make restitution to the customers found to have been defrauded. A civil action under California's false advertising law ([Bus. & Prof. Code, § 17500 et seq.](#)) is an equitable action triable to the court.

**[CA\(15\)](#) [Download] (15)****Advertising § 9—False Advertising—Equitable Action Tried by Court—Government Action Seeking Civil Penalties and Injunction.**

The California Attorney General has only one cause of action against a defendant for violating [Bus. & Prof. Code, § 17500](#), but the amount of civil penalties which may be imposed under [Bus. & Prof. Code, § 17536](#), is dependent upon the number of violations committed by a defendant. Because the cause of action for violating [§ 17500](#) is an equitable action, the clear implication is that even when the Attorney General or a district attorney seeks civil penalties as well as injunctive relief in such an action, the action under California's false advertising law (FAL) ([Bus. & Prof. Code, § 17500 et seq.](#)) remains an equitable action, and, as such, is to be tried by the court, rather than by a jury. The amount of civil penalties under the FAL is to be determined by the court, not by a jury.

**[CA\(16\)](#) [Download] (16)****Advertising § 8—False Advertising—What Constitutes—Untrue or Misleading Advertising.**

Like the choice of the term "unfair" in California's unfair competition law (UCL) ([Bus. & Prof. Code, § 17200 et seq.](#)), the governing substantive standard of California's false advertising law (FAL) ([Bus. & Prof. Code, § 17500 et seq.](#))—prohibiting advertising that is "untrue or misleading" ([§ 17500](#))—is set forth in broad and open-ended language that is intended to permit a court of equity to reach any novel or creative scheme of false or misleading advertising that a deceptive business may devise. The FAL prohibits not only advertising which is false, but also advertising which, although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public. Thus, to state a claim under [\*284] either the UCL or the FAL, based on false advertising or promotional practices, it is necessary only to show that members of the public are likely to be deceived.

**[CA\(17\)](#) [Download] (17)****Advertising § 8—False Advertising—What Constitutes—Untrue or Misleading Advertising—Equitable Nature of Determination.**

The broad reach and scope of the “untrue or misleading” standard of California’s false advertising law (FAL) ([Bus. & Prof. Code, § 17500 et seq.](#)) is often framed in language (whether members of the public are likely to be deceived) that is not, on its face, beyond the ken of a jury. As employed in the FAL (as well as in California’s unfair competition law (UCL) ([Bus. & Prof. Code, § 17200 et seq.](#))), however, a determination that advertising poses a sufficient risk or tendency to deceive or confuse the public may potentially result in an injunctive order prohibiting what may be a common and widely utilized advertising, labeling, or promotional practice. In the FAL and the UCL settings, this standard—whether members of the public are likely to be deceived—has been understood to call for the exercise of the type of equitable discretion and judgment traditionally employed by a court of equity.

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

##### **Advertising § 8—False Advertising—What Constitutes—Untrue or Misleading Advertising—Equitable Nature of Determination.**

The crucial issue in cases under California’s false advertising law (FAL) ([Bus. & Prof. Code, § 17500 et seq.](#)) does not typically involve the type of ordinary factfinding assigned to a jury, but rather calls for an equitable judgment to determine whether an often undisputed advertising or promotional practice presents a sufficient tendency to deceive or confuse the public so as to support invocation of the FAL’s remedies. As the breadth of the cases arising under the FAL attests, this determination calls for consideration of a wide variety of factors that prior cases and past administrative experience have shown may render an affirmative statement (or a failure to disclose) in a product label, packaging, or in other advertising or promotional practices misleading in a particular context. Given the capacity of the FAL’s standard to be applied expansively to encompass all of the novel ways in which advertising or promotional material may be misleading, it is important that trial courts are required to set forth their reasoning for a determination that the FAL has been violated so that a body of precedent can evolve to inform businesses of advertising practices they must avoid.

#### [CA\(19\)](#) [] (19)

##### **Advertising § 8—False Advertising—What Constitutes—Untrue or Misleading Advertising—Reference to Federal Guidelines.**

The complexities and nuances that are often involved in the determination whether an advertisement should properly be considered untrue or misleading for [\*285] purposes of California’s false advertising law ([Bus. & Prof. Code, § 17500 et seq.](#)) are often ameliorated by judicial reference to the relevant guidelines developed by the Federal Trade Commission (FTC) regarding deceptive advertising. The great variety and complexity of contexts in which the potentially misleading nature of advertising may arise and must be evaluated can be gleaned from a simple listing of the numerous guidelines that the FTC has published relating to deceptive advertising.

#### [CA\(20\)](#) [] (20)

##### **Advertising § 8—False Advertising—What Constitutes—Untrue or Misleading Advertising—Equitable Nature of Determination.**

The determination whether an advertising or promotional practice should properly be found untrue or misleading within the meaning of California’s false advertising law ([Bus. & Prof. Code, § 17500 et seq.](#)) depends upon the exercise of the type of equitable discretion and judgment typically employed by a court of equity.

#### [CA\(21\)](#) [] (21)

##### **Advertising § 9—False Advertising—Civil Penalties and Number of Violations—Equitable Nature of Determination.**

Decisions under California's false advertising law (*Bus. & Prof. Code, § 17500 et seq.*) have made clear the propriety and importance of a court's exercise of its equitable authority not only in determining whether an advertisement is untrue or misleading, but also in determining (1) the number of violations for which a defendant may properly be held responsible; and (2) the reasonable amount of civil penalties to be imposed for each violation.

[CA\(22\)](#) [  ] (22)

**Advertising § 7—False Advertising—Equitable Action Tried by Court—Government Action Seeking Civil Penalties and Injunction.**

The Legislature intended that the civil cause of action embodied in California's false advertising law (FAL) (*Bus. & Prof. Code, § 17500 et seq.*) would be tried by a court of equity rather than by a jury in all FAL actions, including instances in which the California Attorney General or another governmental entity seeks civil penalties for a violation of the FAL as well as injunctive relief.

[CA\(23\)](#) [  ] (23)

**Jury § 7—Right to Jury Trial—Civil Cases—California Constitution.**

*Cal. Const., art. I, § 16*—the jury trial provision—states in part that trial by jury is an inviolate right and shall be secured to all. This provision was intended to preserve the right to a civil jury as it existed at common law in 1850 when the jury trial provision was first incorporated into the California Constitution. The right to trial by jury guaranteed by the California Constitution is the right as it existed at common law at the time the Constitution was adopted. It is the right to trial by jury as it existed at common law which is preserved; and what that right is, is a [\*286] purely historical question, a fact which is to be ascertained like any other social, political or legal fact. The right is the historical right enjoyed at the time it was guaranteed by the Constitution. The California Constitution essentially preserves the right to a jury in those actions in which there was a right to a jury trial at common law at the time the Constitution was first adopted.

[CA\(24\)](#) [  ] (24)

**Jury § 7—Right to Jury Trial—Civil Cases—California Constitution—Actions Triable by Jury at Common Law.**

As a general matter, the California Constitution affords a right to a jury trial in common law actions at law that were triable by a jury in 1850, but not in suits in equity that were not triable by a jury in 1850. In applying this test, the cases have explained that the form or title of a statutory cause of action is not controlling and that if the substance of the cause of action is one that would have been triable by a jury at common law, there is a right to a jury trial even if the statute's designation might suggest that it is an equitable proceeding. In determining whether the action was one triable by a jury at common law, the court is not bound by the form of the action but rather by the nature of the rights involved and the facts of the particular case—the gist of the action. A jury trial must be granted where the gist of the action is legal, where the action is in reality cognizable at law.

[CA\(25\)](#) [  ] (25)

**Jury § 7—Right to Jury Trial—Civil Cases—California Constitution.**

The constitutional right of trial by jury is not to be narrowly construed. It is not limited strictly to those cases in which it existed before the adoption of the California Constitution but is extended to cases of like nature as may afterwards arise.

**CA(26)** [  ] (26)**Jury § 7—Right to Jury Trial—Civil Cases—Severable Legal and Equitable Issues.**

When the legal and equitable causes of action or issues presented in a case are severable, a party retains the right to a jury trial of the severable legal issues and a court trial of the severable equitable issues.

**CA(27)** [  ] (27)**Jury § 7—Right to Jury Trial—Civil Cases—Severable Legal and Equitable Issues.**

When severable legal and equitable causes of action or issues are present in a single proceeding, the trial court generally has authority to determine in what order the matters should be heard, and if the equitable issue is tried by the court first and if the court's resolution of that issue determines a matter that would otherwise be resolved by a jury with regard to the legal claim or issue, the court's resolution of the matter will generally be binding and may leave nothing for a jury to [\*287] resolve. And although a trial court retains discretion regarding the order in which the issues should be tried, the governing California cases express a preference that the equitable issues be tried first. This general "equity first preference" is a long standing feature of California law and has always been viewed as fully compatible with the right to jury trial embodied in the California Constitution.

**CA(28)** [  ] (28)**Jury § 10—Right to Jury Trial—Determining Nature of Civil Action—Legal and Equitable Issues Not Severable—Gist of Action and Mode of Relief.**

Unlike proceedings in which multiple legal and equitable causes or issues are severable, when a cause of action involves legal and equitable aspects that are not severable California decisions have relied upon the gist of the action standard in determining whether the action should be considered legal or equitable for purposes of the constitutional jury trial issue. Although the legal or equitable nature of a cause of action ordinarily is determined by the mode of relief to be afforded, the prayer for relief in a particular case is not conclusive and the fact that damages is one of a full range of possible remedies does not guarantee the right to a jury.

**CA(29)** [  ] (29)**Damages § 1—Statutory—Purposes Associated with Legal Relief.**

The general rule is that monetary relief is a legal remedy, and an award of statutory damages may serve purposes traditionally associated with legal relief, such as compensation and punishment.

**CA(30)** [  ] (30)**Jury § 7—Right to Jury Trial—Civil Cases—Unfair Competition and False Advertising—California Constitution.**

In light of the particular nature of the civil causes of action authorized by California's unfair competition law (UCL) ([Bus. & Prof. Code, § 17200 et seq.](#)) and California's false advertising law (FAL) ([Bus. & Prof. Code, § 17500 et seq.](#)), the gist of a civil action under the UCL and the FAL is equitable rather than legal in nature. Such causes of action are equitable either when brought by a private party seeking only an injunction, restitution, or other equitable relief or when brought by the California Attorney General, a district attorney, or other governmental official seeking

not only injunctive relief and restitution but also civil penalties. Accordingly, there is no right to a jury trial in such actions under the California Constitution.

#### CA(31) [ ] (31)

##### **Equity § 4—Grounds and Subjects of Relief—Unfair Competition and False Advertising.**

The statutory causes of action established by California's unfair competition law (UCL) ([Bus. & Prof. Code, § 17200 et seq.](#)) and California's false advertising law (FAL) ([Bus. & Prof. Code, § 17500 et seq.](#)) are not of like nature or of the same class as any [\*288] common law right of action. The UCL and the FAL were enacted for the specific purpose of creating new rights and remedies that were not available at common law. The statutes deliberately broaden the types of business practices that can properly be found to constitute unfair competition and eliminate a number of elements that were required in common law actions for fraud. Furthermore, when the Legislature adopted the civil penalty provisions of the UCL and the FAL, permitting government officials, and government officials alone, to seek civil penalties along with injunctive or other equitable relief in the civil actions such officials bring under the UCL and the FAL, the causes of action under the UCL and the FAL continued to constitute causes of action that were not of like nature or of the same class as any common law action.

#### CA(32) [ ] (32)

##### **Equity § 4—Grounds and Subjects of Relief—Unfair Competition and False Advertising.**

The legal and equitable aspects of actions brought under California's unfair competition law (UCL) ([Bus. & Prof. Code, § 17200 et seq.](#)) and California's false advertising law (FAL) ([Bus. & Prof. Code, § 17500 et seq.](#)) are nonseverable not only because the determination whether a defendant's alleged conduct constitutes a violation of the statute provides the basis for all of the relief authorized by the statutes, but also because the amount of civil penalties that would be appropriate may well depend on the equitable remedies, including restitution, that are or are not imposed. With respect to the application of the gist of the action standard, the gist of the civil causes of action authorized by the UCL and the FAL must properly be considered equitable, rather than legal, in nature. The bulk of the remedies provided for in the statutes—injunctive relief, restitution, and other clearly equitable remedies such as the appointment of a receiver—are clearly equitable in nature. As the legislative history of both the UCL and the FAL make clear, the primary objective of both statutes is preventive, authorizing the exercise of broad equitable authority to protect consumers from unfair or deceptive business practices and advertising.

#### CA(33) [ ] (33)

##### **Equity § 5—Scope and Types of Relief—Civil Penalties—Unfair Competition and False Advertising.**

Although California's unfair competition law (UCL) ([Bus. & Prof. Code, § 17200 et seq.](#)) and false advertising law (FAL) ([Bus. & Prof. Code, § 17500 et seq.](#)) authorize in actions brought by the California Attorney General, a district attorney, or other government officials (but not private parties), the imposition of civil penalties—a type of remedy that in some contexts is properly considered legal in nature—the UCL and the FAL statutes specify that in assessing the amount of the civil penalty to be imposed under these statutes, the court is afforded broad discretion to consider a nonexclusive list of factors that include the relative seriousness of the defendant's conduct and the potential deterrent effect of such penalties, the type of qualitative [\*289] evaluation and weighing of a variety of factors that is typically undertaken by a court and not a jury ([Bus. & Prof. Code, §§ 17206, 17536](#)). The civil penalties that may be awarded under the UCL and the FAL, unlike the classic legal remedy of damages, are noncompensatory in nature; they require no showing of actual harm to consumers and are not based on the amount of losses incurred by the targets of unfair practices or misleading advertising.

**CA(34)** [  ] (34)**Equity § 4—Grounds and Subjects of Relief—Unfair Competition and False Advertising.**

Although civil penalties under California's unfair competition law (UCL) ([Bus. & Prof. Code, § 17200 et seq.](#)) and California's false advertising law (FAL) ([Bus. & Prof. Code, § 17500 et seq.](#)) may have a punitive or deterrent aspect, their primary purpose is to secure obedience to statutes and regulations imposed to assure important public policy objectives. The focus of both statutory schemes is preventative. And the civil penalties obtained by the government in actions under the UCL and the FAL are to be utilized for the enforcement of the statutes in question. The expansive and broadly worded substantive standards that are to be applied in determining whether a challenged business practice or advertising is properly considered violative of the UCL or the FAL call for the exercise of the flexibility and judicial expertise and experience that was traditionally applied by a court of equity. Particularly in light of the equitable nature of the substantive standards that apply in UCL and the FAL actions—both in actions brought by private parties and by government officials—the gist of the civil causes of action authorized by the UCL and FAL must properly be considered equitable in nature.

**CA(35)** [  ] (35)**Jury § 7—Right to Jury Trial—Civil Cases—Unfair Competition and False Advertising—California Constitution.**

Under the California Constitution, there is no right to a jury trial in a cause of action under California's unfair competition law (UCL) ([Bus. & Prof. Code, § 17200 et seq.](#)) and California's false advertising law (FAL) ([Bus. & Prof. Code, § 17500 et seq.](#)), including when the action is brought by a government official and seeks both injunctive relief and civil penalties. This conclusion does not deprive a defendant in a UCL or FAL action of any constitutional right afforded by the jury trial provision of the California Constitution. That constitutional provision grants the right to jury trial in actions of like nature or of the same class in which a jury trial was provided at common law in 1850, when the jury trial provision of the California Constitution was first adopted. The consumer protection actions authorized in the UCL and the FAL are not of like nature or of the same class as an action that was triable by jury at common law. In actions like those under the UCL and the FAL, in which the equitable and legal aspects are nonseverable, there is no constitutional right to a [\*290] jury trial when the gist of the action is equitable rather than legal. In sum, there is no right to a jury trial under the California Constitution in a cause of action under the UCL or the FAL, including an action in which civil penalties as well as an injunction or other equitable relief are sought.

**CA(36)** [  ] (36)**Jury § 7—Right to Jury Trial—Civil Cases—Federal Constitution—Applicability.**

The federal civil jury trial provision of [U.S. Const., 7th Amend.](#), applies only to civil trials in federal court; federal decisions explicitly hold that the civil jury trial provision of the [U.S. Const., 7th Amend.](#), does not apply to state court proceedings. Instead, the right to jury trial in state court proceedings is governed by the provisions and judicial interpretation of each state's own constitutional jury trial provision.

**CA(37)** [  ] (37)**Jury § 7—Right to Jury Trial—Civil Cases—California Constitution—Independent of Federal Constitutional Civil Jury Trial Right.**

In California, the constitutional right to a civil jury trial under the California Constitution is entirely independent of the federal constitutional civil jury trial right under [U.S. Const., 7th Amend.](#) ([Cal. Const., art. I, § 24](#)), and California

cases have not hesitated to decline to follow the federal interpretation of the *U.S. Const., 7th Amend.*, when the federal interpretation has been found inconsistent with a proper reading of the California provision.

#### CA(38) [ ] (38)

**Jury § 7—Right to Jury Trial—Civil Cases—Severable and Nonseverable Legal and Equitable Issues.**

When the legal and equitable aspects are severable, there is a preference for trying the equitable issues first. If common facts are resolved in a manner that obviates the need to try the legal issue, there is no right under the California Constitution to have the legal issues submitted to the jury. In cases in which a cause of action contains nonseverable legal and equitable aspects, California cases undertake a qualitative, holistic analysis of the action in its entirety to determine whether the gist of the action is legal or equitable, that is, whether the legal or equitable aspects predominate.

#### CA(39) [ ] (39)

**Jury § 7—Right to Jury Trial—Civil Cases—Unfair Competition and False Advertising.**

In causes of action under California's unfair competition law (*Bus. & Prof. Code, § 17200 et seq.*) and California's false advertising law (*Bus. & Prof. Code, § 17500 et seq.*) seeking injunctive relief and civil penalties, the gist of the actions is equitable, and there is no right to a jury trial in such actions under California law either as a statutory or constitutional matter. An appellate judgment [\*291] holding that a company had a right to a jury trial under the California Constitution in such actions thus had to be reversed and the matter remanded.

[Cal. Forms of Pleading and Practice (2020) ch. 322, Juries and Jury Selection, § 322.13; 2 Kiesel et al., Matthew Bender Practice Guide: Cal. Pretrial Civil Procedure (2020) § 23.38; 7 Witkin, Summary of Cal. Law (11th ed. 2017) Constitutional Law, § 238; 7 Witkin, Cal. Procedure (5th ed. 2008) Trial, §§ 59, 60, 68, 91, 108; 13 Witkin, Summary of Cal. Law (11th ed. 2017) Equity, §§ 117, 141.]

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Mark Zahner; Matthew T. Cheever, Deputy District Attorney (Sonoma) and Patrick Collins, Deputy [\*\*\*\*2] District Attorney (Napa), for California District Attorneys Association as Amicus Curiae on behalf of Real Party in Interest.

**Judges:** Opinion by Cantil-Sakauye, C. J., with Chin, Corrigan, and Groban, JJ., concurring. Concurring opinion by Kruger, J., with Liu, and Cuéllar, JJ., concurring.

**Opinion by:** Cantil-Sakauye, C. J.

## Opinion

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[\*292]

[\*\*464] **CANTIL-SAKAUYE, C. J.**—Under two of California's most prominent consumer protection statutes—the unfair competition law (UCL)<sup>1</sup> and the false advertising law (FAL)<sup>2</sup>—the Attorney General or local prosecuting authorities may bring a civil action against a business that has allegedly engaged in an unfair, unlawful or deceptive business act or practice or false or misleading advertising and may obtain civil penalties as well as injunctive relief and restitution in such an action. In this case we must decide whether, when the government seeks civil penalties as well an injunction or other equitable remedies under those statutes, the causes of action are to be tried by the court (that is, the trial judge) or, instead, by a jury.

For more than 45 years, a uniform line of California Court of Appeal decisions has [\*\*\*717] held that such causes of action under the UCL and the FAL are to be tried by the court rather than by a jury. In the current writ proceeding [\*\*\*\*3] in this case, however, the Court of Appeal, relying primarily on a decision of the United States Supreme Court applying the civil jury trial provision of the [Seventh Amendment to the federal Constitution—Tull v. United States \(1987\) 481 U.S. 412 \[95 L.Ed.2d 365, 107 S.Ct. 1831\]](#) (*Tull*)—disagreed with the earlier line of decisions and held that the jury trial provision of the California Constitution should be interpreted to require a jury trial in any action brought under the UCL or the FAL in which the government seeks civil penalties in addition to injunctive or other equitable relief. We granted review to resolve the conflict in the Court of Appeal decisions.

For the reasons discussed hereafter, we conclude that the causes of action established by the UCL and the FAL at issue here are equitable in nature and are properly tried by the court rather than a jury. As we explain, the legislative history and underlying purpose of the statutory provisions in question demonstrate that these very broadly worded consumer protection statutes were fashioned to permit courts to utilize their traditional flexible equitable authority, tempered by judicial experience and familiarity with the treatment of analogous business practices in this and other jurisdictions, in evaluating whether a challenged business act or practice [\*\*\*\*4] or advertising should properly be considered impermissible under these statutory provisions.

With regard to petitioners' constitutional claim, it is firmly established that California's constitutional jury trial provision preserves the right to jury trial [\*293] in civil actions comparable to those *legal* causes of action in which the right to jury trial existed at the time of the first Constitution's adoption in 1850 and does not apply to causes of action that are *equitable* in nature. At early common law, "legal" causes of action (or "actions at law") typically involved lawsuits in which the plaintiff sought to recover money damages to compensate for an injury caused, for example, by the defendant's breach of contract or tortious conduct, whereas "equitable" causes of action (or "suits in equity") sought relief that was unavailable in actions at law, such as an injunction to prohibit ongoing or future misconduct or an order requiring a defendant to provide specific performance or disgorge ill-gotten gains. The consumer protection statutory causes of action at issue here are quite different from any early common law cause of action that was in existence at the time the civil jury trial provision [\*\*\*\*5] of the California [\*\*465] Constitution was first adopted. Given the nature of the substantive standard to be applied and the remedies afforded by the statutes, we conclude that the gist of both the UCL and FAL causes of action at issue here is equitable and consequently such actions are properly tried by the court rather than by a jury.

As further explained, the United States Supreme Court decision in [Tull, supra, 481 U.S. 412](#), relied upon by the Court of Appeal below, does not govern this case for a variety of reasons. To begin with, the *Tull* decision rests

<sup>1</sup> The unfair competition law is set forth at [Business and Professions Code section 17200 et seq.](#) Although the Legislature has not given an official name to these statutory provisions, the legislation has generally been referred to as the unfair competition law, and we will refer to this statute as the UCL. (See [Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. \(1999\) 20 Cal.4th 163, 169, fn. 2 \[83 Cal. Rptr. 2d 548, 973 P.2d 527\]](#) (*Cel-Tech*)).

<sup>2</sup> The FAL is set forth at [Business and Professions Code section 17500 et seq.](#)

upon the federal high court's interpretation of the civil jury trial provision of the *Seventh Amendment to the federal Constitution*, and that court's decisions explicitly hold that the *Seventh Amendment* applies only to *federal court* proceedings, not *state court* proceedings. The constitutional right to jury trial in *state court* civil proceedings is governed only by the civil jury trial provisions of each individual state's own state constitution. In several important respects, California decisions have construed the civil jury trial provision of the California Constitution in a manner differently [\*\*\*718] from how the federal high court has interpreted the federal civil jury trial provision. These differences are significant in this [\*\*\*6] context and serve to distinguish the *Tull* decision from this case. Second, unlike the broad, flexible standards embodied in the two consumer protection statutes at issue in this case, there is no indication that the relevant substantive statutory standard at issue in *Tull* called for the exercise of a court's traditional equitable authority and discretion in determining whether a violation of the statute had occurred. Accordingly, the court in *Tull* had no occasion to determine how the federal constitutional civil jury trial provision should be interpreted or applied in such a setting.

Because the nature of the substantive statutory standards and remedies embodied in the civil causes of action under the UCL and the FAL establish the equitable nature of the actions, we limit the holding in this case to the UCL and FAL setting and express no opinion regarding how the state constitutional jury trial right applies to other statutory causes of action that authorize both injunctive relief and civil penalties.

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## I. FACTS AND PROCEEDINGS BELOW

Petitioners Nationwide Biweekly Administration, Inc., Loan Payment Administration LLC, and Daniel S. Lipsky, the alleged alter ego, principal and sole shareholder [\*\*\*7] of both entities (hereafter collectively referred to as Nationwide) operated a debt payment service in California and other states. Nationwide's program claimed to save debtors money through a process in which the debtor would reduce the amount of interest owed over the life of a loan by having the debtor accelerate the repayment of the debt through an extra monthly payment each year. Under the program, a debtor would pay to Nationwide one-half the debtor's ordinary monthly loan payment every two weeks (biweekly) rather than one full payment once a month, resulting in an extra month's payment each year (26 half-payments equal 13 full payments), and Nationwide would in turn pay those amounts to the debtor's lender. Nationwide advertised its services statewide, mostly through direct mailers to consumers with outstanding residential mortgages, and through followup telephone conversations with consumers who responded to the mailers.

In May 2015, the district attorneys of four counties, acting on behalf of the People, filed a civil complaint alleging that Nationwide had violated the UCL and the FAL by, among other things, employing business practices that: (1) misleadingly implied that Nationwide [\*\*\*8] was affiliated with the consumer's lender; (2) disguised the amount that Nationwide's services actually cost by failing to fully and adequately disclose the amount, payment schedule, and effect of Nationwide's fees; and (3) overstated the amount of savings a consumer could reasonably expect to receive through Nationwide's services.<sup>3</sup> The complaint [\*\*466] also stated that Nationwide's practices have been the subject of numerous consumer complaints and regulatory and law enforcement activities around the country, including an action brought by the federal Consumer Financial Protection Bureau (CFPB).<sup>4</sup>

<sup>3</sup> As initially filed, the complaint also alleged that Nationwide's practices violated the Check Sellers, Bill Payers and Proraters Law (*Fin. Code, § 12200 et seq.*) and asserted causes of action under that statute. While this case was pending before this court, those causes of action were dismissed as part of a larger settlement between the Department of Business Oversight and Nationwide. The underlying action now rests solely on the causes of action under the UCL and the FAL set forth in the complaint.

<sup>4</sup> In the action brought by the CFPB, the federal district court, after a seven-day bench trial, found that although some of the claims advanced by the CFPB were not meritorious, Nationwide had made a variety of misleading statements in its marketing materials. The court imposed injunctive relief and civil penalties of more than \$7 million against Nationwide based on that misleading conduct. (*Consumer Financial Protection Bureau v. Nationwide Biweekly Administration, Inc. (N.D.Cal., Sept. 8,*

[\*295]

[\*\*\*719] The complaint's prayer for relief requested that the court (1) issue an injunction prohibiting the business practices found to violate the provisions of the UCL or the FAL, (2) order restitution of all money wrongfully acquired by Nationwide from California consumers in violation of the UCL and the FAL, and (3) impose civil penalties up to \$2,500 for each violation of the UCL or the FAL found by the court.<sup>5</sup>

In its amended answer to the complaint, Nationwide demanded a jury trial "on all issues so triable," and the People, in response, [\*\*\*9] filed a motion to strike the jury demand "based on well settled law that this is an equity action requiring a court trial." After briefing, the trial court granted the People's motion to strike the jury demand.

Nationwide then filed a petition for writ of mandate in the Court of Appeal, challenging the trial court's ruling striking the jury demand. After the Court of Appeal initially summarily denied the writ petition, this court granted Nationwide's petition for review and retransferred the matter to the Court of Appeal with directions to issue an order requiring the People to show cause why Nationwide does not have a right to jury trial when the government seeks the civil penalties authorized under the UCL and the FAL.

After briefing and argument, the Court of Appeal held that under *article I, section 16 of the California Constitution*—the jury trial provision—Nationwide has a right to a jury trial in this matter and that the trial court erred in striking the jury demand. (*Nationwide Biweekly Administration, Inc. v. Superior Court* (2018) 24 Cal.App.5th 438 [234 Cal. Rptr. 3d 468] (*Nationwide Biweekly*)). The Court of Appeal, relying heavily on the reasoning of the United States Supreme Court's decision in *Tull, supra, 481 U.S. 412*, concluded that because the People are seeking civil penalties as well as injunctive relief and restitution, the "gist" of the People's [\*\*\*10] UCL and FAL causes of action against Nationwide should properly be considered legal rather than equitable, "giving rise to a right to a jury trial" under *article I, section 16*. (*Nationwide Biweekly, supra, 24 Cal.App.5th at p. 442*.) At the same time, the Court of Appeal, again following the approach adopted by the United States Supreme Court in *Tull*, held that Nationwide's jury trial right is limited to the issue of liability—that is, to whether Nationwide's business practices violated the [\*296] provisions of the UCL or the FAL—and [\*\*\*720] does not extend to the issue of remedy, including the amount of civil penalties to be imposed. (*Nationwide Biweekly, at p. 456*.)

In the course of its opinion, the Court of Appeal rejected the People's contention that there is "an unbroken line of appellate decisions finding no right to a jury trial [under the California Constitution] in UCL or FAL actions ... where the People sought penalties" [\*\*467] (*Nationwide Biweekly, supra, 24 Cal.App.5th at p. 457*), finding instead that most of the cases relied upon by the People held only that such actions under the UCL and the FAL were not criminal in nature and thus that the jury trial provision of the *Sixth Amendment of the federal Constitution* did not apply to such actions. (*Nationwide Biweekly, at pp. 457–459*.) Although the Court of Appeal acknowledged that at least one appellate court decision—*People v. Bhakta* (2008) 162 Cal.App.4th 973 [76 Cal.Rptr.3d 421]—clearly held that the gist of an action under the UCL [\*\*\*11] is equitable in nature and that there is no right to a jury trial in such an action under the California constitutional jury trial provision, the Court of Appeal disagreed with that decision's analysis and declined to follow its holding. (*Nationwide Biweekly, supra, 24 Cal.App.5th at pp. 459–460*.) In addition, the Court of Appeal questioned the validity of another appellate court decision relied upon by the People—*DiPirro v. Bondo Corp.* (2007) 153 Cal.App.4th 150 [62 Cal. Rptr. 3d 722] (*DiPirro*)—which held that there is no right to a jury trial in an action seeking injunctive relief, restitution, and civil penalties under the *Safe Drinking Water and Toxic Enforcement Act of 1986* (Health & Saf. Code, § 25249.5 et seq.) (commonly known as Prop. 65).

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[2017, No. 15-cv-02106-RS](#) 2017 WL 3948396, pp. \*6–\*9, \*12–\*13.) Both parties filed appeals from the district court's decision, that are pending in the United States Court of Appeals for the Ninth Circuit. (Case Nos. 18-15431 & 18-15887, filed Mar. 15, 2018, & May 10, 2018.)

<sup>5</sup> In the answer brief filed in this court, Nationwide claims that the government seeks to impose "over \$19.25 billion in civil penalties." The complaint, however, seeks no specific amount in penalties, and, as explained hereafter, the applicable statutes and case law grant trial courts broad, but not unlimited, discretion to impose penalties in a reasonable amount (up to \$2,500 per violation) in light of the nature and severity of an offending business's conduct. (*Post*, at pp. 299, 307, 313.) The answer's hyperbole in this regard does not advance its legal argument.

The Court of Appeal found that the *Dipirro* decision had not adequately analyzed the United States Supreme Court's reasoning in *Tull*. ([Nationwide Biweekly, supra, 24 Cal.App.5th at pp. 461–463](#).)

Accordingly, the Court of Appeal concluded that a writ of mandate should issue, directing the trial court to vacate its order striking Nationwide's request for jury trial and to grant a jury trial on all issues except the amount of any statutory penalties to be awarded. ([Nationwide Biweekly, supra, 24 Cal.App.5th at p. 463](#).)

We granted the People's petition for review to determine whether there is a right to a jury trial in a UCL or FAL action brought by the government when the government seeks civil penalties as well as injunctive [\*\*\*\*12] relief and restitution.

## II. GENERAL PRINCIPLES REGARDING THE RIGHT TO JURY TRIAL IN CIVIL CASES UNDER CALIFORNIA LAW

**CA(1)** (1) As this court recently explained in [Shaw v. Superior Court \(2017\) 2 Cal.5th 983 \[216 Cal. Rptr. 3d 643, 393 P.3d 98\]](#) (*Shaw*): **HN1** “Under California [\*297] law, the right to a jury trial in a civil action may be afforded either by statute or by the California Constitution. ... [¶] ... [¶] As a general matter, the California Legislature has authority to grant the parties in a civil action the right to a jury trial by statute, either when the Legislature establishes a new cause of action or with respect to a cause of action that rests on the common law or a constitutional provision. [Citations.] Given the Legislature's broad general legislative authority under the California Constitution and in the absence of any constitutional prohibition [citations], the Legislature may extend the right to a jury trial to instances in which the state constitutional jury trial provision does not itself mandate a right to a jury trial. [¶] ... But even when the language and legislative history of a statute [\*\*\*721] indicate that the Legislature intended that a cause of action established by the statute is to be tried by the court rather than by a jury, if the California constitutional jury trial [\*\*\*\*13] provision itself guarantees a right to a jury trial in such a cause of action, the Constitution prevails and a jury trial cannot be denied.” ([2 Cal.5th at pp. 993–994](#), fn. omitted.)

## III. IS THERE A STATUTORY RIGHT TO JURY TRIAL UNDER EITHER THE UCL OR THE FAL WHEN THE GOVERNMENT SEEKS CIVIL PENALTIES AS WELL AS INJUNCTIVE RELIEF?

Neither the UCL nor the FAL explicitly addresses the question whether the causes of action created by the two statutes—both of which authorize the government to seek civil penalties as well as injunctive relief and restitution—are to be tried by the court or by a jury. As we shall see, however, the legislative history and legislative purpose of both statutes convincingly establish that the Legislature intended that such causes of action under these statutes would be tried by the court, exercising the traditional flexible discretion [\*468] and judicial expertise of a court of equity, and not by a jury, including when civil penalties as well as injunctive relief and restitution are sought.

### A. The UCL

**CA(2)** (2) Prior to 1933, former [section 3369 of the Civil Code](#) provided simply that “[n]either specific nor preventive relief can be granted to enforce a penal law, except in a case of nuisance, nor to enforce a penalty or forfeiture in [\*\*\*\*14] any case.” The current provisions of the UCL—set forth in [Business and Professions Code section 17200 et seq.](#)—derive from a 1933 amendment of [Civil Code former section 3369](#). (Stats. 1933, ch. 953, § 1, p. 2482.) The 1933 amendment broadened the exception in the statute to include “unfair competition” as well as “nuisance” (Civ. Code, former [§ 3369, subd. \(1\)](#)) and added additional subdivisions that: (a) provided that “[a]ny person performing or proposing to perform an act of unfair competition within this State *may be* [\*298] enjoined in any court of competent jurisdiction” (*id., subd. (2)*, italics added); (b) defined “unfair competition” as used in the statute to “mean and include *unfair or fraudulent business practice and unfair, untrue or misleading advertising*” (*id.*,

subd. (3), italics added);<sup>6</sup> and (c) authorized actions for injunction under the statute to be brought “by the Attorney General or any district attorney in this State in the name of the people of the State of California” or by “any board, officer, … corporation or … person acting for the interests of itself, its members or the general public” (Civ. Code, former § 3369, subd. (5)). Because the unfair competition cause of action established by the 1933 amendment of former section 3369 authorized the government (as well as private [\*\*\*\*15] parties) to seek only injunctive relief, there is no question that the civil cause of action created in 1933 was equitable in nature and, as such, was intended to be tried by the court and not a jury. (See 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 126, p. 205 [HN2]<sup>7</sup> “Actions seeking injunctive relief are, of course, equitable in nature”.) Nationwide does not suggest otherwise.

In 1972, as part of a legislative measure that expanded the reach of former section 3369 of the Civil Code [\*\*\*722] to include “deceptive,” as well as “unfair,” “untrue,” or “misleading,” advertising (Stats. 1972, ch. 1084, § 1, p. 2020), the Legislature added former section 3370.1 to the Civil Code, authorizing the Attorney General or any district attorney (but not private parties) to seek and obtain, in addition to injunctive relief, “a civil penalty not to exceed two thousand five hundred dollars (\$2,500) for each violation” of former section 3369 (Stats. 1972, ch. 1084, § 2, p. 2021 [enacting Assem. Bill No. 1937 (1971–1972 Reg. Sess.)]). The 1972 legislation was proposed by the Attorney General and district attorneys who were charged with enforcing the prohibition on unfair competition embodied in former section 3369. In support of the legislation, the proponents maintained that “[i]t is [\*\*\*\*16] our experience that an injunction without a civil penalty is not a deterrent to future consumer fraud abuses.” (Atty. Gen. Evelle J. Younger, letter to Sen. Alfred H. Song re Assem. Bill No. 1937 (1971–1972 Reg. Sess.) July 13, 1972.) A legislative committee analysis of the proposed bill after its final amendment set forth the purpose of the legislation as intended to “[p]ermit the Attorney General and a district attorney to collect civil penalties in addition to either specific or preventive relief in actions they commence to enjoin acts of unfair competition,” explaining that “[i]t is felt that the allowance of civil penalties, in addition to the requested injunctive relief, will provide a sufficient deterrent to the resumption of these unlawful practices.” (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1937 (1971–1972 Reg. Sess.) as amended May [\*299] 25, 1972, pp. 1, 2.) There is no indication in the legislative history of the 1972 enactment that the Legislature, in providing an additional remedy that could be sought in actions under former section 3369 to enjoin acts of unfair competition, intended to transform such actions from ones that were to be tried by the court into actions [\*\*469] that were [\*\*\*\*17] to be tried by a jury. Civil actions under the UCL that were filed by private parties, in which only injunctive relief was authorized, continued to be tried by the court.

**CA(3)<sup>8</sup>** (3) In 1977, the Legislature moved the relevant sections of the Civil Code embodying the UCL into the Business and Professions Code at sections 17200 to 17206. (Stats. 1977, ch. 299, § 1, p. 1202.) Former section 3370.1 of the Civil Code—the section authorizing the Attorney General or a district attorney to seek civil penalties as well as injunctive relief—was moved to Business and Professions Code section 17206. In 1992, the Legislature added subdivision (b) to Business and Professions Code section 17206, which provides in relevant part that “[i]n assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant’s misconduct, and the defendant’s assets, liabilities, and net worth.” (Stats. 1992, ch. 430, § 4, pp. 1707, 1708, italics added.) Nothing in these further amendments suggests that in an action under the UCL in [\*\*\*\*18] which the government seeks civil penalties as well as injunctive or other equitable relief, the Legislature intended that the action would be tried by a jury rather than by the trial court, and HN3[<sup>9</sup>] the language of Business and Professions Code section 17206, subdivision (b) clearly indicates that the amount of civil penalties is intended to be determined by the court.<sup>7</sup>

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<sup>6</sup>The 1933 amendment also defined “unfair competition” to include any violation of the then-existing provisions of Penal Code former sections 654a, 654b, or 654c, all of which prohibited different specific forms of false advertising. (Stats. 1933, ch. 953, § 1, p. 2482 [Civ. Code, former § 3369, subd. (3)].)

<sup>7</sup>In the statewide election held in November 2004, the voters approved Proposition 64, an initiative statute that restricted the kinds of private plaintiffs that may seek an injunction or other equitable relief under the UCL or the FAL (Bus. & Prof. Code, §§

**CA(4) [↑] (4) [\*\*\*723]** The factors just discussed—namely (1) the origin of the government's cause of action under the UCL as an action simply to enjoin an unfair business practice and (2) the language of the statutory provision relating to the awarding of civil penalties in such an action—clearly support the conclusion that the Legislature, in enacting the UCL, intended to create an equitable, rather than a legal, cause of action. Furthermore, from the statute's inception, California decisions interpreting and applying both the provisions of former [section 3369 of the Penal Code](#) and its current counterparts have explained that **HN4 [↑]** the [\*300] exceedingly broad and general language that the Legislature incorporated in the statute to define the business practices that are proscribed by the statute—in the original language, “unfair or fraudulent business practice and unfair, untrue, or misleading advertising”—was adopted with the specific understanding [\*\*\*\*19] that this broad language would be applied *by a court of equity* in determining whether a challenged business practice violated the statutory prohibition.

**CA(5) [↑] (5)** For example, in [Barquis v. Merchants Collection Assn. \(1972\) 7 Cal.3d 94 \[101 Cal. Rptr. 745, 496 P.2d 817\]](#) (*Barquis*)—one of this court's seminal decisions applying the UCL—we emphasized that past cases under the statute “have frequently noted that the section was intentionally framed in its broad, sweeping language, precisely to enable *judicial tribunals* to deal with the innumerable “new schemes which the fertility of man's invention would contrive.”” (*Barquis*, at p. 112, italics added.) Quoting from [American Philatelic Soc. v. Claibourne \(1935\) 3 Cal.2d 689, 698–699 \[46 P.2d 135\]](#)—one of the earliest decisions discussing the appropriate reach of the broad language of the statute at issue—*Barquis* observed: **HN5 [↑]** “When a scheme is evolved which on its face violates the fundamental rules of honesty and fair dealing, a *court of equity* is not impotent to frustrate its consummation because the scheme is an original one. There is a maxim as old as law that there can be no right without a remedy, and in searching for a precise precedent, an *equity court* must not lose sight, not only of its power, but of its duty to arrive at a just [\*470] solution of the problem.” (*Barquis, supra*, 7 Cal.3d at p. 112, italics added.)

**CA(6) [↑] (6)** The objective that the Legislature sought to accomplish [\*\*\*20] through its adoption of the broad standard embodied in the UCL fits perfectly with the role historically exercised by a court of equity. As Pomeroy explained in his classic treatise on equity jurisprudence: **HN6 [↑]** “[Equity is] much more elastic and capable of expansion and extension to new cases than the common law. Its very central principles, its foundation upon the eternal verities of right and justice, its resting upon the truths of morality rather than upon arbitrary customs and rigid dogmas, necessarily gave it this character of flexibility, and permitted its doctrines to be enlarged so as to embrace new cases as they constantly arose. It has, therefore, as an essential part of its nature, a capacity of orderly and regular growth—a growth not arbitrary, according to the will of individual judges—but in the direction of its already settled principles. [\*\*\*724] It is ever reaching out and expanding its doctrines so as to cover new facts and relations, but still without any break or change in the principles or doctrines themselves.” (1 Pomeroy, *Equity Jurisprudence* (5th ed. 1941) § 59, p. 76.) As the Court of Appeal observed in [A-C Co. v. Security Pacific Nat. Bank \(1985\) 173 Cal.App.3d 462, 473 \[219 Cal. Rptr. 62\]](#): “The tradition and heredity of the flexible equitable powers of the modern [\*\*\*21] trial judge derive from the role of the trained and experienced chancellor and depend upon [\*301] skills and wisdom acquired through years of study, training and experience which are not susceptible of adequate transmission through instructions to a lay jury.”<sup>8</sup>

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[17203](#), [17204](#), [17535](#)) and provided that the revenue from the civil penalties imposed under the UCL or the FAL may be used only by the Attorney General and local public prosecutors for the enforcement of consumer protection laws. ([Bus. & Prof. Code, §§ 17206, subd. \(c\), 17536, subd. \(c\)](#).) The changes effectuated by Proposition 64 have no direct bearing on the issue before us.

<sup>8</sup>The very broad consumer protective language set forth in the UCL closely tracks the broad language that Congress embodied in the [Federal Trade Commission Act \(15 U.S.C. § 41 et seq.\)](#) to reach business practices that were not specifically forbidden by the common law or other statutes. (See [15 U.S.C. § 45\(a\)](#) (“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce” are declared unlawful); see generally Baker & Baum, *Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition* (1962) 7 Vill. L.Rev. 517, 525–542.) California decisions have long recognized the close relationship between the language of the UCL and the Federal Trade Commission Act. (See, e.g., [People ex rel. Mosk v. National Research Co. \(1962\) 201 Cal.App.2d 765, 772–773 \[20 Cal. Rptr. 516\]](#).)

Over the more than 80-year history of the UCL, scores of decisions of both this court and the Courts of Appeal have uniformly recognized that the cause of action established by this statute is equitable in nature. (See, e.g., [Solus Industrial Innovations, LLC v. Superior Court \(2018\) 4 Cal.5th 316, 340 \[228 Cal. Rptr. 3d 406, 410 P.3d 32\]](#) [the UCL “provides an *equitable* means through which both public prosecutors and private individuals can bring suit to prevent unfair business practices” (italics added & omitted)]; [Korea Supply Co. v. Lockheed Martin Corp. \(2003\) 29 Cal.4th 1134, 1144 \[131 Cal. Rptr. 2d 29, 63 P.3d 937\]](#) [“A UCL action is equitable in nature; damages cannot be recovered. … Civil penalties may be assessed in public unfair competition actions, but the law contains no criminal provisions” (citation omitted)].)

In [Cel-Tech, supra, 20 Cal.4th 163](#), our court addressed questions arising from the expansive scope of the language of the UCL in a case in which the plaintiff cell phone vendor challenged the business practices of the defendant competitor cell phone [\*\*\*\*22] company as unfair under the UCL. In that case, the plaintiff contended that the defendant had assertedly taken improper advantage of its privileged position as one of only two cell phone companies licensed to provide cellular service in the Los Angeles area when it engaged in the practice of selling [\*\*471] cell phones to its cellular service customers at below cost. In *Cel-Tech*, we noted that our court had not yet defined the term “unfair” as used in the UCL and determined that although two Court of [\*302] Appeal decisions [\*\*\*725] had attempted such a definition,<sup>9</sup> the suggested definitions in those appellate decisions were “too amorphous and provide too little guidance to courts and businesses.” ([Cel-Tech, at p. 185.](#))

**CA(7)[↑] (7)** Thereafter, in devising “a more precise test for determining what is unfair under the unfair competition law,” the court in *Cel-Tech* “turn[ed] for guidance to the jurisprudence arising under the ‘parallel’ [citation] [section 5 of the Federal Trade Commission Act \(15 U.S.C. § 45\(a\)\)](#),” observing that [HN7\[↑\]](#) “[i]n view of the similarity of language and obvious identity of purpose of the two statutes, decisions of the federal court on the subject are more than ordinarily persuasive.” ([Cel-Tech, supra, 20 Cal.4th at p. 185.](#)) **CA(8)[↑] (8)** After describing a number of federal high court decisions [\*\*\*23] considering the types of practices that would be considered “unfair methods of competition” between competitors under [section 5 of the Federal Trade Commission Act \(FTC Act\) \(Cel-Tech, at p. 186\)](#)—federal decisions that the *Cel-Tech* court emphasized it considered persuasive but not “controlling or determinative” (*id. at p. 186, fn. 11*)—the court in *Cel-Tech* concluded that “to guide courts and the business community adequately and to promote consumer protection, [HN8\[↑\]](#) we must require that any finding of unfairness to competitors under [[Business and Professions Code](#)] [section 17200](#) be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition. We thus adopt the following test: *When a plaintiff who claims to have suffered injury from a direct competitor’s ‘unfair’ act or practice invokes section 17200 [(the relevant provision of the UCL)], the word ‘unfair’ in that section means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition*” ([20 Cal.4th at pp. 186–187](#), italics added).

**HN9[↑] CA(9)[↑] (9)** It is clear from both the language and nature of the test adopted in *Cel-Tech*—that is, whether the challenged business practice [\*\*\*24] “threatens an incipient violation of an *antitrust law*” or “violates the policy or spirit of one of those laws”—that such a standard is one that may reasonably be applied only by a court. ([Cel-Tech, supra, 20 Cal.4th at p. 187.](#)) This standard is too indeterminate to be adequately conveyed by jury instructions or applied by a jury. Indeed, the *Cel-Tech* court’s detailed description of the analysis that would have to be undertaken on remand of that case in determining whether the challenged practice meets the test of unfairness

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[244 \[31 L.Ed.2d 170, 92 S.Ct. 898\]](#), concluded that “legislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, *like a court of equity*, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of antitrust laws.” (Italics added.)

<sup>9</sup> See [People v. Casa Blanca Convalescent Homes, Inc. \(1984\) 159 Cal.App.3d 509, 530 \[206 Cal. Rptr. 164\]](#), which stated that “an ‘unfair’ business practice occurs when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers,” and [State Farm Fire & Casualty Co. v. Superior Court \(1996\) 45 Cal.App.4th 1093, 1104 \[53 Cal. Rptr. 2d 229\]](#), which declared that in determining whether a business practice is unfair “the court must weigh the utility of the defendant’s conduct against the gravity of the harm to the alleged victim.”

adopted in *Cel-Tech* [\*303] makes it clear that our opinion in that case recognized that the test was to be applied by the trial court and not a jury. (See *Cel-Tech, supra, 20 Cal.4th at pp. 188–191*; cf. *F. T. C. v. Motion Picture Adv. Co. (1953) 344 U.S. 392, 396 [97 L.Ed. 426, 73 S.Ct. 361]* [“The point where a method of competition becomes ‘unfair’ ... will often turn on the exigencies of a particular situation, trade [\*\*\*726] practices, or the practical requirements of the business in question”].)

The court in *Cel-Tech* explicitly noted that the case before it involved “an action by a competitor alleging anticompetitive practices” and emphasized that the specific test adopted in that decision was limited to that context and did not apply to “actions by consumers or by competitors alleging other kinds of violations of the unfair competition [\*\*\*\*25] law.” (*Cel-Tech, supra, 20 Cal.4th at p. 187, [\*\*472] fn. 12.*) Subsequent to the decision in *Cel-Tech*, our court has not addressed the question whether in actions under the UCL brought on behalf of consumers rather than competitors, the term “unfair” in the UCL needs to be similarly defined in a more prescribed standard or test, and, if so, what that test should be. In the years since *Cel-Tech*, a split of authority has developed in the Courts of Appeal with regard to the proper test for determining whether a business practice is unfair under the UCL in consumer cases, with appellate decisions adopting three different tests for determining unfairness in the consumer context. (See, e.g., *Zhang v. Superior Court (2013) 57 Cal.4th 364, 380, fn. 9 [159 Cal. Rptr. 3d 672, 304 P.3d 163]* [describing split of authority].)<sup>10</sup> The issue of the proper test for defining the term “unfair” as used in [\*304] the UCL in the consumer context is not raised in the present case, and we have no occasion to address it here. Nonetheless, we note that all the tests that have been proposed in the appellate court decisions are ones that, like the test adopted in *Cel-Tech*, can reasonably be applied only by courts, rather than by juries.

**CA(10)[↑] (10)** Accordingly, *HN10[↑]* both (1) the fact that the cause of action under the UCL originated solely as an action to enjoin an [\*\*\*26] unfair or misleading business practice—an equitable action triable only by a court and not a jury—and (2) the fact that the broad and general standard of unfair competition that was incorporated into the statute contemplated [\*\*\*727] that the standard would be applied by a court exercising its traditional, flexible equitable authority rather than by a jury, support the conclusion that the Legislature, in enacting the UCL, intended that a cause of action under the UCL would be tried by the court and not a jury, even when the government seeks civil penalties as well as injunctive relief.

**CA(11)[↑] (11)** We note that *HN11[↑]* the nature of the principal issue presented in a great many UCL actions additionally supports the conclusion that such causes of action were intended to be decided by the court rather than

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<sup>10</sup> One line of Court of Appeal decisions has held that a balancing test, which the *Cel-Tech* court declined to adopt in the competitor context (see *Cel-Tech, supra, 20 Cal.4th at pp. 184–185*), should nonetheless be applied in the consumer context, under which the determination whether a business practice is unfair to consumers ““involves an examination of [that practice’s] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant’s conduct against the gravity of the harm to the alleged victim.”” (*Smith v. State Farm Mutual Automobile Ins. Co. (2001) 93 Cal.App.4th 700, 718 [113 Cal. Rptr. 2d 399]*; see, e.g., *Ticconi v. Blue Shield of California Life & Health Ins. Co. (2008) 160 Cal.App.4th 528, 539 [72 Cal. Rptr. 3d 888]*; cf. *FTC v. Sperry & Hutchinson Co., supra, 405 U.S. 233, 244–245, fn. 5* [quoting with approval similar test adopted by FTC in 1964 for determining unfairness under *§ 5 of the FTC Act*.])

A second line of Court of Appeal decisions has adopted what has been termed a “tethering test,” requiring that “the public policy which is a predicate to [a consumer unfair competition action under the “unfair” prong of the UCL] must be ‘tethered’ to specific constitutional, statutory or regulatory provisions” in a manner similar to which *Cel-Tech* requires a competitor’s cause of action to be tethered to the antitrust laws. (*Gregory v. Albertson’s, Inc. (2002) 104 Cal.App.4th 845, 854 [128 Cal. Rptr. 2d 389]*; see, e.g., *Scripps Clinic v. Superior Court (2003) 108 Cal.App.4th 917, 940 [134 Cal. Rptr. 2d 101]*.)

A third line of Court of Appeal cases has adopted the three-part definition of unfairness applied under section 5 of the FTC Act since 1980, namely that: “(1) The consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided.” (*Camacho v. Automobile Club of Southern California (2006) 142 Cal.App.4th 1394, 1403 [48 Cal. Rptr. 3d 770]*; see, e.g., *Rubenstein v. The Gap, Inc. (2017) 14 Cal.App.5th 870, 880 [222 Cal. Rptr. 3d 397]*.) This test has sometimes been termed the “*section 5* test.”

a jury. A cursory review of the numerous UCL actions that have been brought in recent years (see Stern, Cal. Practice Guide: [Bus. & Prof. Code § 17200](#) Practice (The Rutter Group 2019) ¶ 3:131, pp. 3-39 to 3-44 [describing 41 recent UCL cases]) reveals that such cases often concern a nuanced and qualitative determination regarding whether a business practice should properly be considered unfair or deceptive within the meaning of the UCL. (See, [\*\*\*\*27] e.g., [Klein v. Chevron U.S.A., Inc. \(2012\) 202 Cal.App.4th 1342, 1376–1382 \[137 Cal. Rptr. 3d 293\]](#) [considering whether failing to sell temperature-adjusted motor fuel or to [\*\*473] disclose the effect of temperature increases on the volume of fuel sold could constitute an unfair or fraudulent business practice]; [Jolley v. Chase Home Finance, LLC \(2013\) 213 Cal.App.4th 872, 907–908 \[153 Cal. Rptr. 3d 546\]](#) [considering whether bank's practice of "dual tracking"—agreeing to a loan modification while continuing to pursue foreclosure—could constitute an unfair or fraudulent business practice].) This type of qualitative determination—often requiring the consideration of a variety of factors or circumstances identified in prior cases in California or other jurisdictions or in administrative guidelines developed by the Federal Trade Commission or other consumer protection administrative agencies—is the type of decision that has traditionally been viewed as the province of courts rather than juries.

[\*305]

Moreover, we have emphasized that “the overarching legislative concern [in enacting the UCL is] to provide a *streamlined* procedure for the prevention of ongoing or threatened acts of unfair competition” ([Cortez v. Purolator Air Filtration Products Co. \(2000\) 23 Cal.4th 163, 173–174 \[96 Cal. Rptr. 2d 518, 999 P.2d 706\]](#)), an objective that is inconsistent with the unavoidable delays and increased costs inherent in a jury, as compared to a court, trial. Furthermore, having a court, rather than [\*\*\*\*28] a jury, decide the question whether a business practice is properly considered unfair or deceptive for purposes of the UCL has the additional significant benefit—for both defendants and plaintiffs—of facilitating appellate review of that determination, because a trial court, unlike a jury, is required to provide, upon request of any party, “a statement of decision explaining the factual and legal basis for its decision.” ([Code Civ. Proc., § 632](#).) And having appellate courts in the position in which they can adequately review trial courts’ evaluations of the validity of business practices under the UCL, in turn, promotes the creation of a cumulative body of precedent that improves the consistency of future determinations under the UCL and provides needed guidance to companies in the formulation of their business practices.

**CA(12)[↑] (12)** In sum, for all of the foregoing reasons, we believe that it is clear that [HN12\[↑\]](#) the Legislature intended that a cause of action under the UCL—including an action brought by the government that seeks both injunctive relief and civil penalties—is to be tried by the court rather than by a jury.

#### B. The FAL

**HN13[↑] CA(13)[↑] (13)** The FAL ([Bus. & Prof. Code, § 17500 et seq.](#)) has been accurately described as “the [\*\*\*728] major California legislation designed [\*\*\*\*29] to protect consumers from false or deceptive advertising.” ([People v. Superior Court \(Olson\) \(1979\) 96 Cal.App.3d 181, 190 \[157 Cal. Rptr. 628\]](#).) The procedures set forth in the FAL and the UCL are in many respects parallel to one another, and the UCL specifically provides that any practice that violates the FAL is also prohibited by the UCL. (See [Bus. & Prof. Code, § 17200](#).)

The original version of the FAL creating a civil cause of action was enacted in 1941. (Stats. 1941, ch. 63, § 1, pp. 727–729 [enacting [Bus. & Prof. Code, §§ 17500–17535](#)].)<sup>11</sup> The statute broadly prohibited false or misleading [\*306] advertising, declaring that it is unlawful for any person or business to make or distribute any

<sup>11</sup> The FAL traces its origin to the 1915 version of former [section 654a of the Penal Code](#) (Stats. 1915, ch. 634, § 1, pp. 1252–1253), which, in turn, was based upon a model false advertising statute that was first proposed in 1911 in *Printer's Ink* magazine, an advertising journal. (See Note, *The Regulation of Advertising* (1956) 56 Colum. L.Rev. 1018, 1058; Note, *Enforcing California's False Advertising Law: A Guide to Adjudication* (1974) 25 Hastings L.J. 1105, 1106.) The 1911 model statute proposed to make it a misdemeanor to publish an advertisement containing “any assertion, representation or statement of fact which is untrue, deceptive or misleading” and was quite stringent, omitting any requirement that the advertiser be shown to have intended to deceive or to know the improper character of the advertisement. (Note, *The Regulation of Advertising*, *supra*, 56 Colum. L.Rev. at pp. 1058–1059 & fn. 245.) In adopting the statute in California in 1915, however, the Legislature added a scienter requirement, requiring a showing that the advertiser knew or, in the exercise of reasonable care, should have known of the false, deceptive or misleading character of the advertisement. (Stats. 1915, ch. 634, § 1, pp. 1252–1253.)

statement to induce the public to enter into a transaction “which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, [\*\*474] to be untrue or misleading.” (*Bus. & Prof. Code, § 17500.*) Like the civil cause of action authorized by the original version of the UCL, the FAL, as originally enacted, explicitly authorized only injunctive relief (*Bus. & Prof. Code, former § 17535*), permitting civil actions for injunction under the act to be prosecuted by the Attorney General or any district attorney on behalf of the People, and also “by any [entity or] person acting for the interests of itself, its members or the general public.” (*Ibid.*) Because [\*\*\*30] the civil action established by the 1941 legislation authorized only injunctive relief, it is clear that, as originally enacted, a civil action under the FAL, like that under the UCL as originally enacted, was equitable in nature and was intended to be tried by a court and not a jury. Again, Nationwide does not argue otherwise.

In 1965, the Legislature added *Business and Professions Code section 17536* to the FAL, authorizing the Attorney General or a district attorney, but not a private party, to seek a civil penalty not to exceed \$2,500 for each violation of the FAL. (Stats. 1965, ch. 827, § 1, pp. 2419–2420.) The enactment of *section 17536* as part of the FAL in 1965 predated the enactment in 1972 of the comparable provision of the UCL, discussed above, authorizing the Attorney General or a district attorney to seek civil penalties as well as injunctive relief in an action under the UCL. (See, *ante*, pp. 297–298.) As with the comparable provision of the UCL, the legislative history of the 1965 enactment of *section 17536* indicates that the legislation was introduced at the request of the Attorney General to provide an additional remedy in actions [\*\*\*31] to enjoin fraudulent sales schemes. (See Assemblyman George E. Danielson, letter to Gov. Edmund G. Brown, June 14, 1965 [urging approval of 1965 bill introduced by Danielson].) Nothing in the legislative history of the 1965 enactment indicates any legislative [\*\*\*729] intent to change the nature of a civil action under the FAL from an equitable action that is tried to the court to one that is tried by a jury. As under the UCL, actions under the FAL that were filed by private parties, in which injunctive relief was the prescribed remedy, continued to be tried by the court, not a jury.

In *People v. Superior Court (Jayhill Corp.)* (1973) 9 Cal.3d 283 [107 Cal. Rptr. 192, 507 P.2d 1400] (*Jayhill*), this court addressed a number of [\*307] issues arising in a civil action filed by the Attorney General under the FAL in which the Attorney General sought injunctive relief, restitution and civil penalties for alleged false and misleading advertising engaged in by door-to-door encyclopedia salespersons. The trial court had permitted the action to go forward with respect to injunctive relief but had struck all other forms of relief.

**CA(14)[<sup>12</sup>]** (14) On appeal, the court in *Jayhill* first addressed the question of the availability of restitution in an FAL action under *Business and Professions Code section 17535*. At the time the complaint in *Jayhill* was filed, *section 17535* provided [\*\*\*32] simply “that false or misleading advertising ‘may be enjoined’ in an action by the Attorney General, but was silent as to the power of the trial court to order restitution in such a proceeding.” (*Jayhill, supra, 9 Cal.3d at p. 286.*) Relying on the general principle that *HN14[<sup>12</sup>]* “[i]n the absence of such a restriction a court of equity may exercise the full range of its inherent powers in order to accomplish complete justice between the parties, restoring if necessary the *status quo ante* as nearly as may be achieved,” the *Jayhill* court held that “in an action by the Attorney General under *section 17535* a trial court has the inherent power to order, as a form of ancillary relief, that the defendants make or offer to make restitution to the customers found to have been defrauded.” (*Ibid.*, first italics added.)<sup>12</sup> Thus, the court in *Jayhill* clearly recognized that a civil action under the FAL is an equitable action triable to the court.

[\*\*475] **CA(15)[<sup>12</sup>]** (15) In *Jayhill, supra, 9 Cal.3d 283*, this court also addressed a separate issue concerning the application of *Business and Professions Code section 17536*, the provision of the FAL authorizing the trial court to impose civil penalties in a civil action under the FAL. We found that the trial court in that case had erred in determining that “each claim for penalty is a separate [\*\*\*33] cause of action” which must be separately stated, concluding instead that “[t]he Attorney General has only one cause of action against a particular defendant for violating *section 17500*; for this he seeks several forms of relief, including the civil penalty of \$2,500 set forth in

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<sup>12</sup> After the trial court ruling but prior to our decision in *Jayhill*, the Legislature had explicitly amended *Business and Professions Code section 17535* to authorize the court to order restitution as well as injunctive relief. (Stats. 1972, ch. 244, § 1, p. 494.) In *Jayhill*, the court found that in light of its legislative history, the 1972 amendment was not intended “to create a new power in the trial court but simply to clarify existing law on the point.” (*Jayhill, supra, 9 Cal.3d at p. 287, fn. 1.*)

section 17536. Since multiple victims are involved he prays for a penalty for each violation, but this does not elevate each violation to a separate cause of action. ... We hold that HN15[<sup>15</sup>] the Attorney General has only one cause of action against a defendant for violating section 17500, but that the amount of civil penalties which may be imposed under section 17536 is dependent upon the number of ‘violations’ committed by a defendant.” (9 Cal.3d at p. 288, italics added.) Because, as [\*308] we have seen, the court in *Jayhill* had already [\*\*\*730] explained that the cause of action for violating section 17500 is an equitable action (Jayhill, at p. 286), the clear implication of the decision in *Jayhill* is that even when the Attorney General or a district attorney seeks civil penalties as well as injunctive relief in such an action, the action under the FAL remains an equitable action, and, as such, is to be tried by the court, rather than by a jury.

In 1992, Business and Professions Code section 17536 was amended to provide that “[i]n assessing the amount of the civil penalty, [\*\*\*\*34] the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant’s misconduct, and the defendant’s assets, liabilities, and net worth.” (Stats. 1992, ch. 430, § 5, pp. 1708, 1709, italics added.) This wording directly tracks the language that was added to section 17206 of the UCL in the same 1992 legislation. (See, *ante*, p. 299.) Again, this terminology makes it clear that the Legislature intended that the amount of civil penalties under the FAL is to be determined by the court, not by a jury.

As with respect to the UCL, past decisions of both this court and the Courts of Appeal have consistently described the civil cause of action authorized by the FAL as an equitable action that is to be tried by the court rather than a jury, including when the action is one brought by a government attorney and seeks civil penalties as well as injunctive relief. (See, e.g., Jayhill, supra, 9 Cal.3d at p. 286; Fletcher v. Security Pacific National Bank (1979) 23 Cal.3d 442, 452 [153 Cal. Rptr. 28, 591 P.2d 51] [“the basic equitable principles underlying [Business and Professions Code] section 17535 arm the trial court with broad [\*\*\*\*35] discretionary power ... ‘... to accomplish complete justice between the parties’”]; People v. Overstock.com, Inc. (2017) 12 Cal.App.5th 1064, 1091 [219 Cal. Rptr. 3d 65] (Overstock.com) [the ““equitable ...” ... “... remedial power granted under [the UCL and the FAL] is extraordinarily broad”” (citation omitted)].)

HN16[<sup>16</sup>] CA(16)[<sup>16</sup>] (16) Like the choice of the term “unfair” in the UCL, the governing substantive standard of the FAL—prohibiting advertising that is “untrue or misleading” (Bus. & Prof. Code, § 17500, italics added)—is set forth in broad and open-ended language that is intended to permit a court of equity to reach any novel or creative scheme of false or misleading advertising that a deceptive business may devise. (See, e.g., Kwikset Corp. v. Superior Court (2011) 51 Cal.4th 310, 320 [120 Cal. Rptr. 3d 741, 246 P.3d 877]; Overstock.com, supra, 12 Cal.App.5th 1064, 1091 [““Probably because false advertising and unfair business practices can take many forms, the [\*309] Legislature has given the courts the power to fashion remedies to prevent their ‘use or employment’ in whatever context they may occur””].) As this court explained in Kasky v. Nike, Inc. (2002) 27 Cal.4th 939 [119 Cal. Rptr. 2d 296, 45 P.3d 243], the FAL prohibits “not [\*\*476] only advertising which is false, but also advertising which[,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public.’ [Citation.] Thus, to state a claim under either the UCL or the false advertising law, based on false advertising or promotional practices, ‘it [\*\*\*\*36] is necessary only to show that “members of the public are likely to be deceived.”’” (Kasky, at p. 951, quoting Leoni v. State Bar (1985) 39 Cal.3d 609, 626 [217 Cal. Rptr. 423, 704 P.2d 183] and Committee on Children’s Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 211 [197 Cal. Rptr. 783, 673 P.2d 660] (Com. on Children’s Television).)<sup>13</sup>

CA(17)[<sup>17</sup>] (17) [\*\*\*731] It is true that HN17[<sup>17</sup>] the broad reach and scope of the FAL’s untrue or misleading standard is often framed in language (whether members of the public are likely to be deceived) that is not, on its face, beyond the ken of a jury. As employed in the FAL (as well as in the UCL), however, a determination that advertising poses a sufficient risk or tendency to deceive or confuse the public may potentially result in an injunctive

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<sup>13</sup> As noted above (*ante*, p. 297), the UCL contains an overlapping prohibition of impermissible advertising, barring, in addition to “any unlawful, unfair or fraudulent business act or practice,” any “unfair, deceptive, untrue or misleading advertising.” (Bus. & Prof. Code, § 17200.)

order prohibiting what may be a common and widely utilized advertising, labeling, or promotional practice. (See, e.g., [Chern v. Bank of America \(1976\) 15 Cal.3d 866, 875–876 \[127 Cal. Rptr. 110, 544 P.2d 1310\]](#) [challenge to common bank practice of calculating interest rate advertised as “per annum” on the basis of a 360-day year]; [Com. on Children’s Television, supra, 35 Cal.3d 197, 205–215, 222–223](#) [challenge to children’s television advertising representing that breakfast foods with high sugar content are “healthful and nutritious,” and labeling such foods “‘cereals’” rather than “candy breakfasts”].) In the FAL and UCL settings, this standard—whether members of the public are likely to be deceived—has been understood to call for the exercise of the type of equitable discretion [\*\*\*\*37] and judgment traditionally employed by a court of equity. [CA\(18\)\[↑\] \(18\)](#) As in the case of the UCL, [HN18\[↑\]](#) the crucial issue in cases under the FAL does not typically involve the type of ordinary factfinding assigned to a jury, but rather calls for an equitable judgment to determine whether an often undisputed advertising or promotional practice presents a sufficient tendency to deceive or confuse the public so as to support invocation of the FAL’s remedies. As the breadth of the cases arising under the FAL attests, this determination calls for consideration of a wide variety of factors that prior cases and past administrative experience have shown may render an affirmative statement (or a failure to disclose) in a product label, packaging, [\*310] or in other advertising or promotional practices misleading in a particular context.<sup>14</sup> And, again as in the UCL context (see *ante*, pp. 304–305), given the capacity of the FAL’s standard to be applied expansively to encompass all of the novel ways in which advertising or promotional material may be misleading, it is important that trial courts are required to set forth their reasoning for a determination that the FAL has been violated so that a body of precedent can evolve to [\*\*\*\*38] inform businesses of advertising practices they must avoid.

In [Brady v. Bayer Corp. \(2018\) 26 Cal.App.5th 1156 \[237 Cal. Rptr. 3d 683\]](#), for example, the Court of Appeal determined that the One A Day label on a bottle of gummy vitamins that required, in “minuscule” instructions on the back of the label (*id. at p. 1159*), that two gummies be taken daily to provide the recommended daily vitamin dosage was sufficiently potentially misleading to support [\*\*\*732] a cause of action for violation of the FAL. The *Brady* court pointed out that despite the well understood traditional meaning of the One A Day brand, consumers who take one gummy a day “end up receiving only half the daily vitamin coverage [\*\*477] they think they are getting.” (*Brady, at p. 1160*.) In the course of its opinion, the *Brady* court discussed at some length a number of factors that past decisions had considered and balanced in determining whether a product label could be found sufficiently misleading to violate the FAL, including “common sense,” the factual context in which literally true or literally false statements are made, the degree to which back-of-the-label qualifiers ameliorate any tendency to mislead, and the tendency of particular brand names to mislead. (*Brady, at pp. 1165–1174*.) Considering these factors [\*\*\*\*39] as a whole, the *Brady* court found that the One A Day label had a sufficient “capacity, likelihood or tendency to deceive or confuse the public” to support a cause of action under the FAL. (*Brady, at p. 1173*.)

As a further example, in [Day v. AT & T Corp. \(1998\) 63 Cal.App.4th 325 \[74 Cal. Rptr. 2d 55\]](#), the Court of Appeal determined that although the defendant phone company’s policy of rounding up charges for phone calls longer than a minute to the next full minute was permissible under the “filed rate” doctrine, the failure of the packaging of defendant’s prepaid phone cards to disclose this rounding-up practice was sufficiently misleading to violate the FAL. In reaching this conclusion, the *Day* court considered but distinguished two earlier out-of-state decisions that had rejected a claim by ordinary phone subscribers that a telephone company’s failure to disclose the rounding-up practice was misleading. The court relied on the fact that unlike ordinary phone bills that disclosed to consumers that all phone calls were [\*311] charged for full minutes, “[t]he phone cards in question, whose outer packagings do not reveal the practice of rounding up, are *prepaid*. A consumer cannot read any materials provided by the carrier with the card before buying the card, which will advise [\*\*\*\*40] him or her of the practice. Based on the advertising a consumer will not know that whole minutes are being credited for each fraction of a minute until the card has been used.” (*Day, at p. 334*.) Under these circumstances, the *Day* court concluded “that the practices alleged here were likely to mislead, confuse or deceive members of the public.” (*Ibid.*)

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<sup>14</sup> For a general discussion of the numerous and complex factors and considerations that may affect the determination whether advertising should properly be viewed as deceptive or misleading, see *Developments in the Law—Deceptive Advertising* (1967) 80 Harv. L.Rev. 1005, 1038–1063.

And in [Overstock.com, supra, 12 Cal.App.5th 1064](#), the Court of Appeal upheld a trial court finding that the defendant online bargain retailer had violated the FAL through its online advertising practices. The defendant had used a number of different methods to indicate the purported bargain nature of its prices. At first, its advertisements displayed a “list price” that was shown stricken through, along with the retailer’s own lower price and the difference that the consumer would assertedly save. Later, the advertisements changed “list price” to “Compare at,” and thereafter, to “Compare.” The evidence at trial showed, however, that (1) the defendant failed to have a reliable procedure in place to verify that the comparator prices were realistic and (2) that the prices being compared frequently were not for the same or similar item. In affirming the trial court’s finding that the challenged [\*\*\*\*41] advertising was false or misleading within the meaning of the FAL, the *Overstock.com* court relied in part on the Federal Trade Commission (FTC) Guides Against Deceptive Pricing (16 C.F.R. § 233 (2019)). ([Overstock.com, supra, 12 Cal.App.5th at p. 1081](#).) That FTC guide sets forth in considerable detail the numerous ways in [\*\*\*733] which advertised pricing practices may be misleading or deceptive. (See [16 C.F.R. §§ 233.1–233.5 \(2019\)](#).) Specifically with respect to retail value comparisons, the guide provides that the advertiser “should be reasonably certain that the higher price he advertises does not appreciably exceed the price at which substantial sales of the article are being made in the area—that is, a sufficient number of sales so that a consumer would consider a reduction from the price to represent a genuine bargain or saving” and also that the compared merchandise is “of essentially similar quality and obtainable in the area.” ([16 C.F.R. § 233.2\(a\), \(c\) \(2019\)](#).)

**CA(19)[↑] (19)** The Court of Appeal decision in *Overstock.com* illustrates that, as with the determination whether a business practice is unfair within the meaning of the UCL, **HN19[↑]** the complexities and nuances that are often involved [\*\*478] in the determination whether an advertisement should properly be considered untrue or misleading for purposes [\*\*\*\*42] of the FAL are often ameliorated by judicial reference to the relevant guidelines developed by the FTC regarding deceptive advertising. (See generally Stern, Cal. Practice Guide: [Bus. & Prof. Code § 17200](#) Practice, *supra*, ¶¶ 4:46-4:80.4, pp. 4-14 to 4-32.) The great variety and complexity of contexts in which the potentially misleading nature [\*312] of advertising may arise and must be evaluated can be gleaned from a simple listing of the numerous guidelines, in addition to the Guides Against Deceptive Pricing relied upon in *Overstock*, that the FTC has published relating to deceptive advertising. (See Guides Against Bait Advertising [[16 C.F.R. §§ 238.0–238.4 \(2019\)](#)]; Guides for the Advertising of Warranties and Guarantees [[16 C.F.R. §§ 239.1–239.5 \(2019\)](#)]; Guides for Advertising Allowances and Other Merchandising Payments and Services [[16 C.F.R. §§ 240.1–240.15 \(2019\)](#)]; Guide Concerning Use of the Word “Free” and Similar Representations [[16 C.F.R. § 251.1\(a\)–\(i\) \(2019\)](#)]; Guides for Private Vocational and Distance Education Schools [[16 C.F.R. §§ 254.0–254.7 \(2019\)](#)]; Guides Concerning Use of Endorsements and Testimonials in Advertising [[16 C.F.R. §§ 255.0–255.5 \(2019\)](#)]; Guide Concerning Fuel Economy Advertising for New Automobiles [[16 C.F.R. §§ 259.1–259.4 \(2019\)](#)]; Guides for the Use of Environmental Marketing Claims [[16 C.F.R. §§ 260.1–260.17 \(2019\)](#)].)

And a brief look at just one of these FTC guidelines [\*\*\*\*43]—the Guides Concerning Use of Endorsements and Testimonials in Advertising—provides a good indication of the type of equitable consideration and evaluation of a substantial variety of factors that often goes into the determination whether advertising is properly considered untrue or misleading for purposes of the FAL. The guide on endorsements declares, for example, that “[e]ndorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser,” and that “[a]n advertiser may use an endorsement of an expert or celebrity only so long as it has good reason to believe that the endorser continues to subscribe to the views presented. An advertiser may satisfy this obligation by securing the endorser’s views at reasonable intervals where reasonableness will be determined by such factors as new information on the performance or effectiveness of the product, a material alteration in the product, changes in the performance of competitors’ products, and the advertiser’s contract commitments.” ([16 C.F.R. § 255.1\(a\), \(b\) \(2019\)](#).) This FTC guide also distinguishes between advertising that uses “consumer endorsements” and advertising that uses “expert endorsements.” (*Id.*, [§§ 255.2, 255.3 \(2019\)](#).) With [\*\*\*\*44] respect to consumer endorsements, the guide provides in part: “An advertisement employing endorsements by one or more [\*\*\*734] consumers about the performance of an advertised product or service will be interpreted as representing that the product or service is effective for the purpose depicted in the advertisement. Therefore, the advertiser must possess and rely upon adequate substantiation, including, when appropriate, competent and reliable scientific evidence, to support such claims made through endorsements in the same manner the advertiser would be required to do if it had made the representation directly, *i.e.*, without using endorsements.” (*Id.*, [§ 255.2\(a\) \(2019\)](#).) With respect to

expert endorsements, the guide requires that “the endorser’s qualifications must in fact give the endorser the expertise that he or she is represented as possessing with respect to the endorsement,” [\*313] and that “the endorsement must be supported by an actual exercise of that expertise in evaluating product features or characteristics with respect to which he or she is expert and which are relevant to an ordinary consumer’s use of or experience with the product and are available to the ordinary consumer. This evaluation [\*\*\*\*45] must have included an examination or testing of the product at least as extensive as someone with the same degree of expertise would normally need to conduct in order to support the conclusions presented in the endorsement.” (*Id.*, § 255.3(a), (b) (2019).) Further, the guide provides with respect to all endorsers that “[w]hen there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by [\*\*479] the audience), such connection must be fully disclosed.” (*Id.*, § 255.5 (2019).) Finally, the guide discusses numerous hypothetical examples that further explain the guide’s provisions. (See *id.*, §§ 255.1–255.5 (2019).)

**CA(20)[↑] (20)** Thus, as past FAL decisions and the numerous FTC guidelines indicate, **HN20[↑]** the determination whether an advertising or promotional practice should properly be found untrue or misleading within the meaning of the FAL depends upon the exercise of the type of equitable discretion and judgment typically employed by a court of equity. Federal cases examining whether an advertising practice is sufficiently deceptive to violate analogous federal consumer protection statutes [\*\*\*\*46] also support this conclusion. (See, e.g., *FTC v. Colgate-Palmolive Co. (1965) 380 U.S. 374, 385–392 [13 L.Ed.2d 904, 85 S.Ct. 1035]* [discussing competing considerations involved in determining whether an undisclosed televised mockup of a product demonstration could properly be found to constitute deceptive advertising even if the underlying product claim was true]; *FTC v. Mary Carter Paint Co. (1965) 382 U.S. 46, 47–48 [15 L.Ed.2d 128, 86 S.Ct. 219]* [upholding FTC finding that advertisement offering a free can of paint if the consumer bought a can of the same paint at the advertised price was deceptive when the manufacturer never sold single cans of paint, even if the advertised price was a fair price for a single can of comparable paint]; *FTC v. Direct Marketing Concepts, Inc. (D.Mass. 2008) 569 F.Supp.2d 285, 298–299* [discussing numerous factors to be considered in determining whether an advertiser had sufficient “substantiation for the representation prior to making it in an advertisement” so as to render the advertisement nondeceptive].)<sup>15</sup>

[\*314]

**CA(21)[↑] (21)** [\*\*\*735] Furthermore, past **HN21[↑]** FAL decisions also make clear the propriety and importance of a court’s exercise of its equitable authority not only in determining whether an advertisement is untrue or misleading, but also in determining (1) the number of violations for which a defendant may properly be held responsible (see, e.g., *Jayhill, supra, 9 Cal.3d 283, 288–289; Overstock.com, supra, 12 Cal.App.5th 1064, 1087–1088; People v. JTH Tax, Inc. (2013) 212 Cal.App.4th 1219, 1249–1255 [151 Cal. Rptr. 3d 728]; People ex rel. Kennedy v. Beaumont Investment, Ltd. (2003) 111 Cal.App.4th 102, 127–130 [3 Cal. Rptr. 3d 429]* (Beaumont Investment); *People v. Toomey (1984) 157 Cal.App.3d 1, 22–23 [203 Cal. Rptr. 642]; People v. Superior Court (Olson), supra, 96 Cal.App.3d 181, 197–198*), and (2) the reasonable amount of [\*\*\*\*47] civil penalties to be imposed for each violation. (See, e.g., *Overstock.com, supra, 12 Cal.App.5th at pp. 1087–1091; Beaumont Investment, supra, 111 Cal.App.4th at pp. 130–131; People v. First Federal Credit Corp. (2002) 104 Cal.App.4th 721, 733–734 [128 Cal. Rptr. 2d 542].*)

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<sup>15</sup> At oral argument, counsel for Nationwide suggested that in federal court juries often decide such questions in actions under the FTC Act in which civil penalties are sought. Under the FTC Act, however, civil penalties may be sought only for a defendant’s violation of a prior cease and desist order (*15 U.S.C. § 45(l), (m)(1)(B)*) or for a defendant’s knowing violation of a specific trade regulation rule (*15 U.S.C. § 45(m)(1)(A)*). Although federal courts have held that there is a right to a jury trial in such actions, the jury in such actions does not determine whether the practice is unfair or deceptive within the meaning of the *FTC Act*, but rather determines only whether the defendant violated the existing cease and desist order or the specific trade regulation rule. (See, e.g., *U.S. v. J.B. Williams Co. (2d Cir. 1974) 498 F.2d 414, 421–430; U.S. v. Dish Network, LLC (C.D.Ill. 2010) 754 F.Supp.2d 1002, 1003–1004*; see also *15 U.S.C. § 45(m)(2)* [providing that when the cease and desist order was not issued against the particular defendant from whom civil penalties are sought, upon request “the court shall ... review the determination of law made by the Commission ... that the act or practice which was the subject of such proceeding constituted an unfair or deceptive act or practice in violation of subsection (a)” (italics added)].)

**CA(22) [↑] (22)** In sum, in light of the language and legislative history of the FAL and the relevant judicial precedent, we believe it is clear that, as with the UCL, **HN22 [↑]** the Legislature intended that the civil cause of action embodied in the FAL would be tried by a court of equity rather than by a jury in all FAL actions, including instances in which the Attorney General or another governmental entity seeks civil penalties for a violation of the FAL as well as injunctive relief.

#### **[\*\*480] IV. UNDER THE CALIFORNIA CONSTITUTION, IS THERE A CONSTITUTIONAL RIGHT TO JURY TRIAL IN A UCL OR FAL ACTION WHEN THE PEOPLE SEEK BOTH INJUNCTIVE RELIEF AND CIVIL PENALTIES?**

As already noted, in our recent decision in *Shaw*, we explained that “even when the language and legislative history of a statute indicate that the Legislature intended that a cause of action established by the statute is to be tried by the court rather than by a jury, if the California constitutional jury trial provision itself guarantees a right to a jury trial in such a cause of action, the Constitution prevails and a jury trial cannot be denied.” (*Shaw, supra, 2 Cal.5th at p. 994.*) Thus, we turn to the question whether, **[\*\*\*\*48]** notwithstanding the Legislature’s intent that such actions be tried by the court rather than a jury, **[\*315]** the jury trial provision of the California Constitution itself guarantees a right to jury trial in an action brought by the People under the UCL or the FAL that seeks both injunctive relief and civil penalties.

##### A. General California Constitutional Jury Trial Principles

**HN23 [↑] CA(23) [↑] (23)** *Article I, section 16 of the California Constitution*—the jury trial provision—**[\*\*\*736]** states in relevant part that “[t]rial by jury is an inviolate right and shall be secured to all . . . .” From the outset of our state’s history, our courts have explained that this provision was intended to *preserve* the right to a civil jury as it existed at common law in 1850 when the jury trial provision was first incorporated into the California Constitution. (See, e.g., *Cassidy v. Sullivan (1883) 64 Cal. 266 [28 P. 234]; Koppius v. State Capitol Comm’rs (1860) 16 Cal. 248, 253–255.*) As this court observed in *People v. One 1941 Chevrolet Coupe (1951) 37 Cal.2d 283 [231 P.2d 832]* (*One 1941 Chevrolet Coupe*): “The right to trial by jury guaranteed by the Constitution is the right as it existed at common law at the time the Constitution was adopted. . . . It is the right to trial by jury as it existed at common law which is preserved; and what that right is, is a purely historical question, a fact which is to be ascertained like any other social, political or legal fact. **[\*\*\*\*49]** The right is the historical right enjoyed at the time it was guaranteed by the Constitution.” (*Id. at pp. 286–287*, citation & fn. omitted.) “Our state Constitution essentially *preserves* the right to a jury in those actions in which there was a right to a jury trial at common law at the time the Constitution was first adopted.” (*Crouchman v. Superior Court (1988) 45 Cal.3d 1167, 1175 [248 Cal. Rptr. 626, 755 P.2d 1075].*)

**CA(24) [↑] (24)** Pursuant to this historical approach, **HN24 [↑]** as a general matter the California Constitution affords a right to a jury trial in common law actions at law that were triable by a jury in 1850, but not in suits in equity that were not triable by a jury in 1850. (*C & K Engineering Contractors v. Amber Steel Co. (1978) 23 Cal.3d 1, 8–9 [151 Cal. Rptr. 323, 587 P.2d 1136]* (*C & K Engineering*)). In applying this test, our cases have explained that the *form* or *title* of a statutory cause of action is not controlling and that if the *substance* of the cause of action is one that would have been triable by a jury at common law, there is a right to a jury trial even if the statute’s designation might suggest that it is an equitable proceeding. (See, e.g., *One 1941 Chevrolet Coupe, supra, 37 Cal.2d at p. 299.*) “In determining whether the action was one triable by a jury at common law, the court is not bound by the form of the action but rather by the nature of the rights involved and the facts of the particular case—the *gist* of the action. A jury trial must **[\*\*\*\*50]** be granted where the *gist* of the action is legal, where the action is in reality cognizable at law.” (*Ibid.*) In the *One 1941 Chevrolet Coupe* decision, for example, the court held that the *gist* of the action at issue in that case—a civil lawsuit by **[\*316]** the government seeking forfeiture of an automobile that was allegedly used to illegally transport a prohibited drug—was legal because at common law a similar cause of action for forfeiture of otherwise lawful property that was allegedly used for unlawful purposes was triable by a jury in a court of law. (*Id. at pp. 297–300.*) The court ruled that the fact that the statutory provision authorizing the cause of action designated the forfeiture action as a “special proceeding” did not change the legal nature of the action. (*Id. at p. 299.*)

[\*\*481] [CA\(25\)](#)<sup>15</sup> (25) The court in [\*One 1941 Chevrolet Coupe, supra, 37 Cal.2d 283\*](#), further explained that the fact that the statute under which the forfeiture proceeding in that case was brought was enacted after the adoption of the California Constitution did not in itself bring the statutory cause of action outside the guarantee of the constitutional jury trial provision. The court observed in this regard: [HN25](#)<sup>15</sup> “The constitutional right of trial by jury is not to be narrowly construed. It is not limited [\*\*\*\*51] strictly to those cases in which it existed before [\*\*\*737] the adoption of the Constitution but is extended to cases of like nature as may afterwards arise. It embraces cases of the same class thereafter arising.” ([\*One 1941 Chevrolet Coupe, at p. 300.\*](#)) In explaining why the lawsuit at issue was of “like nature” or “the same class” as the common law action at law, the court stated: “At common law, prior to the adoption of the Constitution, a party against whom the forfeiture of property used in violation of law (then a carriage, wagon, horse or mule, now usually an automobile), was sought to be enforced was entitled to a trial by jury. Consequently such right exists now.” (*Ibid.*; see also [\*Franchise Tax Bd. v. Superior Court \(2011\) 51 Cal.4th 1006, 1012 \[125 Cal. Rptr. 3d 158, 252 P.3d 450\]\*](#) [“We look to whether a claim arising under a modern statute is ‘of like nature’ or ‘of the same class’ as a common law right of action”].)

In a case like *One 1941 Chevrolet Coupe* that involves a single cause of action that at common law in 1850 was triable only by a jury, or conversely a case involving a single cause of action that at common law was triable only by the court (see, e.g., [\*People v. Englebrecht \(2001\) 88 Cal.App.4th 1236, 1245 \[106 Cal. Rptr. 2d 738\]\*](#) [action for injunctive relief to abate a nuisance]), the determination whether the gist of the action in question [\*\*\*52] is legal or equitable is relatively straightforward. When a case involves multiple causes of action or multiple issues, some of which are legal in nature and would have been triable by a jury at common law and some of which are equitable in nature and would have been triable by the court at common law, the analysis is somewhat more complex.

#### B. Cases Involving Severable Legal and Equitable Issues

[HN26](#)<sup>15</sup> [CA\(26\)](#)<sup>15</sup> (26) When the legal and equitable causes of action or issues presented in a case are severable, past California decisions establish that a party retains the [\*317] right to a jury trial of the severable legal issues and a court trial of the severable equitable issues. (See, e.g., [\*Connell v. Bowes \(1942\) 19 Cal.2d 870, 871 \[123 P.2d 456\]\*](#) [“It is now established in this state … that if a complaint states two complete rights of action, one legal and one equitable, a jury trial may be obtained upon the issues raised by the legal cause”]; see generally 7 Witkin, Cal. Procedure, *supra*, Trial, § 86, p. 113 [“Where the action is of a hybrid character, raising both legal and equitable issues, a party is entitled to a jury trial of the severable legal issues”].)

[CA\(27\)](#)<sup>15</sup> (27) At the same time, California decisions have also repeatedly held that [HN27](#)<sup>15</sup> when severable legal and equitable causes of action or issues are present in [\*\*\*\*53] a single proceeding, the trial court generally has authority to determine in what order the matters should be heard, and if the equitable issue is tried by the court first and if the court's resolution of that issue determines a matter that would otherwise be resolved by a jury with regard to the legal claim or issue, the court's resolution of the matter will generally be binding and may leave nothing for a jury to resolve. (See, e.g., [\*Raedeke v. Gibraltar Sav. & Loan Assn. \(1974\) 10 Cal.3d 665, 671 \[111 Cal.Rptr. 693, 517 P.2d 1157\]\*](#) (Raedeke) [“It is well established that, in a case involving both legal and equitable issues, the trial court may proceed to try the equitable issues first, without a jury … , and that if the court's determination of those issues is also dispositive of the legal issues, nothing further remains to be tried by a jury”].) And although a trial court retains discretion regarding the order in which the issues should be tried, the governing California cases express a preference that the equitable issues be tried first. (See, e.g., [\*Orange County Water Dist. v. Alcoa Global Fasteners, Inc. \(2017\) 12 Cal.App.5th 252, 355 \[219 Cal. Rptr. 3d 474\]\*](#) [citing cases].) [\*\*\*738] This general “equity first preference” is a long standing feature of California law and has always been viewed as fully compatible [\*\*482] with the right to jury trial embodied in the California Constitution. (See, [\*\*\*\*54] e.g., [\*Raedeke, supra, 10 Cal.3d at pp. 670–671;\*](#)<sup>16</sup> [\*Connell v. Bowes, supra, 19 Cal.2d 870, 872;\*](#) [\*Thomson v. Thomson \(1936\) 7 Cal.2d 671, 682–683 \[62 P.2d 358\]; Angus v. Craven \(1901\) 132 Cal. 691, 699 \[64 P. 1091\]\*](#) (conc. opn. of

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<sup>16</sup> In *Raedeke* itself, the court, after confirming the existence and validity of the “equity first preference,” held that a plaintiff who brings an action presenting both legal and equitable issues can avoid the potential loss of a jury trial on common issues by electing to forgo the equitable claim and thus removing the equitable issues from the case. (See [\*Raedeke, supra, 10 Cal.3d at pp. 671–672.\*](#))

Henshaw, J.); *Swasey v. Adair* (1891) 88 Cal. 179, 180 [25 P. 1119]; *Fish v. Benson* (1886) 71 Cal. 428, 433–435 [12 P. 454]; *Lestrade v. Barth* (1862) 19 Cal. 660, 671–672.)<sup>17</sup>

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### C. Cases Involving Nonseverable Legal and Equitable Issues

**HN28** [↑] **CA(28)** [↑] (28) Unlike proceedings in which multiple legal and equitable causes or issues are severable, when a cause of action involves legal and equitable aspects that are not severable California decisions have relied upon “the gist of the action” standard in determining whether the action should be considered legal or equitable for purposes of the constitutional jury trial issue. (See, e.g., *C & K Engineering, supra*, 23 Cal.3d 1, 9–11 [in action seeking damages for breach of contract (“in form an action at law”) but relying solely on “the equitable doctrine of promissory estoppel,” court concluded “[t]he ‘gist’ of such an action is equitable”]; *Central Laborers’ Pension Fund v. McAfee, Inc.* (2017) 17 Cal.App.5th 292, 344–350 [225 Cal. Rptr. 3d 249] [in action by shareholders seeking money damages for breach of corporate directors’ and officers’ breach of fiduciary duty, court concluded that the gist of the action was equitable]; *Interactive Multimedia Artists, Inc. v. Superior Court* (1998) 62 Cal.App.4th 1546, 1552–1556 [73 Cal. Rptr. 2d 462] [in action seeking money damages for breach of a trustee’s fiduciary duty, court held that the gist of the action was equitable when, under the applicable Delaware law, the determination of whether a breach occurred turned on a multifactor “entire fairness test” that required the application [\*\*\*\*55] of equitable principles in “weighing various considerations [\*\*\*739] in order to reach a just result”]; *Martin v. County of Los Angeles* (1996) 51 Cal.App.4th 688, 695–697 [59 Cal. Rptr. 2d 303] [although a tort defendant’s claim for “equitable indemnity” seeking recovery of money damages for the proportional fault of a cotortfeasor involved application of equitable principles, court concluded the gist of the claim was legal because ascertaining the relative fault of cotortfeasors for equitable indemnity “involves determinations of rights and liabilities traditionally arising in common law suits for negligence”].) In our decision in *C & K Engineering*, we noted that “[a]lthough we have said that ‘the legal or equitable nature of a cause of action ordinarily is determined by the mode of relief to be afforded’ … , the prayer for relief in a particular case is not conclusive” and “[t]he fact that damages is one of a full range of possible remedies does not guarantee … the right to a jury.” (*C & K Engineering*, at p. 9, citations omitted.)

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[\*\*483] Two Court of Appeal decisions that have grappled with the proper characterization of an action as legal or equitable involved statutory causes of action, like those at issue in the present case, in which both equitable and legal relief may be awarded.

In the first case, [\*\*\*\*56] *Southern Pac. Transportation Co. v. Superior Court* (1976) 58 Cal.App.3d 433 [129 Cal. Rptr. 912] (*Southern Pac. Transportation*), the plaintiffs, who claimed that they had made improvements to real property in the good faith belief that they were the owners of the property, brought the underlying action against the true owner of the property seeking damages as good faith improvers of the property. The action was brought pursuant to a recently enacted “good faith improver” statutory scheme (*Code Civ. Proc.*, §§ 871.1–871.7) that authorized a good faith improver of real property to bring an independent civil cause of action for relief. (*Id.*, § 871.3.) The legislation provided that in such an action the court, under appropriate circumstances, “may … effect such an adjustment of the rights, equities, and interests of the good faith improver, the owner of the land, and other

<sup>17</sup> Contrary to the implication of the Court of Appeal decision below (see *Nationwide Biweekly, supra*, 24 Cal.App.5th at p. 456), this court’s recent decision in *Shaw, supra*, 2 Cal.5th 983 did not purport to abrogate or change this state’s well-established “equity first preference” doctrine. In *Shaw*, we interpreted one provision of the statute before the court—*Health and Safety Code section 1278.5, subdivision (m)*, which provided that nothing in the new legislation “abrogate[s] or limit[s] any other theory of liability or remedy otherwise available at law”—as preserving in full a plaintiff’s complementary cause of action under *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167 [164 Cal. Rptr. 839, 610 P.2d 1330], including the plaintiff’s right to obtain a jury resolution of the *Tameny* claim. (*Shaw, supra*, 2 Cal.5th at p. 1006.) *Shaw* did not purport to overrule or disapprove the numerous California decisions cited above that have applied the “equity first preference” doctrine for more than a century.

Because in this case the equitable and legal aspects of the UCL and FAL actions are nonseverable and because Nationwide has not questioned the continued vitality of the “equity first preference” doctrine, we have no occasion to consider whether there is any reason to reevaluate this doctrine or to determine its proper application in a particular context.

interested parties ... as is consistent with substantial justice to the parties under the circumstances of the particular case." (*Id.*, [§ 871.5](#))

The question before the Court of Appeal in *Southern Pac. Transportation* was whether the plaintiffs had a right to a jury trial in their action against the owner. The plaintiffs claimed that because their complaint sought only money damages from the landowner, the action was one at law in which they had a right to [\*\*\*57] a jury trial. The Court of Appeal rejected the plaintiffs' contention. After noting that the right to a jury trial under the California Constitution is the right "existing at common law at the time the Constitution was adopted" (*Southern Pac. Transportation, supra, 58 Cal.App.3d at p. 436*), the court explained: "Because the provisions of [Code of Civil Procedure] sections 871.1–871.7 have no counterpart in English law, classification of the action as either legal or equitable depends upon characterization of the nature of the relief sought. Although [the plaintiffs] assert that they seek damages only, by bringing an action under [section 871.3](#), they have invited the court to 'effect such an adjustment of the rights, equities, and interests' of the parties as is consistent with substantial justice. ([§ 871.5](#)) 'Under this section, the court has considerable discretion to select appropriate relief from the full range of equitable and legal remedies.' (Legislative Committee Comment—Assembly, to [§ 871.5](#).)" (*Southern Pac. Transportation, supra, 58 Cal.App.3d at p. 437*.)

[\*\*\*740] The Court of Appeal continued: "The fact that damages is one of a full range of possible remedies does not guarantee [the plaintiffs] the right to a jury for their good faith improver action. We recognize that where a complaint raises both legal and equitable issues, a jury trial may be obtained upon the issues [\*\*\*58] raised by the legal cause. [Citation.] Here, however, there is [\*320] no possibility of severing the legal from the equitable. The trier of fact must determine whether to quiet title in the improver on the condition he pay to the landowner the value of the unimproved land, or whether and in what amount, to award damages to the improver, or whether to require a completely different form of relief. [Citation.] Such a determination is not susceptible of division into one component to be resolved by the court and another component to be determined by a jury. Only one decision can be made, and it must make a proper adjustment of the 'rights, equities, and interests' of all the parties involved." (*Southern Pac. Transportation, supra, 58 Cal.App.3d at pp. 437–438*.)

Under these circumstances the *Southern Pac. Transportation* court concluded: "Because of the wide range of equitable and legal relief authorized by [Code of Civil Procedure section 871.5](#), it would be an impossible task for a jury to determine the appropriate relief and to resolve the rights, equities, and interests of all of the parties. ... We have concluded, therefore, that it is the function of the court and not the jury to be the trier of fact in a good faith improver action." (*Southern Pac. Transportation, supra, 58 Cal.App.3d at p. 438*.)

In this court's subsequent decision in [C & K Engineering, supra, 23 Cal.3d 1](#), we specifically [\*\*\*59] cited [\*\*484] and discussed the *Southern Pac. Transportation* decision with approval, quoting at some length the Court of Appeal's reasoning in that case. ([C & K Engineering, supra, 23 Cal.3d at p. 11](#).)

In the second case, [DiPirro, supra, 153 Cal.App.4th 150](#), the Court of Appeal addressed whether there is a right to a jury trial in an action seeking enforcement of the provisions of the [Safe Drinking Water and Toxic Enforcement Act of 1986 \(Health & Saf. Code, §§ 25249.5–25249.13\)](#), a legislative measure adopted by the voters through the initiative process and most commonly known as Proposition 65.<sup>18</sup> That measure—which generally prohibits businesses from (1) knowingly discharging chemicals known to cause cancer or reproductive toxicity into any source of drinking water ([Health & Saf. Code, § 25249.5](#)) or (2) knowingly exposing any individual to such chemicals without first giving clear and reasonable warning (*id.*, [§ 25249.6](#))—authorizes government officials and, under specified circumstances, private persons, to bring a cause of action seeking injunctive relief and civil penalties against any person who violates the statute. (*Id.*, [\*321] [§ 25249.7](#).) Like the UCL and the FAL,

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<sup>18</sup> The legislation was adopted by the voters at the November 4, 1986 General Election. The Legislature has amended relevant provisions of the act on numerous occasions since its inception. (See Stats. 1999, ch. 599, § 1, p. 4297; Stats. 2001, ch. 578, § 1, p. 4748; Stats. 2002, ch. 323, § 1, p. 1265; Stats. 2003, ch. 62, § 185, p. 500; Stats. 2013, ch. 581, § 1; Stats. 2014, ch. 71, § 90; Stats. 2014, ch. 828, § 1; Stats. 2017, ch. 510, § 1.) For convenience, we shall refer to the legislation in its current form as Proposition 65.

Proposition 65 provides that once a statutory violation is found, the court may issue an injunction and shall impose a civil penalty not to exceed \$2,500 per day for each violation ([Health & Saf. Code, § 25249.7, subds. \(a\), \(b\)\(1\)](#)), and, again [\*\*\*\*60] like the UCL [\*\*\*741] and the FAL, Proposition 65 sets forth a list of multiple factors, including “[a]ny other factor that justice may require,” that the court is to consider in determining the amount of the civil penalties to be imposed. ([Health & Saf. Code, § 25249.7, subd. \(b\)\(2\)\(G\).](#))<sup>19</sup> Because the determination whether a statutory violation has been established itself triggers the availability of both injunctive relief and civil penalties, the equitable and legal aspects of the action are not severable.

In deciding whether the plaintiff had a right to a jury trial in the civil action authorized by Proposition 65, the *DiPirro* court examined the statutory scheme as a whole to determine whether the gist of the action was legal or equitable. (*DiPirro, supra, 153 Cal.App.4th at pp. 180–184.*) In concluding that the legislation is “thoroughly infused with equitable principles that must be considered and adjudicated in an enforcement action” (*id. at p. 180*), the court relied in part on the fact that “Proposition 65 is “a remedial statute intended to protect the public”” (*ibid.*), along with its determination that the remedies authorized by the act were primarily equitable in nature, including injunctive relief to prevent the sale of offending products that lack the required warning. (*Id. at p. 180*; see *id. at p. 181.*)

**CA(29) [↑] (29)** The *DiPirro* court [\*\*\*\*61] acknowledged that Proposition 65 also authorized an award of civil penalties (*DiPirro, supra, 153 Cal.App.4th at p. 181*) and explicitly recognized **HN29** [↑] “the “general rule” that monetary relief is a legal remedy, ‘and an award of statutory damages may serve purposes traditionally associated with legal relief, such as compensation and punishment.’” (*Id. at p. 182.*) The Court of Appeal pointed out, however, [\*\*485] that the civil penalties that are authorized by Proposition 65 are to be determined by a highly discretionary consideration of multiple factors “that do not primarily take into account any harm suffered by the plaintiff … [and are] the kind of calculation traditionally performed by judges rather than a jury … .” (*DiPirro, I\*3221 at p. 182,* citation & fn. omitted.) Emphasizing that [proposition 65] “is informational and preventative rather than compensatory in its nature and function” (*ibid.*) and that “[t]he primary right to bring an action for civil penalties pursuant to [proposition 65] is … given to the state rather than individuals seeking compensation” (*id. at p. 183*), the *DiPirro* court determined that “the statutory remedies afforded by [proposition 65], including civil penalties, are not damages at law, but instead constitute equitable relief appropriate and incidental to enforcement of the Act, [\*\*\*\*62] which do not entitle the plaintiff to a jury trial” (*id. at p. 184*).

#### D. Application of Constitutional Principles to UCL and FAL Actions

**CA(30) [↑] (30)** As we shall explain, **HN30** [↑] in light of the particular nature of the civil causes of action [\*\*\*742] authorized by the UCL and the FAL, we conclude that the gist of a civil action under the UCL and the FAL is equitable rather than legal in nature. Such causes of action are equitable either when brought by a private party seeking only an injunction, restitution, or other equitable relief or when brought by the Attorney General, a district attorney, or other governmental official seeking not only injunctive relief and restitution but also civil penalties. Accordingly, we conclude that there is no right to a jury trial in such actions under the California Constitution.

<sup>19</sup> [Health & Safety Code section 25249.7, subdivision \(b\)\(2\)](#) provides in full: “In assessing the amount of a civil penalty for a violation of this chapter, the court shall consider all of the following:

- “(A) The nature and extent of the violation.
- “(B) The number of, and severity of, the violations.
- “(C) The economic effect of the penalty on the violator.
- “(D) Whether the violator took good faith measures to comply with this chapter and the time these measures were taken.
- “(E) The willfulness of the violator’s misconduct.
- “(F) The deterrent effect that the imposition of the penalty would have on both the violator and the regulated community as a whole.
- “(G) Any other factor that justice may require.”

**CA(31) [↑]** (31) To begin with, [HN31 \[↑\]](#) the statutory causes of action established by the UCL and the FAL are clearly not of like nature or of the same class as any common law right of action. (Cf. [One 1941 Chevrolet Coupe, supra, 37 Cal.2d 283, 300.](#)) As the leading treatise on California's consumer protection statutes explains, under the common law only a business adversely affected by trademark or trade name infringement by a business competitor could file an action for unfair competition against the [\*\*\*\*63] competitor and such an action could be brought only as a suit in equity. (See Stern, Cal. Practice Guide: [Bus. & Prof. Code § 17200](#) Practice, *supra*, ¶ 2:1, p. 2-1.) "At common law, deceived consumers had no claim for unfair competition. This made little sense, since ultimately it is the consumer who is harmed by a business that passes off goods or services as genuine, or as those of another. ... No matter; consumers were left without a claim or remedy. This was the era of *caveat emptor* [that is, let the buyer beware]." (*Id.*, ¶ 2:3, p. 2-1.)

The UCL and the FAL were enacted for the specific purpose of creating new rights and remedies that were not available at common law. (See, e.g., [Bank of the West v. Superior Court \(1992\) 2 Cal.4th 1254, 1263–1264 \[10 Cal. Rptr. 2d 538, 833 P.2d 545.\]](#)) The statutes deliberately broaden the types of business practices that can properly be found to constitute unfair competition (see, e.g., [Barquis, supra, 7 Cal.3d at p. 112](#)), and eliminate a number of elements that were required in common law actions for fraud (see, e.g., [In re \[\\*323\] Tobacco II Cases \(2009\) 46 Cal.4th 298, 312 \[93 Cal. Rptr. 3d 559, 207 P.3d 20\]; Com. on Children's Television, supra, 35 Cal.3d 197, 211.](#)) The statutes explicitly authorize government officials and injured private individuals to obtain injunctive relief to prevent a business from continuing to use the practice to the detriment of other consumers and to obtain restitution and other clearly equitable relief. ([Bus. & Prof. Code, §§ 17203, 17204.](#)) Such causes of action for unfair competition [\*\*\*\*64] that authorize injunctive relief against unfair or deceptive business practices had no close or analogous counterpart at common law.

Furthermore, when the Legislature adopted the civil penalty provisions of the UCL and the FAL in 1972 and 1965 respectively, permitting government officials, and government officials alone, to seek civil penalties along with injunctive or other equitable relief in the civil actions such officials bring under the UCL and the FAL (see [Jayhill, supra, 9 Cal.3d at p. 288](#)), the causes of action under the UCL and the FAL continued to constitute causes of [\*\*486] action that were not of like nature or of the same class as any common law action. Prior to 1850, early English law embodied numerous statutes imposing civil penalties for a variety of specifically delineated impermissible business practices—like using false weights and measures in the sale of a product or failing to pay the appropriate excise taxes due—that were enforced by the government through a civil action in the Court of [\*\*\*743] Exchequer in which a jury was available. (See [One 1941 Chevrolet Coupe, supra, 37 Cal.2d at pp. 295–296](#) & fn. 15.) We are unaware, however, of any early English statute that defined the business conduct proscribed by the statute in the type of broad and sweeping language adopted [\*\*\*\*65] in the UCL and the FAL, which was specifically intended to reach novel but offensive business practices that were not encompassed by more specific statutory prohibitions. (See, e.g., [Barquis, supra, 7 Cal.3d at p. 112.](#)) Furthermore, the early English statutes generally set forth a specific amount of civil penalty that was to be imposed for each violation; again, we are aware of no such statute that required the amount of the civil penalty to be determined by a consideration of multiple factors comparable to those set out in the relevant provisions of the UCL and the FAL. ([Bus. & Prof. Code, §§ 17206, subd. \(b\), 17536, subd. \(b\).](#)) Finally, and perhaps most significantly, unlike the UCL and the FAL, none of the early English statutes authorized a prosecuting official to seek and obtain, *in the same action*, a civil penalty and an injunction that would explicitly restrain the business from committing the prohibited conduct in the future.<sup>20</sup>

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<sup>20</sup> In his seminal article on the right to civil jury trial, Professor Fleming James observed that, at common law, when a plaintiff was seeking to obtain both injunctive relief and civil penalties for a defendant's alleged statutory violation, the plaintiff would have been required to bring two separate actions—one in equity and one in law. As Professor James explained: "B's violation of A's statutory right ... might entitle A to an injunction, to compensatory damages, and to a penalty. The right to any relief would turn on whether B violated the statute. A might get a determination of that issue without a jury in an equity suit, seeking an injunction and perhaps compensatory damages as incidental to an injunction. Or he might get such determination in an action at law for damages or for the penalty. Since equity refused to enforce a penalty and the law would not give an injunction, two suits would be required for complete relief. A had the choice which to bring first. And the first determination of the common issue (violation *vel non*) would bind the parties in the second action. The plaintiff then had the power to choose the mode of trial of the common issue, and he could so exercise it as to leave no room for judicial discretion." (James, *Right to a Jury Trial in Civil*

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Accordingly, in the absence of a comparable common law counterpart, in deciding whether there is a right to a jury trial under the California Constitution, we must look to the statutory scheme as a whole to determine whether the gist of a cause of action under the UCL or the FAL seeking both injunctive relief [\*\*\*\*66] and civil penalties is legal or equitable.

For nearly a half century, Court of Appeal decisions have explicitly and uniformly held that actions under the UCL and the FAL are equitable in nature and are to be tried by the court and not by a jury, including when the remedies sought are civil penalties as well as injunctive or other equitable relief. (See, e.g., *People v. Witzerman* (1972) 29 Cal.App.3d 169, 176–177 [105 Cal. Rptr. 284] (*Witzerman*); *People v. Bestline Products, Inc.* (1976) 61 Cal.App.3d 879, 915–916 [132 Cal. Rptr. 767]; *People v. First Federal Credit Corp.*, *supra*, 104 Cal.App.4th 721, 732–733; *People v. Bhakta*, *supra*, 162 Cal.App.4th 973, 977–979; *People ex rel. Feuer v. Superior Court (Cahuenga's the Spot)* (2015) 234 Cal.App.4th 1360, 1384 [184 Cal. Rptr. 3d 809].) Although this court has not previously [\*\*\*744] been directly asked to decide this issue itself, we note that as recently as 2015, in *Quesada v. Herb Thyme Farms, Inc.* (2015) 62 Cal.4th 298 [195 Cal. Rptr. 3d 505, 361 P.3d 868], our court, in responding to the defendant's concern that the plaintiff's false advertising and unfair competition claims in that case "would be evaluated by a lay jury applying a nebulous 'reasonable consumer' standard," stated that [\*\*487] "these claims are decided by a judge, not a jury." (*Id. at p. 322*, citing *Hodge v. Superior Court* (2006) 145 Cal.App.4th 278, 284–285 [51 Cal. Rptr. 3d 519] [action brought by private plaintiff seeking equitable relief] and *Witzerman*, *supra*, 29 Cal.App.3d 169, 176–177 [action brought by public official seeking injunctive relief and civil penalties].)

The Court of Appeal decision under review here was the first appellate decision to reach a contrary conclusion. Although the Court of Appeal suggested that the numerous prior Court of Appeal decisions cited above were either not on point or did not [\*\*\*67] fully analyze the jury trial issue (*Nationwide Biweekly*, *supra*, 24 Cal.App.5th at p. 457), our review of those [\*325] appellate court decisions does not support the Court of Appeal's characterization of those decisions. Those prior decisions, contrary to the Court of Appeal's suggestion, directly analyze the question whether there is a right to a jury trial in such actions under the California Constitution and conclude that there is no state constitutional right to a jury trial in such actions.

The 1972 decision in *Witzerman*, *supra*, 29 Cal.App.3d 169—the initial decision in this line of cases—demonstrates this point. *Witzerman* was an enforcement action brought by the Attorney General under the FAL seeking both injunctive relief and civil penalties. After noting that the defendants' jury trial claim relied on both the federal and state constitutional jury trial rights, the court initially addressed the state constitutional claim and rejected the defendants' argument that the trial court's denial of a jury trial was improper under the California Constitution because the issues to be tried were assertedly legal rather than equitable in nature. (*Witzerman*, *at p. 176*.) The court in *Witzerman* explained: "Assuming, without so deciding, that the civil penalties sought represent legal rather than equitable [\*\*\*\*68] relief, we do not believe that in this case such issues could have been severed from the equitable ones. The same alleged misconduct on the part of appellants was the basis for both types of relief sought by the People. (Cf. *Jaffe v. Albertson Co.* [(1966)] 243 Cal.App.2d 592, 610 [53 Cal.Rptr. 25].) Under these circumstances trial to the court of the People's case for injunctive relief disposed of as well the People's case for relief by way of civil penalties. (Cf. *Veale v. Piercy* [(1962)] 206 Cal.App.2d 557, 562–563 [24 Cal.Rptr. 91].)" (*Witzerman*, *supra*, 29 Cal.App.3d at pp. 176–177.) Contrary to the Court of Appeal's critique below, only after rejecting the defendants' state constitutional jury trial claim did the court in *Witzerman* turn to and reject the defendants' federal *Sixth Amendment* claim. (*Witzerman*, *at p. 177*.)

Although the *Witzerman* decision directly addressed and rejected the defendant's state constitutional jury trial claim, it is not clear that the decision applied the proper mode of analysis. After correctly observing that the equitable and legal aspects of the FAL action before it were nonseverable, the court did not explicitly apply the "gist of the action"

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*Actions* (1963) 72 Yale L.J. 655, 671–672, fns. omitted.) Thus, as a general matter, at common law when a plaintiff sought both injunctive relief and civil penalties based upon a business's alleged violation of a statute, the business was by no means guaranteed that the question whether it violated the statute would be determined by a jury rather than by a court.

test but instead appears to have applied the “equity first preference” doctrine. ([Witzerman, supra, 29 Cal.App.3d at pp. 176–177](#)) [\*\*\*745] Nonetheless, we conclude that the [Witzerman](#) court reached the correct result.

**CA(32) [↑]** (32) All parties before us agree that the legal and equitable aspects of [\*\*\*\*69] the UCL and FAL actions at issue are nonseverable and that the gist of the action standard applies. [HN32\[↑\]](#) The legal and equitable aspects of these actions are nonseverable not only because, as the [Witzerman](#) court indicated ([Witzerman, supra, 29 Cal.App.3d at pp. 176–177](#)), the determination whether a defendant’s alleged conduct constitutes a violation of the statute provides the basis [\*326] for all of the relief authorized by the statutes, but also because the amount of civil penalties that would be appropriate may well depend on the equitable remedies, including restitution, that are or are not imposed. (See, e.g., [Overstock.com, supra, 12 Cal.App.5th 1064, 1088–1089](#); [People ex rel. Harris v. Sarpas \(2014\) 225 Cal.App.4th 1539, 1567 \[172 Cal. Rptr. 3d 25\]](#).)

With respect to the application of the gist of the action standard, our independent analysis of the UCL and the FAL causes of action as [\*\*488] a whole convinces us that the gist of the civil causes of action authorized by the UCL and the FAL must properly be considered equitable, rather than legal, in nature.

To begin with, the bulk of the remedies provided for in the statutes— injunctive relief, restitution, and other clearly equitable remedies such as the appointment of a receiver (see [Bus. & Prof. Code, §§ 17203, 17535](#))—are clearly equitable in nature. As the legislative history of both the UCL and the FAL make clear, the primary objective of both statutes is preventive, [\*\*\*70] authorizing the exercise of broad equitable authority to protect consumers from unfair or deceptive business practices and advertising.

**CA(33) [↑]** (33) Second, [HN33\[↑\]](#) although the statutes also authorize in actions brought by the Attorney General, a district attorney, or other government officials (but not private parties), the imposition of civil penalties—a type of remedy that in some contexts is properly considered legal in nature—the UCL and the FAL statutes specify that in assessing the amount of the civil penalty to be imposed under these statutes, the court is afforded broad discretion to consider a nonexclusive list of factors that include the relative seriousness of the defendant’s conduct and the potential deterrent effect of such penalties, the type of qualitative evaluation and weighing of a variety of factors that is typically undertaken by a court and not a jury. ([Bus. & Prof. Code, §§ 17206, 17536](#).) Notably, the civil penalties that may be awarded under the UCL and the FAL, unlike the classic legal remedy of damages, are noncompensatory in nature; they require no showing of actual harm to consumers and are not based on the amount of losses incurred by the targets of unfair practices or misleading advertising. **CA(34) [↑]** (34) Like the civil penalties [\*\*\*71] at issue in [Kizer v. County of San Mateo \(1991\) 53 Cal.3d 139, 147–148 \[279 Cal. Rptr. 318, 806 P.2d 1353\]](#), [HN34\[↑\]](#) although the civil penalties under the UCL and the FAL “may have a punitive or deterrent aspect, their primary purpose is to secure obedience to statutes and regulations imposed to assure important public policy objectives. ... The focus of [both] statutory scheme[s] is *preventative*. ” ([Kizer, at p. 147–148](#), citations omitted.) And like the civil penalties in [Kizer \(id. at p. 147\)](#), the civil penalties obtained by the government in actions under the UCL and the FAL are to be utilized for the enforcement of the statutes in question. (See [Bus. & Prof. Code, §§ 17206, subd. \(c\), 17536, subd. \(c\)](#).)

[\*327]

**CA(35) [↑]** (35) [\*\*\*746] Finally, as discussed above (*ante*, pp. 299–303, 308–313), the expansive and broadly worded substantive standards that are to be applied in determining whether a challenged business practice or advertising is properly considered violative of the UCL or the FAL call for the exercise of the flexibility and judicial expertise and experience that was traditionally applied by a court of equity. Particularly in light of the equitable nature of the substantive standards that apply in UCL and FAL actions—both in actions brought by private parties and by government officials—we conclude that the gist of the civil causes of action authorized by the UCL and the FAL must properly be considered [\*\*\*72] equitable in nature. Accordingly, we conclude that [HN35\[↑\]](#) under the California Constitution, there is no right to a jury trial in a cause of action under the UCL and the FAL, including when the action is brought by a government official and seeks both injunctive relief and civil penalties.

We emphasize that this conclusion does not deprive a defendant in a UCL or FAL action of any constitutional right afforded by the jury trial provision of the California Constitution. As we have explained (*ante*, pp. 315–316), that constitutional provision grants the right to jury trial in actions “of like nature” “or of the same class” in which a jury

trial was provided at common law in 1850, when the jury trial provision of the California Constitution was first adopted. (*One 1941 Chevrolet Coupe, supra*, 37 Cal.2d 283, 300.) The consumer protection actions authorized in the UCL and the FAL are not of like nature or of the same class as an action that was triable by jury at common law. In actions like those under the UCL and the FAL, in which the equitable and legal aspects are nonseverable, there is no constitutional right [\*\*489] to a jury trial when, as here, the gist of the action is equitable rather than legal.

In sum, we conclude that there is no right to a jury trial [\*\*\*\*73] under the California Constitution in a cause of action under the UCL or the FAL, including an action in which civil penalties as well as an injunction or other equitable relief are sought. Because our conclusion rests in significant part on the fact that the substantive standards embodied in the UCL and the FAL contemplate the exercise of the type of equitable discretion and judgment traditionally applied by a court of equity, we have no occasion in this case to decide how the California constitutional jury trial provision applies to other statutory causes of action that authorize both injunctive relief and civil penalties.<sup>21</sup>

[\*328]

#### [\*\*\*747] E. *Inapplicability of Tull*

As already noted, in reaching a contrary conclusion, the Court of Appeal relied heavily upon the United States Supreme Court's decision in *Tull, supra*, 481 U.S. 412. As we explain, for a variety of reasons we conclude that the Court of Appeal's reliance upon *Tull* was unwarranted.

*Tull* involved a civil action filed by the federal government against a real estate developer, alleging that the developer had dumped fill on wetlands without a permit in violation of the *federal Clean Water Act*. (33 U.S.C. § 1251 et seq.) As authorized by that act, the government sought both injunctive relief (*id.*, § 1319(b)) and [\*\*\*\*74] civil penalties (*id.*, § 1319(d)). The court in *Tull* observed, however, that at the time the complaint in that case was filed the developer had sold most of the properties in question to a third party, and “[i]njunctive relief was therefore impractical except with regard to a small portion of the land.” (*Tull, supra*, 481 U.S. at p. 415.) After denying the developer's demand for a jury trial, the trial court conducted a 15-day bench trial, concluded that the property on which the defendant had admittedly dumped fill constituted “wetlands” within the meaning of the federal statute, and ultimately imposed injunctive relief and civil penalties on the defendant.

<sup>21</sup> In concluding that the gist of the causes of action created by the UCL and the FAL is equitable even when civil penalties as well as injunctive relief are sought, we have relied on the specific attributes of the California UCL and FAL statutes, as well as the established understanding of the scope of the California constitutional jury trial provision.

Every other state has adopted consumer protection legislation somewhat comparable to the UCL and the FAL. (See, e.g., Stern, Cal. Practice Guide: *Bus. & Prof. Code § 17200* Practice, *supra*, ¶¶ 2:54-2:62, pp. 2-22 to 2-24; Nat. Consumer Law Center, Unfair and Deceptive Acts and Practices (9th ed. 2016) § 1.1., p. 1.) Although the numerous unfair or deceptive practice statutes in other jurisdictions differ from the California statutes in a variety of respects, we note that a substantial majority of other state courts that have addressed the question whether there is a right to a jury trial in civil actions brought under those states' unfair or deceptive practice laws have concluded that there is no right to a jury trial in such actions. (See *Nunley v. State (Ala. 1993) 628 So.2d 619, 621–622*; *People v. Shifrin (2014) 2014 COA 14* [342 P.3d 506, 512–513]; *Associated Investment Co. Limited Partnership v. Williams Associates IV* (1994) 230 Conn. 148 [645 A.2d 505, 508–512]; *Martin v. Heinold Commodities* (1994) 163 Ill.2d 33 [205 Ill.Dec. 443, 643 N.E.2d 734, 753]; *Nei v. Burley* (1983) 388 Mass. 307 [446 N.E.2d 674, 678–679]; *State by Humphrey v. Alpine Air Products, Inc.* (Minn.Ct.App. 1992) 490 N.W.2d 888, 895; *State ex rel. Douglas v. Schroeder* (1986) 222 Neb. 473 [384 N.W.2d 626, 629–630]; *State v. State Credit Assn.* (1983) 33 Wn.App. 617 [657 P.2d 327, 330].) Several states have reached a contrary conclusion, but none of those cases involved a statute that created a cause of action in which both injunctive relief as well as damages or civil penalties could be obtained. (See *Robinson v. McDougal* (1988) 62 Ohio App.3d 253 [575 N.E.2d 469, 474]; *State v. Credit Bureau of Laredo, Inc. (Tex. 1975) 530 S.W.2d 288, 290–292*; *State v. Abbott Laboratories* (2012) 2012 WI 62 [341 Wis.2d 510, 816 N.W.2d 145, 156–159].) (See generally Annot., Constitutional Right to Jury Trial in Cause of Action Under State Unfair or Deceptive Trade Practices Law (1997) 54 A.L.R.5th 631.)

On appeal, the United States Supreme Court reversed, concluding that the developer was entitled to a jury trial under the *Seventh Amendment to the federal Constitution*. (*Tull, supra, 481 U.S. at pp. 417–425*.) The court in *Tull* acknowledged that a proceeding under the Clean Water Act seeking both injunctive relief and civil penalties is analogous to two different common law causes of action—an action to abate a nuisance in which there was no right to [\*329] a jury trial and an action in debt to impose a civil penalty in which there was a right to a jury trial. (*Tull, at pp. 420–421*). [\*\*\*490] However, the court concluded that it need not decide which common law action was the closer historical [\*\*\*\*75] analog, because prior Supreme Court precedent established that “characterizing the relief sought is ‘[m]ore important’ than finding a precisely analogous common-law cause of action in determining whether the *Seventh Amendment* guarantees a jury trial.” (*Id. at p. 421*, citing *Curtis v. Loether* (1974) 415 U.S. 189, 196 [39 L.Ed.2d 260, 94 S.Ct. 1005].)

Thereafter, in discussing the relief sought in the action, the court in *Tull* focused primarily on the civil penalties that had been sought and obtained in the action, emphasizing that “[a] civil penalty was a type of remedy at common law that could only be enforced in courts of law” (*Tull, supra, 481 U.S. at p. 422*) in which a jury trial was available. Although the government had also sought and obtained injunctive relief in the action, the *Tull* court observed that under the applicable federal statute the government was free to seek an equitable remedy independent [\*\*\*\*748] of legal relief (*id. at p. 425*) and further explained that prior federal decisions established that “if a ‘legal claim is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact. The right cannot be abridged by characterizing the legal claim as “incidental” to the equitable relief sought’” (*ibid.*, citing *Curtis v. Loether, supra, 415 U.S. at p. 196, fn. 11*). (See also, e.g., *Ross v. Bernhard* (1970) 396 U.S. 531, 537–538 [24 L.Ed.2d 729, 90 S.Ct. 733] [“where equitable and [\*\*\*\*76] legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims”]; *Dairy Queen v. Wood* (1962) 369 U.S. 469, 473 [8 L.Ed.2d 44, 82 S.Ct. 894] [requiring “that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury” “whether the trial judge chooses to characterize the legal issues presented as ‘incidental’ to equitable issues or not”]; *Beacon Theatres v. Westover* (1959) 359 U.S. 500, 510–511 [3 L.Ed.2d 988, 79 S.Ct. 948] [“only under the most imperative circumstances … can the right to a jury trial of legal issues be lost through prior determination of equitable claims” (fn. omitted)].) Thus, because prior federal decisions had interpreted the *Seventh Amendment* generally to require a jury trial whenever a legal claim is joined with an equitable claim, the court in *Tull* held that, for *Seventh Amendment* purposes, the fact that the government sought civil penalties in the action before it was itself sufficient to conclude that the developer had “a constitutional right to a jury trial to determine his liability on the legal claims.” (*Tull, supra, 481 U.S. at p. 425*).<sup>22</sup>

[\*330]

**CA(36)↑ (36)** For a number of reasons, we conclude that the Court of Appeal erred in relying [\*\*\*\*77] upon the *Tull* decision. First and most fundamentally, the decision in *Tull* rested exclusively on the United States Supreme Court’s interpretation of the right to civil jury trial embodied in the *Seventh Amendment to the United States Constitution*. **HN36↑** The federal civil jury trial provision of the *Seventh Amendment* applies only to civil trials in *federal court*; federal decisions explicitly hold that the civil jury trial provision of the *Seventh Amendment* does not apply to *state court proceedings*. (See, e.g., *Osborn v. Haley* (2007) 549 U.S. 225, 252, fn. 17 [166 L.Ed.2d 819, 127 S.Ct. 881]; *Gasperini v. Center For Humanities, Inc.* (1996) 518 U.S. 415, 432 [135 L.Ed.2d 659, 116 S.Ct. 2211]; *Curtis v. Loether, supra, 415 U.S. at p. 192, fn. 6*; [\*\*\*491] *Minn. & St. Louis R. R. v. Bombolis* (1916) 241 U.S. 211, 217–223 [60 L.Ed. 961, 36 S.Ct. 595].) Instead, the right to jury trial in state court proceedings is

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<sup>22</sup> Although the court in *Tull* held that the *Seventh Amendment* granted the developer a right to a jury trial on the issue of *liability*, the majority went on to hold that the *Seventh Amendment* did not require a jury trial on the *amount of civil penalties*. The majority explained that because “highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties under the Clean Water Act” and “[t]hese are the kinds of calculations traditionally performed by judges,” “the *Seventh Amendment* does not require a jury trial for that purpose in a civil action.” (*Tull, supra, 481 U.S. at p. 427*.)

Justice Scalia, joined by Justice Stevens, dissented from the latter holding, objecting that by fashioning a civil action in which liability but not the amount of damages is to be decided by a jury, “the Court creates a form of civil adjudication I have never encountered.” (*Tull, supra, 481 U.S. at p. 428* (dis. opn. of Scalia, J.)).

governed by the provisions and [\*\*\*749] judicial interpretation of each state's own constitutional jury trial provision.<sup>23</sup>

**HN37** [↑] **CA(37)** [↑] (37) In California, the constitutional right to a civil jury trial under the California Constitution is entirely independent of the federal constitutional civil jury trial right under the [Seventh Amendment \(Cal. Const., art. I, § 24\)](#), and past California cases have not hesitated to decline to follow the federal interpretation of the [Seventh Amendment](#) when the federal interpretation has been found inconsistent with a proper reading of the California provision. (See, e.g., [Jehl v. Southern Pacific Co. \(1967\) 66 Cal.2d 821, 835 & fn. 17 \[59 Cal. Rptr. 276, 427 P.2d 988\]](#); [Rankin v. Frebank Co. \(1975\) 47 Cal.App.3d 75, 91–92 \[121 Cal. Rptr. 348\]](#).) The *Tull* decision rested on several points in [\*331] which the federal interpretation of the [Seventh Amendment](#) departs from California's interpretation of the California jury trial [\*\*\*\*78] provision.

**CA(38)** [↑] (38) Initially, unlike actions under the UCL and the FAL in which the equitable (injunctive relief) and legal (criminal penalties) nature of the available remedies are unquestionably *nonseverable* features of a single cause of action (see [Jayhill, supra, 9 Cal.3d at p. 288](#)), in *Tull* the court held that under the applicable Clean Water Act, the equitable (injunctive relief) and legal (criminal penalties) remedies were severable. (See [Tull, supra, 481 U.S. at p. 425](#) “[T]he Government was free to seek an equitable remedy in addition to, or independent of, legal relief. [Section 1319](#) [the relevant provision of the [Clean Water Act](#)] does not intertwine equitable relief with the imposition of civil penalties. Instead each kind of relief is separably authorized in a separate and distinct statutory provision. [Subsection \(b\)](#), providing injunctive relief, is independent of [subsection \(d\)](#), which provides only for civil penalties.”].) And the *Tull* court went on to rely on the severable nature of the claims at issue in finding that the issue of liability was to be tried by a jury rather than by the court, because federal decisions dictate that in cases involving severable legal and equitable issues, the legal issues should be tried prior to the equitable issues. ([Tull, supra, 481 U.S. at p. 425](#) “[In such [\*\*\*\*79] a situation, if a ‘legal claim is joined with an equitable claim, the right to jury trial on the legal claim … remains intact.’ … Thus, petitioner has a constitutional right to a jury trial to determine his liability on the legal claims”].) By contrast, as noted above, the governing California decisions hold that **HN38** [↑] when the legal and equitable aspects are severable, there is a preference for trying the equitable issues first and that if common facts are resolved in a manner that obviates the need to try the legal issue, there is no right under the California Constitution to have the legal issues submitted to the jury. (See *ante*, p. 315; [Hoopes v. Dolan \(2008\) 168 Cal.App.4th 146, 156–158 \[85 Cal. Rptr. 3d 337\]](#) [discussing difference in California and federal rules]; see also Hamilton, *Federalism and the State Civil Jury Rights* (2013) [65 Stan. L.Rev. 851, 864–865, 869–870](#) [same].) [\*\*\*750] Thus, the conclusion reached in *Tull* under the [Seventh Amendment](#) is not necessarily the same result as would follow under California law.

[\*\*492] Moreover, the *Tull* court's analysis of the jury trial question also demonstrates a second difference between the interpretation and application of the federal and state constitutional civil jury trial provisions. As we have explained, in cases in which a cause of action contains nonseverable [\*\*\*\*80] legal and equitable aspects, California cases undertake a qualitative, holistic analysis of the action in its entirety to determine whether the gist of the action is legal or equitable, that is, whether the legal or equitable aspects predominate. (See [\*332] *ante*, pp. 317–321.)<sup>24</sup> In *Tull*, by contrast, the court, in determining that under the [Seventh Amendment](#) there is a right to a

<sup>23</sup> We note that since the decision in *Tull*, a number of state courts, in interpreting and applying their own state constitutional civil jury trial provisions, have concluded, unlike the *Tull* decision, that there is no right to a jury trial in statutory causes of action authorizing both injunctive relief and civil penalties. (See, e.g., [State ex rel. Darwin v. Arnett \(2014\) 235 Ariz. 239 \[330 P.3d 996, 1002\]](#); [Commissioner of Environmental Protection v. Connecticut Building Wrecking Co. \(1993\) 227 Conn. 175 \[629 A.2d 1116, 1121–1123\]](#); [Dept. of Environmental Protection v. Emerson \(Me. 1992\) 616 A.2d 1268, 1271](#); [Dept. of Environmental Quality v. Morley \(2015\) 314 Mich.App. 306 \[885 N.W.2d 892, 897\]](#); [State v. Irving Oil Corp. \(2008\) 183 Vt. 386 \[955 A.2d 1098, 1106–1108\]](#); [State v. Evergreen Freedom Foundation \(2002\) 111 Wn.App. 586 \[49 P.3d 894, 908–909\]](#).) A few states that have traditionally looked to the [Seventh Amendment](#) in interpreting their own state jury trial provision have followed *Tull*. (See, e.g., [Dept. of Revenue v. Printing House \(Fla. 1994\) 644 So.2d 498, 500–501](#); [Bendick v. Cambio \(R.I. 1989\) 558 A.2d 941, 943–944](#).)

jury trial for the statutory cause of action for civil penalties at issue in that case, relied primarily on its determination that the civil penalties in question were intended, at least in part, to be punitive in nature, which in the court's view was apparently sufficient to render the action legal in nature and require a jury trial. (*Tull, supra, 481 U.S. at pp. 422–424*.) In reaching this conclusion, however, the *Tull* court did not take into account a number of nonseverable equitable aspects of the action for civil penalties at issue there. Thus, the court does not appear to have thought it at all significant that the civil penalties were also intended in part to further the equitable purpose of [\*\*\*751] restitution. (*Ibid.*) Moreover, and significantly, the court did not consider that, unlike actions for civil penalties at common law that typically provided a specific and fixed [\*\*\*\*81] penalty for each violation, the civil penalties authorized by the statutory cause of action at issue in that case were to be determined by the equitable weighing and balancing of a number of factors similar to the list of factors set forth in the UCL and the FAL (see *Tull, supra, 481 U.S. at pp. 422–423, fn. 8*)—a determination that the *Tull* court itself recognized was more appropriate for a court than a jury. (*Id. at p. 427.*) Thus, rather than determining whether [\*333] the statutory cause of action for civil penalties at issue should be characterized as legal or equitable by considering *all* of the legal and equitable aspects of that cause of action holistically, the *Tull* court somewhat artificially severed the cause of action for civil penalties into two parts—one that the court held is to be decided by a jury and one that is to be decided by the court—creating a novel type of cause of action that, as Justice Scalia's dissent in *Tull* pointed out, was unknown at common law. (*Id. at pp. 427–428* (dis. opn. of Scalia, J.)) As *Tull* demonstrates, in applying the *Seventh Amendment* federal courts generally have not applied the [\*\*493] type of holistic gist of the action standard that California decisions have utilized in applying California's constitutional jury trial provision, and thus the [\*\*\*\*82] *Tull* decision is distinguishable from the case before us on this ground as well.

Finally, in addition to the differences attributable to disparate interpretations of the federal and state constitutional civil jury trial provisions, the decision in *Tull* is distinguishable from the present case in yet another significant respect. Unlike the relevant broadly worded and expansive substantive standards embodied in the UCL and the FAL—which, as we have explained, call for the exercise of the type of equitable discretion and judgment traditionally employed by a court of equity—under the statute at issue in *Tull*, the question of liability turned simply on the question whether the defendant had, without a permit, deposited fill into an area constituting “wetlands” within the meaning of the Clean Water Act. (*Tull, supra, 481 U.S. at pp. 414–415*.) The parties in *Tull* apparently did not dispute that the substantive statutory standard of liability at issue in that case involved the type of factual determination that in other contexts has traditionally been made by juries. Accordingly, the court in *Tull* had no occasion to decide whether a jury trial is constitutionally required [\*\*\*\*83] under the *Seventh Amendment* whenever a statute permits the recovery of civil penalties, even when the applicable substantive statutory standard clearly

<sup>24</sup> California is by no means alone in employing a holistic, qualitative standard for determining whether an action involving both legal and equitable aspects should be characterized as legal or equitable for purposes of an applicable constitutional jury trial provision. (See, e.g., *Miller v. Carnation Co.* (1973) 33 Colo.App. 62 [516 P.2d 661, 663] [“Where there are legal and equitable claims joined in the complaint the court must determine whether the basic thrust of the action is equitable or legal in nature”]; *Commissioner of Environmental Protection v. Connecticut Building Wrecking Co., supra*, 629 A.2d 1116, 1121 [“In a case that involves both legal and equitable claims, “whether the right to a jury trial attaches depends upon the relative importance of the two types of claims””]; *Shaner v. Horizon Bancorp.* (1989) 116 N.J. 433 [561 A.2d 1130, 1139] [“we have eschewed a focus solely on the remedy sought and have espoused a more eclectic view of the standards that serve to characterize the essential nature of a cause of action in giving meaning and scope to the right to a jury trial conferred by *article I, paragraph 9 of the New Jersey Constitution*”]; *Insurance Financial Services, Inc. v. South Carolina Ins. Co.* (1978) 271 S.C. 289 [247 S.E.2d 315, 318] [“Since the appellant has prayed for money damages in addition to seeking equitable relief, characterization of the action as equitable or legal depends on the appellant's ‘main purpose’ in bringing the action”]; *Norback v. Bd. of Directors of Church Extension Society* (1934) 84 Utah 506 [37 P.2d 339, 345] [“If the issues are legal or the major issues legal, either party is entitled upon proper demand to a jury trial; but, if the issues are equitable or the major issues to be resolved by an application of equity, the legal issues being merely subsidiary, the action should be regarded as equitable and the rules of equity apply”]; *Brown v. Safeway Stores* (1980) 94 Wn.2d 359 [617 P.2d 704, 709] [“In determining whether a case is primarily equitable in nature or is an action at law, the trial court is accorded wide discretion [which] should be exercised with reference to a variety of factors including, but not necessarily limited to, [seven factors set forth in an earlier Washington decision]”]; *Hyatt Bros. ex rel. Hyatt v. Hyatt* (Wyo. 1989) 769 P.2d 329, 333 [“the right to a jury trial in cases involving mixed issues of law and equity [is] resolved by examining the entire pleadings and all the issues raised to determine whether the action is *primarily legal in nature* or *primarily equitable in nature*”].)

contemplates the exercise of equitable judicial discretion and judgment. We note in this regard that when the court in *Tull* addressed a substantive standard as to which the exercise of such equitable discretion was contemplated—that is, in assessing the *amount* of civil penalties to be imposed through “highly discretionary calculations that take into account multiple factors … traditionally performed by judges” (*Tull*, at p. 427)—the *Tull* court found that the trial court could properly resolve that matter without violating the federal constitutional civil jury trial right. (*Ibid.*)

Because of the significant differences in the manner in which the federal and California constitutional civil jury trial provisions have been interpreted and applied and because the court in *Tull* did not address a statutory standard, like those involved in the UCL and the FAL, which contemplates the exercise [\*334] of the type of equitable discretion typically undertaken by a court of equity, we conclude that the Court [\*\*\*752] of Appeal's reliance upon the *Tull* decision was misplaced.<sup>25</sup>

## V. CONCLUSION

**CA(39) [↑] (39)** For [\*\*\*84] the reasons set forth above, we conclude that [HN39](#)[↑] in causes of action under the UCL or the FAL seeking injunctive relief and civil penalties, the gist of the actions is equitable, and there is no right to a jury trial in such actions under California law either as a statutory or constitutional matter. Given the specific attributes of the UCL and the FAL discussed above, we have no occasion to determine whether there is a right to a jury trial in other settings in which the government seeks injunctive relief and civil penalties under other statutes authorizing those remedies.

The judgment of the Court of Appeal, holding that Nationwide has a right to a jury trial under the California Constitution in such actions, is reversed and the matter is remanded to the Court of Appeal for further proceedings consistent with this opinion.

Chin, J., Corrigan, J., and Groban, J., concurred.

**Concur by:** KRUGER, J.

## Concur

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[\*\*494] **KRUGER, J.**, Concurring.—I concur in the judgment. I agree with the majority that [article I, section 16 of the California Constitution](#) does not guarantee a jury trial in this action for equitable relief and civil penalties under the unfair competition law (UCL; [Bus. & Prof. Code, § 17200 et seq.](#)) and the false advertising law (FAL; [Bus. & Prof. Code, § 17500 et seq.](#)). But I arrive at that conclusion by a somewhat different—and narrower—path.

As the majority [\*\*\*85] notes, California courts have assumed for decades that the UCL and the FAL create causes of action that are equitable in character and thus must be tried to a judge rather than a jury. This assumption only makes sense, since, at their inception, the only remedy under both statutes was injunctive relief, the quintessential equitable remedy. Even today, only equitable remedies are available to private parties who bring UCL and FAL actions. ([Bus. & Prof. Code, §§ 17203](#) [injunction and restitution as remedies for UCL violation], [17535](#) [same for FAL].)

[\*335]

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<sup>25</sup> In its answer brief filed in this court, Nationwide maintains that if this court rejects its state constitutional claim, we should address the question whether it has a right to a jury trial under the [Sixth](#) or [Seventh Amendment to the United States Constitution](#) and should hold, notwithstanding the absence of federal decisional support, that it has a right to jury trial in a state court action under those federal provisions. The Court of Appeal did not address these issues, neither the petition for review nor any answer to the petition raised these issues, and thus we decline to address those issues. (See [Cal. Rules of Court, rule 8.516\(b\)\(1\).](#))

But many years after the statutes were first passed, the Legislature authorized certain public officials—including, primarily, the Attorney General and district attorneys—to seek civil penalties as well as injunctive relief. ([Bus. & Prof. Code, §§ 17206 \[UCL\], 17536 \[FAL\]](#).) This development has called into question the courts' long-held assumption about the availability of jury trial. That is because government actions seeking civil penalties, generally speaking, sound in law rather than equity and thus carry with them a constitutional right of jury trial under both the [Seventh Amendment to the United States Constitution](#) (applicable in federal courts) and [article I, section 16 of the California Constitution](#) (applicable in state courts). ([Tull v. United States \(1987\) 481 U.S. 412, 420 \[95 L.Ed.2d 365, 107 S.Ct. 1831\]](#) (*Tull*); [People v. One 1941 Chevrolet Coupe \(1951\) 37 Cal.2d 283, 295 & fn. 15 \[231 P.2d 832\]](#).)

[\*\*\*753] It is not uncommon for the Legislature to enact a statutory [\*\*\*86] cause of action that has some equitable features and some legal features. Our case law instructs that in such cases, we are to determine which feature predominates in defining its essential character—which, in the distinctive terminology of our precedents, represents the “gist” of the action. ([People v. One 1941 Chevrolet Coupe, supra, 37 Cal.2d at p. 299](#); [C & K Engineering Contractors v. Amber Steel Co. \(1978\) 23 Cal.3d 1, 9 \[151 Cal. Rptr. 323, 587 P.2d 1136\]](#)). If the gist is legal, then the parties are constitutionally entitled to a jury. If the gist is equitable, then they are not.<sup>1</sup>

Our cases also instruct that the nature of the remedies sought is an important—if not necessarily controlling—consideration in this analysis. ([C & K Engineering Contractors v. Amber Steel Co., supra, 23 Cal.3d at p. 9](#).) In [\*336] some cases where plaintiffs seek both equitable and legal remedies, courts have determined whether jury trial is available by comparing the relative [\*\*495] significance of the two kinds of remedies. Where the government asks for massive penalties and only very minor injunctive restrictions on the defendant—or, conversely for highly burdensome injunctive orders and only nominal penalties—one form of relief might be deemed incidental to the other and the jury trial right recognized, or not, accordingly. (Cf. [Tull, supra, 481 U.S. at pp. 424–425](#) [where relief “would be limited primarily to civil penalties, since petitioner had [\*\*\*87] already sold most of the properties at issue[, the] potential penalty of \$22 million hardly can be considered incidental to the modest equitable relief sought” (citation omitted)].)

But that is not this case. The present case comes to us in an early procedural posture—on a motion to strike the jury trial demand from defendant’s answer—and the parties dispute both the size of potential penalties and the significance of the injunctive relief sought. It does not appear possible here to characterize either form of relief as clearly predominant over, or incidental to, the other. We must therefore look more broadly at the bases for liability alleged in the complaint and the relationships between these causes of action [\*\*\*754] and between the liability and remedy issues presented.

<sup>1</sup> Despite what the term “gist” might otherwise call to mind, the aim of this inquiry is not to identify a single essential element at the action’s theoretical core. We instead try to understand how the statutory cause of action, considered as a whole, relates to the historical division between law and equity, the goal being to place the cause of action appropriately among its possible historical analogues.

I do not believe federal law differs a great deal on this basic point. Though the majority reads *Tull* as establishing a strict rule that the plea for a legal remedy carries a jury trial right notwithstanding any other substantial equitable characteristics the action might have (maj. opn., *ante*, at pp. 330–331), I do not read *Tull* this way. The high court’s case law has long made clear that the federal jury trial inquiry turns on a holistic examination of both “the nature of the action and of the remedy sought”—a rule *Tull* cited without signaling any intent to depart from it. ([Tull, supra, 481 U.S. at p. 417](#); see also *id. at p. 422, fn. 6* [“Our search is for a single historical analog, taking into consideration the nature of the cause of action and the remedy as two important factors.”]; accord, e.g., [Feltner v. Columbia Pictures Television, Inc. \(1998\) 523 U.S. 340, 348 \[140 L.Ed.2d 438, 118 S.Ct. 1279\]](#) [*7th Amend. to the U.S. Const.* intended to apply to actions “in which legal rights were to be ascertained and determined” (italics omitted & added)].).

In any event, *Tull* is distinguishable from this case on other, more case-specific grounds, which I discuss later in this opinion. We need not rely here on any broad generalizations about how, if at all, the federal approach to the civil jury right differs from California’s.

Taking this broader look at the UCL, I agree with the majority that the gist of the statutory action is equitable.<sup>2</sup> Whatever type of relief a government plaintiff might seek in a particular case, liability under the UCL inherently rests on equitable considerations—considerations of a sort that only the trial court can effectively weigh and determine. (Maj. opn., *ante*, at pp. 301–303.) The central provision of the UCL, [Business and Professions Code section 17200](#), prohibits “unfair competition,” [\*\*\*\*88] which it defines to include “unfair” business practices. Determining what is unfair calls on courts to exercise the sort of flexible discretion that characterized the courts of equity—a kind of judgment that juries have not historically made, nor are well suited to make. It is hard to imagine drafting jury instructions, for example, to embody the “unfairness” test enunciated in [Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. \(1999\) 20 Cal.4th 163, 187 \[83 Cal. Rptr. 2d 548, 973 P.2d 527\]](#), which refers to “conduct that threatens an incipient violation of an [antitrust law](#), or violates the policy or spirit” of those laws.

[\*337]

The liability determinations at issue in *Tull* were of a different character. The question was whether the defendant had, without a permit, dumped fill into an area constituting “wetlands” within the meaning of the Clean Water Act. (*Tull, supra, 481 U.S. at pp. 414–415*.) The statutory rules governing this determination were certainly complicated and technical. (See [33 U.S.C. § 1344\(f\)](#); [33 C.F.R. § 328.3\(b\) \(2019\)](#).) But they did not call on the decision maker’s equitable discretion, and no one in *Tull*, including the court, disputed that this was the type of factual determination that has traditionally been made by juries in otherwise appropriate cases. Indeed, the Clean Water Act also provides for criminal penalties for willful or negligent [\*\*\*\*89] violations ([33 U.S.C. § 1319\(c\)](#))—which means that in some set of Clean Water Act cases, the relevant factual disputes are, of necessity, resolved by juries. *Tull* is thus distinguishable from this case by the nature of the liability decision there, which required only the determination of the historical facts and the application of legal standards to those facts—tasks central to the traditional role of trial juries—in contrast to the balancing of interests typically called for in assessing liability under the UCL.

But here is where my analysis differs from the majority’s: While UCL liability can readily [\*\*496] be characterized as dependent on equitable considerations, I do not believe the same can be said of liability under the FAL. To be sure, the FAL, much like the UCL, is broadly written: The statute is designed to encompass any novel scheme for misleading the public. (Maj. opn., *ante*, at p. 308.) The statute makes claims relatively easy to prove, compared to common law fraud, by employing a negligence standard [\*\*\*755] and omitting the elements of reliance and injury; the plaintiff need show only that the challenged advertisement or promotion is likely to mislead members of the public. (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 951 [119 Cal. Rptr. 2d 296, 45 P.3d 243].)<sup>3</sup> But at least by its text, [\*\*\*\*90] the FAL does not create a standard of liability that depends on the exercise of a court’s equitable judgment. No balancing of harms and benefits or weighing of the parties’ and public interests are involved in determining liability; no equitable principles like laches or unclean hands come into play. Rather, as other state courts have observed in evaluating similar laws, the FAL in significant respects resembles the common law cause of action for negligent misrepresentation, a species of the tort of deceit. (See *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 407 [<sup>1</sup>\*338] [11 Cal. Rptr. 2d 51, 834 P.2d 745]; cf. *State v. Abbott Laboratories* (2012) 341 Wis.2d 510, 533 [816 N.W.2d 145, 156] [holding that Wisconsin’s Deceptive Trade Practices Act, as “an essential

<sup>2</sup> The majority discusses the equitable character of the UCL and the FAL in detail only in part III of the opinion, which addresses *statutory* jury trial rights. The majority concludes there that in enacting and amending both statutes, “the legislative history and legislative purpose of both statutes convincingly establish that the Legislature intended that such causes of action under these statutes would be tried by the court, exercising the traditional flexible discretion and judicial expertise of a court of equity . . . .” (Maj. opn., *ante*, at p. 297.) In its constitutional analysis, the majority simply cross-references this discussion. (*Id.* at p. 326.) Readers should not be confused, however, by this organizational choice: The Legislature’s intent does not control whether there is a constitutional right to jury trial. (See *id.* at p. 314.)

<sup>3</sup> [Business and Professions Code section 17500](#) defines the scope of false advertising liability: “It is unlawful for any person . . . with intent directly or indirectly to dispose of real or personal property or to perform services . . . to make or disseminate or cause to be made or disseminated before the public . . . any statement, concerning that real or personal property or those services . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any person . . . to so make . . . any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised.”

counterpart to the common law claim of ‘cheating,’” carries a right to jury trial].) Though the FAL requires only a misleading advertisement, not necessarily one containing express falsehoods, the same is true for tortious deceit in California. (*Universal By-Products, Inc. v. City of Modesto* (1974) 43 Cal.App.3d 145, 151 [117 Cal. Rptr. 525] [“A misrepresentation need not be express but may be implied by or inferred from the circumstances.”]; *Sullivan v. Helbing* (1924) 66 Cal.App. 478, 483 [226 P. 803] [“Fraudulent representations may consist of half-truths calculated to deceive. Thus a representation literally true is actionable if used to create an impression substantially false.”].) At least considered in isolation, then, nothing about the nature [\*\*\*\*91] of liability determination under the FAL suggests it sits beyond the scope of the jury right.

In characterizing the nature of the FAL action as equitable, the majority emphasizes that appellate courts analyzing FAL liability have discussed a “variety of factors” relevant to whether a particular advertisement is misleading. (Maj. opn., *ante*, at p. 309.) These appellate discussions, though, tell us little about the legal or equitable character of FAL liability. The issues before the appellate courts were ones of legal sufficiency: whether allegations of misleading advertising were sufficient to survive demurrer (*Brady v. Bayer Corp.* (2018) 26 Cal.App.5th 1156 [237 Cal. Rptr. 3d 683]; *Day v. AT & T Corp.* (1998) 63 Cal.App.4th 325 [74 Cal. Rptr. 2d 55]) or whether substantial evidence supported a trial court’s finding of an FAL violation (*People v. Overstock.com, Inc.* (2017) 12 Cal.App.5th 1064 [219 Cal. Rptr. 3d 65] (Overstock.com)). In answering these questions, the courts did cite a number of factual considerations that supported the complaint’s or evidentiary showing’s sufficiency, but those factual discussions are not particularly suggestive of an inherently equitable approach to FAL liability. What the appellate courts did in these cases does not differ in any meaningful way from what courts do when they review evidentiary sufficiency questions in cases involving [\*\*\*756] causes of action that are tried to juries, such [\*\*\*\*92] as common law fraud. (See, e.g., *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 393 [46 Cal. Rptr. 3d 668, 139 P.3d 56] [in suit for fraudulent inducement to enter into at-will employment contract, evidence was [\*\*497] insufficient to show reliance where employment offer did not specifically guarantee the plaintiff “would be employed there so long as his work was satisfactory or that he could be fired only for good cause” or contain any other “promises of long-term employment”]; *AREI II Cases* (2013) 216 Cal.App.4th 1004, 1022 [157 Cal. Rptr. 3d 368] [detailing several “facts and circumstances that permit a reasonable inference” defendant participated in fraud].) Indeed, even in criminal cases tried to juries, appellate decisions on sufficiency of evidence often articulate a number of factual considerations to guide the analysis. (See, e.g., *People v. Banks* (2015) 61 [\*339] Cal.4th 788, 804–811 [189 Cal. Rptr. 3d 208, 351 P.3d 330] [detailed analysis of sufficiency of evidence to show major participation in felony and reckless indifference to human life]; *People v. Koontz* (2002) 27 Cal.4th 1041, 1081–1082 [119 Cal. Rptr. 2d 859, 46 P.3d 335] [discussing three nonexclusive factors relevant to sufficiency of evidence for premeditation and deliberation].)

None of the cases the majority cites discusses the possibility of a jury trial when civil penalties are sought. Indeed, the only case in which the issue could have arisen is Overstock.com—the only action brought by a public plaintiff entitled to seek civil penalties—but it [\*\*\*\*93] was not raised there. Nor do any of the cases hold or state that determining an FAL violation requires weighing competing interests, applying equitable doctrines such as laches, estoppel, or unclean hands, or balancing the harms and benefits of a requested remedy. Indeed, the considerations discussed in the opinions appear fairly typical of issues that, in a jury trial, might be used by the jury to resolve the question of liability under the FAL: the inability of consumers to learn the terms of a prepaid phone card before buying the card (*Day v. AT & T Corp.*, *supra*, 63 Cal.App.4th at p. 334); the application of “common sense” (*Brady v. Bayer Corp.*, *supra*, 26 Cal.App.5th at p. 1165); the possibility that a brand name by itself would mislead consumers (*id.* at p. 1170); and the likelihood a consumer would understand “Compare at” in an advertisement boasting of a low price to refer to another seller’s price for the same item (*Overstock.com*, *supra*, 12 Cal.App.5th at p. 1081).

The Overstock.com court did cite as consistent with its own analysis a regulation of the Federal Trade Commission (FTC), part of the agency’s Guides Against Deceptive Pricing (FTC Guides), stating that price comparisons to other merchandise can be “useful and legitimate” when the comparison items are of essentially similar quality and are obtainable in the area. (*Overstock.com*, *supra*, 12 Cal.App.5th at p. 1081 [\*\*\*\*94], quoting 16 C.F.R. § 233.2(c) (2017).) The majority holds this up as an example of how “the complexities and nuances” of FAL liability “are often ameliorated by judicial reference to the relevant guidelines developed by the FTC regarding deceptive advertising.”

(Maj. opn., *ante*, at p. 311, citing Stern, Cal. Practice Guide: [Bus. & Prof. Code § 17200](#) Practice (The Rutter Group 2019) ¶¶ 4:46–4:80.4, pp. 4-14 to 4-32.)

This overstates the significance of the FTC Guides to the question before us. For one thing, the link between the FTC Guides and liability under the FAL appears rather tenuous. The FTC Guides are not comprehensive or definitive regulations even [\*\*\*757] for interpreting the FTC Act, and certainly nothing suggests they were intended, or have functioned, to define deceptive practices [\*340] for purposes of state law.<sup>4</sup> In any event, while the FTC [\*\*498] Guides offer guidance on what sort of practices will be considered deceptive, none of this guidance appears to turn on the application of equitable judgment. For example, the Guides Concerning Use of Endorsements and Testimonials in Advertising, which the majority describes as illustrating the type of “equitable consideration” that goes into an FAL liability determination (maj. opn., *ante*, at p. 312), covers such questions as when [\*\*\*95] an advertiser should confirm that the endorser’s views have not changed ([16 C.F.R. § 255.1\(b\)](#) (2020)) and what kind of substantiation must support the claims of effectiveness implied by a consumer endorsement (*id.*, [§ 255.2\(a\), \(b\) \(2020\)](#)). The FTC Guides illustrate the potential factual complexity of deceptive advertising claims, but they do not support the majority’s conclusion that deciding the merits of an FAL claim “depends upon the exercise of the type of equitable discretion and judgment typically employed by a court of equity.” (Maj. opn., *ante*, at p. 313.)<sup>5</sup>

The majority also argues that because of the FAL’s potential breadth, it is important that the FAL liability standard be administered by trial courts, which can “set forth their reasoning for a determination that the FAL has been violated so that a body of precedent can evolve to inform businesses of advertising practices they must avoid.” (Maj. opn., *ante*, at p. 310.) As an argument for cabining the scope of the constitutional jury trial right, I find this reasoning unconvincing. Binding precedent is made only by appellate courts, and an appellate decision on sufficiency of the evidence fills out the precedential picture [\*\*\*96] regardless of whether trial was to a jury or to the bench. And while it might be thought desirable from some points of view to have all FAL actions heard by judges, the same might be said for any number of civil causes of action. Defendants in insurance bad faith cases, for example, might well prefer bench trials and could argue that they, too, need a body of precedent to guide their actions. But they get such precedential guidance from [\*341] appellate decisions on legal issues. (E.g., [Wilson v. 21st Century Ins. Co. \(2007\) 42 Cal.4th 713, 721–726 \[68 Cal. Rptr. 3d 746, 171 P.3d 1082\]](#) [propriety of summary judgment].) It would not be consistent with the constitutional [\*\*\*758] mandate that trial by jury “is an inviolate right and shall be secured to all” ([Cal. Const., art. I, § 16](#)) for us to pick out categories of civil actions that, because they sometimes raise complicated factual issues or implicate common business decisions, we regard as more suitable for trial to the court.

In the end, however, while it seems to me the majority comes up short in its effort to show that FAL claims implicate inherently equitable judgment uniquely suited to a court, I agree that the present action was nonetheless predominantly equitable in character.

<sup>4</sup> The FTC Guides on testimonials and endorsements, for example, simply “provide the basis for voluntary compliance with the law by advertisers and endorsers.” ([16 C.F.R. § 255.0\(a\)](#) (2020); see also *id.*, [§ 260.1\(a\)](#) (2019)) [Guides on environmental claims “help marketers avoid making environmental marketing claims that are unfair or deceptive,” but “do not operate to bind the FTC or the public.”]; [FTC v. Mary Carter Paint Co. \(1965\) 382 U.S. 46, 47–48 \[15 L.Ed.2d 128, 86 S.Ct. 219\]](#) [“These, of course, were guides, not fixed rules as such, and were designed to inform businessmen of the factors which would guide Commission decision.”].) And while the Stern treatise describes some of the FTC Guides as potentially relevant to FAL liability, it gives no examples of their use by courts for this purpose and does not describe such use as common. (See Stern, Cal. Practice Guide: [Bus. & Prof. Code § 17200](#) Practice, *supra*, ¶¶ 4:46, 4:72, 4:80.2–4:80.4, pp. 4-14, 4-32.)

<sup>5</sup> The same is true of the cited federal decisions upholding FTC findings of deceptiveness (maj. opn., *ante*, at p. 313), such as [FTC v. Colgate-Palmolive Co. \(1965\) 380 U.S. 374, 384–390 \[13 L.Ed.2d 904, 85 S.Ct. 1035\]](#) and [FTC v. Mary Carter Paint Co., supra, 382 U.S. at pages 47](#) to 48: They may show that deceptiveness can be factually complicated, but not that it depends on application of equitable principles.

First, as the majority explains, even if liability for civil penalties is [\*\*\*\*97] deemed a legal question, the amount of such penalties under the UCL and the FAL is decided by the court on an equitable basis, along with questions of injunctive relief and appropriate restitution. (Maj. opn., *ante*, at p. 326 [“[T]he UCL and the FAL statutes specify that in assessing the amount of the civil penalty to be imposed under these statutes, the court is afforded broad discretion to consider a nonexclusive list of factors that include the relative seriousness of the defendant's conduct and the potential deterrent effect of such penalties, the type of qualitative evaluation and weighing of a variety of factors that is typically undertaken by a court and not a jury. ([Bus. & Prof. Code, §§ 17206, 17536](#).)”].) The parties do not dispute that even if the request for civil penalties triggered a jury trial right, the right would extend only to the trial on liability; the ultimate amount of any penalties awarded would be decided by the court. Such an arrangement is not unprecedented (see [Tull, supra, 481 U.S. at pp. 425–427](#)), but this allocation of remedial authority [\*\*499] does diminish the practical importance of the jury's factfinding role and, in my view, strains the idea that the gist of the action is predominantly legal.

Second, and equally important, the causes [\*\*\*\*98] of action under the UCL and the FAL are inherently intertwined. This is because “unfair” competition under the UCL expressly includes “any act prohibited by” the FAL ([Bus. & Prof. Code, § 17200](#)), meaning that every violation of the FAL is therefore also a violation of the UCL. When, as here, allegedly deceptive conduct is pleaded as a violation of both statutes, the same liability questions that a jury would decide for purposes of the FAL would be decided by the court for purposes of the UCL. And while it might be theoretically possible to separate out the UCL claims that depend on equitable principles from those that do not, in practice the effort to keep the claims separate would be bound to collapse, since each UCL cause of action in a complaint is not necessarily limited to a single type of conduct or a single legal theory of liability.

[\*342]

In these circumstances, trying liability under the FAL to the jury, while the rest of the action was decided by the court, would create procedural complications without significant benefit to the defendant demanding jury trial. Because the FAL and the UCL are intertwined in this manner, a trial court that considered the defendant's advertising deceptive could impose liability [\*\*\*\*99] under the UCL before even putting the FAL liability question to the jury. (See maj. opn., *ante*, at p. 317 [trial court has discretion as to order of trying severable legal and equitable issue].) The court could then exercise its equitable judgment to impose both injunctive relief and substantial civil penalties for the UCL violation, regardless of the jury's view as to FAL liability. In other words, although every found violation of the FAL triggers civil penalties under the UCL, the inverse is [\*\*\*759] not true; a jury's finding of no FAL liability would not preclude a judge from awarding substantial civil penalties under the UCL. Because of the way these intertwined causes of action relate when the same conduct is at issue, the jury's verdict does not ultimately determine whether civil penalties are imposed.

Plaintiffs here seek a traditionally legal remedy, civil penalties, along with the equitable remedies of injunction and restitution. They also plead causes of action under the FAL, for which liability appears to rest on factual determinations rather than equitable judgment, as well as the UCL. But in the end, the equitable facets of this action predominate over the legal ones. The amount [\*\*\*\*100] of any civil penalties would be determined by the trial court on the basis of equitable principles, allowing the court to all but nullify any jury finding of an FAL violation. What is more, the court could effectively override any jury decision *against* FAL liability by imposing liability for the same conduct under the UCL before the FAL issue is ever tried, then awarding plaintiffs injunctive relief and penalties for that violation. For these reasons, I agree with the majority that the action is predominantly equitable in nature.

Liu, J., and Cuéllar, J., concurred.



## Ixchel Pharma, LLC v. Biogen, Inc.

Supreme Court of California

August 3, 2020, Opinion Filed

S256927

### **Reporter**

9 Cal. 5th 1130 \*; 470 P.3d 571 \*\*; 266 Cal. Rptr. 3d 665 \*\*\*; 2020 Cal. LEXIS 4876 \*\*\*\*; 2020-2 Trade Cas. (CCH) P81,313

IXCHEL PHARMA, LLC, Plaintiff and Appellant, v. BIOGEN, INC., Defendant and Respondent.

**Subsequent History:** Reported at [Ixchel Pharma, LLC v. Biogen, Inc., 2020 Cal. LEXIS 5387 \(Cal., Aug. 3, 2020\)](#)

**Prior History:** [\*\*\*\*1] Ninth Circuit, No. 18-15258. Eastern District of California, No. 2:17-cv-00715-WBS-EFB.

[Ixchel Pharma, LLC v. Biogen, Inc., 930 F.3d 1031, 2019 U.S. App. LEXIS 20997 \(9th Cir. Cal., July 16, 2019\)](#)

[Ixchel Pharma, LLC v. Biogen, Inc., 2019 Cal. LEXIS 6767 \(Cal., Sept. 11, 2019\)](#)

## **Core Terms**

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contracts, at-will, invalidating, contractual, terminate, contractual relationship, economic relations, restrained, restraint of trade, decisions, engaging, parties, void, prospective economic advantage, profession, non competition agreement, terms, cases, wrongful act, competitor, dealings, termination of employment, rule of reason, compete, business operations, third party, interpreting, interfered, antitrust, tortious interference

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade

Civil Procedure > Settlements > Settlement Agreements > Validity of Agreements

Torts > ... > Contracts > Intentional Interference > Elements

### **[HN1](#) [] Regulated Practices, Price Fixing & Restraints of Trade**

The California Supreme Court held that tortious interference with at-will contracts requires independent wrongfulness and that a rule of reason applies to determine the validity of the settlement provision under *Bus. & Prof. Code, § 16600*.

Torts > ... > Commercial Interference > Contracts > Intentional Interference

Torts > Business Torts > Commercial Interference > Prospective Advantage

## **HN2** Contracts, Intentional Interference

California has traditionally recognized two economic relations torts: interference with the performance of a contract and interference with a prospective economic relationship. Both of these torts protect the public interest in stable economic relationships.

Torts > ... > Contracts > Intentional Interference > Elements

## **HN3** Intentional Interference, Elements

Tortious interference with contractual relations requires (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage. It is generally not necessary that the defendant's conduct be wrongful apart from the interference with the contract itself.

Torts > ... > Prospective Advantage > Intentional Interference > Elements

## **HN4** Intentional Interference, Elements

Tortious interference with prospective economic advantage does not depend on the existence of a legally binding contract. A plaintiff asserting this tort must show that the defendant knowingly interfered with an economic relationship between the plaintiff and some third party, which carries the probability of future economic benefit to the plaintiff.

Torts > ... > Prospective Advantage > Intentional Interference > Elements

## **HN5** Intentional Interference, Elements

A plaintiff seeking to recover damages for interference with prospective economic advantage must plead as an element of the claim that the defendant's conduct was wrongful by some legal measure other than the fact of interference itself. Courts provide a damage remedy against third party conduct intended to disrupt an existing contract precisely because the exchange of promises resulting in such a formally cemented economic relationship is deemed worthy of protection from interference by a stranger to the agreement. Economic relationships short of contractual, however, should stand on a different legal footing as far as the potential for tort liability is reckoned. Because ours is a culture firmly wedded to the social rewards of commercial contests, the law usually takes care to draw lines of legal liability in a way that maximizes areas of competition free of legal penalties.

Torts > ... > Commercial Interference > Contracts > Intentional Interference

## **HN6** Contracts, Intentional Interference

While intentionally interfering with an existing contract is generally a wrong in and of itself, intentionally interfering with prospective economic advantage requires pleading that the defendant committed an independently wrongful act. An act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.

Torts > ... > Commercial Interference > Contracts > Intentional Interference

### **HN7** Contracts, Intentional Interference

Interference with at-will contracts is actionable as an economic tort. The fact that a contract is at the will of the parties, respectively does not make it one at the will of others.

Torts > ... > Commercial Interference > Contracts > Intentional Interference

Torts > Business Torts > Commercial Interference > Prospective Advantage

### **HN8** Contracts, Intentional Interference

Merely inducing a contracting party to seek a judicial determination whether it can terminate a contract according to its terms is not sufficient to state a claim under either the tort of interference with contractual relations or the tort of interference with prospective economic advantage.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade

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

### **HN9** Regulated Practices, Price Fixing & Restraints of Trade

It has long been the public policy of California that a former employee has the right to engage in a competitive business for himself or herself and to enter into competition with his or her former employer, even for the business of his or her former employer, provided such competition is fairly and legally conducted. Where no unlawful methods are used, public policy generally supports a competitor's right to offer more pay or better terms to another's employee, so long as the employee is free to leave.

Torts > ... > Commercial Interference > Contracts > Intentional Interference

### **HN10** Contracts, Intentional Interference

Interference with other legally binding contracts, such as contracts of a definite term, is tortious because the exchange of promises resulting in such a formally cemented economic relationship is deemed worthy of protection from interference by a stranger to the agreement. But at-will contracts do not involve the same cemented economic relationships as contracts of a definite term. Any interference with an at-will contract that induces its termination is primarily an interference with the future relation between the parties, and the plaintiff has no legal assurance of them. As for the future hopes, the plaintiff has no legal right but only an expectancy; and when the contract is terminated by the choice of a contracting party there is no breach of it. The competitor is therefore free, for its own competitive advantage, to obtain the future benefits for itself by causing the termination. Thus, the competitor may offer better contract terms, as by offering an employee of the plaintiff more money to work for the competitor or by offering a seller higher prices for goods, and the competitor may make use of persuasion or other suitable means, all without liability.

Torts > ... > Commercial Interference > Contracts > Intentional Interference

Torts > Business Torts > Commercial Interference > Prospective Advantage

#### **HN11** [ Contracts, Intentional Interference

One's interest in a contract terminable at will is primarily an interest in future relations between the parties, and he or she has no legal assurance of them. For this reason, an interference with this interest is closely analogous to interference with prospective contractual relations. If the defendant was a competitor regarding the business involved in the contract, his or her interference with the contract may be not improper.

Labor & Employment Law > Employment Relationships > At Will Employment

Torts > ... > Commercial Interference > Prospective Advantage > Intentional Interference

Torts > ... > Commercial Interference > Contracts > Intentional Interference

#### **HN12** [ Employment Relationships, At Will Employment

Like parties to a prospective economic relationship, parties to at-will contracts have no legal assurance of future economic relations. An at-will contract may be terminated, by its terms, at the prerogative of a single party, whether it is because that party found a better offer from a competitor, because the party decided not to continue doing business, or for some other reason. The other party has no legal claim to the continuation of the relationship. The contracting parties presumably bargained for these terms, aware of the risk that the relationship may be terminated at any time. At-will contractual relations are thus not cemented in the way that a contract not terminable at will is. The interest in protecting the contract from interference more closely resembles the interest in protecting prospective economic relationships than the interest in protecting a contractual relationship that, by its terms, is expected to continue on pain of breach.

Torts > ... > Commercial Interference > Contracts > Intentional Interference

#### **HN13** [ Contracts, Intentional Interference

An actionable claim for interference with contractual relations does not require that the defendant have the specific intent to interfere with a contract. A plaintiff states a claim so long as it alleges that the defendant knew interference was certain or substantially certain to occur as a result of defendant's action.

Torts > ... > Contracts > Intentional Interference > Elements

#### **HN14** [ Intentional Interference, Elements

To state a claim for interference with an at-will contract by a third party, the plaintiff must allege that the defendant engaged in an independently wrongful act. *Redfearn v. Trader Joe's Co.*, 20 Cal. App. 5th 989, 230 Cal. Rptr. 3d 98 (2018), and *Popescu v. Apple Inc.*, 1 Cal. App. 5th 39, 204 Cal. Rptr. 3d 302 (2016), are disapproved to the extent they are inconsistent.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade

#### **HN15** [ Regulated Practices, Price Fixing & Restraints of Trade

*Bus. & Prof. Code, § 16600*, which prohibits contracts that restrain trade or business, applies to business contracts. The chapter of the Business and Professions Code containing § 16600 excepts from § 16600's coverage certain noncompetition agreements upon the sale of goodwill or of ownership interest in a business, *Bus & Prof. Code, § 16601*, and upon the dissolution or dissociation from a partnership, *Bus. & Prof. Code, § 16602*, or limited liability corporation, *Bus. & Prof. Code, § 16602.5*.

Governments > Legislation > Interpretation

Governments > Courts > Judicial Precedent

#### **HN16** [blue icon] **Legislation, Interpretation**

In reading statutes, the court considers the text in the context of the statutory framework as a whole in order to determine its scope and purpose. The court must consider the statute in light of precedent construing it.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade

Governments > Legislation > Interpretation

#### **HN17** [blue icon] **Regulated Practices, Price Fixing & Restraints of Trade**

*Bus. & Prof. Code, § 16600*, is best read not to render void per se all contractual restraints on business dealings, but rather to subject such restraints to a rule of reason.

Governments > Legislation > Interpretation

#### **HN18** [blue icon] **Legislation, Interpretation**

When a statute has been construed by the courts and the legislature thereafter reenacts the statute without changing the interpreted language, a presumption is raised that the legislature was aware of and has acquiesced in that construction.

Governments > Legislation > Interpretation

#### **HN19** [blue icon] **Legislation, Interpretation**

A court must consider a statute's language in its broader statutory context and, where possible, harmonize that language with related provisions by interpreting them in a consistent fashion.

Governments > Courts > Judicial Precedent

#### **HN20** [blue icon] **Courts, Judicial Precedent**

It is axiomatic that an unnecessarily broad holding is informed and limited by the facts of the case in which it is articulated.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade

Governments > Legislation > Interpretation

#### **HN21** [ ] **Regulated Practices, Price Fixing & Restraints of Trade**

Statutes are interpreted in the light of reason and common sense, and it may be stated as a general rule that courts will not hold to be in restraint of trade a contract between individuals, the main purpose and effect of which are to promote and increase business in the line affected, merely because its operations might possibly in some theoretical way incidentally and indirectly restrict trade in such line.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade

Governments > Legislation > Interpretation

#### **HN22** [ ] **Regulated Practices, Price Fixing & Restraints of Trade**

Like previous decisions evaluating business contracts, *Great Western Distillery Products v. John A. Wathen Distillery Co.* rejected a literal reading of Civ. Code, former § 1673, in favor of a rule of reasonableness: Contracts with the purpose and effect of promoting trade and competition are valid even if their terms incidentally restrain commercial freedom in some way. After *Great Western Distillery*, the trend of authorities was to construe such statutes as former § 1673 and contracts between individuals intended to promote rather than to restrict a particular business, in the light of reason and common sense so as to uphold reasonable limited restrictions.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade

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

#### **HN23** [ ] **Regulated Practices, Price Fixing & Restraints of Trade**

Even when the California Supreme Court has upheld portions of noncompetition agreements under statutory exceptions to *Bus. & Prof. Code*, § 16600, it has recognized that any portion of the agreement restraining competition not within an exception is per se invalid.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade

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

#### **HN24** [ ] **Regulated Practices, Price Fixing & Restraints of Trade**

An employer cannot by contract restrain a former employee from engaging in his or her profession, trade, or business unless the agreement falls within one of the exceptions to the rule prohibiting covenants not to compete. *Bus. & Prof. Code*, § 16600, and its predecessor statute reject the common law rule of reasonableness for a legislative policy in favor of open competition and employee mobility.

Governments > Courts > Judicial Precedent

**HN25**[ Courts, Judicial Precedent

It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade

**HN26**[ Regulated Practices, Price Fixing & Restraints of Trade

*Bus. & Prof. Code, § 16600*, which prohibits contracts that restrain trade or business, protects Californians and ensures that every citizen retains the right to pursue any lawful employment and enterprise of their choice. The law protects the important legal right of persons to engage in businesses and occupations of their choosing.

Governments > Legislation > Interpretation

Torts > ... > Commercial Interference > Contracts > Intentional Interference

Governments > Courts > Judicial Precedent

**HN27**[ Legislation, Interpretation

A survey of precedent construing *Bus. & Prof. Code, § 16600*, and its predecessor statute reveals that the judiciary has long applied a reasonableness standard to contractual restraints on business operations and commercial dealings.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade

Governments > Courts > Common Law

**HN28**[ Regulated Practices, Price Fixing & Restraints of Trade

Though the Cartwright Act, *Bus. & Prof. Code, § 16700 et seq.*, is written in absolute terms, in practice not every agreement within the four corners of its prohibitions has been deemed illegal. The provisions of the Cartwright Act draw upon the common law prohibition against restraints of trade. Accordingly, the judiciary has taken direction from the common law in establishing a reasonableness standard for determining whether an agreement violates the Cartwright Act. That standard asks whether an agreement promotes or suppresses competition by considering the circumstances, details, and logic of a restraint.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade

**HN29**[ Regulated Practices, Price Fixing & Restraints of Trade

Many forms of exclusive dealing restrain parties from engaging in a lawful business. *Bus. & Prof. Code, § 16600*.

Torts > ... > Contracts > Intentional Interference > Elements

## [\*\*HN30\*\*](#) [L] **Intentional Interference, Elements**

Tortious interference with at-will contracts requires independent wrongfulness.

## **Headnotes/Summary**

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### **Summary**

#### **[\*1130] CALIFORNIA OFFICIAL REPORTS SUMMARY**

Plaintiff, a biotechnology company, was developing a drug containing the active ingredient dimethyl fumarate (DMF) to treat a disorder called Friedreich's ataxia. Plaintiff entered into an agreement with a drug company to jointly develop a drug for the treatment of Friedreich's ataxia. The drug development went according to plan until the drug company decided to withdraw from the agreement, as was allowed by its terms. Pursuant to a settlement with defendant, which was plaintiff's competitor, the drug company agreed to terminate its contract with plaintiff. Plaintiff sued defendant in federal court for tortiously interfering with plaintiff's contractual and prospective economic relationship with the drug company and claimed that defendant did so in violation of *Bus. & Prof. Code*, § 16600. The United States Court of Appeals for the Ninth Circuit certified two questions to the Supreme Court: (1) Does § 16600 void a contract by which a business is restrained from engaging in a lawful trade or business with another business? (2) Is a plaintiff required to plead an independently wrongful act in order to state a claim for intentional interference with a contract that can be terminated by a party at any time, or does that requirement apply only to at-will employment contracts?

The Supreme Court answered the certified questions. The court held that to state a claim for interference with an at-will contract by a third party, the plaintiff must allege that the defendant engaged in an independently wrongful act. Because plaintiff alleged that defendant interfered with its at-will contract, it must allege that defendant did so through wrongful means. The court further held that a rule of reason applies to determine the validity of a contractual provision by which a business is restrained from engaging in a lawful trade or business with another business. The contract between defendant and the drug company was such a restraint because it prevented the drug company from collaborating with plaintiff or any other partner in the development of treatments containing the active ingredient DMF. Its validity under *Bus. & Prof. Code*, § 16600, must therefore be evaluated based on a rule of reason. (Opinion by Liu, J., expressing the unanimous view of the court.)

### **Headnotes**

#### **CALIFORNIA OFFICIAL REPORTS HEADNOTES**

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

##### **Interference § 2—Contract Relationship—Independent Wrongfulness—Restraints of Trade—Validity of Settlement Agreement.**

The Supreme Court held that tortious interference with at-will contracts requires independent wrongfulness and that a rule of reason applies to determine the validity of a settlement provision in an agreement with another company requiring termination of the at-will contract under *Bus. & Prof. Code*, § 16600.

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

##### **Interference § 2—Contract Relationship—Prospective Economic Relationship.**

California has traditionally recognized two economic relations torts: interference with the performance of a contract and interference with a prospective economic relationship. Both of these torts protect the public interest in stable economic relationships.

### CA(3) [ ] (3)

#### **Interference § 2—Contract Relationship—Elements.**

Tortious interference with contractual relations requires (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage. It is generally not necessary that the defendant's conduct be wrongful apart from the interference with the contract itself.

### CA(4) [ ] (4)

#### **Interference § 6—Prospective Economic Advantage—Probability of Future Economic Benefit.**

Tortious interference with prospective economic advantage does not depend on the existence of a legally binding contract. A plaintiff asserting this tort must show that the defendant knowingly interfered with an economic relationship between the plaintiff and some third party, which carries the probability of future economic benefit to the plaintiff.

### CA(5) [ ] (5)

#### **Interference § 6—Prospective Economic Advantage—Wrongful Conduct.**

A plaintiff seeking to recover damages for interference with prospective economic advantage must plead as an element of the claim that the defendant's conduct was wrongful by some legal measure other than the fact of interference itself. Courts provide a damage remedy against third party conduct intended to disrupt an existing contract precisely because the exchange of promises resulting in such a formally cemented economic relationship is deemed worthy of protection from interference by a stranger to the agreement. Economic relationships short of contractual, however, should stand on a different legal footing as far as the potential for tort liability is reckoned. Because ours is a culture firmly wedded to [\*1132] the social rewards of commercial contests, the law usually takes care to draw lines of legal liability in a way that maximizes areas of competition free of legal penalties.

### CA(6) [ ] (6)

#### **Interference § 6—Prospective Economic Advantage—Wrongful Conduct.**

While intentionally interfering with an existing contract is generally a wrong in and of itself, intentionally interfering with prospective economic advantage requires pleading that the defendant committed an independently wrongful act. An act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.

### CA(7) [ ] (7)

#### **Interference § 2—Contract Relationship—At-will Contracts.**

Interference with at-will contracts is actionable as an economic tort. The fact that a contract is at the will of the parties, respectively does not make it one at the will of others.

#### CA(8) [ ] (8)

##### **Interference § 2—Contract Relationship—Prospective Economic Advantage.**

Merely inducing a contracting party to seek a judicial determination whether it can terminate a contract according to its terms is not sufficient to state a claim under either the tort of interference with contractual relations or the tort of interference with prospective economic advantage.

#### CA(9) [ ] (9)

##### **Unfair Competition § 1—Restraints of Trade—Former Employee—Right to Compete.**

It has long been the public policy of California that a former employee has the right to engage in a competitive business for himself or herself and to enter into competition with his or her former employer, even for the business of his or her former employer, provided such competition is fairly and legally conducted. Where no unlawful methods are used, public policy generally supports a competitor's right to offer more pay or better terms to another's employee, so long as the employee is free to leave.

#### CA(10) [ ] (10)

##### **Interference § 2—Contract Relationship—At-will Contract.**

Interference with other legally binding contracts, such as contracts of a definite term, is tortious because the exchange of promises resulting in such a formally cemented economic relationship is deemed worthy of protection from interference by a stranger to the agreement. But at-will contracts do not involve the same cemented economic relationships as contracts of a definite term. Any interference with an at-will contract that induces its termination is primarily an interference with the future relation between the parties, and the plaintiff has no legal assurance of them. As for the future hopes, the plaintiff has no legal right but only an [\*1133] expectancy; and when the contract is terminated by the choice of a contracting party there is no breach of it. The competitor is therefore free, for its own competitive advantage, to obtain the future benefits for itself by causing the termination. Thus, the competitor may offer better contract terms, as by offering an employee of the plaintiff more money to work for the competitor or by offering a seller higher prices for goods, and the competitor may make use of persuasion or other suitable means, all without liability.

#### CA(11) [ ] (11)

##### **Interference § 2—Contract Relationship—At-will Contract.**

One's interest in a contract terminable at will is primarily an interest in future relations between the parties, and he or she has no legal assurance of them. For this reason, an interference with this interest is closely analogous to interference with prospective contractual relations. If the defendant was a competitor regarding the business involved in the contract, his or her interference with the contract may be not improper.

#### CA(12) [ ] (12)

##### **Interference § 6—Prospective Economic Advantage—At-will Contract.**

Like parties to a prospective economic relationship, parties to at-will contracts have no legal assurance of future economic relations. An at-will contract may be terminated, by its terms, at the prerogative of a single party, whether it is because that party found a better offer from a competitor, because the party decided not to continue doing business, or for some other reason. The other party has no legal claim to the continuation of the relationship. The contracting parties presumably bargained for these terms, aware of the risk that the relationship may be terminated at any time. At-will contractual relations are thus not cemented in the way that a contract not terminable at will is. The interest in protecting the contract from interference more closely resembles the interest in protecting prospective economic relationships than the interest in protecting a contractual relationship that, by its terms, is expected to continue on pain of breach.

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

##### **Interference § 2—Contract Relationship—Defendant's Knowledge.**

An actionable claim for interference with contractual relations does not require that the defendant have the specific intent to interfere with a contract. A plaintiff states a claim so long as it alleges that the defendant knew interference was certain or substantially certain to occur as a result of defendant's action.

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

##### **Interference § 2—Contract Relationship—At-will Contract—Third Party—Independently Wrongfulness.**

To state a claim for interference with an at-will contract by a third party, the plaintiff must allege that the defendant engaged in an independently wrongful act. (Disapproving to the extent inconsistent: [Redfearn v. Trader Joe's Co. \(2018\) 20 \[\\*1134\] Cal.App.5th 989 \[230 Cal.Rptr.3d 98\]](#) and [Popescu v. Apple Inc. \(2016\) 1 Cal.App.5th 39 \[204 Cal.Rptr.3d 302\]](#).)

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

##### **Unfair Competition § 1—Restraints of Trade—Noncompetition Agreement.**

*Bus. & Prof. Code*, § 16600, which prohibits contracts that restrain trade or business, applies to business contracts. The chapter of the Business and Professions Code containing § 16600 excepts from § 16600's coverage certain noncompetition agreements upon the sale of goodwill or of ownership interest in a business ([Bus & Prof. Code, § 16601](#)), and upon the dissolution or dissociation from a partnership ([Bus. & Prof. Code, § 16602](#)), or limited liability corporation ([Bus. & Prof. Code, § 16602.5](#)).

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

##### **Statutes § 19—Construction—Scope and Purpose—Precedent.**

In reading statutes, the court considers the text in the context of the statutory framework as a whole in order to determine its scope and purpose. The court must consider the statute in light of precedent construing it.

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

##### **Unfair Competition § 1—Restraints of Trade—Rule of Reason.**

*Bus. & Prof. Code, § 16600*, is best read not to render void per se all contractual restraints on business dealings, but rather to subject such restraints to a rule of reason.

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

##### **Statutes § 19—Construction—Legislature's Acquiescence.**

When a statute has been construed by the courts and the Legislature thereafter reenacts the statute without changing the interpreted language, a presumption is raised that the Legislature was aware of and has acquiesced in that construction.

#### [CA\(19\)](#) [] (19)

##### **Statutes § 28—Construction—Language—Harmonization—Related Provisions.**

A court must consider a statute's language in its broader statutory context and, where possible, harmonize that language with related provisions by interpreting them in a consistent fashion.

#### [CA\(20\)](#) [] (20)

##### **Courts § 34—Judicial Precedent—Facts of Case.**

It is axiomatic that an unnecessarily broad holding is informed and limited by the facts of the case in which it is articulated.

#### [CA\(21\)](#) [] (21)

##### **Statutes § 19—Construction—Reason and Common Sense—Restraints of Trade.**

Statutes are interpreted in the light of reason and common sense, and it may be stated as a general rule that courts will not hold to be in restraint of trade a contract between individuals, the main purpose and effect of which are to promote and increase business in the [\*1135] line affected, merely because its operations might possibly in some theoretical way incidentally and indirectly restrict trade in such line.

#### [CA\(22\)](#) [] (22)

##### **Unfair Competition § 1—Restraints of Trade—Business Contracts—Reasonableness.**

Like previous decisions evaluating business contracts, *Great Western Distillery Products v. John A. Wathen Distillery Co.* rejected a literal reading of Civ. Code, former § 1673, in favor of a rule of reasonableness: Contracts with the purpose and effect of promoting trade and competition are valid even if their terms incidentally restrain commercial freedom in some way. After *Great Western Distillery*, the trend of authorities was to construe such statutes as former § 1673 and contracts between individuals intended to promote rather than to restrict a particular business, in the light of reason and common sense so as to uphold reasonable limited restrictions.

#### [CA\(23\)](#) [] (23)

##### **Unfair Competition § 1—Restraints of Trade—Noncompetition Agreement.**

Even when the Supreme Court has upheld portions of noncompetition agreements under statutory exceptions to *Bus. & Prof. Code*, § 16600, it has recognized that any portion of the agreement restraining competition not within an exception is per se invalid.

[CA\(24\)](#) [↓] (24)

**Unfair Competition § 1—Restraints of Trade—Former Employee—Covenant Not to Compete.**

An employer cannot by contract restrain a former employee from engaging in his or her profession, trade, or business unless the agreement falls within one of the exceptions to the rule prohibiting covenants not to compete. *Bus. & Prof. Code*, § 16600, and its predecessor statute reject the common law rule of reasonableness for a legislative policy in favor of open competition and employee mobility.

[CA\(25\)](#) [↓] (25)

**Courts § 34—Judicial Precedent—Language in Opinion—Facts and Issues.**

It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court.

[CA\(26\)](#) [↓] (26)

**Unfair Competition § 1—Restraints of Trade—Businesses and Occupations.**

*Bus. & Prof. Code*, § 16600, which prohibits contracts that restrain trade or business, protects Californians and ensures that every citizen retains the right to pursue any lawful employment and enterprise of their choice. The law protects the important legal right of persons to engage in businesses and occupations of their choosing.

[CA\(27\)](#) [↓] (27)

**Unfair Competition § 1—Restraints of Trade—Reasonableness Standard.**

A survey of precedent construing *Bus. & Prof. Code*, § 16600, and its predecessor statute reveals that the judiciary has long applied a reasonableness standard to contractual restraints on business operations and commercial dealings.

[\*1136] [CA\(28\)](#) [↓] (28)

**Unfair Competition § 1—Restraints of Trade—Reasonableness Standard.**

Though the Cartwright Act (*Bus. & Prof. Code*, § 16700 *et seq.*) is written in absolute terms, in practice not every agreement within the four corners of its prohibitions has been deemed illegal. The provisions of the Cartwright Act draw upon the common law prohibition against restraints of trade. Accordingly, the judiciary has taken direction from the common law in establishing a reasonableness standard for determining whether an agreement violates the Cartwright Act. That standard asks whether an agreement promotes or suppresses competition by considering the circumstances, details, and logic of a restraint.

[CA\(29\)](#) [↓] (29)

9 Cal. 5th 1130, \*1136 470 P.3d 571, \*\*571 266 Cal. Rptr. 3d 665, \*\*\*665 2020 Cal. LEXIS 4876, \*\*\*\*1

#### **Interference § 6—Prospective Economic Advantage—Exclusive Dealing—Engaging in Lawful Business.**

Many forms of exclusive dealing restrain parties from engaging in a lawful business (*Bus. & Prof. Code*, § 16600).

#### **CA(30) [] (30)**

##### **Interference § 2—Contract Relationship—At-will Contract—Independent Wrongfulness.**

Tortious interference with at-will contracts requires independent wrongfulness.

#### **CA(31) [] (31)**

##### **Interference § 2—Contract Relationship—At-will Contract—Restraint of Trade—Rule of Reason—Collaboration—Development of Drug.**

In answering a certified question from the Ninth Circuit, the Supreme Court held that a rule of reason would apply to determine the validity of a contractual provision between plaintiff's competitor and a drug company that prevented the drug company from collaborating with plaintiff, a biotechnology company, or any other partner in the development of a drug containing the active ingredient dimethyl fumarate to treat a disorder called Friedreich's ataxia. The provision's validity under *Bus. & Prof. Code*, § 16600, would have to be evaluated based on a rule of reason.

[Cal. Forms of Pleading and Practice (2020) ch. 565, Unfair Competition, § 565.73; 5 Witkin, Summary of Cal. Law (11th ed. 2017) Torts, §§ 849, 857, 871; 1 Witkin, Summary of Cal. Law (11th ed. 2017) Contracts, § 600.]

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Gibson, Dunn & Crutcher, Thomas G. Hungar, Rachel S. Brass, Caeli A. Higney; LevatoLaw and Ronald C. Cohen for California Chamber of Commerce and California Business Roundtable as Amici Curiae on behalf of Defendant and Respondent.

Lowenstein & Weatherwax and Kenneth J. Weatherwax for Amici Scholars as Amici Curiae.

Horvitz & Levy, Robert H. Wright, Jeremy B. Rosen; Charis Lex and Sean P. Gates for Quidel Corporation as Amicus Curiae.

**Judges:** Opinion by [\*\*\*667] Liu, J., with Cantil-Sakauye, C. J., Chin, Corrigan, Cuéllar, Kruger, and Groban, JJ., concurring.

**Opinion by:** Liu, J.

## **Opinion**

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[\*\*573] LIU, J.—This case presents two questions about the bounds of legitimate business competition under California [\*\*\*\*2] tort and **antitrust law**. Plaintiff Ixchel Pharma, LLC (Ixchel), a biotechnology company, entered into an agreement with Forward Pharma (Forward) to jointly develop a drug for the treatment of a disorder called

Friedreich's ataxia. The drug development went according to plan until Forward decided to withdraw from the agreement, as was allowed by its terms. Pursuant to a settlement with another biotechnology company, defendant Biogen, Inc. (Biogen), Forward had agreed to terminate its contract with Ixchel.

Ixchel sued Biogen in federal court for tortiously interfering with Ixchel's contractual and prospective economic relationship with Forward and claimed that Biogen did so in violation of *Business and Professions Code section 16600*. On appeal, the United States Court of Appeals for the Ninth Circuit asked us to decide (1) whether Biogen's interference in Ixchel's at-will contract with Forward must be independently wrongful and (2) how *Business and Professions Code section 16600* applies to the settlement provision requiring Forward to terminate its agreement with Ixchel.

**HN1** [↑] **CA(1)** [↑] (1) We hold that tortious interference with at-will contracts requires independent wrongfulness and that a rule of reason applies to determine the validity of the settlement provision under *Business and Professions Code section 16600*.

## I.

Because this case [\*\*\*\*3] comes to us from the Ninth Circuit at the motion to dismiss stage, we assume the truth of the facts as alleged in Ixchel's operative [\*1138] complaint. ([Grisham v. Philip Morris U.S.A., Inc. \(2007\) 40 Cal.4th 623, 629 \[54 Cal. Rptr. 3d 735, 151 P.3d 1151\]](#).) Ixchel is a biotechnology company that develops drugs to treat mitochondrial disease. Since 2012, it has been developing a drug containing the active ingredient dimethyl fumarate (DMF) to treat Friedreich's ataxia, a neurodegenerative disorder affecting one in 50,000 Americans.

Because Ixchel did not have the resources to develop the drug by itself, in 2016 it entered into a collaboration agreement with Forward, a biotechnology company that also develops drugs containing DMF for the treatment of neurological diseases. Under the terms of the collaboration agreement, Ixchel agreed to assign certain patent rights it possessed to Forward. In return, Forward agreed to work with Ixchel to develop a new drug containing DMF to treat Friedreich's ataxia. Forward would investigate the feasibility of conducting clinical trials for the drug and, if feasible, would conduct those trials and [\*\*\*668] pay for them. Ixchel would provide assistance with the clinical trials as necessary. If the clinical trials were successful, Forward agreed to manage and pay for the [\*\*\*\*4] manufacturing and commercialization of the drug with the assistance of Ixchel. Ixchel was entitled to a percentage of royalties on sales of the drug and retained certain rights to engage in its own commercialization of the drug independent of Forward.

The collaboration agreement authorized Forward to terminate the agreement "at any time" so long as it provided notice to Ixchel 60 days in advance. Ixchel was authorized to terminate the agreement if Forward informed Ixchel that it would not conduct clinical trials of the new drug or if it would not or did not timely submit a new drug application for the developed drug to the Food and Drug Administration. In October 2016, Forward informed Ixchel that it had confirmed the feasibility of conducting clinical trials and would proceed to conduct those trials. Thereafter, Ixchel and Forward began to develop a plan for a trial study.

At the same time that Forward and Ixchel were working together, Forward was negotiating with Biogen, another biotechnology company, to settle a patent dispute related to the use of DMF for the treatment of multiple sclerosis. One of Biogen's drugs, Tecfidera, is used to treat multiple sclerosis and contains DMF as [\*\*\*\*5] an active ingredient. Ixchel alleges that because physicians can prescribe a drug containing DMF to treat conditions that the drug was not approved to treat, Ixchel's drug development poses a competitive threat to Biogen's Tecfidera drug.

[\*\*574] As a result of negotiations, Forward and Biogen entered into a settlement and license agreement (Forward-Biogen Agreement) in which Biogen agreed to pay Forward \$1.25 billion in exchange for a license to certain Forward [\*1139] patents and other intellectual property. In addition, section 2.13 of the Forward-Biogen Agreement required Forward to "terminate any and all existing, and not enter into any new, Contracts or obligations to Ixchel Pharma LLC ... and/or any other Person, to the extent related to the development [by Forward and its affiliate companies] of any pharmaceutical product having *dimethyl fumarate* as an [active ingredient] for the

treatment of a human for any indication, including Friedreich's ataxia." Because Forward's only business is the development of drugs containing DMF as an active ingredient to treat humans, Ixchel alleges that the Forward-Biogen Agreement effectively prohibited Forward from engaging in its entire business or a substantial part [\*\*\*\*6] of it.

Forward notified Ixchel that because it had entered into the Forward-Biogen Agreement, it would be terminating the collaboration agreement with Ixchel in 60 days. After Forward terminated the agreement, Ixchel lost its ability to develop its Friedreich's ataxia treatment and has been unable to find another development partner to do so.

Ixchel filed suit against Biogen in federal district court, asserting (1) violations of the federal and state antitrust laws ([15 U.S.C. § 1; Bus. & Prof. Code, § 16700 et seq.](#)), (2) tortious interference with contractual relations, (3) intentional and negligent interference with prospective economic advantage, and (4) violations of the unfair competition law (UCL) ([Bus. & Prof. Code, § 17200 et seq.](#)). (All undesignated statutory references are to the Business and Professions Code.)

The district court granted Biogen's motion to dismiss with respect to each of Ixchel's claims. ([Ixchel Pharma, LLC v. Biogen Inc. \(E.D.Cal., Sept. 12, 2017, No. 2:17-cv-00715-WBS-EFB\) 2017 WL 4012337.](#)) [\*\*\*669] It determined that Ixchel had failed to state a claim for interference with prospective economic advantage or interference with contractual relations because Ixchel did not plead that Biogen engaged in an independently wrongful act. ([Id. at p. \\*5.](#)) The district court acknowledged that tortious interference [\*\*\*7] with contract claims do not generally require independent wrongfulness, but it held that because the contract at issue was one terminable at will, independent wrongfulness was required. ([Id. at p. \\*4.](#)) The district court also dismissed Ixchel's federal and state antitrust claims for lack of antitrust standing. ([Id. at p. \\*3.](#)) Finally, because Ixchel's other claims had been dismissed, the district court dismissed Ixchel's UCL claim for failing to allege an actionable unlawful practice. ([2017 WL 4012337 at pp. \\*5-\\*6.](#))

Ixchel then filed a second amended complaint, the operative complaint in this case, to allege that Biogen had committed the wrongful act of violating *section 16600*'s prohibition against restraints of trade. Ixchel claimed that by [\*1140] agreeing to section 2.13 of the Forward-Biogen Agreement, Biogen restrained Forward from engaging in lawful business with Ixchel and any other entity to develop neurological treatments containing DMF.

The district court disagreed and again dismissed the complaint, this time on the grounds that the Forward-Biogen Agreement must be analyzed under the antitrust rule of reason and that *section 16600* does not apply outside the employment context. ([Ixchel Pharma, LLC v. Biogen Inc. \(E.D.Cal., Jan. 25, 2018, No. 2:17-cv-00715-WBS-EFB\) 2018 WL 558781](#), p. \*4.)

Ixchel [\*\*\*8] sought review of its tort and UCL claims. After oral argument, the Ninth Circuit certified two questions to this court: (1) "Does *section 16600* of the California Business and Professions Code void a contract by which a business is restrained from engaging in a lawful trade or business with another business?" (2) "Is a plaintiff required to plead an independently wrongful act in order to state a claim for intentional interference with a contract that can be terminated by a party at any time, or does that requirement apply only to at-will employment contracts?" ([Ixchel Pharma, LLC v. Biogen, Inc. \(9th Cir. 2019\) 930 F.3d 1031, 1033 \(Ixchel\).](#))

[\*\*575] We rephrase and reorder the questions as follows (see [Cal. Rules of Court, rule 8.548\(f\)\(5\)](#)): (1) Is a plaintiff required to plead an independently wrongful act in order to state a claim for tortious interference with a contract that is terminable at will? (2) What is the proper standard to determine whether *section 16600* voids a contract by which a business is restrained from engaging in a lawful trade or business with another business? The questions are related; the alleged violation of *section 16600* is the independently wrongful act in Ixchel's contractual interference claim.

## II.

We first address Ixchel's claim that Biogen tortiously interfered in Ixchel's contract with Forward. Before this court, neither party contests that the cooperation [\*\*\*\*9] agreement is a valid contract that Forward was entitled to terminate at will. Nor is it at issue whether Forward terminated the agreement according to its terms by giving Ixchel notice 60 days prior to termination. The only question before us is whether Ixchel must allege that Biogen committed an independently wrongful act in order to state a claim for tortious interference with contract in light of the fact that the cooperation agreement is an at-will contract.

#### A.

**HN2** [↑] **CA(2)** [↑] (2) California has traditionally recognized two economic relations torts: interference [\*\*\*670] with the performance of a contract (*Imperial Ice Co. v. Rossier* [\*1141] (1941) 18 Cal.2d 33, 35 [112 P.2d 631] (*Imperial Ice*)) and interference with a prospective economic relationship (*Buckaloo v. Johnson* (1975) 14 Cal.3d 815, 822 [122 Cal. Rptr. 745, 537 P.2d 865] (*Buckaloo*)). “[B]oth of these torts protect the public interest in stable economic relationships ... .” (*Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1152 [17 Cal. Rptr. 3d 289, 95 P.3d 513] (*Reeves*).)

**CA(3)** [↑] (3) The two torts are related but distinct. **HN3** [↑] Tortious interference with contractual relations requires “(1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting [\*\*\*\*10] damage.” (*Reeves, supra*, 33 Cal.4th at p. 1148; see *Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126 [270 Cal. Rptr. 1, 791 P.2d 587] (*Pacific Gas*.). It is generally not necessary that the defendant's conduct be wrongful apart from the interference with the contract itself. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 55 [77 Cal. Rptr. 2d 709, 960 P.2d 513] (*Quelimane*.)) This general rule is subject to certain exceptions discussed below.

**HN4** [↑] **CA(4)** [↑] (4) Tortious interference with prospective economic advantage, on the other hand, does not depend on the existence of a legally binding contract. A plaintiff asserting this tort must show that the defendant knowingly interfered with an ““economic relationship between the plaintiff and some third party, [which carries] the probability of future economic benefit to the plaintiff.”” (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1153 [131 Cal. Rptr. 2d 29, 63 P.3d 937] (*Korea Supply*.))

Before our decision in *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376 [45 Cal. Rptr. 2d 436, 902 P.2d 740] (*Della Penna*), we treated interference with contractual relations and interference with prospective economic advantage as two species of the same tort. (See *Buckaloo, supra*, 14 Cal.3d at p. 823.) Each tort contained the same elements with the exception that interference with contractual relations required the existence of a binding contract. (Compare *id. at p. 827* [elements of interference with prospective economic advantage] with *Pacific Gas, supra*, 50 Cal.3d at p. 1126 [elements of interference with contractual relations].) The primary difference between the two torts was that the range of acceptable justifications [\*\*\*\*11] —that is, affirmative defenses—was broader when a defendant interfered with an unconsummated prospective economic relationship. (*Pacific Gas*, J\*\*576] at p. 1126; *Environmental Planning & Information Council v. Superior Court* (1984) 36 Cal.3d 188, 194 [203 Cal. Rptr. 127, 680 P.2d 1086]; *Buckaloo*, at p. 828.) “[A] competitor's stake in advancing his own economic interest will [\*1142] not justify the intentional inducement of a contract breach [citation], whereas such interests will suffice where contractual relations are merely contemplated or potential.” (*Environmental Planning*, at p. 194.)

**CA(5)** [↑] (5) That changed in *Della Penna*, when we “dr[e]w and enforce[d] a sharpened distinction between claims for the tortious disruption of an existing contract and claims that a prospective contractual or economic relationship has been interfered with.” (*Della Penna, supra*, 11 Cal.4th at p. 392.) **HN5** [↑] [\*\*\*671] We held that a plaintiff seeking to recover damages for interference with prospective economic advantage must plead as an element of the claim that the defendant's conduct was “wrongful by some legal measure other than the fact of interference itself.” (*Id. at p. 393*.) We reasoned that “courts provide a damage remedy against third party conduct intended to disrupt

an existing contract precisely because the exchange of promises resulting in such a formally cemented economic relationship is deemed worthy of protection from interference by a stranger to the agreement. [\*\*\*\*12] Economic relationships short of contractual, however, should stand on a different legal footing as far as the potential for tort liability is reckoned. Because ours is a culture firmly wedded to the social rewards of commercial contests, the law usually takes care to draw lines of legal liability in a way that maximizes areas of competition free of legal penalties.” (*Id. at p. 392.*) Concerned that the old rule led “to time consuming and expensive lawsuits … by a rival, based on conduct that was regarded by the commercial world as both commonplace and appropriate” (*id. at p. 384*), we found it important to afford “greater solicitude to those relationships that have ripened into agreements, while recognizing that relationships short of that subsist in a zone where the rewards and risks of competition are dominant” (*id. at p. 392*). Imposing an independent wrongfulness requirement at the pleading stage thus struck a “balance between providing a remedy for predatory economic behavior and keeping legitimate business competition outside litigative bounds.” (*Id. at p. 378.*)

**CA(6)†** (6) Our decisions since *Della Penna* have reaffirmed the distinction between the two torts. (See *Quelimane, supra, 19 Cal.4th at pp. 55–56;* *Korea Supply, supra, 29 Cal.4th at p. 1158.*) **HN6†** So, while intentionally interfering with an existing contract is generally [\*\*\*\*13] “a wrong in and of itself” (*Quelimane, at p. 56*), intentionally interfering with prospective economic advantage requires pleading that the defendant committed an independently wrongful act (*Korea Supply, at p. 1158*). “[A]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.” (*Id. at p. 1159.*)

[\*1143]

## B.

**CA(7)†** (7) With that framework in mind, we consider whether stating a claim for interference with an at-will contract requires pleading an independently wrongful act. **HN7†** We have long recognized that interference with at-will contracts is actionable as an economic tort. (*Pacific Gas, supra, 50 Cal.3d at p. 1127* [citing cases]; accord, *Truax v. Raich (1915) 239 U.S. 33, 38 /60 L.Ed. 131, 36 S.Ct. 7.*] [recognizing that the weight of authority considers a third party's unjustified interference with an employment-at-will contract actionable].) “[T]he fact that a contract is ‘at the will of the parties, respectively does not make it one at the will of others … .’” (*Speegle v. Board of Fire Underwriters (1946) 29 Cal.2d 34, 39 [172 P.2d 867]* (*Speegle*)).

[\*\*577] But we have not decided whether interference with an at-will contract more closely resembles interference with contractual relations or interference with prospective [\*\*\*672] economic advantage. That is because the distinction was not important for the many decades when the two interference [\*\*\*\*14] torts contained basically the same elements. Ixchel argues that we settled the question in *Pacific Gas, supra, 50 Cal.3d 1118*, a case decided five years before *Della Penna* distinguished the two torts. According to Ixchel, *Pacific Gas* set “the default rule that, for an intentional interference with contract claim, there is no requirement of an independently wrongful act, even where the alleged misconduct is inducing a party to terminate an at-will contract.” We disagree.

**CA(8)†** (8) In that case, the Pacific Gas and Electric Company sued Bear Stearns for interfering in the utility’s contract to purchase hydroelectric power from a water resource agency and for interfering with the utility’s prospective economic relations. (*Pacific Gas, supra, 50 Cal.3d at pp. 1123–1124.*) The contract at issue allowed the water resource agency to terminate the agreement at the end of the year in which the agency retired all of its project bonds. Bear Stearns convinced the agency to seek a determination in state court that it could terminate the contract by retiring its project bonds early. (*Ibid.*) **HN8†** We held that merely inducing a contracting party to seek a judicial determination whether it can terminate a contract according to its terms is not sufficient to state a claim under either economic [\*\*\*15] tort. (*Id. at p. 1137.*) We outlined the elements of a contract interference claim for the first time and did not require that the interference be independently wrongful. (*Id. at p. 1126.*) Separately, we explained that interference with an at-will contract has long been actionable. (*Id. at p. 1127.*)

Critically, we acknowledged that “[m]any cases have treated claims of interference with voidable and terminable contracts as coming within the cause of action for interference with prospective advantage. [Citations.] … [I]t may be preferable not to distinguish the two as separate torts [citation] [\*1144] but we need not resolve that point here, in view of our conclusion that the activity complained of is not included within either tort.” (*Pacific Gas, supra, 50 Cal.3d at p. 1128, fn. 4.*) Thus, contrary to Ixchel’s argument, *Pacific Gas* expressly reserved the question of whether interference with an at-will contract should be treated as a claim of interference with contractual relations or as a claim of interference with prospective economic advantage. Because the alleged misconduct in that case did not constitute interference with any economic relationship, contractual or otherwise, it was unnecessary to resolve the question.

It was also unnecessary to resolve the question because, [\*\*\*\*16] as explained, the elements of both torts were largely the same at that time. We had yet to differentiate the two torts in *Della Penna* by requiring an independent wrongfulness element for interference with prospective economic advantage. There was thus no occasion to address whether interference with an at-will contract required pleading an independently wrongful act since it was not then a requirement for either tort. (Cf. *Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners* (1997) 52 Cal.App.4th 867, 880, fn. 9 [60 Cal. Rptr. 2d 830] [cases decided before *Della Penna* are not relevant to determining whether interference with an unenforceable contract constitutes interference with contractual relations or interference with prospective economic advantage].) So, *Pacific Gas* did not answer the question now before us.

**CA(9)↑ (9) [\*\*\*673]** Fourteen years later in *Reeves, supra, 33 Cal.4th 1140*, we resolved part of the question *Pacific Gas* left open. *Reeves* held that a plaintiff must plead independent wrongfulness to state a claim for interference with a specific category of at-will contracts: employment contracts. (*Reeves, at p. 1145.*) That holding was based on two rationales. First, California’s public policy favoring employment competition supported such a rule. **HN9↑** We observed that “it has long been the public policy of our state that ‘[a] [\*\*578] former employee has the right [\*\*\*\*17] to engage in a competitive business for himself and to enter into competition with his former employer, even for the business of … his former employer, provided such competition is fairly and legally conducted.’” (*Id. at p. 1149.*) Our previous decisions indicated that “[w]here no unlawful methods are used, public policy generally supports a competitor’s right to offer more pay or better terms to another’s employee, so long as the employee is free to leave.” (*Id. at p. 1151;* see also *id. at p. 1145* [observing that the independent wrongfulness requirement “will promote the public policies supporting the right of at-will employees to pursue opportunities for economic betterment and the right of employers to compete for talented workers”].)

**CA(10)↑ (10)** Second, we reasoned that “the economic relationship between parties to contracts that are terminable at will is distinguishable from the [\*1145] relationship between parties to other legally binding contracts.” (*Reeves, supra, 33 Cal.4th at p. 1151.*) **HN10↑** We explained that interference with other legally binding contracts, such as contracts of a definite term, is tortious “because the exchange of promises resulting in such a formally cemented economic relationship is deemed worthy of protection from interference by a stranger to the agreement.” [\*\*\*\*18] (*Ibid.*, quoting *Della Penna, supra, 11 Cal.4th at p. 392.*) But at-will contracts do not involve the same “cemented economic relationship[s]” as contracts of a definite term. (*Della Penna, at p. 392.*) Quoting the Restatement Second of Torts, we explained that “any interference with [an at-will contract] that induces its termination is primarily an interference with the future relation between the parties, and the plaintiff has no legal assurance of them. As for the future hopes he has no legal right but only an expectancy; and when the contract is terminated by the choice of [a contracting party] there is no breach of it. The competitor is therefore free, for his own competitive advantage, to obtain the future benefits for himself by causing the termination. Thus, he may offer better contract terms, as by offering an employee of the plaintiff more money to work for him or by offering a seller higher prices for goods, and he may make use of persuasion or other suitable means, all without liability.” (*Reeves, at pp. 1151–1152*, first bracketed text added, quoting *Rest.2d Torts, § 768, com. i*, p. 44.)

Ixchel argues that we should limit *Reeves* to the employment context. It cites the employment-specific policy concerns animating *Reeves* as well as appellate decisions that have limited *Reeves*’s holding [\*\*\*\*19] to suits involving a former employer suing a competitor for hiring away a former employee. (See *Redfearn v. Trader Joe’s Co.* (2018) 20 Cal.App.5th 989, 1003 [230 Cal. Rptr. 3d 98]; *Popescu v. Apple Inc.* (2016) 1 Cal.App.5th 39, 62 [204

Cal. Rptr. 3d 302].) Biogen contends that the rationale in *Reeves* applies beyond the employment context to intentional interference with [\*\*\*674] contract whenever a “defendant induces a new partner to terminate an at-will agreement.”

**CA(11)[↑]** (11) It is true that our holding in *Reeves* relied partly on reasoning specific to the employment context. But the broader logic underlying that decision is persuasive with respect to other spheres of economic relations. The Restatement’s rationale on which *Reeves* relied is not limited to employment relationships. **HN11[↑]** The Restatement explains: “One’s interest in a contract terminable at will is primarily an interest in future relations between the parties, and he has no legal assurance of them. For this reason, an interference with this interest is closely analogous to interference with prospective contractual relations. [Citation.] If the defendant was a competitor regarding the business involved in the contract, his interference with the contract may be not improper.” (*Rest.2d Torts, § 766, com. g*, pp. 10–11; accord, *id.*, *§ 768, com. i*, p. 44.)

[\*1146]

A number of states have adopted this section of the Restatement to require proof of independent wrongfulness [\*\*\*20] in a claim for interference with at-will contractual relations. (See *Nostrame v. Santiago* (2013) 213 N.J. 109, 121 [61 A.3d 893]; *Macklin v. Robert Logan Associates* (1994) 334 Md. 287, 304 [639 A.2d 112]; *Duggin v. Adams* (1987) 234 Va. 221, 226–227 [<sup>\*\*579</sup>] [360 S.E.2d 832]; *Memorial Gardens, Inc. v. Olympian Sales & Management Consultants, Inc.* (Colo. 1984) 690 P.2d 207, 211; *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.* (1980) 50 N.Y.2d 183, 191 [428 N.Y.S.2d 628, 406 N.E.2d 445].) We have often aligned the elements of both economic relations torts with the Restatement (see *Korea Supply, supra*, 29 Cal.4th at p. 1156 [intentional interference with contract does not contain a specific intent requirement]; *Quelimane, supra*, 19 Cal.4th at p. 56 [interference with prospective economic advantage does not contain a specific intent requirement]; *Della Penna, supra*, 11 Cal.4th at p. 378 [interference with prospective economic advantage requires proof of a “wrongful act”]), and we find the Restatement persuasive here as well.

The purpose of the independent wrongfulness requirement in economic interference torts is to “balance between providing a remedy for predatory economic behavior and keeping legitimate business competition outside litigative bounds.” (*Della Penna, supra*, 11 Cal.4th at p. 378; see *Buckaloo, supra*, 14 Cal.3d at p. 828; *Imperial Ice, supra*, 18 Cal.2d at p. 36.) Where economic relationships have solidified into binding future promises, the stability of the contractual relationship takes precedence over business competition. While “[o]urs is a competitive economy in which business entities vie for economic advantage” (*Buckaloo, at p. 828*), that competition must at some point result in entities making agreements and exchanging things of value. When parties enter a contract not terminable at will, they cement their bargained-for [\*\*\*21] intentions in accordance with the terms of that contract into the future. The concreteness of this relationship means that contracting parties as well as other entities may structure their decisions, invest resources, and take risks in reliance on it. It is precisely this “exchange of promises resulting in such a formally cemented economic relationship [that courts have] deemed worthy of protection from interference by a stranger to the agreement.” (*Della Penna, at p. 392*.) “Intentionally inducing or causing a breach of an existing contract is therefore a wrong in and of itself.” (*Quelimane, supra*, 19 Cal.4th at pp. 55–56.)

[\*\*\*675] The same balance of interests does not apply to prospective economic relationships. Such relationships are only “probable” (*Korea Supply, supra*, 29 Cal.4th at p. 1164), and harms resulting from a breach of such relationships are “speculative” (*Quelimane, supra*, 19 Cal.4th at p. 56). Neither party to such a relationship has a legal claim to continued relations with the other. Because the expectation of future relations is weaker and the interest in maintaining open competition is stronger, “the law usually takes care to draw [\*1147] lines of legal liability in a way that maximizes areas of competition free of legal penalties.” (*Della Penna, supra*, 11 Cal.4th at p. 392.) In circumstances where parties have no legal assurance of future relations, “the [\*\*\*22] rewards and risks of competition are dominant.” (*Ibid.*)

**HN12[↑]** **CA(12)[↑]** (12) Like parties to a prospective economic relationship, parties to at-will contracts have no legal assurance of future economic relations. (See *Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1053 [<sup>141</sup> Cal. Rptr. 3d 142] [at-will contracts provide “only an expectation of future contractual relations”].) An at-will contract may be terminated, by its terms, at the prerogative of a single party, whether it is because that party found a better offer

from a competitor, because the party decided not to continue doing business, or for some other reason. And the other party has no legal claim to the continuation of the relationship. The contracting parties presumably bargained for these terms, aware of the risk that the relationship may be terminated at any time. At-will contractual relations are thus not cemented in the way that a contract not terminable at will is. The interest in protecting the contract from interference more closely resembles the interest in protecting prospective economic relationships than the interest in protecting a contractual [\*\*580] relationship that, by its terms, is expected to continue on pain of breach.

Indeed, sometimes the only difference between an at-will contract and a prospective economic [\*\*\*\*23] relationship is the formality of how a contractual relationship is structured. For example, a buyer who regularly renews a one-time contract to purchase goods has a prospective economic relationship with the vendor with respect to future purchases of those goods. (See *Shida v. Japan Food Corp. (1967) 251 Cal.App.2d 864, 866 /60 Cal. Rptr. 43* [interference with yearly renewal of contract treated as interference with prospective economic advantage].) But that same buyer would have an at-will contractual relationship if it entered into a single contract with the vendor to provide those goods at regular intervals terminable at the buyer's will. In both, the vendor has no legal assurance of the buyer's continued purchases.

We recognize that in an at-will contract, the parties' expectations are of continuity unless one party terminates the contract, whereas the expectations of a continued relationship are more speculative where no contract exists. But from the perspective of third parties, there is no legal basis in either case to expect the continuity of the relationship or to make decisions in reliance on the relationship. We are not convinced that any difference in expectations between the parties requires a different pleading standard between interference with [\*\*\*\*24] prospective economic advantage and interference with at-will contractual relations.

[\*1148]

**CA(13)[]** (13) Finally, allowing interference with at-will contract claims without requiring independent wrongfulness risks chilling legitimate business competition. **HN13[]** An actionable [\*\*\*676] claim for interference with contractual relations does not require that the defendant have the specific intent to interfere with a contract. A plaintiff states a claim so long as it alleges that the defendant knew interference was "certain or substantially certain to occur as a result of [defendant's] action." (*Quelimane, supra, 19 Cal.4th at p. 56.*) Without an independent wrongfulness requirement, a competitor's good faith offer that causes a business to withdraw from an at-will contract could trigger liability or at least subject the competitor to costly litigation. In fact, even if a business in an at-will contract solicits offers on its own initiative, a third party that submits an offer could face liability if it knew that acceptance of the offer would cause the soliciting business to withdraw from its existing contract. Allowing disappointed competitors to state claims for interference with at-will contracts without alleging independently wrongful conduct may expose [\*\*\*\*25] routine and legitimate business competition to litigation.

**HN14[] CA(14)[]** (14) We therefore hold that to state a claim for interference with an at-will contract by a third party, the plaintiff must allege that the defendant engaged in an independently wrongful act. We disapprove *Redfearn v. Trader Joe's Co., supra, 20 Cal.App.5th 989* and *Popescu v. Apple Inc., supra, 1 Cal.App.5th 39* to the extent they are inconsistent with this opinion.

### III.

Ixchel alleges that the wrongful act Biogen committed was including section 2.13 in the Forward-Biogen Agreement in violation of *Business and Professions Code section 16600*. Section 2.13 of the Forward-Biogen Agreement required Forward to terminate its collaboration agreement with Ixchel and barred Forward from engaging in business with any other entity to develop neurological treatments containing DMF. Ixchel claims that this contractual provision is an unlawful restraint of trade in violation of *section 16600*, which provides: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."

The Ninth Circuit certified the following question to us: "Does section 16600 of the California Business and Professions Code void a contract by which a business is restrained from engaging in a lawful trade or business with

another business?” (*Ixchel, supra, 930 F.3d at p. 1033*.) That question appears to ask this court to decide whether section 16600 applies [\*\*\*\*26] to contracts in the business context. The Ninth Circuit suggested [\*\*581] that “the California Supreme Court … [has not] considered whether section 16600 extends beyond the employment setting entirely to contractual restraints on business operations.” (*Ixchel, at p. 1036*.)

[\*1149]

Ixchel asks us to decide that question only. But the primary dispute between Ixchel and Biogen in the Ninth Circuit was not whether section 16600 applies to business contracts. At oral argument in the Ninth Circuit, Biogen acknowledged that it does. Instead, the dispute was whether contractual restraints on business operations or commercial dealings are subject to a reasonableness standard under section 16600. Moreover, the proper standard governing alleged restraints of trade under section 16600 presents an important question of California law, potentially affecting all contracts in California that in some way restrain a contracting party from engaging in a profession, trade, or business.

To provide the Ninth Circuit sufficient guidance to resolve the contentions of the [\*\*\*677] parties and to answer an important question of California law, we address not only whether section 16600 applies to contracts in the business context (the parties agree that it does) but also the proper standard—in particular, whether [\*\*\*27] a rule of reason applies—to evaluate whether restraints on trade in business contracts are void under section 16600. (See *Cal. Rules of Court, rule 8.548(f)(5)*; *Verdugo v. Target Corp. (2014) 59 Cal.4th 312, 317, fn. 1 [173 Cal. Rptr. 3d 662, 327 P.3d 774]* [restating certified question “to conform to the facts at issue in the underlying action”].)

Ixchel argues that deciding this question is premature because the case is at the pleading stage and the parties have not had the opportunity to discover facts that would show whether section 2.13 of the Forward-Biogen Agreement was unreasonable. But in deciding whether section 16600 includes a reasonableness requirement in the context of business contracts, we are deciding a pure question of law. The question at this stage is whether Ixchel must plead and prove unreasonableness, not whether it has actually done so. Whether the parties have put forth facts demonstrating unreasonableness is immaterial to the antecedent question of whether a reasonableness requirement applies here.

## A.

**HN15** [CA(15)] (15) As an initial matter, we agree with the parties that section 16600 applies to business contracts. The chapter of the Business and Professions Code containing section 16600 excepts from section 16600’s coverage certain noncompetition agreements upon the sale of goodwill or of ownership interest in a business ([§ 16601](#)) and upon the dissolution or dissociation from a partnership [\*\*\*\*28] ([§ 16602](#)) or limited liability corporation ([§ 16602.5](#)). If section 16600 did not apply to business contracts, these exceptions would be unnecessary. Indeed, California courts have frequently analyzed whether contracts involving business dealings are void under section 16600. (See, e.g., *Centeno v. Roseville Community Hospital (1979) 107 Cal.App.3d 62, 68 [167 [\*1150] Cal. Rptr. 183]* (Centeno); *Dayton Time Lock Service, Inc. v. Silent Watchman Corp. (1975) 52 Cal.App.3d 1, 6 [124 Cal. Rptr. 678]* (Dayton Time Lock); *Great Western etc. v. J. A. Wathen D. Co. (1937) 10 Cal.2d 442, 445-446 [74 P.2d 745]* (Great Western Distillery) [applying *Civ. Code, former § 1673*, the predecessor statute to Bus. & Prof. Code, § 16600]; *Getz Bros. & Co. v. Federal Salt Co. (1905) 147 Cal. 115, 118-119 [81 P. 416]* (Getz Brothers) [same].)

The parties do not contend that any of the exceptions to section 16600 apply here. Instead, they disagree on the applicable standard to examine the validity of section 2.13 of the Forward-Biogen Agreement under *Business and Professions Code* section 16600. Biogen argues that the rule of reason used to analyze antitrust violations under the *Cartwright Act* ([§ 16700 et seq.](#)) should also govern restraints on business dealings under section 16600. That inquiry asks “whether an agreement harms competition more than it helps” by considering “the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption.” (*In re Cipro Cases I & II (2015) 61 Cal.4th 116, 146 [187 Cal. Rptr. 3d 632, 348 P.3d 845]* (Cipro).) Ixchel counters that section 16600 is not subject to a reasonableness standard; it [\*\*582] urges

the court to extend [\*Edwards v. Arthur Andersen LLP \(2008\) 44 Cal.4th 937 \[81 Cal. Rptr. 3d 282, 189 P.3d 285\]\*](#) (*Edwards*) and hold that any contract in restraint of trade is per se void. [\*\*\*\*29]

**CA(16)** (16) The language of section 16600 is broad on its face: “Except as provided in [\*\*\*678] this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.” Read in isolation, the text suggests that any part of an agreement restraining a party from engaging in a trade, profession, or business is per se invalid unless certain exceptions apply. [\*\*HN16\*\*](#) But in reading statutes, we consider the text in the context of “the statutory framework as a whole in order to determine its scope and purpose.” ([\*Coalition of Concerned Communities, Inc. v. City of Los Angeles \(2004\) 34 Cal.4th 733, 737 \[21 Cal. Rptr. 3d 676, 101 P.3d 563\]\*](#).) And we must consider the statute in light of precedent construing it. (See [\*Coker v. JPMorgan Chase Bank, N.A. \(2016\) 62 Cal.4th 667, 676 \[197 Cal. Rptr. 3d 131, 364 P.3d 176\]\*](#).)

**CA(17)** (17) In context, [\*\*HN17\*\*](#) section 16600 is best read not to render void per se all contractual restraints on business dealings, but rather to subject such restraints to a rule of reason. Section 16600 was initially enacted in 1872 as [\*section 1673 of the Civil Code\*](#) using substantively identical language. ([\*Civ. Code, former § 1673\*](#), repealed by Stats. 1941, ch. 526, § 2, p. 1847 and reenacted as *Bus. & Prof. Code*, § 16600 by Stats. 1941, ch. 526, § 1, p. 1834.) Our decisions interpreting [\*Civil Code former section 1673\*](#) thus inform the [\*1151] interpretation of section 16600. [\*\*HN18\*\*](#) **CA(18)** (18) (See [\*People v. Bonnetta \(2009\) 46 Cal.4th 143, 151 \[92 Cal. Rptr. 3d 370, 205 P.3d 279\]\*](#) “[W]hen a statute has been construed by the courts and the Legislature thereafter reenacts the statute without changing the interpreted [\*\*\*30] language, a presumption is raised that the Legislature was aware of and has acquiesced in that construction.”.) And [\*Civil Code former section 1673\*](#) was enacted against the backdrop of well-established common law prohibitions against restraints of trade. (See [\*Vulcan Powder Co. v. Powder Co. \(1892\) 96 Cal. 510, 513 \[31 P. 581\]\*](#) (*Vulcan Powder*).) As explained below, this court has interpreted section 16600 and its Civil Code predecessor on numerous occasions, and we have declined to categorically invalidate all agreements limiting the freedom to engage in trade. Over time, our case law has generally invalidated agreements not to compete upon the termination of employment or upon the sale of interest in a business without inquiring into their reasonableness, while invalidating other contractual restraints on businesses operations and commercial dealings only if such restraints were unreasonable.

[\*\*HN19\*\*](#) **CA(19)** (19) We must also consider section 16600’s “language in its ‘broader statutory context’ and, where possible, harmonize that language with related provisions by interpreting them in a consistent fashion.” ([\*ZB, N.A. v. Superior Court \(2019\) 8 Cal.5th 175, 189 \[252 Cal. Rptr. 3d 228, 448 P.3d 239\]\*](#) (*ZB*.)) Section 16600 sits alongside another antitrust statute, the Cartwright Act ([\*§ 16700 et seq.\*](#)), which we have construed to permit reasonable restraints of trade. ([\*Cipro, supra, 61 Cal.4th at p. 137\*](#).) This statutory context further supports the conclusion that [\*\*\*31] a rule of reason applies to contractual restraints on business operations and commercial dealings under section 16600.

## B.

We turn first to the statute’s history and our precedent. “Under the common law, … contractual restraints on the practice of a profession, business, or trade, were considered valid, as long as they were reasonably imposed.” ([\*Edwards, supra, 44 Cal.4th at p. 945\*](#); accord, [\*Wright v. Ryder \(1868\) 36 Cal. 342, 357\*](#) (*Wright*.)) As noted, the Legislature in 1872 adopted [\*Civil Code former section 1673\*](#), which provided: [\*\*\*679] “Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void.” The next two sections excepted certain contractual restraints upon the sale of goodwill in a business (*Civ. Code, former § 1674*) or upon dissolution of a partnership ([\*Civ. Code, former § 1675\*](#)).

[\*\*583] The Code Commissioners’ note stated that [\*Civil Code former section 1673\*](#) was enacted in response to certain “modern decisions” that allowed contractual restraints to a “dangerous extent.” (Code comrs., note foll. 1 Ann. [\*\*Civ. \[\\*1152\] Code, § 1673\*\*](#) (1st ed. 1872, Haymond & Burch, comrs.-annotators) p. 502 (Commissioners’ Note).) Specifically, it disapproved of two cases upholding agreements not to compete in the operation of [\*\*\*32]

boats. (*Id.* at pp. 502–503, citing *Dunlop v. Gregory (1851) 10 N.Y. 241*, *Cal. Nav. Co. v. Wright (1856) 6 Cal. 258*). But the Commissioners' Note did not go so far as to say that Civil Code former *section 1673* categorically replaced the common law standard of reasonableness with a per se rule. In fact, the note stated that the statute's limitation on contractual restraints was consistent with two decisions adopting the common law reasonableness standard. (Commissioners' Note, at p. 503, citing *Wright, supra, 36 Cal. 342*, *More v. Bonnet (1870) 40 Cal. 251*.) And one of those decisions expressly upheld a noncompetition agreement “because the limits [were] not unreasonable.” (*More, at p. 254*.) Thus, the Commissioners' Note suggests that *Civil Code former section 1673*, in prohibiting agreements that restrained trade to a “dangerous extent,” was not intended to invalidate all restraints on trade. (Commissioners' Note, at p. 502; see *People v. Chun (2009) 45 Cal.4th 1172, 1187 [91 Cal. Rptr. 3d 106, 203 P.3d 425]* [Commissioners' notes are “entitled to substantial weight”].)

Nor did this court's decisions interpreting *Civil Code former section 1673* adopt a per se rule invalidating all contracts that limit business dealings. Our cases initially offered little clarity on the appropriate standard to evaluate agreements restraining trade. In our first reasoned opinion interpreting the statute, we invalidated an agreement between manufacturers of dynamite to fix prices and limit output. (*Vulcan Powder, supra, 96 Cal. at pp. 514–515*.) We noted that the common law rule of [\*\*\*\*33] reason “led to much perplexing legislation” and had been replaced by *Civil Code former section 1673*, but we did not explain what standard the new statute imposed. (*Vulcan Powder, at p. 513*.) We simply said that the agreement at issue was “clearly in restraint of trade and against public policy; and this conclusion is too obvious to need argument, authorities, or elucidation.” (*Id. at p. 515*.) Our reasoning did not explain whether we found the agreement per se invalid or invalid by some other standard. (See also *Schwalm v. Holmes (1875) 49 Cal. 665, 669* [holding that exclusive sales contract was “not illegal, as being in restraint of trade” in two-sentence disposition without further analysis].)

Over time, however, two discernible categories of holdings emerged in our case law: Agreements not to compete after the termination of employment or the sale of interest in a business were invalid without regard to their reasonableness. And agreements limiting commercial dealings and business operations were generally invalid if they were unreasonable.

As to agreements not to compete after termination of employment or the sale of interest in a business, an early case was *Merchants' Ad-Sign Co. v. Sterling (1899) 124 Cal. 429 [57 P. 468]* (*Merchants' Ad-Sign*), [\*\*\*680] which [\*1153] invalidated an agreement not to compete as part of the sale of stock in an advertising [\*\*\*\*34] company. (*Id. at p. 434*.) Our reasoning in that case rested on the plain language of the statute, and we did not examine whether the restraint was reasonable. We emphasized that “[t]he language of the code is unmistakable” and rejected the applicability of cases adopting a more “liberal construction” of the statute. (*Ibid.*) Because the noncompetition agreement prevented one party from engaging in the business of bill posting after he sold his interest in the advertising business to the other party, it violated the plain language of *Civil Code former section 1673* and was therefore void. (*Merchants Ad-Sign, at p. 434*.)

Likewise, in *Chamberlain v. Augustine (1916) 172 Cal. 285 [156 P. 479]* (*Chamberlain*), we invalidated an agreement imposing a financial penalty for competition, which was included as part of the sale of stock in a foundry company. (*Id. at p. 288*.) The \$5,000 penalty was a sufficient deterrent to competition to constitute a restraint of trade under Civil Code former *section 1673*. [\*\*584] Pointing to “the very language of [former] *section 1673*,” we determined that “[t]he statute makes no exception in favor of contracts only in partial restraint of trade.” (*Chamberlain, at pp. 288, 289*; accord, *Gregory v. Spieker (1895) 110 Cal. 150, 154 [42 P. 576]* [agreement not to compete in a particular county as part of the sale of a liquor business “transgressed the statute”].)

**CA(20)↑ (20)** It is true that these decisions spoke in broad [\*\*\*\*35] terms, suggesting that restraints on trade in all contexts were void per se. (See *Merchants' Ad-Sign, supra, 124 Cal. at p. 434* “[t]he language of the code is unmistakable”); *Chamberlain, supra, 172 Cal. at pp. 288–289* “[the very language of [former] *section 1673* ... makes no exception in favor of contracts only in partial restraint of trade”].) **HN20↑** But “[i]t is axiomatic that an unnecessarily broad holding is ‘informed and limited by the fact[s]’ of the case in which it is articulated.” (*Covenant Care, Inc. v. Superior Court (2004) 32 Cal.4th 771, 790, fn. 11 [11 Cal. Rptr. 3d 222, 86 P.3d 290]*; see *People v. Mendoza (2000) 23 Cal.4th 896, 915 [98 Cal. Rptr. 2d 431, 4 P.3d 265]* [“we must view with caution seemingly

categorical directives not essential to earlier decisions”].) The contracts at issue in these cases involved agreements not to compete upon terminating employment or selling a business, and we understand their holdings to be informed and limited by the factual context presented.

By contrast, we did not interpret [Civil Code former section 1673](#) so literally with regard to contractual restraints on business operations and commercial dealings. We generally declared agreements in this context valid if the restraints they imposed were reasonable. In [Grogan v. Chaffee \(1909\) 156 Cal. 611 \[105 P. 745\]](#) (*Grogan*), we upheld a contract between a manufacturer and purchaser of olive oil requiring the purchaser to resell the [\*1154] product at a certain price. We interpreted [Civil Code former section 1673](#) to contain a reasonableness requirement: “It [\*\*\*\*36] is not every limitation on absolute freedom of dealing that is prohibited. ... ‘... The question is whether, under the particular circumstances of the case, and the nature of the particular contract involved in it, the contract is, or is not, unreasonable.’ ... must be taken to be settled that the sections of the [Civil Code, \[former\] sections 1673](#), 1674, [1675](#), relating to contracts in restraint of trade are to be construed in the light of these principles.” (*Grogan*, at p. 615.) The agreement, we concluded, was a reasonable restraint because its purpose was not to create a monopoly but to “secur[e] the legitimate benefits of the reputation [\*\*\*681] which [the manufacturer’s] product may have attained.” (*Id. at p. 614.*)

Similarly, in [Associated Oil Co. v. Myers \(1933\) 217 Cal. 297 \[18 P.2d 668\]](#) (*Associated Oil*), we upheld a contract between the lessor of an automobile service station and a lessee of the station, which included an agreement that the lessor would only sell the lessee’s petroleum products. Citing the reasonableness standard in *Grogan*, we concluded that the lessee “had the right to decline to sell any but its own product upon the leased property. We can see nothing unreasonable in requiring the [lessor] to do the same thing. The public interest is not involved and competition is not stifled. [\*\*\*\*37] In no way does the agreement attempt to limit production or fix the price of the commodity involved.” (*Associated Oil*, at p. 306.)

Some of our cases invalidating contractual restraints in the business context did not expressly apply a reasonableness standard. (See [Morey v. Paladini \(1922\) 187 Cal. 727 \[203 P. 760\]](#) (*Morey*); [Pacific Wharf etc. Co. v. Dredging Co. \(1920\) 184 Cal. 21 \[192 P. 847\]](#) (*Pacific Wharf*); [Getz Brothers, supra, 147 Cal. 115; Vulcan Powder, supra, 96 Cal. 510](#).) But these decisions did not invalidate contractual provisions merely because they restrained trade in some way. Instead, we examined the purpose of the contracts at issue, much as we would do in a reasonableness inquiry, and we found the contracts to be invalid when their purpose was to restrain trade by creating a monopoly, restricting supply, or fixing prices. (See [Cipro, supra, 61 Cal.4th at p. 146](#) [recounting that the rule of reason asks “whether the challenged conduct promotes or suppresses competition”].)

[\*\*585] In *Morey*, for example, we invalidated an agreement requiring a vendor to sell lobsters exclusively to a purchaser in a certain geographic area. (*Morey, supra, 187 Cal. at pp. 732, 736*.) We emphasized that the overall purpose of the agreement was to “secure to [the purchaser], so far as possible, a monopoly of the lobster business in the selected territory.” (*Id. at p. 738*; see *id. at p. 736* [contract had “the purpose of putting it into the power of the [purchaser] to control the lobster market”]; *id. at p. 737* [contract [\*\*\*\*38] “intended to effect a virtual monopoly of the lobster trade”].) Our reasoning was more [\*1155] concerned with the potential monopoly effect of the agreement than with whether its terms limited trade per se.

Our other decisions in the business context followed similar logic. (See [Endicott v. Rosenthal \(1932\) 216 Cal. 721, 725 \[16 P.2d 673\]](#) (*Endicott*) [invalidating an agreement between clothes dyeing businesses to form an association that set industry-wide prices and prevented its members from soliciting each other’s customers because “the two main purposes for which this association was formed were to increase prices and eliminate competition”]; [Getz Brothers, supra, 147 Cal. at p. 119](#) [invalidating a contract by two companies to exclusively buy and sell salt from each other and to discourage salt shipments by third parties because it had a “direct and primary purpose” to restrain trade]; [Mill and Lumber Co. v. Hayes \(1888\) 76 Cal. 387, 392 \[18 P. 391\]](#) [invalidating exclusive dealing agreement with an “object and view to suppress the supply and enhance the price of lumber in four counties of the state”]; but see [Pacific Wharf, supra, 184 Cal. at p. 23](#) [invalidating agreement forbidding seller of harbor dredge to compete in the dredging business because “[t]he language of [\[Civil Code former section 1673\]](#) is clear and unambiguous”].)

**CA(21)** (21) [\*\*\*682] Our last decision to interpret [Civil Code former section 1673](#) in the context of business [\*\*\*\*39] dealings made clear that a rule of reason applies in this context. In [Great Western Distillery, supra, 10 Cal.2d 442](#), we upheld a contract in which a buyer agreed to purchase whiskey exclusively from a distillery in exchange for being the sole merchant of that whiskey in California. **HN21** We summarized the law as follows: “Statutes are interpreted in the light of reason and common sense, and it may be stated as a general rule that courts will not hold to be in restraint of trade a contract between individuals, the main purpose and effect of which are to promote and increase business in the line affected, merely because its operations might possibly in some theoretical way incidentally and indirectly restrict trade in such line.” (*Id. at p. 446.*) Reviewing the cases upholding and invalidating contractual agreements, we explained that this general rule was consistent with each of them. (*Id. at pp. 447–449*, citing [Associated Oil, supra, 217 Cal. at p. 304](#), [Grogan, supra, 156 Cal. at p. 615](#), [Morey, supra, 187 Cal. 727](#), [Endicott, supra, 216 Cal. 721](#).) Applying this rule to the agreement at issue, we upheld the agreement because it “disclose[d] merely an intent to provide for the promotion of the business of the defendant” and had the effect of “develop[ing] a market for the sale of the commodity within the limited territory.” ([Great Western Distillery, at pp. 449, 450.](#))

**HN22** **CA(22)** (22) Thus, like previous decisions evaluating business contracts, [Great Western Distillery](#) rejected a literal reading of [Civil Code former section 1673](#) in favor of a rule of reasonableness: Contracts with the purpose and effect of [\*1156] promoting trade and competition are valid even if their terms incidentally restrain commercial freedom in some way. After [Great Western Distillery](#), the “trend of authorities [was] to construe such statutes as [\[former\] section 1673 of the Civil Code](#), and contracts between individuals intended to promote rather than to restrict a particular business, ‘[i]n the light of reason and common sense’ so as to uphold reasonable limited restrictions.” ([Keating v. Preston \(1940\) 42 Cal.App.2d 110, 123 \[108 P.2d 479\]](#), quoting [Great Western Distillery, supra, 10 Cal.2d at p. 446.](#))

To summarize, our decisions interpreting [Civil Code former section 1673](#), the predecessor to *Business and Professions Code section 16600*, gradually evolved to evaluate contractual [\*\*586] restraints on business operations and commercial dealings based on a reasonableness standard. In this respect, [Civil Code former section 1673](#) did not depart from the common law rule. (See [Centeno, supra, 107 Cal.App.3d at p. 68](#) [observing in a case involving an exclusive medical services contract that “[s]ection 16600 is basically a codification of the common law relating to contracts in restraint of trade”].) But we often interpreted the statute more strictly when it came to agreements not to compete after the termination of employment or the sale [\*\*\*\*41] of interest in a business. Thus, instead of adopting a *per se* rule that all contractual limitations on the freedom to engage in commercial dealings are invalid, our precedent interpreting [Civil Code former section 1673](#) was more nuanced.

In 1941, the Legislature repealed [Civil Code former section 1673](#) and reenacted it as *Business and Professions Code section 16600* using substantively identical language. (Stats. 1941, ch. 526, § 1, p. 1834.) In doing so, the Legislature is presumed to have incorporated this court’s construction of [Civil Code former section 1673](#) into section 16600. ([People v. Bonnetta, supra, 46 Cal.4th at p. 151](#).) Since then, this court has had [\*\*\*683] occasion to construe section 16600 only in relation to contracts restraining competition after the termination of employment or the sale of interest in a business. (See [Edwards, supra, 44 Cal.4th at p. 950](#) [termination of employment]; [Swenson v. File \(1970\) 3 Cal.3d 389, 395 \[90 Cal. Rptr. 580, 475 P.2d 852\]](#) (Swenson) [termination of partnership]; [Muggill v. Reuben H. Donnelley Corp. \(1965\) 62 Cal.2d 239, 242–243 \[42 Cal. Rptr. 107, 398 P.2d 147\]](#) (Muggill) [termination of employment]; [Martinez v. Martinez \(1953\) 41 Cal.2d 704, 706 \[263 P.2d 617\]](#) (Martinez) [sale of business].) These cases have followed our earlier decisions by strictly construing the prohibition on restraint of trade in such contexts.

In *Muggill*, we invalidated a noncompetition agreement between a retiree and his former employer when the former employer ceased pension payments after the employee went to work for a competitor. ([Muggill, supra, 62 Cal.2d at p. 240](#).) We said that the “settled interpretation” of section 16600 created [\*\*\*\*42] [\*1157] an unambiguous rule: “This section invalidates provisions in employment contracts prohibiting an employee from working for a competitor after completion of his employment . . . .” ([Muggill, at pp. 243, 242](#).) Comparing the facts to those in *Chamberlain*, a prerenactment decision involving the sale of business stock by a former employee, we stated that “[s]imilarly, in

this case, the provision forfeiting plaintiff's pension rights if he works for a competitor restrains him from engaging in a lawful business and is therefore void." (*Id. at p. 243.*)

**HN23** [↑] **CA(23)** [↑] (23) Even when we have upheld portions of noncompetition agreements under statutory exceptions to *section 16600*, we have recognized that any portion of the agreement restraining competition not within an exception is per se invalid. For example, we said in *Swenson* that a noncompetition agreement between a former partner of an accounting firm and his firm would fall outside the *section 16602* exception and thus be invalid "[o]n its face" if "it forb[ade him] from serving former partnership clients without regard to territorial limits." (*Swenson, supra, 3 Cal.3d at p. 395*; see *§ 16602, subd. (a)* ["Any partner may, upon [dissolution or disassociation from the partnership], agree that he or she will not carry on a similar business within a specified geographic area [\*\*\*\*43] where the partnership business has been transacted, so long as any other member of the partnership ... carries on a like business therein."]; see also *Martinez, supra, 41 Cal.2d at p. 706* [trial court "properly limited the duration of the covenant [not to compete] by providing that it should continue so long as plaintiff ... should carry on a like business in San Diego County, that being the period permitted by sections 16600 and *16601 of the Business and Professions Code*"].)

Our most recent *section 16600* decision broke no new ground in holding that a noncompetition agreement between a tax manager and his employer was per se invalid. (*Edwards, supra, 44 Cal.4th at p. 955.*) [\*\*587] The plaintiff in *Edwards* signed an agreement with his employer Arthur Andersen, which prohibited him from working for or soliciting certain clients of the firm for limited periods following his termination of employment. (*Id. at p. 942.*) When HSBC acquired Arthur Andersen, it offered to employ Edwards on the condition that he sign a "Termination of Non-compete Agreement," which would effect a general release of claims against Arthur Andersen and, in turn, induce Arthur Andersen [\*\*\*684] to release Edwards from the noncompetition agreement he had previously signed. (*Id. at p. 943.*) When Edwards refused to sign the termination of noncompete agreement, Arthur Andersen fired him, and [\*\*\*44] HSBC withdrew its offer to employ him. (*Ibid.*) Edwards sued Arthur Andersen for interference with prospective economic advantage, claiming that the interference was wrongful because the underlying noncompetition agreement he signed was invalid under *section 16600*. (*Edwards, at p. 944.*)

[\*1158]

**HN24** [↑] **CA(24)** [↑] (24) We agreed, holding that "an employer cannot by contract restrain a former employee from engaging in his or her profession, trade, or business unless the agreement falls within one of the exceptions to the rule." (*Edwards, supra, 44 Cal.4th at pp. 946–947.*) We said that *section 16600* and its predecessor statute had rejected the common law "rule of reasonableness" for a "legislative policy in favor of open competition and employee mobility." (*Edwards, at pp. 945, 946.*) Stressing the statute's plain meaning, we rejected the argument that *section 16600* only voids restraints that entirely prohibit an employee from engaging in a profession and not less restrictive limitations that are reasonable. (*Edwards, at pp. 946–947.*) Similarly, we rejected the Ninth Circuit's "narrow-restraint" construction of *section 16600*, which excepted agreements limiting only a narrow part of a party's business, trade, or profession. (*Edwards, at pp. 948–950.*)

**CA(25)** [↑] (25) Ixchel argues that *Edwards* conclusively held that *section 16600* invalidates all restraints on trade for all contracts, no matter how reasonable. It relies on our [\*\*\*\*45] conclusion that "[s]ection 16600 is unambiguous, and if the Legislature intended the statute to apply only to restraints that were unreasonable or overbroad, it could have included language to that effect." (*Edwards, supra, 44 Cal.4th at p. 950.*) But Ixchel reads too much into *Edwards*. **HN25** [↑] "It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court." (*Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (1999) 19 Cal.4th 1182, 1195 [81 Cal. Rptr. 2d 521, 969 P.2d 613].) The plaintiff in *Edwards* sought to invalidate a noncompetition clause in his employment agreement, and we "limited our review" to whether "Business and Professions Code section 16600 prohibit[s] employee noncompetition agreements ... ." (*Edwards, at p. 941*, fn. omitted.) We held that "section 16600 prohibits employee noncompetition agreements unless the agreement falls within a statutory exception ... ." (*Id. at p. 942.*) The question of whether noncompetition agreements outside the employment context are per se invalid was not presented in *Edwards*.

**CA(26)** [↑] (26) Moreover, the rationale in *Edwards* focused on policy considerations specific to employment mobility and competition: **HN26** [↑] “The law protects Californians and ensures ‘that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice.’ [Citation.] It protects ‘the important legal right of persons to engage in [\*\*\*\*46] businesses and occupations of their choosing.’” (*Edwards, supra, 44 Cal.4th at p. 946*; see *ibid.* [the statute “evinces a settled legislative policy in favor of open competition and employee mobility”].) And we cited cases exclusively from the employment context in our reasoning. (*Id. at pp. 945–948*, citing *Bosley Medical Group v. Abramson* (1984) 161 Cal.App.3d 284 [207 Cal. Rptr. 477], *D'Sa v. Playhut, Inc.* (2000) 85 Cal.App.4th 927 [102 Cal. Rptr. 2d 495], *Muggill, supra, 62 Cal.2d 239* [\*\*588] , *Chamberlain, supra, 172 Cal. 285, Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 [99 Cal. Rptr. 2d 745, ¶¶1159] 6 P.3d 669], *South Bay Radiology Medical Associates v. Asher* (1990) 220 Cal.App.3d 1074 [269 Cal. Rptr. 15], and *Vacco Industries, Inc. v. Van Den Berg* (1992) 5 Cal.App.4th 34 [6 Cal. Rptr. 2d 602].)

[\*\*\*685] Finally, the holding and language in *Edwards* simply confirmed our long line of decisions interpreting section 16600 strictly in the context of noncompetition agreements following the termination of employment or the sale of interest in a business. Nothing about *Edwards* indicates a departure from that precedent to also invalidate reasonable contractual limitations on business operations and commercial dealings. Nor did *Edwards* address our substantial body of law permitting such reasonable limitations.

**HN27** [↑] **CA(27)** [↑] (27) In sum, a survey of our precedent construing section 16600 and its predecessor statute reveals that we have long applied a reasonableness standard to contractual restraints on business operations and commercial dealings. We do not disturb the holding in *Edwards* and other decisions strictly interpreting section 16600 to invalidate noncompetition agreements following the termination of employment or sale of interest in a business. But those cases do not call into [\*\*\*\*47] doubt the applicability of a reasonableness standard to contractual restraints on business operations and commercial dealings.

## C.

**CA(28)** [↑] (28) We also consider section 16600 in its broader statutory context and seek to harmonize its language with related provisions. (*ZB, supra, 8 Cal.5th at p. 189*.) Section 16600 appears alongside the *Cartwright Act* (§ 16700 et seq.), which also employs broadly worded language to prohibit agreements in restraint of trade. *Section 16722* provides: “Any contract or agreement in violation of this chapter is absolutely void and is not enforceable at law or in equity.” And *section 16726* provides: “Except as provided in this chapter, every trust is unlawful, against public policy and void.” But we have not interpreted these provisions in a sweeping fashion. **HN28** [↑] “Though the *Cartwright Act* is written in absolute terms, in practice not every agreement within the four corners of its prohibitions has been deemed illegal.” (*Cipro, supra, 61 Cal.4th at p. 136*.) The provisions of the *Cartwright Act* “draw upon the common law prohibition against restraints of trade.” (*Cipro, at p. 136*; accord, *Speegle, supra, 29 Cal.2d at p. 44*.) Accordingly, this court has taken direction from the common law in establishing a reasonableness standard for determining whether an agreement violates the *Cartwright Act*. (*Cipro, at pp. 137, 146*.) That standard asks whether an agreement “promotes or suppresses [\*\*\*\*48] competition” by considering the “circumstances, details, and logic of a restraint.” (*Id. at pp. 146, 147.*)

[\*1160]

Similarly, *Civil Code former section 1673* was enacted against the backdrop of a common law standard prohibiting unreasonable restraints of trade. Our interpretation of that statute and section 16600 did not depart from the common law reasonableness standard for contractual restraints on business operations and commercial dealings. Section 16600 should [\*\*\*686] therefore be read in accordance with the *Cartwright Act* to incorporate the same rule of reason in such cases. Indeed, we have occasionally relied on antitrust decisions when interpreting *Civil Code former section 1673* (see *Great Western Distillery, supra, 10 Cal.2d at pp. 448–449*, citing *United States v. American Tobacco Co.* (1911) 221 U.S. 106, 179 [55 L.Ed. 663, 31 S.Ct. 632]), and Courts of Appeal have evaluated section 16600 and antitrust claims together under a reasonableness standard (see *Dayton Time Lock, supra, 52 Cal.App.3d at p. 6; LaFortune v. Ebie* (1972) 26 Cal.App.3d 72, 74–75 [102 Cal.Rptr. 588]).

Amicus curiae Beckman Coulter, Inc., argues that [\*Cianci v. Superior Court \(1985\) 40 Cal.3d 903 \[221 Cal. Rptr. 575, 710 P.2d 375\]\*](#) rejected the use of the [\*Cartwright Act\*](#) as an aid to construing section 16600. *Cianci* held that the [\*Cartwright Act\*](#) applied [\[\\*\\*589\]](#) to the medical profession. In doing so, we overturned a previous decision that reasoned that because section 16600 includes the word “profession” in its scope, the absence of the same word in the [\*Cartwright Act\*](#) implied that it was not intended to apply to professions. ([\*Cianci, at pp. 921–922\*](#), citing [\*Willis v. Santa Ana etc. Hospital Assn. \(1962\) 58 Cal.2d 806, 809 \[26 Cal. Rptr. 640, 376 P.2d 568\]\*](#).) We concluded that because section 16600 and [\[\\*\\*\\*\\*49\]](#) the [\*Cartwright Act\*](#) were enacted separately and only later consolidated in the Business and Professions Code, “a finding of legislative intent to exclude the professions from the [\*Cartwright Act\*](#), based upon nothing more than language differences between the two code sections, exceeds the limits of plausible inference.” ([\*Cianci, at p. 922\*](#).) But *Cianci*’s focus on a specific textual difference between the two statutes does not cast doubt on the broader point here: The similarities between the two statutes stretch beyond their language. They share a statutory purpose and doctrinal heritage in common law prohibitions on restraints of trade. They should therefore be interpreted together.

#### D.

Finally, we are mindful of the consequences of strictly interpreting the language of section 16600 to invalidate all contracts that limit the freedom to engage in commercial dealing. “Every agreement concerning trade … restrains.” ([\*Chicago Board of Trade v. United States \(1918\) 246 U.S. 231, 238 \[62 L.Ed. 683, 38 S.Ct. 242\]\*](#), italics added.) In certain circumstances, contractual limitations on the freedom to engage in commercial dealings can promote competition. Businesses engaged in commerce routinely employ legitimate partnership and exclusive dealing arrangements, which limit the [\[\\*1161\]](#) parties’ freedom to engage in commerce with third parties. [\[\\*\\*\\*\\*50\]](#) Such arrangements can help businesses leverage complementary capabilities, ensure stability in supply or demand, and protect their research, development, and marketing efforts from being exploited by contractual partners.

These arrangements can have procompetitive effects since they “enable long-term planning on the basis of known costs,” “give protection against price fluctuations, and—of particular advantage to a newcomer to the field to whom it is important to know what capital expenditures are justified—offer the possibility of a predictable market.” ([\*Standard Oil Co. v. United States \(1949\) 337 U.S. 293, 306–307 \[93 L.Ed. 1371, 69 S.Ct. 1051\]\*](#); see also [\*Sterling Merchandising, Inc. v. Nestlé, S.A. \(1st Cir. 2011\) 656 F.3d 112, 123\*](#) [“exclusive dealing agreements ‘can achieve legitimate economic benefits (reduced cost, stable long-term supply, predictable prices)”].) Exclusive [\[\\*\\*\\*687\]](#) dealing arrangements also “may provide an incentive for the marketing of new products and a guarantee of quality-control distribution.” ([\*Dayton Time Lock, supra, 52 Cal.App.3d at p. 6\*](#); accord, [\*Fisherman’s Wharf Bay Cruise Corp. v. Superior Court \(2003\) 114 Cal.App.4th 309, 335 \[7 Cal. Rptr. 3d 628\]\*](#).) For example, exclusive dealing arrangements are “often a part of a franchise agreement or a distributorship contract.” ([\*UAS Management, Inc. v. Mater Misericordiae Hospital \(2008\) 169 Cal.App.4th 357, 365 \[87 Cal. Rptr. 3d 81\]\*](#).) In exchange for the right to sell the franchisor’s products, franchisees often agree to purchase from a particular supplier or operate in a particular geographic area. (See, e.g., [\*Dayton Time Lock, at pp. 4–5\*](#) [describing franchise [\[\\*\\*\\*51\]](#) agreement].) We decline to construe section 16600 to call such arrangements into question simply because they restrain trade in some way.

**CA(29)** [\(29\)](#) Ixchel and amicus curiae Beckman Coulter, Inc., argue that these dire consequences are exaggerated because section 16600 only voids agreements that restrain a party from “engaging in a lawful … business” and not all contractual restraints on business activity do so. (Italics added.) But they do not explain where the line is to be drawn. **HN29** Many forms of exclusive dealing restrain parties from “engaging in a lawful … business.” (§ 16600.) Franchise agreements often prohibit the franchisee from selling a third party’s products; requirements and output contracts restrain buyers and sellers respectively from doing business with third parties. In *Great* [\[\\*\\*590\]](#) *Western Distillery*, we upheld a contract in which a business agreed to purchase whiskey exclusively from another whiskey distillery in exchange for being the sole merchant of that whiskey in California. ([\*Great Western Distillery, supra, 10 Cal.2d at pp. 445–446\*](#).) Under the agreement, the purchaser was restrained from engaging in the business of buying whiskey from a third party, and the whiskey distiller was restrained from doing any business with other potential whiskey buyers. Our opinion [\[\\*\\*\\*\\*52\]](#) applied a reasonableness standard in

determining whether the agreement ran afoul of Civil Code former section 1673. (*Great Western Distillery, at pp. 445–446*.) Similarly here, the Forward-Biogen [\*1162] Agreement restrained Forward from engaging in business with Ixchel or another third party to develop drugs containing the active ingredient DMF. Ixchel fails to meaningfully differentiate *Great Western Distillery* from this case with respect to the applicability of a reasonableness standard.

## CONCLUSION

**HN30** [↑] **CA(30)** [↑] (30) We hold that tortious interference with at-will contracts requires independent wrongfulness. Because Ixchel alleges that Biogen interfered with its at-will contract, it must allege that Biogen did so through wrongful means.

**CA(31)** [↑] (31) We also hold that a rule of reason applies to determine the validity of a contractual provision by which a business is restrained from engaging in a lawful trade or business with another business. Section 2.13 of the Forward-Biogen Agreement is such a restraint because it prevents Forward from collaborating with Ixchel or any other partner in the development of treatments containing the active ingredient DMF. Its validity under *section 16600* must therefore be evaluated based on a rule of reason. We express no view on the validity of the agreement at issue. [\*\*\*688] [\*\*\*\*53]

Cantil-Sakauye, C. J., Chin, J., Corrigan, J., Cuéllar, J., Kruger, J., and Groban, J., concurred.

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## Villanueva v. Fidelity National Title Co.

Supreme Court of California

March 18, 2021, Opinion Filed

S252035

### **Reporter**

11 Cal. 5th 104 \*; 482 P.3d 989 \*\*; 276 Cal. Rptr. 3d 209 \*\*\*; 2021 Cal. LEXIS 1914 \*\*\*\*; 2021 WL 1031874

MANNY VILLANUEVA et al., Plaintiffs and Appellants, v. FIDELITY NATIONAL TITLE COMPANY, Defendant and Appellant.

**Prior History:** [\*\*\*\*1] Superior Court of Santa Clara County, No. 1-10-CV173356, Peter H. Kirwan, Judge. Sixth Appellate District, No. H041870, No. H042504.

[Villanueva v. Fidelity National Title Co., 26 Cal. App. 5th 1092, 237 Cal. Rptr. 3d 702, 2018 Cal. App. LEXIS 802, 2018 WL 4275376 \(Sept. 7, 2018\)](#)

## **Core Terms**

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immunity, rates, insurers, title insurance, provisions, charging, regulation, articles, title insurer, consumer, ratemaking, unfiled, confer authority, restitution, proceedings, antitrust, argues, anti trust law, entities, extends, cases, concerted, supplying, exempt, offers, noninsurance, workers' compensation, trial court, commencing, aggrieved

## **LexisNexis® Headnotes**

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Business & Corporate Compliance > ... > Industry Practices > Rate Regulation > Approval Process

Insurance Law > Regulators > State Insurance Commissioners & Departments > Authorities & Powers

Insurance Law > Industry Practices > Rate Regulation > Rate Hearings

Insurance Law > ... > State Insurance Commissioners & Departments > Hearings & Orders > Hearings

### **[HN1](#) [down arrow] Rate Regulation, Approval Process**

The statutory immunity for acts done pursuant to the authority conferred in [Ins. Code, § 12414.26](#), by the rate-filing statutes does not shield title insurers from suit for charging unauthorized rates, and the California Insurance Commissioner does not have exclusive jurisdiction over such claims.

Insurance Law > Types of Insurance > Property Insurance > Title Insurance

## [HN2](#) Property Insurance, Title Insurance

Title insurance is a customary incident of practically every California real estate transaction, including a sale or refinancing. Title insurers insure the record title of real property for persons with some interest in the estate, including owners, occupiers, and lenders. A title insurance policy is not a guarantee as to the state of the property's title. It instead offers indemnification to the insured against many losses arising from title defects not disclosed in the title policy or report, as well as errors by the entity performing the title search. [Ins. Code, §§ 104, 12340.1, 12340.2.](#)

Business & Corporate Compliance > ... > Industry Practices > Rate Regulation > Approval Process

Insurance Law > Types of Insurance > Property Insurance > Title Insurance

Business & Corporate Compliance > ... > Regulators > State Insurance Commissioners & Departments > Rules & Regulations

## [HN3](#) Rate Regulation, Approval Process

Title insurance differs in some respects from other forms of insurance. While most other forms of insurance provide protection against future loss, title insurance instead relates to the past; it protects against undisclosed encumbrances and defects in title that exist at the time the policy is issued. Thus, rather than requiring periodic, ongoing premiums to obtain continuing future coverage, title insurance requires a one-time payment (compensating for the risk assumed and the services rendered in connection with researching and preparing the policy. [Ins. Code, § 12340.7.](#) Notwithstanding these differences, title insurance and title insurance rates are subject to regulation by the Insurance Commissioner, just like more classical forms of insurance and insurance premiums. [Ins. Code, §§ 12340-12418.4.](#)

Business & Corporate Compliance > ... > Industry Practices > Rate Regulation > Approval Process

Insurance Law > Industry Practices > Rate Regulation > Judicial Review

Insurance Law > Industry Practices > Rate Regulation > Rate Hearings

Insurance Law > Types of Insurance > Property Insurance > Title Insurance

## [HN4](#) Rate Regulation, Approval Process

The California Insurance Code requires all title insurers to file a schedule of their rates with the California Insurance Commissioner. [Ins. Code, § 12401.1.](#) The filing requirement extends to any rate imposed as part of the business of title insurance, [Ins. Code, § 12401.7](#), which includes any service in conjunction with the issuance of a title policy including but not limited to the handling of any escrow, settlement or closing in connection therewith, [Ins. Code, § 12340.3, subd. \(c\).](#) This regulatory approach - commonly known as "file and use" - allows entities to implement their filed rates without the need for formal prior approval.

Governments > Legislation > Interpretation

## [HN5](#) Legislation, Interpretation

To determine the scope of the immunity afforded by a statute, the court begins, as always, with the text, which affords the best guide to the legislature's intent.

Business & Corporate Compliance > ... > Industry Practices > Rate Regulation > Approval Process

Insurance Law > Industry Practices > Rate Regulation > Judicial Review

Insurance Law > Industry Practices > Rate Regulation > Rate Hearings

Insurance Law > Types of Insurance > Property Insurance > Title Insurance

#### **HN6** [down] **Rate Regulation, Approval Process**

Among other things, article 5.5 of the California Insurance Code requires title insurers to establish basic classifications of coverages and services as a basis for their rates, [Ins. Code, § 12401.2](#), and to then file those rates with the California Insurance Commissioner, [Ins. Code, § 12401.1](#). The article forbids rates that are excessive, inadequate, or discriminatory. Ins. Code, § 2401.3, subd. (a). It generally prohibits title insurers from charging unfiled rates or rates before their effective date, 30 days after filing. [Ins. Code, §§ 12401.1, 12401.7](#). In addition, article 5.5 permits insurers to consult with each other and with industry organizations and share information and loss experience data, [Ins. Code, § 12401.4](#), data that is central to the insurers' ability to set rates.

Business & Corporate Compliance > ... > Industry Practices > Rate Regulation > Approval Process

Insurance Law > Industry Practices > Rate Regulation > Judicial Review

Insurance Law > Industry Practices > Rate Regulation > Rate Hearings

Insurance Law > Types of Insurance > Property Insurance > Title Insurance

#### **HN7** [down] **Rate Regulation, Approval Process**

Article 5.5 of the California Insurance Code contemplates that title insurers may: (1) charge a filed rate after its effective date, [Ins. Code, §§ 12401.1, 12401.7](#); (2) charge a filed rate before its effective date if the new rate results in a rate reduction, [Ins. Code, § 12401.71, subd. \(a\)](#); and (3) for unusual risks or services, impose surcharges in excess of those set forth in the rate filing, provided the surcharges are reasonable and approved in writing in advance, [Ins. Code, § 12401.8](#).

Governments > Legislation > Interpretation

#### **HN8** [down] **Legislation, Interpretation**

When possible, courts should give meaning to every word of a statute.

Governments > Legislation > Interpretation

#### **HN9** [down] **Legislation, Interpretation**

Limiting the immunity conveyed by [Ins. Code, § 12414.26](#), to the scope expressly granted by its terms conforms to the general rule of statutory construction that a legislative grant of privilege or immunity is strictly construed against the grantee.

Business & Corporate Compliance > ... > Industry Practices > Rate Regulation > Approval Process

#### [HN10](#) **Rate Regulation, Approval Process**

Nothing in the plain language of [Ins. Code, § 12414.26](#), supports an expansive view of a title insurer's immunity from suit. The provision confers immunity for acts, actions, or agreements authorized by articles 5.5 and 5.7 of the California Insurance Code. This statutory immunity does not extend to the charging of unfiled rates because those articles confer no such authority; on the contrary, the referenced articles expressly prohibit the charging of unfiled rates.

Governments > Legislation > Interpretation

#### [HN11](#) **Legislation, Interpretation**

Questions of statutory interpretation are ultimately for the court to decide.

Administrative Law > Agency Adjudication > Decisions

#### [HN12](#) **Agency Adjudication, Decisions**

The soundness of an agency's reasoning adds to its power to persuade.

Business & Corporate Compliance > ... > Insurance Law > Industry Practices > Insurance Company Operations

#### [HN13](#) **Industry Practices, Insurance Company Operations**

That the California Legislature granted insurers immunity from suit for certain acts does not excuse insurers, as the parties claiming entitlement to that protection, from having to demonstrate, with evidence if necessary, that the preconditions for its invocation have been met. Qualified immunity, for example, likewise supplies an immunity from suit rather than a mere defense to liability. But the immunity attaches only once its basis is apparent; allegations that would defeat qualified immunity will allow suit to proceed, and dismissal may in some cases not occur until a motion for summary judgment or later. That [Ins. Code, § 12414.26](#), includes language establishing a broad procedural protection offers no basis to disregard other language in the statute, limiting immunity to any act done, action taken, or agreement made pursuant to specific statutory sources of authority, that more narrowly defines the universe of conduct to which it applies. Even so construed, [§ 12414.26](#) still provides a basis for bringing a lawsuit to a prompt end, once the statutory prerequisites have been shown.

Insurance Law > Remedies

#### [HN14](#) **Insurance Law, Remedies**

Administrative proceedings are not a ratepayer's exclusive remedy against a title insurer for the charging of an unfiled rate.

Administrative Law > Separation of Powers > Primary Jurisdiction

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > Administrative Remedies

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

#### **HN15** Separation of Powers, Primary Jurisdiction

When primary jurisdiction applies, an initial suit in court is permitted, although the trial court may thereafter choose to stay the action and solicit an agency's views. When exhaustion applies, a party must pursue an administrative remedy initially, but may thereafter file suit in court. When a statutory regime vests exclusive jurisdiction in an agency, in contrast, a party may only proceed administratively and thereafter may only challenge the results of any administrative outcome through administrative mandamus, [Code Civ. Proc., § 1094.5](#), or such other means as the statutory scheme may specify.

Business & Corporate Compliance > ... > State Insurance Commissioners & Departments > Authorities & Powers > Examinations & Investigations

Insurance Law > ... > State Insurance Commissioners & Departments > Hearings & Orders > Hearings

Insurance Law > Industry Practices > Rate Regulation > Judicial Review

#### **HN16** State Insurance Commissioners & Departments, Examinations & Investigations

Under [Ins. Code, § 12414.13](#), a written complaint to the regulated entity is a necessary prerequisite to a written complaint to the California Insurance Commissioner; it is only if the written complaint fails that a person is aggrieved and entitled to seek a hearing with the Commissioner. But nothing in either [§ 12414.13](#) or the remainder of article 6.7 of the California Insurance Code suggests that a complaint to the Commissioner is exclusive of any other remedy that might be available to the consumer, including remedies otherwise available in judicial proceedings.

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > Administrative Remedies

#### **HN17** Exhaustion of Remedies, Administrative Remedies

In evaluating whether a remedial scheme was intended to be exclusive, the court may consider the scope of the recourse it affords. Exhaustion of a remedy prior to pursuing a civil suit may not be required if the relief available is materially incomplete.

Insurance Law > ... > State Insurance Commissioners & Departments > Hearings & Orders > Hearings

#### **HN18** Hearings & Orders, Hearings

[Gov. Code, § 11519.1](#), authorizes an order of restitution only in a very narrow subset of proceedings, those involving a decision rendered against a licensee under Article 1 (commencing with [Gov. Code, § 11700](#)) of Chapter 4 of Division 5 of the Vehicle Code. [Gov. Code, § 11519.1, subd. \(a\)](#). The Government Code and the Insurance

Code provision incorporating its procedures by reference do not grant the California Insurance Commissioner any power to order restitution to insureds.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Business & Corporate Compliance > ... > Industry Practices > Unfair Business Practices > Unfair Trade Practices Acts

Governments > Legislation > Interpretation

#### **HN19** [blue icon] **Trade Practices & Unfair Competition, State Regulation**

*Ins. Code, § 12414.29*, governs the relationship between article 5.5 of the California Insurance Code and other parts of the Insurance Code and resolves any conflict or overlap by specifying that those provisions specific to title insurance, rather than insurance generally, should govern unless another provision of the Insurance Code explicitly specifies otherwise. *Section 12414.29* does not govern the relationship between the provisions of article 5.5 and other noninsurance laws, such as the unfair competition law.

Business & Corporate Compliance > ... > Industry Practices > Insurance Company Operations > Conducting Business

Governments > Legislation > Interpretation

#### **HN20** [blue icon] **Insurance Company Operations, Conducting Business**

Considered side-by-side, *Ins. Code, §§ 1860.1* & *1860.2*, are naturally read to regulate distinct spheres. *Section 1860.1* governs the interplay between the insurance chapter and other noninsurance laws. *Section 1860.2*, in contrast, deals with the interplay between the insurance chapter and other insurance-specific laws.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

#### **HN21** [blue icon] **Standards of Review, Deference to Agency Statutory Interpretation**

An administrative agency's interpretation of statutes regulating the extent of its power and responsibilities is entitled to a measure of respect.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Business & Corporate Compliance > ... > State Insurance Commissioners & Departments > Authorities & Powers > Examinations & Investigations

Insurance Law > ... > State Insurance Commissioners & Departments > Hearings & Orders > Hearings

#### **HN22** [blue icon] **Deceptive & Unfair Trade Practices, State Regulation**

State antitrust and unfair competition law may in some instances be superseded, but only to the extent specific provisions of the California Insurance Code authorize some practices and as to others give the Insurance Commissioner authority to determine the propriety of the conduct.

Business & Corporate Compliance > ... > Industry Practices > Rate Regulation > Approval Process

Insurance Law > ... > State Insurance Commissioners & Departments > Hearings & Orders > Hearings

Insurance Law > Industry Practices > Rate Regulation > Judicial Review

Insurance Law > Industry Practices > Rate Regulation > Rate Hearings

### **HN23** [blue icon] Rate Regulation, Approval Process

The California Legislature, in crafting the various provisions of the scheme regulating title insurance, has made the relevant decisions concerning the appropriate spheres for courts and the California Insurance Commissioner. The text of the provisions it chose to adopt does not extend administrative exclusivity to circumstances in which a rate was required to be filed with, but was never filed with, the Commissioner. Nothing in the statutory scheme forecloses a court from considering a claim that an insurer failed to meet its threshold obligation to file a rate and then charged the rate anyway.

Business & Corporate Compliance > ... > Industry Practices > Rate Regulation > Approval Process

Insurance Law > Industry Practices > Rate Regulation > Judicial Review

Insurance Law > Industry Practices > Rate Regulation > Rate Hearings

Business & Corporate Compliance > ... > State Insurance Commissioners & Departments > Authorities & Powers > Examinations & Investigations

### **HN24** [blue icon] Rate Regulation, Approval Process

Charging an unfiled rate is not an act done pursuant to the authority conferred by Ins. Code, [§ 12401 et seq. Ins. Code, § 12414.26](#). It is a violation of the express terms of the California Insurance Code. Nor does any aspect of other provisions in the chapter regulating title insurance grant to the California Insurance Commissioner exclusive jurisdiction to address consumer challenges to unfiled rates. [Ins. Code, § 12414.13](#), supplies an administrative remedy, but it is not exclusive of other remedies otherwise available in the courts.

## **Headnotes/Summary**

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### **Summary**

#### **[\*104] CALIFORNIA OFFICIAL REPORTS SUMMARY**

Plaintiffs filed a class action lawsuit against a title insurer, asserting that the delivery, courier, and draw deed fees added to plaintiffs' escrow statement were illegal because they had never been filed with the Insurance Commissioner. The trial court granted plaintiffs injunctive relief under the unfair competition law, but denied their restitution claims on the ground that the rates charged were disclosed to and approved by plaintiff and other class members, who received the benefit of their bargain, the services for which they paid. (Superior Court of Santa Clara County, No. 1-10-CV173356, Peter H. Kirwan, Judge.) The Court of Appeal, Sixth Dist., Nos. H041870 and H042504, reversed in part and entered judgment dismissing the lawsuit. It concluded the trial court lacked jurisdiction to consider the merits of the suit.

The Supreme Court reversed the judgment of the Court of Appeal and remanded the matter. The court held the statutory immunity for acts done pursuant to the authority conferred set forth in [Ins. Code, § 12414.26](#), by the rate-filing statutes does not shield title insurers from suit for charging unauthorized rates, and the Insurance Commissioner does not have exclusive jurisdiction over such claims. That [§ 12414.26](#) includes language establishing a broad procedural protection offers no basis to disregard other language in the statute, limiting immunity to any act done, action taken, or agreement made pursuant to specific statutory sources of authority, that more narrowly defines the universe of conduct to which it applies. The court agreed with plaintiff and the Insurance Commissioner that administrative proceedings are not a ratepayer's exclusive remedy for the charging of an unfiled rate. (Opinion by Kruger, J., expressing the unanimous view of the court.)

## **Headnotes**

### CALIFORNIA OFFICIAL REPORTS HEADNOTES

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

##### **Abstracters and Title Insurers § 9—Title Insurers—Liability—Unfiled Rate—Immunity—Jurisdiction.**

In a class action lawsuit filed against a title insurer, the Supreme Court held the statutory immunity for [\*105] acts done pursuant to the authority conferred in [Ins. Code, § 12414.26](#), by the rate-filing statutes does not shield title insurers from suit for charging unauthorized rates, and the Insurance Commissioner does not have exclusive jurisdiction over such claims.

[Cal. Insurance Law & Practice (2021) ch. 39, § 39.10; 2 Witkin, Summary of Cal. Law (11th ed. 2017) Insurance, § 12; 2 Witkin, Cal. Procedure (5th ed. 2008) Jurisdiction, § 13; 12 Witkin, Summary of Cal. Law (11th ed. 2017) Real Property, § 367.]

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

##### **Abstracters and Title Insurers § 5—Title Insurers—Defects—Indemnification.**

Title insurance is a customary incident of practically every California real estate transaction, including a sale or refinancing. Title insurers insure the record title of real property for persons with some interest in the estate, including owners, occupiers, and lenders. A title insurance policy is not a guarantee as to the state of the property's title. It instead offers indemnification to the insured against many losses arising from title defects not disclosed in the title policy or report, as well as errors by the entity performing the title search ([Ins. Code, §§ 104, 12340.1, 12340.2](#)).

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

##### **Abstracters and Title Insurers § 6—Title Insurers—Defects—Undisclosed Encumbrances.**

Title insurance differs in some respects from other forms of insurance. While most other forms of insurance provide protection against future loss, title insurance instead relates to the past; it protects against undisclosed encumbrances and defects in title that exist at the time the policy is issued. Thus, rather than requiring periodic, ongoing premiums to obtain continuing future coverage, title insurance requires a one-time payment compensating for the risk assumed and the services rendered in connection with researching and preparing the policy ([Ins. Code, § 12340.7](#)). Notwithstanding these differences, title insurance and title insurance rates are subject to regulation by the Insurance Commissioner, just like more classical forms of insurance and insurance premiums ([Ins. Code, §§ 12340–12418.4](#)).

**CA(4)** [ ] (4)**Abstracters and Title Insurers § 6—Title Insurers—Regulation—Rates—Filing Requirement.**

The Insurance Code requires all title insurers to file a schedule of their rates with the Insurance Commissioner ([Ins. Code, § 12401.1](#)). The filing requirement extends to any rate imposed as part of the business of title insurance ([Ins. Code, § 12401.7](#)), which includes any service in conjunction with the issuance of a title policy including but not limited to the handling of any escrow, settlement or closing in connection therewith ([Ins. Code, § 12340.3, subd. \(c\)](#)). This regulatory approach—commonly known as “file and use”—allows entities to implement their filed rates without the need for formal prior approval.

[\*106] **CA(5)** [ ] (5)**Statutes § 29—Construction—Language—Legislative Intent—Immunity.**

To determine the scope of the immunity afforded by a statute, the court begins, as always, with the text, which affords the best guide to the Legislature's intent.

**CA(6)** [ ] (6)**Abstracters and Title Insurers § 6—Title Insurers—Regulation—Rates—Filing Requirement.**

Among other things, division 2, part 6, chapter 1, article 5.5 of the Insurance Code requires title insurers to establish basic classifications of coverages and services as a basis for their rates ([Ins. Code, § 12401.2](#)), and to then file those rates with the Insurance Commissioner ([Ins. Code, § 12401.1](#)). The article forbids rates that are excessive, inadequate, or discriminatory ([Ins. Code, § 2401.3, subd. \(a\)](#)). It generally prohibits title insurers from charging unfiled rates or rates before their effective date, 30 days after filing ([Ins. Code, §§ 12401.1, 12401.7](#)). In addition, article 5.5 permits insurers to consult with each other and with industry organizations and share information and loss experience data ([Ins. Code, § 12401.4](#)), data that is central to the insurers' ability to set rates.

**CA(7)** [ ] (7)**Abstracters and Title Insurers § 6—Title Insurers—Regulation—Rates.**

Division 2, part 6, chapter 1, article 5.5 of the Insurance Code contemplates that title insurers may: (1) charge a filed rate after its effective date ([Ins. Code, §§ 12401.1, 12401.7](#)); (2) charge a filed rate before its effective date if the new rate results in a rate reduction ([Ins. Code, § 12401.71, subd. \(a\)](#)); and (3) for unusual risks or services, impose surcharges in excess of those set forth in the rate filing, provided the surcharges are reasonable and approved in writing in advance ([Ins. Code, § 12401.8](#)).

**CA(8)** [ ] (8)**Statutes § 28—Construction—Language—Meaning of Words.**

When possible, courts should give meaning to every word of a statute.

**CA(9)** [ ] (9)

**Abstracters and Title Insurers § 9—Title Insurers—Liability—Immunity—Scope.**

Limiting the immunity conveyed by [Ins. Code, § 12414.26](#), to the scope expressly granted by its terms conforms to the general rule of statutory construction that a legislative grant of privilege or immunity is strictly construed against the grantee.

**CA(10) [↓] (10)****Abstracters and Title Insurers § 9—Title Insurers—Liability—Unfiled Rate—Immunity.**

Nothing in the plain language of [Ins. Code, § 12414.26](#), supports an expansive view of a title insurer's immunity from suit. The provision confers immunity for acts, actions, or agreements authorized by division 2, part 6, chapter 1, articles 5.5 and 5.7 of the Insurance Code. This statutory immunity does not extend to the [\*107] charging of unfiled rates because those articles confer no such authority; on the contrary, the referenced articles expressly prohibit the charging of unfiled rates.

**CA(11) [↓] (11)****Statutes § 20—Construction—Judicial Function.**

Questions of statutory interpretation are ultimately for the court to decide.

**CA(12) [↓] (12)****Administrative Law § 113—Judicial Review and Relief—Standard of Review—Agency's Reasoning.**

The soundness of an agency's reasoning adds to its power to persuade.

**CA(13) [↓] (13)****Abstracters and Title Insurers § 9—Title Insurers—Liability—Qualified Immunity.**

That the Legislature granted insurers immunity from suit for certain acts does not excuse insurers, as the parties claiming entitlement to that protection, from having to demonstrate, with evidence if necessary, that the preconditions for its invocation have been met. Qualified immunity, for example, likewise supplies an immunity from suit rather than a mere defense to liability. But the immunity attaches only once its basis is apparent; allegations that would defeat qualified immunity will allow suit to proceed, and dismissal may in some cases not occur until a motion for summary judgment or later. That [Ins. Code, § 12414.26](#), includes language establishing a broad procedural protection offers no basis to disregard other language in the statute, limiting immunity to any act done, action taken, or agreement made pursuant to specific statutory sources of authority, that more narrowly defines the universe of conduct to which it applies. Even so construed, [§ 12414.26](#) still provides a basis for bringing a lawsuit to a prompt end, once the statutory prerequisites have been shown.

**CA(14) [↓] (14)****Abstracters and Title Insurers § 9—Title Insurers—Liability—Unfiled Rate—Remedy.**

Administrative proceedings are not a ratepayer's exclusive remedy against a title insurer for the charging of an unfiled rate.

**CA(15)** [  ] (15)**Administrative Law § 85—Judicial Review and Relief—Limitations—Exhaustion of Remedies—Jurisdiction—Administrative Mandamus.**

When primary jurisdiction applies, an initial suit in court is permitted, although the trial court may thereafter choose to stay the action and solicit an agency's views. When exhaustion applies, a party must pursue an administrative remedy initially, but may thereafter file suit in court. When a statutory regime vests exclusive jurisdiction in an agency, in contrast, a party may only proceed administratively and thereafter may only challenge the results of any administrative outcome through administrative mandamus ([Code Civ. Proc., § 1094.5](#)), or such other means as the statutory scheme may specify.

[\*108] **CA(16)** [  ] (16)**Abstracters and Title Insurers § 9—Title Insurers—Liability—Complaint—Remedies.**

Under [Ins. Code, § 12414.13](#), a written complaint to the regulated entity is a necessary prerequisite to a written complaint to the Insurance Commissioner; it is only if the written complaint fails that a person is aggrieved and entitled to seek a hearing with the commissioner. But nothing in either [§ 12414.13](#) or the remainder of article 6.7 of the Insurance Code suggests that a complaint to the commissioner is exclusive of any other remedy that might be available to the consumer, including remedies otherwise available in judicial proceedings.

**CA(17)** [  ] (17)**Election of Remedies § 1—Remedial Scheme—Exclusivity—Scope of Recourse.**

In evaluating whether a remedial scheme was intended to be exclusive, the court may consider the scope of the recourse it affords. Exhaustion of a remedy prior to pursuing a civil suit may not be required if the relief available is materially incomplete.

**CA(18)** [  ] (18)**Insurance Companies § 2—Regulation—Power of Insurance Commissioner—Restitution.**

[Gov. Code, § 11519.1](#), authorizes an order of restitution only in a very narrow subset of proceedings, those involving a decision rendered against a licensee under article 1 (commencing with [Gov. Code, § 11700](#)) of chapter 4 of division 5 of the Vehicle Code ([Gov. Code, § 11519.1, subd. \(a\)](#)). The Government Code and the Insurance Code provision incorporating its procedures by reference do not grant the Insurance Commissioner any power to order restitution to insureds.

**CA(19)** [  ] (19)**Abstracters and Title Insurers § 6—Title Insurers—Regulation—Conflict or Overlap—Noninsurance Laws.**

[Ins. Code, § 12414.29](#), governs the relationship between division 2, part 6, chapter 1, article 5.5 of the Insurance Code and other parts of the Insurance Code and resolves any conflict or overlap by specifying that those provisions specific to title insurance, rather than insurance generally, should govern unless another provision of the Insurance Code explicitly specifies otherwise. [Section 12414.29](#) does not govern the relationship between the provisions of article 5.5 and other noninsurance laws, such as the unfair competition law.

**CA(20)** [ ] (20)**Statutes § 19—Construction—Insurance and Noninsurance Laws—Interplay.**

Considered side by side, [Ins. Code, §§ 1860.1](#) and [1860.2](#), are naturally read to regulate distinct spheres. [Section 1860.1](#) governs the interplay between the insurance chapter and other noninsurance laws. [Section 1860.2](#), in contrast, deals with the interplay between the insurance chapter and other insurance-specific laws.

[\*109] **CA(21)** [ ] (21)**Statutes § 19—Construction—Administrative Agency's Interpretation—Deference.**

An administrative agency's interpretation of statutes regulating the extent of its power and responsibilities is entitled to a measure of respect.

**CA(22)** [ ] (22)**Insurance Companies § 12—Insurance Commissioner—Authority—State Antitrust and Unfair Competition Law.**

State antitrust and unfair competition law may in some instances be superseded, but only to the extent specific provisions of the Insurance Code authorize some practices and as to others give the Insurance Commissioner authority to determine the propriety of the conduct.

**CA(23)** [ ] (23)**Abstracters and Title Insurers § 9—Title Insurers—Liability—Unfiled Rate.**

The Legislature, in crafting the various provisions of the scheme regulating title insurance, has made the relevant decisions concerning the appropriate spheres for courts and the Insurance Commissioner. The text of the provisions it chose to adopt does not extend administrative exclusivity to circumstances in which a rate was required to be filed with, but was never filed with, the commissioner. Nothing in the statutory scheme forecloses a court from considering a claim that an insurer failed to meet its threshold obligation to file a rate and then charged the rate anyway.

**CA(24)** [ ] (24)**Abstracters and Title Insurers § 9—Title Insurers—Liability—Unfiled Rate—Remedies.**

Charging an unfiled rate is not an act done pursuant to the authority conferred by [Ins. Code, § 12401 et seq. \(Ins. Code, § 12414.26\)](#). It is a violation of the express terms of the Insurance Code. Nor does any aspect of other provisions in the chapter regulating title insurance grant to the Insurance Commissioner exclusive jurisdiction to address consumer challenges to unfiled rates. [Ins. Code, § 12414.13](#), supplies an administrative remedy, but it is not exclusive of other remedies otherwise available in the courts.

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11 Cal. 5th 104, \*109 482 P.3d 989, \*\*989 276 Cal. Rptr. 3d 209, \*\*\*209 2021 Cal. LEXIS 1914, \*\*\*\*1

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**Judges:** Opinion by Kruger, J., with Cantil-Sakauye, C. J., Corrigan, Liu, Cuéllar, Groban, and Jenkins, JJ., concurring.

**Opinion by:** Kruger, J.

## Opinion

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[\*\*\*213] [\*\*992] **KRUGER, J.**—The Insurance Code requires title insurers and title companies to file most rates with the Insurance Commissioner before charging those rates to consumers. ([Ins. Code, §§ 12401.1, 12401.7, 12414.27](#)) The issue in this case is whether, if a title insurer charges rates without filing them, a consumer can challenge the charges as unlawful in court. The insurer in this case argues the answer is no for two reasons. First, it asserts entitlement to immunity under a provision barring suits under noninsurance laws for any “act done, action [\*\*\*3] taken, or agreement made pursuant to the authority conferred” by the rate-filing statutes. (*Id.*, § [12414.26](#)) Second, it argues that under other provisions of the Insurance Code, unfiled-rate claims are committed to the exclusive jurisdiction of the Insurance Commissioner.

**HN1** **CA(1)** (1) We reject both arguments. The statutory immunity for “act[s] done … pursuant to the authority conferred” ([Ins. Code, § 12414.26](#)) by the [\*111] rate-filing statutes does not shield title insurers from suit for charging unauthorized rates, and the Insurance Commissioner does not have exclusive jurisdiction over such claims. We reverse the judgment of the Court of Appeal, which reached the opposite conclusion on both questions, and remand for further proceedings.

### I.

When plaintiff Manny Villanueva (Villanueva) and his wife Sonia refinanced the mortgage on their home, defendant Fidelity National Title Company (Fidelity) handled the escrow and Fidelity National Title Insurance Company supplied title insurance. For its services, Fidelity charged the Villanuevas an escrow fee, overnight delivery fee, courier fee, and draw deed fee (i.e., a fee for preparing a new deed).

Villanueva later sued Fidelity, asserting that the delivery, courier, and draw deed fees [\*\*\*4] added to the Villanuevas' escrow statement were illegal because they had never been filed with the Insurance Commissioner (Commissioner). (See [Ins. Code, §§ 12401.7](#) “[No title insurer … shall use any rate in the business of title insurance

... prior to the filing" and public display of the rate], [12414.27.](#)) The original complaint alleged a range of common law claims and a statutory claim under the unfair competition law. ([Bus. & Prof. Code, § 17200 et seq.](#); UCL.)<sup>1</sup> Subsequent motions eliminated the common law claims, leaving only the UCL claim. Villanueva sought to certify a class of similarly [\[\\*\\*993\]](#) situated consumers, and the court granted the motion.

Following a bench trial, the court determined that Fidelity was required to file its rates with the Commissioner, that document delivery was a service for which a rate filing was required, and that Fidelity had not filed its delivery service rate. The court further determined that, for the first two years of the class period, Fidelity had no rate on file for drawing deeds or document preparation, and thus during that [\[\\*\\*\\*214\]](#) period, the fee for drawing up a deed was also illegal.

The trial court rejected Fidelity's argument that it should be held immune from Villanueva's suit under [Insurance Code section 12414.26 \(section 12414.26\)](#). The court reasoned [\[\\*\\*\\*\\*5\]](#) that the section insulates from suit only those actions that are authorized by relevant provisions of the Insurance Code. [\[\\*112\]](#) Because those provisions do not authorize charging unfiled rates, [section 12414.26](#) immunity did not apply.

Based on its findings, the trial court granted the class injunctive relief. But it denied restitution on the ground that the rates charged were disclosed to and approved by Villanueva and other class members, who received the benefit of their bargain, the services for which they paid.<sup>2</sup>

Both sides appealed. The Court of Appeal reversed in part and ordered the trial court to enter judgment dismissing the suit. ([Villanueva v. Fidelity National Title Co. \(2018\) 26 Cal.App.5th 1092, 1136 \[237 Cal. Rptr. 3d 702\]](#).) It concluded the class claims were barred for two independent reasons. First, reversing the trial court, the Court of Appeal held that Fidelity was in fact immune from Villanueva's suit under [section 12414.26](#). Invoking language from [Quelimane Co. v. Stewart Title Guaranty Co. \(1998\) 19 Cal.4th 26 \[77 Cal. Rptr. 2d 709, 960 P.2d 513\]](#) (Quelimane), the Court of Appeal reasoned that immunity under the statute extends to all "ratemaking-related activities," a category that includes the charging of unfiled rates. ([Villanueva, at p. 1124](#), quoting [Quelimane, at p. 46](#).) Second, the court held that the statutory scheme affords consumers charged unfiled rates only one avenue of redress: an administrative complaint submitted to the [\[\\*\\*\\*\\*6\]](#) Commissioner pursuant to Insurance Code, division 2, part 6, chapter 1, article 6.7 (article 6.7) ([Ins. Code, §§ 12414.13–12414.19](#)), part of the title insurance chapter. The Court of Appeal concluded the trial court therefore lacked jurisdiction to consider the merits of Villanueva's suit. ([Villanueva, at pp. 1126–1128](#).)

We granted review to consider both components of the Court of Appeal's ruling.

## II.

[HN2](#) [CA\(2\)](#) (2) Title insurance "is a customary incident of practically every California real estate transaction," including a sale or refinancing. ([Chicago Title Ins. Co. v. Great Western Financial Corp. \(1968\) 69 Cal.2d 305, 314 \[70 Cal. Rptr. 849, 444 P.2d 481\]](#); see 3 Miller & Starr, Cal. Real Estate (4th ed. 2020) § 7:1, pp. 7-13 to 7-14.) Title insurers insure "the record title of real property for persons with some interest in the estate, including owners, occupiers, and lenders." ([FTC v. Ticor Title Ins. Co. \(1992\) 504 U.S. 621, 625 \[119 L. Ed. 2d 410, 112 S. Ct. 2169\]](#).) A title insurance policy is not a guarantee as to the state of the property's title. ([Quelimane, supra, 19 Cal.4th at p. 41](#); [Siegel v. Fidelity Nat. Title Ins. Co. \(1996\) 46 Cal.App.4th 1181, 1191 \[54 Cal. Rptr. 2d \[\\*113\] 84\]](#).) It instead offers indemnification to the insured against many losses arising from title defects not disclosed in the title policy or

<sup>1</sup> "The UCL prohibits, and provides civil remedies for, unfair competition, which it defines as 'any unlawful, unfair or fraudulent business act or practice.' [Citation.] Its purpose 'is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services.'" ([Kwikset Corp. v. Superior Court \(2011\) 51 Cal.4th 310, 320 \[120 Cal. Rptr. 3d 741, 246 P.3d 877\]](#).)

<sup>2</sup> The trial court's ruling denying restitution is not before us, and we express no views concerning its correctness.

report, as well as errors by the entity performing the title search. ([Ins. Code, §§ 104, 12340.1, 12340.2](#); see [Ticor Title, at pp. 625–626](#).)

**HN3** [↑] **CA(3)** [↑] (3) Title insurance differs in some respects from other forms of insurance. [\*\*\*215] While most other forms of insurance provide protection against future loss, title insurance instead relates to the past; it protects against undisclosed encumbrances and defects in title [\*\*\*\*7] that exist at the time the policy is issued. ([Quelimane, supra, 19 Cal.4th at p. 41](#); [\*\*994] [King v. Stanley \(1948\) 32 Cal.2d 584, 590 \[197 P.2d 321\]](#).) Thus, rather than requiring periodic, ongoing premiums to obtain continuing future coverage, title insurance requires a one-time payment ([Wolschlager v. Fidelity National Title Ins. Co. \(2003\) 111 Cal.App.4th 784, 789 \[4 Cal. Rptr. 3d 179\]](#)) compensating for the risk assumed and the services rendered in connection with researching and preparing the policy (see [Ins. Code, § 12340.7](#)). Notwithstanding these differences, title insurance and title insurance rates are subject to regulation by the Commissioner, just like more classical forms of insurance and insurance premiums. (See [Ins. Code, §§ 12340–12418.4](#).)

The work involved in supplying a title insurance policy is often divided between the title insurer and other entities. Fidelity is what is known as an “underwritten title company,” meaning a company that conducts the title search and prepares a preliminary title report and may also collect fees and issue the policy on behalf of the title insurer. (See [Ins. Code, §§ 12340.4, 12340.5](#); [Title Ins. Co. v. State Bd. of Equalization \(1992\) 4 Cal.4th 715, 720 \[14 Cal. Rptr. 2d 822, 842 P.2d 121\]](#).) For the regulatory purposes at issue here, title insurers and underwritten title companies are treated alike. (See, e.g., [Ins. Code, §§ 12401.1, 12401.2, 12401.7, 12401.71](#).) For convenience, therefore, we will refer to both as simply “title insurers.”

**HN4** [↑] **CA(4)** [↑] (4) The Insurance Code requires all title insurers to file a schedule of their rates with the Commissioner. ([Ins. Code, § 12401.1](#).) [\*\*\*8] The filing requirement extends to any rate imposed as part of “the business of title insurance” (*id.*, [§ 12401.7](#)), which includes “any service in conjunction with the issuance ... of a title policy including but not limited to the handling of any escrow, settlement or closing in connection therewith” (*id.*, [§ 12340.3, subd. \(c\)](#)).<sup>3</sup> Once rates are filed, regulated entities are required to wait 30 days before using them. ([Ins. Code, §§ 12401.1, 12401.7](#).) This regulatory approach—commonly known as “file and use”—allows entities to implement their filed rates without the need for formal prior approval. (See [McCray v. Fidelity National Title Ins. Co. \(D.Del. 2009\) 636 F.Supp.2d 322, 325](#) [in a [\*114] “file and use’ state ... the insurers file their rates with the [Department of Insurance] and begin to charge them after the effective date stated in their filings, unless the Commissioner disapproves the rates”]; Quiner, *Title Insurance and the Title Insurance Industry* (1973) 22 Drake L.Rev. 711, 724.)

The Legislature first established this system of title insurance rate regulation in 1973. Although voters would later require the Commissioner to affirmatively approve most other insurance rates before they could take effect Prop. 103, as approved by voters, Gen. Elec. (Nov. 8, 1988); see [Amwest Surety Ins. Co. v. Wilson \(1995\) 11 Cal.4th 1243, 1259 \[48 Cal. Rptr. 2d 12, 906 P.2d 1112\]](#)), they expressly exempted title insurance from this prior-approval [\*\*\*9] approach ([Ins. Code, §§ 1851, subd. \(d\)](#), [1861.13](#)). The system in place today is thus the same file-and-use system the Legislature originally chose in 1973.

[\*\*\*216] The issue in this case concerns the remedies available to a consumer when a title insurer uses rates that it has not filed. Fidelity argues, and the Court of Appeal agreed, that the relevant statutory provisions leave no room for a consumer to sue based on unfiled-rate charges—both because [section 12414.26](#) immunizes their ratemaking from civil suit under noninsurance laws and because administrative complaints to the Commissioner constitute the exclusive avenue for consumer relief. We consider each argument in turn.

### III.

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<sup>3</sup> There is an exception for “miscellaneous charges.” ([Ins. Code, § 12340.7](#).) This exception is not at issue here.

**A.**

**HN5** [↑] **CA(5)** [↑] (5) To determine the scope of the immunity afforded by [section 12414.26](#), we begin, as always, with the text, which affords the best guide to the Legislature's intent. (See, e.g., [McLean v. State of California \(2016\) 1 Cal.5th 615, 622 \[206 Cal. Rptr. 3d 545, \\*\\*\\*995\] 377 P.3d 796](#); [Tonya M. v. Superior Court \(2007\) 42 Cal.4th 836, 844 \[69 Cal. Rptr. 3d 96, 172 P.3d 402\]](#).) The statute provides in full: "No act done, action taken, or agreement made pursuant to the authority conferred by Article 5.5 (commencing with [Section 12401](#)) or Article 5.7 (commencing with [Section 12402](#)) of this chapter shall constitute a violation of or grounds for prosecution or civil proceedings under any other law of this state heretofore or hereafter enacted which does not specifically refer to insurance." ([§ 12414.26](#).) Villanueva [\*\*\*\*10] argues that this provision extends immunity only to conduct authorized by the relevant articles and that the unfiled rates challenged here are not authorized. Fidelity counters that the conduct here is authorized by the referenced articles. But it also contends that the provision in any event extends immunity beyond conduct *authorized* by the relevant articles to conduct *regulated* by the relevant articles. [\*115]

**CA(6)** [↑] (6) To evaluate Fidelity's argument that Villanueva's suit targets conduct authorized by Insurance Code, division 2, part 6, chapter 1, articles 5.5 (article 5.5) and 5.7 (article 5.7), we begin by examining what it is, precisely, that these articles authorize. Article 5.5 ([Ins. Code, §§ 12401–12401.10](#)) is the article directly relevant here. It governs title insurance rate filing and regulation. **HN6** [↑] Among other things, article 5.5 requires title insurers to "establish basic classifications of coverages and services" as a basis for their rates ([Ins. Code, § 12401.2](#); see *id.*, [§ 12401.3, subd. \(d\)](#)) and to then file those rates with the Commissioner (*id.*, [§ 12401.1](#)). The article forbids rates that are excessive, inadequate, or discriminatory. (*Id.*, [§ 12401.3, subd. \(a\)](#).) It generally prohibits title insurers from charging unfiled rates or rates before their effective date, 30 days after filing. (*Id.*, [§§ 12401.1, 12401.7](#); see *id.*, [§§ 12401.71, 12401.8](#) [specifying exceptions].) In addition, article [\*\*\*\*11] 5.5 permits insurers to consult with each other and with industry organizations and share information and loss experience data (*id.*, [§ 12401.4](#)), data that is central to the insurers' ability to set rates (see [State Comp. Ins. Fund v. Superior Court \(2001\) 24 Cal.4th 930, 939 \[103 Cal. Rptr. 2d 662, 16 P.3d 85\]](#) (*State Fund*) ["As a practical matter the business of insurance cannot be conducted and maintained upon a sound basis unless insurance carriers discuss and pool their experience for rate making purposes" (quoting Joint Interim Legis. Com., Rep. on Insurance Reg., 1 Sen. J. Appen. (1947 Reg. Sess.) p. 5)]). Finally, the article permits entities under the same management to act in concert. ([Ins. Code, § 12401.6](#).)

Article 5.7 ([Ins. Code, §§ 12402–12402.2](#)) regulates insurance advisory organizations, a term defined to include entities that "collect[] and furnish[] to [their] members or insurance supervisory officials loss and expense statistics or other statistical information" [\*\*\*217] and data relating to the business of title insurance." (*Id.*, [§ 12340.8](#).) Through such organizations, insurers may obtain a much deeper pool of loss experience data than they would otherwise have at their disposal.

**CA(7)** [↑] (7) Fidelity argues that because article 5.5 regulates rates for the business of title insurance, the act of charging rates—including unfiled rates—is an act "done ... [\*\*\*\*12] pursuant to the authority conferred by Article 5.5." ([§ 12414.26](#).) But article 5.5 is more narrowly drawn. **HN7** [↑] It contemplates that title insurers may: (1) charge a filed rate after its effective date ([Ins. Code, §§ 12401.1, 12401.7](#)); (2) charge a filed rate before its effective date if the new rate results in a rate reduction (*id.*, [§ 12401.71, subd. \(a\)](#)); and (3) for unusual risks or services, impose surcharges in excess of those set forth in the rate filing, provided the surcharges are reasonable and approved in writing in advance (*id.*, [§ 12401.8](#)). Setting aside "miscellaneous charges" (*id.*, [§ 12340.7](#)), the imposition of any charge that does not fit within these categories would not be authorized by article 5.5. The rates charged here, which were never filed [\*116] with the Commissioner, do not fall into any of these categories. Far from being authorized, they are expressly prohibited. (See [Ins. Code, §§ 12401.1, 12401.7, 12414.27](#).)

**CA(8)** [↑] (8) Fidelity's alternative contention—that immunity extends not just to conduct authorized by article 5.5 but also to any matter regulated by the article—is plainly contradicted by the language of the statute. [Section 12414.26](#) extends immunity only to acts done, actions taken, or agreements made "*pursuant to the authority*

conferred by Article [\*\*996] 5.5 ... or Article 5.7." (Italics added.) If [\*\*\*\*13] the Legislature had wished to adopt Fidelity's desired approach, it could have simply written, "No matter regulated under Article 5.5 or Article 5.7" shall be a basis for suit under a law not specifically referencing insurance. The Legislature instead chose to include language explicitly limiting immunity to acts authorized by, rather than merely regulated under, the relevant articles, and we must give effect to that choice. [HN8](#) (E.g., [Tuolumne Jobs & Small Business Alliance v. Superior Court \(2014\) 59 Cal.4th 1029, 1038 \[175 Cal. Rptr. 3d 601, 330 P.3d 912\]](#) [when possible, "courts should give meaning to every word of a statute"].)<sup>4</sup>

Prior cases reinforce our understanding of [section 12414.26](#) immunity. [Section 12414.26](#) is not the only provision of its kind; it is one of four nearly identical immunity provisions scattered through the Insurance Code that supplement limited state regulation with partial immunity for specific categories of insurance. (See [Ins. Code, §§ 795.7, 1860.1, 11758, 12414.26](#).) These statutes address the same class of subjects and share a common purpose, and so their parallel language should be construed in like fashion. ([People v. Villatoro \(2012\) 54 Cal.4th 1152, 1161 \[144 Cal. Rptr. 3d 401, 281 P.3d 390\]](#); accord, e.g., [People v. Tran \(2015\) 61 Cal.4th 1160, 1167–1168 \[191 Cal. Rptr. 3d 251, 354 P.3d 148\]](#).) Those courts that have addressed the issue have consistently understood the language of these provisions to immunize acts affirmatively authorized by the relevant provisions of the Insurance Code, as opposed to acts that are [\*\*\*\*14] merely regulated under those provisions.

[\*\*\*218] In *State Fund*, *supra*, 24 Cal.4th 930, for example, we emphasized that by the express terms of [Insurance Code section 11758](#), immunity extends only to acts taken and agreements made "pursuant to the authority conferred by this article" (*State Fund*, at p. 936, italics added, quoting [Ins. Code, § 11758](#)), not to any act taken or agreement made "pursuant to this article" (*State Fund*, at p. 936). We identified what the relevant article authorized—namely, [\*117] specific forms of cooperation between insurers—and concluded that immunity applied only if the challenged wrongdoing, the miscalculation and misreporting of loss information, was "related to such authorized cooperation." (*Ibid.*) Because the alleged wrongdoing was not related to any such authorized cooperation, the insurer was not entitled to immunity.<sup>5</sup>

To similar effect is [Fogel v. Farmers Group, Inc. \(2008\) 160 Cal.App.4th 1403 \[74 Cal. Rptr. 3d 61\]](#), in which insurance exchanges sought immunity under a different parallel statute, [Insurance Code section 1860.1 \(section 1860.1\)](#), for their collection of certain fees. Pointing to the plain statutory text, the Court of Appeal explained that the collection of fees would be immune from suit only if it was "an act done or action taken under the authority conferred by" the relevant chapter. ([Fogel](#), at p. 1416.) Because the defendants could "not identify any specific provision [\*\*\*\*15] [of the chapter] that authorize[d] them to collect" the fees, no immunity applied. (*Ibid.*; see [id. at pp. 1416–1417](#); accord, [MacKay v. Superior Court \(2010\) 188 Cal.App.4th 1427, 1443 \[115 Cal. Rptr. 3d 893\] \[§ 1860.1 "does not exempt all acts done 'pursuant to' the chapter—which is to say, all ratemaking acts—but instead exempts acts done 'pursuant to the authority conferred by this chapter'"\]](#); [\*\*997] [MacKay](#), at p. 1449 [immunity "does not extend to insurer conduct *not* taken pursuant to that authority"].)

[HN10](#) [CA\(10\)](#) (10) Much as in these prior cases, we see nothing in the plain language of [section 12414.26](#) that supports Fidelity's expansive view of its immunity from suit. The provision confers immunity for acts, actions, or agreements authorized by articles 5.5 and 5.7. This statutory immunity does not extend to the charging of unfiled

<sup>4</sup> [HN9](#) [CA\(9\)](#) (9) Limiting the immunity conveyed by [section 12414.26](#) to the scope expressly granted by its terms also conforms to the "general rule of statutory construction ... that a legislative grant of privilege or immunity is strictly construed against the grantee." ([Katsaris v. Cook \(1986\) 180 Cal.App.3d 256, 265 \[225 Cal. Rptr. 531\]](#), citing 3 Sutherland, Statutory Construction (4th ed. 1974) § 63.02, p. 81.)

<sup>5</sup> Fidelity tries to distinguish *State Fund* on the ground that the article prescribing the scope of immunity for [Insurance Code section 11758](#) differs from the underlying articles determining the scope of immunity under [section 12414.26](#). While that may be, the relevance of **State Fund** does not depend on any substantive similarity in what it is those underlying articles authorize, but rather on the point that each statute extends immunity only to what is authorized—whatever that may be—and not to acts that are related to, but unauthorized by, the underlying article.

rates because those articles confer no such authority; on the contrary, the referenced articles expressly prohibit the charging of unfiled rates.

We consider the text clear on this point. But to the extent any uncertainty remains, we may also look to the provision's history. (See, e.g., *In re Marriage of Davis* (2015) 61 Cal.4th 846, 853–862 [189 Cal. Rptr. 3d 835, 352 P.3d 401]; *ABC Internat. Traders, Inc. v. Matsushita Electric Corp.* (1997) 14 Cal.4th 1247, 1258–1262 [61 Cal. Rptr. 2d 112, 931 P.2d 290].) That history reinforces the conclusion that [section 12414.26](#) was not designed to immunize title insurers for any and all activities related to rate setting—including, as Fidelity would have it, charging unfiled rates.

[\*118]

[Section 12414.26](#) and the related immunity [\*\*\*\*16] provisions (see *Ins. Code, §§ 795.7, 1860.1, [\*\*\*219] 11758*) were a byproduct of legal changes in the regime governing the application of [antitrust law](#) to the insurance field. To understand these provisions in historical context thus requires a brief excursion into the development of that body of law.

In its infancy, [antitrust law](#) was generally assumed not to apply to the insurance industry. In 1869, the United States Supreme Court had held that insurance contracts were neither interstate nor commercial transactions for purposes of the federal commerce clause. (*Paul v. Virginia* (1869) 75 U.S. 168, 182–185 [19 L.Ed. 357].) Though *Paul* did not expressly address the question, the implications for federal insurance regulation seemed clear: If an insurance contract was not interstate commerce, then insurers could not be subject to federal regulation under the commerce clause. Thus, when Congress later invoked its commerce clause power to enact the [Sherman Act](#) (15 U.S.C. § 1 et seq.) and other antitrust legislation, the insurance industry generally proceeded on the assumption that the industry lay beyond the reach of the laws' restrictions. (Carlson, *The Insurance Exemption from the Antitrust Laws* (1979) 57 Tex. L.Rev. 1127, 1130.) The same assumption applied to this state's antitrust laws, which similarly trained [\*\*\*\*17] their sights on combinations operating to restrain "commerce." (Stats. 1907, ch. 530, § 1, p. 984; see *Speegle v. Board of Fire Underwriters* (1946) 29 Cal.2d 34, 43 [172 P.2d 867] (*Speegle*).) This assumption led insurers to engage in the common industry practice of sharing claims history information to assist in setting premiums, free from worries about potential liability for engaging in concerted action. (Cf. *Group Life & Health Ins. Co. v. Royal Drug Co.* (1979) 440 U.S. 205, 221 [59 L. Ed. 2d 261, 99 S. Ct. 1067] [noting "the widespread view that it is very difficult to underwrite risks in an informed and responsible way without intra-industry cooperation"]; *Speegle*, at p. 45; State Deputy Insurance Comr. J. R. Maloney, letter to Governor Earl Warren re Sen. Bill No. 1572 (1947 Reg. Sess.) June 10, 1947, p. 1.)

The assumption was proved false in 1944, however, when the United States Supreme Court decided [U.S. v. Underwriters Assn.](#) (1944) 322 U.S. 533 [88 L.Ed. 1440, 64 S.Ct. 1162]. In that case, the court revisited and overruled *Paul*, concluding that insurance qualified as interstate commerce after all and that nothing in the Sherman Act exempted insurers from its reach. (*Underwriters Assn.*, at pp. 553, 560–561.) This court shortly followed suit, concluding that state [antitrust law](#) likewise contained no exemption for insurers and so they could be found liable under the state's principal [antitrust law](#), the [Cartwright Act](#). (*Speegle*, supra, 29 Cal.2d at pp. 43–46; see *Bus. & Prof. Code, §§ 16700–16758*.)

These developments significantly altered the insurance landscape. Newly [\*\*\*\*18] faced with significant antitrust exposure, insurers quickly sought both federal [\*119] and state legislative relief. Their efforts were successful. In 1945, Congress enacted the [McCarran-Ferguson Act](#), which provided that states would continue to play the primary role in regulating the insurance industry. (15 U.S.C. §§ 1011–1015; [\*\*998] see *Group Life & Health Ins. Co. v. Royal Drug Co.*, supra, 440 U.S. at pp. 217–220.) The federal statute further declared a temporary moratorium on applying federal [antitrust law](#) to the insurance industry (15 U.S.C. § 1013), with application of federal law to resume only to the extent the insurance industry was not regulated in a given state by the end of the moratorium period (*id.*, § 1012(b)). In response, the California Legislature passed the McBride-Grunsky Insurance Regulatory Act of 1947 (McBride-Grunsky Act). (Stats. 1947, ch. 805, pp. 1896–1908; [\*\*\*220] *State Fund*, supra, 24 Cal.4th at p. 938.) By supplying rudimentary regulation of certain lines of insurance, the McBride-Grunsky Act ensured that insurers would remain exempt from federal antitrust regulation. (See *State Fund*, at p. 939; *Donabedian v. Mercury*

[Ins. Co. \(2004\) 116 Cal.App.4th 968, 980 \[11 Cal. Rptr. 3d 45\]](#); State Deputy Insurance Comr. J. R. Maloney, letter to Governor Earl Warren re Sen. Bill No. 1572, *supra*, June 10, 1947, pp. 1–2.)<sup>6</sup>

The immunity language now found in [section 12414.26](#) traces its origins to this early legislative effort at state insurance regulation. One of the stated [\*\*\*\*19] purposes of the McBride-Grunsky Act was to authorize and define the permissible extent of “cooperation between insurers in rate making and other related matters.” ([Ins. Code, former § 1850](#), added by Stats. 1947, ch. 805, § 1, p. 1896 and repealed by Prop. 103, § 7, as approved by voters, Gen. Elec. (Nov. 8, 1988).) Former section 1853, for example, permitted insurers to share information and act in concert when setting rates, while former [section 1853.6](#) largely prohibited agreements to adhere to the same rates. (Ins. Code, former § 1853, added by Stats. 1947, ch. 805, § 1, p. 1898 and repealed by Prop. 103, § 7, as approved by voters, Gen. Elec. (Nov. 8, 1988); [Ins. Code, former § 1853.6](#), added by Stats. 1947, ch. 805, § 1, p. 1899 and repealed by Prop. 103, § 7, as approved by voters, Gen. Elec. (Nov. 8, 1988).) In tandem with these provisions, the Legislature conferred immunity on insurers who engaged in such authorized activities. [Section 1860.1](#) provides: “No act done, action taken or agreement made pursuant to the authority conferred by this [\*120] chapter<sup>7</sup> shall constitute a violation of or grounds for prosecution or civil proceedings under any other law of this State heretofore or hereafter enacted which does not specifically refer to insurance.”

In later years, [\*\*\*\*20] the Legislature would enact several additional pieces of similar legislation regulating additional lines of insurance that had been excluded from the McBride-Grunsky Act. Each time it included a similar immunity provision. First, in 1951, acting to address concerns that workers' compensation insurers working in concert might be subject to federal antitrust prohibitions, the Legislature enacted workers' compensation insurance legislation paralleling the McBride-Grunsky Act. ([Ins. Code, §§ 11750–11759.2; State Fund, supra, 24 Cal.4th at pp. 939–940.](#)) The legislation included new [Insurance Code section 11758](#), modeled on [section 1860.1](#): “No act done, action taken or agreement made pursuant to the authority conferred by this [\*221] article shall constitute a violation of or grounds for prosecution or civil proceedings under any other law of this State heretofore or hereafter enacted which does not specifically refer to insurance.” ([Ins. Code, § 11758](#).) And in 1963, as part of a new article in the Insurance [\*\*999] Code ([§§ 795–795.7](#)) aimed at improving insurance options for the elderly, the Legislature enacted [Insurance Code section 795.7](#): “No act done, action taken or agreement made pursuant to the authority conferred by this article shall constitute a violation of or grounds for prosecution or civil proceedings under any other law of this State heretofore or hereafter [\*\*\*\*21] enacted which does not specifically refer to insurance.”

Finally, in 1973, the Legislature turned to title insurance. Because the McBride-Grunsky Act expressly exempted this category ([Ins. Code, § 1851, subd. \(d\)](#)), title insurance rates were to that point unregulated.<sup>8</sup> With title insurers facing suits alleging state antitrust violations, the industry sponsored a measure that would extend McBride-Grunsky-Act-style rate regulation to title insurance, while supplying, as the McBride-Grunsky Act had, future

<sup>6</sup>The McBride-Grunsky Act was designed only to “enact[] the minimal regulation required to exempt California insurance from federal [antitrust law](#).” ([King v. Meese \(1987\) 43 Cal.3d 1217, 1240 \[240 Cal. Rptr. 829, 743 P.2d 889\]](#) (conc. opn. of Broussard, J.).) The law made California “a so-called ‘open rate’ state,” with rates “set by insurers without prior or subsequent approval by the ... Commissioner.” (*Id. at p. 1221* (maj. opn.).) Indeed, the act prohibited the Commissioner from fixing rates, relying instead on the open market to dictate rates. (See Ins. Code, former § 1850, added by Stats. 1947, ch. 805, § 1, p. 1896 and repealed by Prop. 103, § 7, as approved by voters, Gen. Elec. (Nov. 8, 1988); [20th Century Ins. Co. v. Garamendi \(1994\) 8 Cal.4th 216, 287, fn. 15, 300 \[32 Cal. Rptr. 2d 807, 878 P.2d 566\]](#).) Under this regime, “California ha[d] less regulation of insurance than any other state ... .” ([Garamendi, at p. 240](#).)

<sup>7</sup>Division 1, part 2, chapter 9 of the [Insurance Code \(former §§ 1850–1860.3\)](#), i.e., the chapter added by the McBride-Grunsky Act.

<sup>8</sup>See Department of Finance, Enrolled Bill Report on Senate Bill No. 1293 (1973–1974 Reg. Sess.) prepared for Governor Reagan (Sept. 25, 1973) page 1; Legislative Analyst, analysis of Senate Bill No. 1293 (1973–1974 Reg. Sess.) as amended August 27, 1973, page 1.

immunity from antitrust liability for certain concerted actions.<sup>9</sup> To that end, [\*121] the Legislature largely copied the same immunity language it had used in the McBride-Grunsky Act and subsequent legislation.<sup>10</sup>

As this history reveals, and as numerous courts have observed over time, the language of these statutes was originally drafted to ensure that insurers would not be subject to antitrust liability for consulting with each other before establishing their rates. (See State Deputy Insurance Comr. J. R. Maloney, letter to Governor Earl Warren re Sen. Bill No. 1572, *supra*, June 10, 1947, pp. 1–2; [\*\*\*222] Deputy Atty. Gen. Harold B. Haas, interdepartmental communication to Governor Earl Warren re Sen. Bill No. 1572 (1947 Reg. [\*\*\*22] Sess.) June 11, 1947, pp. 3, 13; *State Fund*, *supra*, 24 Cal.4th at pp. 938–940; *Fogel v. Farmers Group, Inc.*, *supra*, 160 Cal.App.4th at p. 1410; *Donabedian v. Mercury Ins. Co.*, *supra*, 116 Cal.App.4th at p. 990.) The available committee reports concerning section 12414.26 express a parallel purpose—to extend the same McBride-Grunsky-Act-style rate regulation to title insurance while permitting the use of industry rating organizations and the exchange of loss experience data. (Sen. Insurance & Financial Institutions Com., Analysis of Sen. Bill No. 1293 (1973–1974 Reg. Sess.) as amended June 12, 1973, pp. 2–3; Assem. Financial & Insurance Com., Analysis of Sen. Bill No. 1293, *supra*, as amended Aug. 27, 1973; Dept. of Insurance, Analysis of Sen. Bill No. 1293 (1973–1974 Reg. Sess.) as amended Aug. 27, 1973; Sen. George N. Zenovich, author of Sen. Bill No. 1293, letter to [\*\*1000] Governor Ronald Reagan, *supra*, Sept. 18, 1973, p. 1.)

Read against the backdrop of this history, section 12414.26 is best understood as an effort to reconcile the tension between what is explicitly allowed by articles 5.5 (*Ins. Code, § 12401 et seq.*) and 5.7 (*Ins. Code, § 12402 et seq.*) and what is potentially disallowed by other noninsurance statutes, most prominently the Cartwright Act and other antitrust acts. It creates a safe [\*122] harbor for actions authorized by articles 5.5 and 5.7 and harmonizes title insurance law with background state laws governing business competition and other matters. The history offers [\*\*\*23] no hint that either section 12414.26 or its predecessor immunity provisions were ever thought to categorically immunize all ratemaking activity—even unauthorized activity—from suit.

Finally, we may consider the views of the Insurance Commissioner himself. (See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7 [78 Cal. Rptr. 2d 1, 960 P.2d 1031] (*Yamaha*) [“an agency's interpretation [of a statute] is one among several tools available to the court”].) The Commissioner is charged by statute with enforcing compliance with the title insurance ratemaking scheme. (See *Ins. Code, §§ 12414.13–12414.31*.) For decades, the Commissioner has consistently maintained the view that section 12414.26 and its parallel statutes do not immunize against civil suit the charging of unauthorized rates, but rather are aimed at concerted activities that

<sup>9</sup> See Assembly Finance and Insurance Committee, Analysis of Senate Bill No. 1293 (1973–1974 Reg. Sess.) as amended August 27, 1973; Senator George N. Zenovich, author of Senate Bill No. 1293 (1973–1974 Reg. Sess.) letter to Governor Ronald Reagan, September 18, 1973, page 1; Assistant Legislative Counsel Sean E. McCarthy, California Land Title Association, letter to Governor Ronald Reagan re Senate Bill No. 1293 (1973–1974 Reg. Sess.) September 17, 1973, pages 1, 3, 5.

<sup>10</sup> As originally introduced, the legislation extended immunity to acts authorized under the title insurance chapter. (Sen. Bill No. 1293 (1973–1974 Reg. Sess.) as amended Aug. 27, 1973, § 15.) Shortly before final passage, the provision was amended to narrow immunity to only those acts authorized by specific articles: “No act done, action taken, or agreement made pursuant to the authority conferred by Article 5.5 (commencing with Section 12401) or Article 5.7 (commencing with Section 12402) of this chapter shall constitute a violation of or grounds for prosecution or civil proceedings under any other law of this state heretofore or hereafter enacted which does not specifically refer to insurance.” (Sen. Bill No. 1293 (1973–1974 Reg. Sess.) as amended Sept. 10, 1973, § 15.)

As noted above (*ante*, p. 114), in 1988, voters passed Proposition 103, an initiative that discarded much of the original McBride-Grunsky Act and replaced it with a drastically revised insurance rate regulation scheme. (See generally *20th Century Ins. Co. v. Garamendi*, *supra*, 8 Cal.4th at pp. 239–246; *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 812–813 [258 Cal. Rptr. 161, 771 P.2d 1247]; *MacKay v. Superior Court*, *supra*, 188 Cal.App.4th at pp. 1445–1446.) But the McBride-Grunsky Act's exemption for title insurance was left in place (see *Ins. Code, §§ 1851, subd. (d)*, *1861.13*; *Calfarm Ins. Co.*, at p. 812, fn. 1), and so these reforms did not alter the framework for title insurance rate regulation, which remains subject to the McBride-Grunsky-Act-style rules specific to title insurance adopted in 1973.

would otherwise be susceptible to challenge under the antitrust laws. (See, e.g., *State Fund, supra*, 24 Cal.4th at p. 940 [relating and giving weight to this position in the context of [Ins. Code, § 11758](#) immunity]; [Donabedian v. Mercury Ins. Co., supra](#), 116 Cal.App.4th at p. 990 [same, in the context of [§ 1860.1](#) immunity]; Gen. Counsel Adam Cole, Dept. of Ins., letter to Chief Justice Ronald M. George, Nov. 19, 2010, pp. 2–3 [presenting Commissioner's position that statutes do not immunize against civil suits challenging individual insurer's rates]; *id.* at pp. 3–4 [recounting repeated instances of previous Commissioners taking the same view as [\*\*\*\*24] far back as 1991].) Acting as an amicus curiae in this case, the current Commissioner maintains the same position, urging that [section 12414.26](#) was intended only to afford "immunity for certain types of concerted ratemaking activity that would otherwise be subject to the Cartwright Act or other antitrust laws" and should not be read to immunize the charging of unfiled rates.

**HN11** [↑] **CA(11)** [↑] (11) These views do not bind us; questions of statutory interpretation are [\*\*\*223] ultimately for this court to decide. (E.g., [Association of California Ins. Companies v. Jones](#) (2017) 2 Cal.5th 376, 389–390 [212 Cal. Rptr. 3d 395, 386 P.3d 1188].) But the Commissioner's interpretation of [section 12414.26](#) is, like interpretive rules generally, due weight and respect insofar as contextual factors suggest that the interpretation rests on institutional expertise giving the Commissioner a "comparative interpretive advantage" and that the interpretation is "probably correct." ([Yamaha, supra](#), 19 Cal.4th at p. 12.) Here, the Commissioner's view is consistent and long-standing, having been maintained by five different Commissioners across a period stretching back nearly 30 years. It has roots in an even longer period of experience overseeing the mechanisms for enforcing insurers' ratemaking and rate-filing obligations. Such a history justifies treating the Commissioner's position with considerable respect. (See [\*\*\*\*25] [Ste. Marie v. Riverside County Regional Park & Open-Space Dist.](#) (2009) 46 Cal.4th 282, 292–293 [93 \*123] Cal. Rptr. 3d 369, 206 P.3d 739; [Yamaha](#), at pp. 13, 14.) **HN12** [↑] **CA(12)** [↑] (12) The Commissioner's views, moreover, draw on the best evidence available from the statutory text and legislative history and align with the conclusions logically inferable from those sources (see [Yamaha](#), at p. 14 [the soundness of an agency's reasoning adds to its power to persuade]). The Commissioner's views thus reinforce our conclusion that [section 12414.26](#) does not immunize title insurers from suits based on the charging of unfiled rates.

Villanueva, the Commissioner, and other amici curiae urge us to hold more broadly that [section 12414.26](#) immunizes insurers *only* against antitrust liability for concerted actions. Their argument raises interpretive [\*\*1001] questions unnecessary to the resolution of this case, and we do not decide them here. (See [Fogel v. Farmers Group, Inc., supra](#), 160 Cal.App.4th at p. 1416 [declining to decide whether immunity extended only to concerted action because even under a broader reading the challenged action was manifestly not within the statutory immunity].)<sup>11</sup> Even if the immunity granted by [section 12414.26](#) extends beyond antitrust laws, nothing in the text, surrounding scheme, or legislative history supports extending the provision to immunize what article 5.5 itself expressly prohibits.

## B.

Fidelity offers several additional arguments in favor of its expansive reading of [section 12414.26](#), but none [\*\*\*26] is persuasive.

First, like the Court of Appeal, Fidelity relies on language in [Quelimane, supra](#), 19 Cal.4th 26. In *Quelimane*, this court reversed a determination that [section 12414.26](#) barred an action based on conspiracy to refuse to issue title insurance policies for certain categories of properties. We explained that the scope of [section 12414.26](#) immunity is limited to actions taken under articles 5.5 and 5.7 and, generally speaking, "Article 5.5 applies only to rate

<sup>11</sup> Concerning the parallel language in a sister statute, the Court of Appeal has observed: "[W]hile the initial motivation behind [Insurance Code section 1860.1](#) may have been exemption from antitrust laws in particular, it was recognized [at the time of enactment] that the language of the exemption was, in fact, broader." ([MacKay v. Superior Court, supra](#), 188 Cal.App.4th at p. 1445.) Neither Villanueva nor the Commissioner addresses whether the language of [section 12414.26](#) sweeps more broadly than concerted action, and we do not attempt to resolve the issue here.

regulation, article 5.7 only to advisory organizations which supply data related to ratemaking.” (*Quelimane, at pp. 44–45.*) [\*\*\*224] Because the “Court of Appeal did not consider the restriction to ratemaking-related activities in *Insurance Code section[] 12414.26*,” it erroneously extended the statutory immunity to an agreement (a conspiracy not to issue policies at all) entirely unrelated to ratemaking. (*Quelimane, at p. 46.*)

[\*124]

Fidelity argues that our description of *section 12414.26* as restricted to ratemaking-related activities should control the outcome here. After all, Fidelity contends, charging unfiled rates is an activity related to ratemaking, even if it is not an “act done … pursuant to the authority conferred by” the ratemaking provisions of article 5.5 or 5.7. (*§ 12414.26.*) Fidelity’s argument overreads *Quelimane* by a fair stretch. *Quelimane* [\*\*\*27] did not purport to cast aside the actual terms of the statute. It merely identified a necessary condition for immunity—that the challenged act, action, or agreement relate to ratemaking, as do articles 5.5 and 5.7—without offering a comprehensive overview of *section 12414.26* immunity. *Quelimane*’s truncated description was more than adequate for purposes of that case, because even when discussed in that fashion, it was apparent that the scope of these articles (loosely speaking, ratemaking) and the allegations of the *Quelimane* complaint (a conspiracy not to issue policies) did not overlap. There was no need to describe the conduct immunized by *section 12414.26* with any greater precision.

Even so, Fidelity would read *Quelimane* as establishing not just a necessary condition for immunity, but a sufficient one: so long as the alleged conduct relates to ratemaking in some way, it automatically is immunized by *section 12414.26*. It is simply a logical fallacy to infer from *Quelimane*’s holding—if conduct does not relate to ratemaking, it cannot be immunized by *section 12414.26*—that if conduct does relate to ratemaking, it necessarily is immunized by *section 12414.26*. *Quelimane* said no such thing, and overreading it in this fashion would lead to results *Quelimane* surely did not intend.

Consider, for example, the case of an insurer that deviates from its filed rates to impose higher rates for African-Americans seeking title insurance for home purchases in particular neighborhoods. Such a policy would surely relate to ratemaking: The insurer effectively has two rate schedules, one for African-Americans and another for [\*\*\*28] those of other races. Such a policy would also be [\*\*1002] clearly illegal—not only under general antidiscrimination laws like the *Unruh Civil Rights Act (Civ. Code, § 51 et seq.)* and the *California Fair Employment and Housing Act (Gov. Code, § 12900 et seq.)*, but also under article 5.5 itself. (*Civ. Code, § 51* [prohibiting racial discrimination in the provision of services by businesses]; Gov. Code, § 12955, subds. (d), (i) [prohibiting racial discrimination by businesses engaged in real estate transactions]; *Ins. Code, § 12401.3, subd. (a)* [“Rates shall not be … unfairly discriminatory”].) Under Fidelity’s view of *section 12414.26* immunity, the illegality would make no difference; a consumer aggrieved by the discriminatory rate could not sue. *Quelimane* is not fairly read to establish such a rule, particularly in the face of clear textual and historical indications that *section 12414.26* immunity was intended to have a much more limited reach.

Fidelity, like the Court of Appeal, also invokes *Walker v. Allstate Indemnity Co. (2000) 77 Cal.App.4th 750 [92 Cal. Rptr. 2d 132]* and *MacKay v. Superior* [\*125] *Court, supra, 188 Cal.App.4th 1427* in support of its proposed reading of *section 12414.26*. (See *Villanueva v. Fidelity National Title Co., supra, 26 Cal.App.5th at pp. 1120–1124.*) [\*\*\*225] Those cases, however, involved challenges to certain insurance rates that were actually filed with and approved by the Commissioner. Specifically, after Proposition 103, insurers were required to file automobile insurance rate applications with the Commissioner and await approval before imposing them. (*Ins. Code, § 1861.05*; see *Calfarm Ins. Co. v. Deukmejian, supra, 48 Cal.3d at p. 813.*) In *Walker* [\*\*\*29] and *MacKay*, the insurers had done so, but were nevertheless being sued for charging these filed and approved rates. The Courts of Appeal concluded the governing immunity statute, *section 1860.1*, “must bar claims based upon an insurer’s charging a rate that has been approved by the commissioner.” (*Walker, at p. 756*; see *MacKay, at p. 1449* [finding “no tort liability for charging a rate that has been approved by the commissioner”].)

Unlike the automobile insurance rates at issue in *Walker* and *MacKay*, title insurance rates need not receive formal approval from the Commissioner, but need only be filed in order to become, after a waiting period, effective. (See *Ins. Code, §§ 12401.1, 12401.2, 12401.7.*) But as the trial court and Court of Appeal concluded, Fidelity did not fulfill even these lesser responsibilities: It did not establish or file certain rates, identify the services covered by

others, or hold off charging rates until after they became effective, and so “failed to comply with [sections 12401.1, 12401.2, and 12401.7](#).<sup>12</sup>” (*Villanueva v. Fidelity National Title Co., supra, 26 Cal.App.5th at p. 1126*.) For this reason, neither Walker nor MacKay can help Fidelity’s case. (See *MacKay v. Superior Court, supra, 188 Cal.App.4th at p. 1449* [distinguishing “cases [in which] the underlying conduct was *not* the charging of an approved rate”]; *Donabedian v. Mercury Ins. Co., supra, 116 Cal.App.4th at p. 992* [distinguishing Walker as involving “a challenge to approved rates”].)

Finally, Fidelity raises [\*\*\*\*30] a practical argument. It notes that [section 12414.26](#) supplies not just immunity from liability but immunity from suit. (See [§ 12414.26](#) [acts that are the subject of immunity shall not “constitute ... grounds for prosecution or civil proceedings”].) Fidelity argues that for any such immunity to be meaningful, it must always be demonstrable at the earliest possible opportunity, i.e., on demurrer. From this premise, Fidelity argues that the substantive standard for when immunity applies must be defined in such a way that its application can be determined at a glance from the pleadings—an imperative that argues in favor of extending immunity to all acts connected with ratemaking.

**CA(13)↑** (13) The argument rests on a flawed premise. **HN13↑** That the Legislature granted insurers immunity from suit for certain acts does not excuse insurers, as the parties claiming entitlement to that protection, from having to demonstrate, with evidence if necessary, that the preconditions for its invocation [\*126] have been met. Qualified immunity, for example, likewise supplies “an *immunity from suit* rather than a mere defense to liability.” (*Mitchell v. Forsyth (1985) 472 U.S. 511, 526 [86 L. Ed. 2d 411, 105 S. Ct. 2806]*.) But the immunity [\*\*1003] attaches only once its basis is apparent; allegations that would defeat qualified immunity will [\*\*\*\*31] allow suit to proceed, and dismissal may in some cases not occur until a motion for summary judgment (see *ibid.*) or later (see, e.g., *Johnson v. Jones (1995) 515 U.S. 304, 317–320 [132 L. Ed. 2d 238, 115 S. Ct. 2151]* [denying interlocutory review of summary judgment denial that required defendants asserting qualified immunity to go to trial]; *Harlow v. Fitzgerald (1982) 457 U.S. 800, 819–820 [73 L. Ed. 2d 396, 102 S. Ct. 2727]* [\*\*\*226] [remanding for lower court to determine whether, in face of claimed qualified immunity, case could go to trial]). That [section 12414.26](#) includes language establishing a broad procedural protection offers no basis to disregard other language in the statute, limiting immunity to any “act done, action taken, or agreement made” pursuant to specific statutory sources of authority ([§ 12414.26](#)), that more narrowly defines the universe of conduct to which it applies. Even so construed, [section 12414.26](#) still provides a basis for bringing a lawsuit to a prompt end, once the statutory prerequisites have been shown.

#### IV.

**CA(14)↑** (14) We turn to Fidelity’s alternative argument that Villanueva’s lawsuit is barred because a proceeding before the Commissioner is a consumer’s exclusive remedy for the charging of an unfiled rate. Notably, Fidelity disavows any argument that this statutory administrative proceeding must be exhausted before filing a suit in superior court or that a superior court should [\*\*\*\*32] refer such a suit to the Commissioner under the doctrine of primary jurisdiction.<sup>12</sup> Fidelity’s argument about the role of administrative proceedings is considerably broader. **HN14↑** Focusing our attention on this broad alternative argument for affirmance, we agree with Villanueva and the Commissioner that administrative proceedings are not a ratepayer’s exclusive remedy for the charging of an unfiled rate.

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<sup>12</sup> **HN15↑** **CA(15)↑** (15) When primary jurisdiction applies, an initial suit in court is permitted, although the trial court may thereafter choose to stay the action and solicit an agency’s views. (*Jonathan Neil & Assoc., Inc. v. Jones (2004) 33 Cal.4th 917, 931–933 [16 Cal. Rptr. 3d 849, 94 P.3d 1055]; Farmers Ins. Exchange v. Superior Court (1992) 2 Cal.4th 377, 390–392 [6 Cal. Rptr. 2d 487, 826 P.2d 730]*.) When exhaustion applies, a party must pursue an administrative remedy initially, but may thereafter file suit in court. (*Jonathan Neil, at pp. 930–931; Farmers Ins. Exchange, at p. 390*.) When a statutory regime vests exclusive jurisdiction in an agency, in contrast, a party may only proceed administratively and thereafter may only challenge the results of any administrative outcome through administrative mandamus ([Code Civ. Proc., § 1094.5](#)) or such other means as the statutory scheme may specify (see, e.g., [Lab. Code, § 1700.44, subd. \(a\)](#) [exclusive jurisdiction vested in the Labor Commissioner, with review by way of trial de novo in superior court]).

[\*127]

**CA(16)** [16] Article 6.7 ([Ins. Code, §§ 12414.13–12414.19](#)) of the chapter covering title insurance provides for administrative proceedings before the Commissioner in the event of disputes over charged rates or rating plans or systems. First, a “person aggrieved by any rate charged ... by a title insurer ... may request such person or entity to review the manner in which the rate, plan, system, or rule has been applied with respect to insurance or services afforded him. Such request ... shall be written.” (*Id.*, [§ 12414.13](#).) If unable to obtain satisfaction from the insurer, the aggrieved consumer may then turn to the Commissioner: “Any person aggrieved by the action of any such person or entity in refusing the review requested, or in failing or refusing to grant all or part of the relief requested, may file a written complaint and request [\*\*\*\*33] for hearing with the commissioner, specifying the grounds relied upon.” (*Ibid.*) **HN16** [16] Under this provision, a written complaint to the regulated entity is a necessary prerequisite to a written complaint to the Commissioner; it is only if the written complaint fails that a person is “aggrieved” and entitled to seek a hearing with the Commissioner. (*Ibid.*) But nothing in either [Insurance Code section 12414.13](#) or the remainder of article 6.7 suggests that a complaint to the Commissioner is exclusive of any other remedy that might [\*\*\*227] be available to the consumer, including remedies otherwise available in judicial proceedings.<sup>13</sup>

[\*\*1004] The language in [Insurance Code section 12414.13](#) contrasts with that of other schemes where the Legislature has made manifest its intent to establish an exclusive administrative remedy. For example, the Talent Agencies Act ([Lab. Code, §§ 1700–1700.47](#)) regulates relations between artists in Hollywood and those who represent them (see [Marathon Entertainment, Inc. v. Blasi \(2008\) 42 Cal.4th 974, 984–985 \[70 Cal. Rptr. 3d 727, 174 P.3d 741\]](#)). A provision of the act requires that disputes under it be submitted in the first instance to the Labor Commissioner: “In cases of controversy arising under this chapter, the parties involved *shall* refer the matters in dispute to the Labor Commissioner, who shall hear and determine the same, subject to an appeal within 10 days after [\*\*\*\*34] determination, to the superior court where the same shall be heard *de novo*.” ([Lab. Code, §1700.44, subd. \(a\)](#), italics added.) This language, using the mandatory “shall,” grants “original and exclusive jurisdiction over issues arising under the Act” to the Labor Commissioner. ([Marathon Entertainment, Inc., at p. 981, fn. 2](#); see [Styne v. Stevens \(2001\) 26 Cal.4th 42, 54–56 \[109 Cal. Rptr. 2d 14, 26 P.3d 343\]](#).)

[\*128]

The state's workers' compensation scheme is to similar effect. The Legislature has set out an administrative procedure for injured workers to file for and obtain compensation for workplace injuries. ([Lab. Code, §§ 3200–6149](#); see [Cal. Const., art. XIV, § 4](#) [authorizing the Legislature to establish and vest an administrative body with jurisdiction “to determine any dispute” arising under the workers' compensation law].) The statutory scheme expressly makes that compensation, in the cases where it is available, “the exclusive remedy” for such injuries. ([Lab. Code, § 3601, subd. \(a\)](#); see *id.*, [§ 3602, subd. \(a\)](#) [“sole and exclusive remedy”].) The scheme also explicitly provides that “[a]ll the following proceedings shall be instituted before the [Workers' Compensation Appeals Board] and not elsewhere,” including claims seeking compensation, to enforce liability for compensation, and so on. (*Id.*, [§ 5300](#); see [King v. CompPartners, Inc. \(2018\) 5 Cal.5th 1039, 1056–1057 \[236 Cal. Rptr. 3d 853, 423 P.3d 975\]](#).) Through the use of such express language, the Legislature has ousted superior courts of jurisdiction and granted the Workers' [\*\*\*\*35] Compensation Appeals Board “exclusive jurisdiction to determine the extent of recovery for an injury” covered by the workers' compensation scheme. ([Unruh v. Truck Ins. Exchange \(1972\) 7 Cal.3d 616, 624 \[102 Cal. Rptr. 815, 498 P.2d 1063\]](#).)

The language of these statutes shows that the Legislature knows how to prescribe exclusivity when it so intends. The Legislature used no comparable language here. In describing a consumer's right to file a complaint with the Commissioner, the Legislature used the permissive “may” rather than the mandatory “shall.” (See [Ins. Code, § 16](#) [governing interpretation of the two terms].) And the Legislature included no other language expressly [\*\*\*228]

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<sup>13</sup> Fidelity further notes that other parts of the statutory scheme give the Commissioner additional responsibilities for interpreting and enforcing the rate-filing requirements of the title insurance chapter. For example, [Insurance Code section 12340.7](#) gives the Commissioner the authority to promulgate regulations identifying certain “miscellaneous charges” that are not subject to regulation as rates. But nothing about this grant of rulemaking authority implies exclusive jurisdiction over consumer claims based on failure to comply with the relevant provisions of the title insurance law.

making proceedings before the Commissioner the exclusive avenue of recourse. In the absence of such language, we infer the Legislature did not intend such a result.

**HN17** [↑] **CA(17)** [↑] (17) In evaluating whether a remedial scheme was intended to be exclusive, we may also consider the scope of the recourse it affords. We have said that exhaustion of a remedy prior to pursuing a civil suit—never mind, as Fidelity urges here, exclusivity—may not be required if the relief available is materially incomplete. (See *Ramos v. County of Madera* (1971) 4 Cal.3d 685, 691 [94 Cal. Rptr. 421, 484 P.2d 93] [“The rule that a party must exhaust his administrative remedies prior to seeking relief in the courts “has no application in a situation [\*\*\*\*36] where an administrative remedy is unavailable or inadequate””].) Of course, we do not doubt the Legislature has the power to limit aggrieved parties to an administrative forum, even if that forum is incapable of supplying a make-whole remedy. But an incomplete remedial [\*\*1005] scheme offers some indication as to whether the Legislature intended the administrative forum to serve as an exclusive path to relief.

[\*129]

Here, Villanueva seeks restitution on a classwide basis, but as Villanueva notes (and the Commissioner agrees), the statutory scheme grants the Commissioner no power to issue restitution to aggrieved individual consumers, never mind a class of them. The only relief the Commissioner can provide is an order prohibiting the unlawful rate or suspending or revoking the insurer's license. (See *Ins. Code, §§ 12414.16, 12414.17*; *State Fund, supra*, 24 Cal.4th at p. 938 [noting the Ins. Code contains no provision authorizing the Commissioner to order refunds to insureds of improper charges].) To interpret article 6.7 as supplying consumers' sole avenue of recourse would leave them unable to obtain restitution of, or have the insurer disgorge, illegal overcharges. It would, as the Commissioner argues, undermine the stated overarching goal of ensuring that insurers [\*\*\*\*37] do not impose excessive or unfairly discriminatory rates. (*Ins. Code, § 12401*.) In some cases where a violation is too minor to warrant a license suspension, exclusivity would eliminate any effective deterrent, and in other cases where a suspension is imposed, the absence of restitution would render any remedy incomplete. For this reason, the Commissioner in his briefing urges that “private enforcement is an important complement to the Department[ of Insurance]’s jurisdiction and consumer protection mission.”

Fidelity disputes the premise, arguing that the Commissioner does in fact have authority to order restitution in proceedings under *Insurance Code section 12414.13 et seq.* Fidelity’s argument rests on *Insurance Code section 12414.18*, which sets out the procedures to be followed when denying, suspending, or revoking an insurer’s license, incorporating by reference the rules set out in *Government Code sections 11500 to 11529*. The statute also provides that the “commissioner shall have all the powers granted to him” in that chapter of the Government Code. (*Ins. Code, § 12414.18*.) Among these are the power to file an accusation (*Gov. Code, §§ 11503, subd. (a), 11507*), to obtain discovery (*id.*, *§ 11507.6*), to hear a case (*id.*, *§ 11512*), to issue a decision (*id.*, *§ 11517*), and to certify official acts (*id.*, *§ 11528*).

**CA(18)** [↑] (18) Fidelity argues that one statute in the cross-referenced chapter, *Government Code section 11519.1*, grants the [\*\*\*\*38] Commissioner the power to order restitution. Fidelity’s argument is unsound. **HN18** [↑] While nearly every other statute in the chapter grants powers generically to any “agency,” defined as every “state board[], commission[], and officer[] to which this [\*\*\*229] chapter is made applicable by law” (*Gov. Code, § 11500, subd. (a)*), *Government Code section 11519.1* is far more circumscribed: It authorizes “an order of restitution” only in a very narrow subset of proceedings, those involving a “decision rendered against a licensee under Article 1 (commencing with *Section 11700*) [\*130] of Chapter 4 of Division 5 of the Vehicle Code”<sup>14</sup> (*Gov. Code, § 11519.1, subd. (a)*). It does not authorize any other agencies in any other proceedings to issue restitution. Had the Legislature intended the procedural rules of the chapter to include a broad grant of authority to agencies to issue restitution, it presumably would have used the same unlimited, generic language consistently employed elsewhere in the chapter. The Government Code and the Insurance Code provision incorporating its procedures by reference do not grant the Commissioner any power to order restitution to insureds. Fidelity offers no reason why the Legislature would have intended to consign consumers to an exclusive set of administrative remedies incapable of offering [\*\*\*\*39] restitution for their losses; this failure to make any provision for restitutionary relief offers an

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<sup>14</sup> That article pertains generally to the licensing of car dealers by the Department of Motor Vehicles.

additional indication that the Legislature did not intend to make administrative proceedings exclusive of all other remedies.

Turning from the specific provisions governing administrative rate proceedings before the Commissioner, Fidelity also invokes [Insurance Code section 12414.29 \(section 12414.29\)](#) [\*\*1006] as support for its view that these proceedings are exclusive of other remedies. [Section 12414.29](#) provides in full: “The administration and enforcement of Article 5.5 (commencing with [Section 12401](#)) [\*\*\*230] and Article 5.7 (commencing with [Section 12402](#)) of this chapter shall be governed solely by the provisions of this chapter. Except as provided in this chapter, no other law relating to insurance and no other provisions in this code heretofore or hereafter enacted shall apply to or be construed as supplementing or modifying the provisions of such articles unless such other law or other provision expressly so provides and specifically refers to the sections of such articles which it intends to supplement or modify. The provisions of this chapter and regulations adopted pursuant thereto shall constitute the exclusive regulation of the conduct of escrow and title transactions by entities [\*\*\*\*40] engaged in the business of title insurance as defined in [Section 12340.3](#), notwithstanding any local regulation or ordinance.”

Fidelity's argument rests solely on the first two sentences of the provision; we have previously explained that the third sentence, which was added to the statute some years after it was enacted, serves “to preempt local regulation, not to exempt title insurers from other state laws governing unfair business practices” ([Quelimane, supra, 19 Cal.4th at p. 45](#)), and so it has no bearing on the viability of Villanueva's UCL claim. According to Fidelity, the requirements that the “enforcement of Article 5.5 … shall be governed solely by the provisions of this chapter,” and “no other law relating to insurance” shall apply absent express provision ([§ 12414.29](#)), permit administrative [\*131] proceedings before the Commissioner ([Ins. Code, §§ 12414.13–12414.19](#)), but preclude enforcement of article 5.5 through any other means, including the UCL suit at issue here.

**CA(19)↑ (19)** Read in isolation, the first sentence—“The administration and enforcement of Article 5.5 (commencing with [Section 12401](#)) and Article 5.7 (commencing with [Section 12402](#)) of this chapter shall be governed solely by the provisions of this chapter”—might seem to support Fidelity's view. ([§ 12414.29](#).) But this sentence and the following sentence [\*\*\*\*41] were enacted together and are better read and understood together. The first sentence limits administration and enforcement of articles 5.5 and 5.7 to the provisions of “this chapter,” i.e., [Insurance Code sections 12340 to 12418.4](#), the chapter specifically governing title insurance. The second sentence explains what provisions are being excluded from application: “Except as provided in this chapter, no other law *relating to insurance* and no other provisions in *this code* … shall apply to or be construed as supplementing or modifying the provisions of such articles unless such other law or other provision expressly so provides and specifically refers to the sections of such articles which it intends to supplement or modify.” ([§ 12414.29](#), italics added.) **HN19↑** In other words, the statute governs the relationship between article 5.5 and *other parts of the Insurance Code* and resolves any conflict or overlap by specifying that those provisions specific to title insurance, rather than insurance generally, should govern unless another provision of the Insurance Code explicitly specifies otherwise. [Section 12414.29](#) does not govern the relationship between the provisions of article 5.5 and other noninsurance laws, such as the UCL.<sup>15</sup>

This [\*\*\*\*42] reading of the text is supported by considering the historical background and surrounding statutory scheme. [Section 12414.29](#) was modeled on a parallel provision in the [McBride-Grunsky Act, Insurance Code section 1860.2](#), which provides in nearly identical terms: “The administration and enforcement of this chapter shall be governed solely by the provisions of this chapter. Except as provided in this chapter, no other law relating to insurance and no other provisions in [\*\*1007] this code heretofore or hereafter enacted shall apply to or be

<sup>15</sup> Fidelity urges that in [section 12414.29](#), “[n]o other law relating to insurance’ … means no other law,” and if “the Legislature meant to limit [section 12414.29](#) to other provisions in the Insurance Code, it could easily and clearly have said so.” But the Legislature *did* clearly say so, in the very language Fidelity quotes: “no other law *relating to insurance*” ([§ 12414.29](#), italics added), i.e., no other insurance-specific law. When the Legislature intended to reference laws of general application from outside the Insurance Code, it used quite different language, as in [sections 1860.1](#) and [12414.26](#) (“any other law … which does not specifically refer to insurance”).

construed as supplementing or modifying the provisions of this chapter unless such other law or other provision expressly so provides and specifically refers to the sections of this chapter which it intends to supplement or modify." Indeed, as originally drafted, [section 12414.29](#) copied [\*132] [Insurance Code section 1860.2](#) verbatim (see Sen. Bill No. 1293 (1973–1974 Reg. Sess.) as amended Aug. 27, 1973, § 15), although it was later amended to confine its scope to the administration of specific articles rather than the entire title insurance chapter (Sen. Bill No. 1293 (1973–1974 Reg. Sess.) as amended Sept. 10, 1973, § 15).

**CA(20)↑ (20)** [Section 1860.2](#) immediately follows [section 1860.1](#), which, as already discussed, served as a kind of template for the immunity provision in [section 12414.26](#). (Ante, pp. 119–120.) **HN20↑** Considered [\*\*\*\*43] side by side, [sections 1860.1](#) and [1860.2](#) are naturally read to regulate distinct spheres. [Section 1860.1](#) governs the interplay between the insurance chapter and other noninsurance laws. (*Ibid.* [actions authorized under the chapter shall not constitute violations of any state law "which does not specifically refer to insurance"].) [Section 1860.2](#), in contrast, [\*\*\*231] deals with the interplay between the insurance chapter and other insurance-specific laws. (*Ibid.* ["no other law relating to insurance and no other provisions in this [Insurance C]ode" shall apply unless it expressly references the provisions of the chapter it is intended to supplant].)

We conclude the same is true of [sections 12414.26](#) and [12414.29](#). While the former deals with the interplay between articles 5.5 and 5.7 and noninsurance laws, the latter deals with the interplay between those articles and insurance-specific laws. This understanding attends to the textual differences in phrasing—one set of statutes specifically deals with laws "relating to insurance" ([Ins. Code, §§ 1860.2, 12414.29](#)), while the other set deals with laws that "do[] not specifically refer to insurance" ([§§ 1860.1, 12414.26](#)). It also prevents these statutes from duplicating each other. If [section 12414.29](#) (and [Ins. Code, § 1860.2](#)) were understood to forbid not only application of other insurance laws, [\*\*\*\*44] but also other noninsurance laws, then [section 12414.26](#) (as well as [§ 1860.1](#)) would be superfluous.

**CA(21)↑ (21)** To the extent [section 12414.29](#) is ambiguous, we consider the Commissioner's view that this provision does not foreclose suits under noninsurance laws. **HN21↑** An administrative agency's interpretation of statutes regulating the extent of its power and responsibilities is entitled to a measure of respect ([Ste. Marie v. Riverside County Regional Park & Open-Space Dist., supra, 46 Cal.4th at p. 292](#); see [Krumme v. Mercury Ins. Co. \(2004\) 123 Cal.App.4th 924, 937 \[20 Cal. Rptr. 3d 485\]](#) ["The fact that the Commissioner does not view the trial court as having poached into the Commissioner's statutory domain is clearly significant, and we defer to his interpretation of his authority"]), and so we accord weight to the Commissioner's view that [section 12414.29](#) does not render his powers to enforce article 5.5 exclusive.

**CA(22)↑ (22)** Finally, Fidelity looks to case law in search of support for its exclusivity argument, but its search turns up empty. Fidelity notes that in [\*133] [Chicago Title Ins. Co. v. Great Western Financial Corp., supra, 69 Cal.2d at page 323](#), an antitrust case, this court observed in passing that "rate regulation has traditionally commanded administrative expertise" and held allegations an insurer was charging below-cost rates to harm competition were subject to demurrer because "a court is not the appropriate initial arbiter of factors involved in insurance costs." But we made these observations in a very different [\*\*\*\*45] context, a complaint that alleged illegal below-cost pricing, and thus asked courts to weigh in on whether an insurer's rates exceeded its costs.

**HN22↑** As we explained in [Manufacturers Life Ins. Co. v. Superior Court \(1995\) 10 Cal.4th 257 \[41 Cal. Rptr. 2d 220, 895 P.2d 56\]](#), *Chicago Title* stands for the proposition that state antitrust and unfair competition law may in some instances be superseded, but only to the extent "specific provisions of the Insurance Code ... authorize some practices and as to others [give] the Insurance Commissioner authority to determine the propriety of the conduct." (*Id. at p. 272.*) [Krumme v. Mercury Ins. Co., supra, 123 Cal.App.4th 924](#) [\*\*1008] and [Donabedian v. Mercury Ins. Co., supra, 116 Cal.App.4th 968](#) are likewise to no avail. Although Fidelity cites these cases in passing as supporting exclusive original jurisdiction for the Commissioner, neither found such exclusive jurisdiction for the claims there at issue (challenges to an auto insurer using broker-agents and withholding discounts based on a lack of past insurance, respectively), and neither [\*\*\*232] contains any reasoning or analysis that would support exclusive original jurisdiction here.

**HN23** [↑] **CA(23)** [↑] (23) The Legislature, in crafting the various provisions of the scheme regulating title insurance, has made the relevant decisions concerning the appropriate spheres for courts and the Commissioner. The text of the provisions it chose to adopt does not extend [\*\*\*\*46] administrative exclusivity to circumstances in which a rate was required to be filed with, but was never filed with, the Commissioner. Nothing in the statutory scheme forecloses a court from considering a claim that an insurer failed to meet its threshold obligation to file a rate and then charged the rate anyway.

## V.

**CA(24)** [↑] (24) The Insurance Code required Fidelity to file its rates with the Insurance Commissioner before charging consumers, but it failed to do so. **HN24** [↑] Charging an unfiled rate is not an “act done ... pursuant to the authority conferred by” *Insurance Code section 12401 et seq.* (§ 12414.26). It is a violation of the express terms of the Insurance Code, for which Fidelity enjoys no statutory immunity from suit under *section 12414.26*. Nor does any aspect of other provisions in the chapter regulating title insurance grant to the Commissioner exclusive jurisdiction to address consumer challenges to unfiled rates. *Insurance Code section 12414.13* supplies an administrative remedy, but it is not exclusive of other remedies otherwise available in the [\*134] courts. The superior court therefore did not err in ruling on the merits of Villanueva’s UCL action challenging the imposition of unfiled rates. (See *Manufacturers Life Ins. Co. v. Superior Court, supra, 10 Cal.4th at p. 263* [the Legislature generally intended the UCL and other laws to be cumulative to the powers [\*\*\*\*47] granted the Commissioner to sanction insurers]; *Krumme v. Mercury Ins. Co., supra, 123 Cal.App.4th at p. 936* [“The Insurance Code does not ... displace the UCL ‘except as to ... activities related to rate setting’”].)

We reverse the Court of Appeal’s judgment and remand for further proceedings not inconsistent with this opinion.

Cantil-Sakauye, C. J., Corrigan, J., Liu, J., Cuéllar, J., Groban, J., and Jenkins, J., concurred.