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A T T O R N E Y S   A T   L A W

# California Antitrust & Unfair Competition Law



3d. Edition - 2003

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**CALIFORNIA ANTITRUST  
AND UNFAIR  
COMPETITION LAW**

**by  
Carlton A. Varner  
Thomas D. Nevins**

**Sheppard, Mullin, Richter & Hampton LLP**

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## CALIFORNIA ANTITRUST & UNFAIR COMPETITION LAW

### I. SUMMARY AND OVERVIEW

Since the second edition of this book was published over two years ago, there have been a number of significant court decisions concerning the scope and nature of California's antitrust and unfair competition laws. These include the *Aguilar* decision by the California Supreme Court which embraced both summary judgment and conspiracy standards from federal law, and the *Chavez* case by a Court of Appeal likewise adopting federal standards for determining when an unlawful vertical price fixing conspiracy exists. Many courts also continue to grapple with issues relating to the scope of the "unfair" prong of Unfair Competition Law ("UCL") in light of the Supreme Court's 1999 decision in *Cel-Tech*. In recent *Korea Supply* decision, the California Supreme Court held that disgorgement apart from restitution was not a form of monetary relief available in private actions under the UCL. This third edition will discuss these court decisions, as well as generally review the status of existing law.

California statutory antitrust law is found at Sections 16600 *et seq.* of the Business & Professions Code. It consists of the Cartwright Act, the Unfair Practices Act ("UPA"), and the Unfair Competition Act ("UCL"), as well as various statutory restrictions on covenants not to compete. The Cartwright Act prohibits trusts, which are defined as a combination of capital, skill or acts by two or more persons to, *inter alia*, create or carry out restrictions in trade or commerce. Bus. & Prof. Code § 16720. It also prohibits sales or leases of products on the condition that the purchaser not deal in the goods of a competitor where the effect is to substantially lessen competition or tend to create a monopoly in any line of commerce. Bus. & Prof. Code § 16727. The UPA prohibits sales below cost, locality discrimination, and secret rebates or unearned discounts which injure competition. Bus. & Prof. Code § 17000 *et seq.* The UCL generally prohibits any unlawful, unfair, or fraudulent business act or practice, as well as deceptive or misleading advertising. Bus. & Prof. Code § 17200 *et seq.*

The statutes alone, however, are rather vague and one must usually resort to case law to determine what is or is not permitted. There is a body of published case law from both California's Supreme Court and its Courts of Appeal. Although the Cartwright Act is not based on or derived from the federal Sherman Act, (*State ex rel. Van de Kamp v. Texaco*, 46 Cal 3d 1147, 1162-64 (1988)), California courts have continued to view federal precedents as persuasive authority. As exemplified by *Aguilar* and *Chavez*, California courts have increasingly imported federal standards into California antitrust law.

Like federal antitrust law, California treats some conduct and agreements which presumptively raise prices or restrict output as *per se* illegal.

Other agreements are analyzed under the rule of reason. An extensive factual analysis of market conditions and business justifications is necessary to determine their legality. California also treats horizontal collusion among competitors more harshly than vertical restraints and is more likely to apply criminal penalties to such collusion.

The most ubiquitous aspect of California antitrust law is the Unfair Competition Law (“UCL”). Bus. & Prof. Code § 172000 *et seq.* It generally prohibits any “unlawful, unfair or fraudulent” conduct and has very lax standing and injury requirements. While intended as a public interest statute, the UCL has been used by some to bring frivolous lawsuits seeking to extort quick settlements and is currently the subject of some legislative scrutiny. Although no legislation has yet been passed to limit the scope of the UCL, the California Supreme Court recently has issued decisions which limit its scope and monetary remedies. *See, e.g., Korea Supply Co. v. Lockheed Martin*, 29 Cal 4th.1134 (2003); *Cel-Tech Communications v. L. A. Cellular*, 20 Cal. 4th.163 (1999).

California’s price discrimination law, the Unfair Practices Act, also has some unusual wrinkles, particularly with respect to prohibitions on secret rebates and discounts. *ABC International Traders, Inc. v. Matsushita Electric Corp.*, 14 Cal. 4th 1247 (1997). Unlike its federal counterpart, the UPA is not limited to price discrimination on commodities. It also applies to services and intangibles, and may include intellectual property.

The penalties for violations of California antitrust laws can be severe. Treble damages and recovery of attorney fees are available for both private and government enforcement. Criminal penalties include fines of \$1 million for corporations and \$250,000 and imprisonment for up to 3 years for individuals. While the UCL does not allow recovery of damages or attorney fees, it does permit injunctive relief and restitution. It also allows government enforcers to seek civil penalties of \$2,500 per violation.

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

## **II. JURISDICTIONAL ISSUES**

California antitrust law applies to restraints imposed in interstate commerce that significantly affect state interests. *Younger v. Jensen*, 26 Cal. 3d 397, 405 (State Attorney General had authority to investigate state and federal antitrust violations in the marketing of natural gas that originates in Alaska); *R.E.*

*Spriggs Co. v. Adolph Coors Co.*, 37 Cal. App. 3d 653, 659 (1974). The existence of parallel federal investigations about the same subject does not preclude or preempt state laws or enforcement. *Younger v. Jensen, supra*; *California v. ARC America Corp.*, 490 U.S. 93 (1989). In practical terms, this means that California antitrust law can be applied to most interstate business activities.

In some cases, however, federal regulation of an area can be so pervasive as to preempt claims under the Cartwright Act or UCL under principles of field or conflict preemption. In *Public Utility District No. 1 of Snohomish County v. Dynegy Power Marketing*, 2003 W. L. 261396 (S. D. Cal. 2003), the court held that exclusive federal jurisdiction over wholesale electricity rates preempted Cartwright and UCL claims alleging anticompetitive practices with respect to such rates. *But see Hendricks v. Dynegy Power Marketing*, 160 F. Supp. 2d 1155 (S. D. Cal. 2001) (holding that such exclusive federal jurisdiction did not constitute complete preemption to justify removal of actions to federal court). Likewise, in *Partee v. San Diego Chargers Football Co.*, 34 Cal. 3d 378, 385 (1983), *cert. denied* 466 U.S. 904 (1984), the Supreme Court held that the Cartwright Act does not apply to NFL rules governing the relationship between players, teams, and the NFL. It reasoned that, under the Commerce Clause, the burden imposed upon interstate commerce by applying state antitrust laws “outweighs the state interest in applying state antitrust laws to those relationships.” *Id.* at 372.

The Unfair Competition Law was initially limited to acts of unfair competition “within this state.” The 1992 amendments to that statute deleted this phrase. (Bus. & Prof. Code § 17203). While this expands the scope of the UCL to include some out of state activity, it does not reach claims of nonresidents based wholly on transactions occurring outside of California. *Norwest Mortgage, Inc. v. Superior Court*, 72 Cal. App. 4th 214 (1999); *See generally Washington Mutual Bank v. Superior Court*, 24 Cal. 4th 906 (2001).

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

### **III. COVENANTS NOT TO COMPETE**

The enforceability of covenants not to compete in California is governed by Section s 16600-16602.5 of the Business & Professions Code. The basic rule is that, in the absence of a statutory exception, “every contract by which



anyone is engaged in a lawful profession, trade, or business of any kind is to that extent void.” Bus. & Prof. Code § 16600. The statutory exceptions are:

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

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

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

California courts also do not apply a rule of reason balancing approach in interpreting Bus. & Prof. Code § 16600. *Scott v. Snelling & Snelling, Inc.*, 732 F. Supp. 1034, 1041 (N.D. Cal. 1990). A California employer may not terminate an employee for refusing to sign a confidentiality agreement that contains an unlawful agreement not to compete. *D’SA v. Playhut, Inc.*, 85 Cal. App. 4th 927 (2000). Neither do the courts tolerate sham arrangements to avoid application of Bus. & Prof. Code § 16600. *Bosley Medical Group v. Abramson*, 161 Cal. App. 3d 284 (1984); *See also, Vacco Ind. v. Van Den Berg*, 5 Cal. App. 4th 34 (1992) (limited *Bosley* to its factual context but held Bus. & Prof. Code § 16601 exception applicable even though defendant owned less than 3% of Vacco’s stock); *Hill Medical Corp. v. Wyckoff*, 103 Cal. Repr. 2d 779 (2001) (covenant unenforceable where stock transferred was only small portion of the corporation). California law also applies to covenants with nonresidents where the employment is in California. *Application Group, Inc. v. Hunter Group, Inc.*, 61 Cal. App. 4th 881 (1998).

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

In determining what constitutes a “profession, trade or business” within the meaning of Bus. & Prof. Code § 16600, however, some courts have concluded it does not apply where one is barred from pursuing only a small or limited part of the business, trade, or profession. *Boughton v. Socony Mobil Oil Co.*, 231 Cal. App. 2d 188 (1964). In *General Commercial Packaging, Inc. v. TPS Package Eng.*, 126 F. 3d 1131 (9th Cir. 1997), the court held that Bus. & Prof. Code § 16600 did not invalidate a contract provision that barred a party from courting a specific named customer. *See also, King v. Gerold*, 109 Cal. App. 2d 316 (1952). In *Campbell v. Board of Trustees*, 817 F. 2d 499 (9th Cir. 1987), the court concluded that a covenant which precluded a psychologist from preparing aptitude tests for universities other than Stanford may fall within Bus. & Prof. Code § 16600 even though he was free to practice all other aspects of his profession.

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

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

#### IV. COMBINATION AND COLLUSION

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

In some cases involving horizontal relationships (*e.g.*, competitors or potential competitors), the existence of a combination or conspiracy may be a fact issue. *Saxer v. Phillip Morris, Inc.*, 54 Cal. App. 2d 7, 19-22 (1975) In *Biljac Associates v. First Interstate Bank*, 218 Cal. App. 3d 1410 (1990), however, the court affirmed a summary adjudication of Cartwright Act and 17200 claims against banks which allegedly manipulated interest rates to middle market borrowers by tying them to the prime rate. The key evidence upon which the court relied was declarations by defendants' own employees in which they denied sharing or receiving information from competitors *in advance* of announcing their own rates to the public. *See also Nova Designs, Inc. v. Scuba Retailers Ass 'n.*, 202 F. 3d 1088, 1092 (9th Cir. 2000) (granting summary judgment on conspiracy claims). By contrast, in *Cellular Plus, Inc. v. Superior Court*, 14 Cal. App. 4th 1224 (1993) the court concluded that meetings among defendants followed by uniform prices was sufficient to defeat a demurrer at the pleading stage. 14 Cal. App. 4th at 1239-40.

In *Aguilar v. Atlantic Richfield Corp., et al.*, 25 Cal. 4th. 826 (2001), the California Supreme Court affirmed a summary judgment in favor of defendants on a claim that defendant petroleum companies had conspired to raise the price of CARB gasoline in California. In doing so, the court embraced both the summary judgment and conspiracy standards from federal antitrust law as articulated in *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 US 574 (1986) and *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U. S. 752 (1984). Under that standard, the plaintiff must present evidence that tends to exclude the possibility that the

alleged conspirators acted independently, and ambiguous evidence that is as consistent with competition as conspiracy is insufficient to prove a conspiracy or to defeat a summary judgment motion. In *Aguilar* the defendants had submitted detailed declarations from their own officers that they made pricing decisions independently which shifted the burden to plaintiffs to show otherwise. The evidence offered by plaintiff--consisting of the dissemination of price information through a common independent company, use of common consultants to advise them with respect to pricing issues on CARB gasoline, and that they had frequently entered into exchange agreements whereby they traded the same product among each other--was deemed ambiguous by the court and was not the type of evidence that excluded the possibility of independent action.

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

With respect to vertical relationships (*e.g.*, parties at different levels of the distribution chain), the federal *Colgate* doctrine applies and California antitrust laws do not generally prohibit a single trader from unilaterally determining with whom it will deal and the terms on which it will transact business. *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th. 363 (2001) (no conspiracy where manufacturer announces a policy prescribing minimum resale prices for its products, monitors compliance, and simply terminates noncomplying dealers); *Gianelli v. Beck & Co.*, 172 Cal. App. 3d 1020 (1985) (unilateral termination of dealer for carrying competitive products did not violate § 16720). Where, however, the single trader pressures customers or dealers into adhering to resale price restrictions, territorial restraints, or unlawful exclusive dealing or tying arrangements, or reaches an actual agreement with them to do so, an unlawful combination may be established. *G.H.I.I. v. MTS, Inc.*, 147 Cal. App. 3d 256, 267 (1983); *See also Chavez, supra*, 93 Cal. App. 4th. at 365-66. Although some *pre-Aguilar* and *Chavez* cases suggest that a combination may be found where a manufacturer terminates a dealer based on complaints from other dealers ( *See, eg, R.E. Spriggs v. Adolph Coors Co.*, 94 Cal. App. 3d 419 (1979)), the validity of this authority is questionable in light of the fact that in *Aguilar, supra*, the California Supreme Court embraced the federal *Monsanto* standard. *See also Nova Designs, Inc., supra*, 202 F. 3d at 1092 (cannot infer agreement from existence of complaints). Where the allegations of the Complaint show that the alleged conduct falls within the *Colgate* doctrine, a demurrer may be sustained to the complaint. *Chavez, supra*

As does Section 1 of the Sherman Act, Section 16720 requires two or more independent actors and does not reach single firm conduct. The federal courts have concluded that a corporation and its wholly owned subsidiaries, divisions, and agents are not separate entities for purposes of Section 1. *Copperweld v. Independence Tube Corp.*, 467 US 752 (1984). California courts now appear to have embraced the *Copperweld* rule, although courts may differ in its application to specific entities. *Compare Freeman v. San Diego Association of Realtors*, 77 Cal. App. 4th 171, 189-96 (1999) with *Freeman v. San Diego Association of Realtors*, 2003 DAR 2754 (9th Cir. 2003). *See also MacManus v. A.E. Realty Partners*, 195 Cal. App. 3d 1106, 1111 (1987) (tying case where court concluded that a Cartwright cause of action was stated regardless of whether defendants operated as separate entities). 195 Cal. App. 3d at 1112. Other courts infer conspiracies only when there are individuals or entities “maintaining separate and independent interests.” *Bondi v. Jewels by Edward, Ltd.*, 267 Cal. App. 2d 672, 678 (1968); *Roth v. Rhodes*, 25 Cal. App. 4th 530, 544 (1994); *Kolling v. Dow Jones*, 137 Cal. App. 3d 709, 720 (1982).

## V. PRICE FIXING

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

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

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

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

## VI. TERRITORIAL AND CUSTOMER RESTRICTIONS

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

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

In dual distribution situations--where the manufacturer also competes with its own wholesalers or distributors--one California case, contrary to federal law, treats territorial and customer restrictions as horizontal and thus *per se* illegal. In *Guild Wineries & Distilleries v. J. Sosnick & Son*, 102 Cal. App. 3d 627 (1980),

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

## VII. EXCLUSIVE DEALING AND TYING ARRANGEMENTS

Section 16727 of the Business & Professions Code provides, *inter alia*, that it is unlawful to sell or lease goods, or give a rebate or price discount, on the condition that the purchaser not deal in goods of a competitor where the effect is to substantially lessen competition or tend to create a monopoly. Section 16727 is a carbon copy of Section 3 of the Clayton Act (15 USC § 14). Like its federal counterpart, it does not prohibit all exclusive dealing contracts. Rather, California courts apply the rule of reason and invalidate only those with the requisite anticompetitive effects. *Gianelli Distributing Co. v. Beck & Co.*, 172 Cal. App. 3d 1020(1985).

The key issue under the rule of reason in exclusive dealing cases is whether defendant has market power in the relevant market. *Redwood Theatres v. Festival Enterprises*, 200 Cal. App. 3d 687 (1988). The relevant market normally includes all products that are reasonably interchangeable in price, use and quality. *Exxon v. Superior Court*, 51 Cal. App. 4th 1672, 1682-84 (1997). If defendant has a small market share, or otherwise lacks market power, then it is unlikely that the exclusivity requirement will violate the Cartwright Act. *Kim v. Servosnax*, 10 Cal. App. 4th 1346 (1992). While 10 percent or less of the market is clearly not sufficient for market power (*Exxon v. Superior Court*, 51 Cal. App. 4th at 168-83; *Roth v. Rhodes*, 25 Cal. App. 4th 530 (1994)), one court found that 16 % was enough to raise a triable issue of fact in light of the specific factual situation presented. *Redwood Theatres, supra*, 200 Cal. App. 3d at 713.

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

One species of exclusive dealing is tying. This occurs when a seller sells one product on the condition that the purchaser also buy a second product from it. Tying may be *per se* illegal if the seller has market power over the first

product and a substantial amount of commerce was affected in the sale of the second product. *Suburban Mobile Homes v. AMFAC Communities*, 101 Cal. App. 3d 532 (1980). Tying arrangements may be challenged under either Section 16720 or 16727 of the Cartwright Act. Section 16727, however, is limited to commodities. *Morrison v. Viacom*, 66 Cal. App. 4th 534, 546 (1998). Moreover, in *Morrison, supra*, the court stated *in dicta* that the *per se* rule is satisfied under § 16727 if either the market power or substantial commerce tests are satisfied. 66 Cal. App. 4th at 542. Under § 16720, both tests must be satisfied. *Id.*

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

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

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



commodities and the products at issue in *Viacom* were services. 66 Cal. App. 4th at 546-48.

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

### VIII. GROUP BOYCOTTS AND REFUSALS TO DEAL

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

In *Marin County Board of Realtors v. Palsson*, 16 Cal. 3d 920, 931 (1976), however, the court refused to apply *per se* illegality to a real estate association rule that denied part-time agents access to a multiple listing service. It noted that, rather than attempting to coerce part-time agents to adopt anticompetitive practices, the rule may have a legitimate business reason in which the alleged boycott was only a byproduct of that agreement. Nonetheless, since defendants had 75% of the market and the rule had serious anticompetitive effects without any business justification, the court invalidated the association rule under the rule of reason. *See also, Amarel v. Connell*, 202 Cal. App. 3d 137 (1988) (companies with 75% of market engaged in boycotts and refusals to sell to those who purchased from competitors); *People v. National Association of Realtors*, 120 Cal. App. 3d 459 (1981) (rule restricting access to multiple listing service was group boycott). In *Freeman v. San Diego Assn. of Realtors*, 77 Cal. App. 4th 171, 196-98 (1999), however, the court held that denial of access to ancillary services offered by a multiple listing service did not state a group boycott claim. Where defendants are not competitors, the *per se* rule does not apply. *Nova Designs, Inc. v. Scuba Retailers Ass'n.*, 202 F. 3d 1088, 1092 (9th Cir. 2000).

Vertical boycotts -- those among entities at different levels of distribution -- may violate the Cartwright Act under a rule of reason analysis. In *G.H.I.I. v. MTS, Inc.*, 147 Cal. App. 3d 256 (1983), the plaintiff was a record retailer that alleged that three of its larger competitors used their market power to coerce

record wholesalers to grant discounts to them, but not plaintiff and other retailers. The court held that the plaintiff stated a claim against one of the large retailers who had used threats and coercion to induce wholesalers to boycott plaintiff, but not against the other two defendants because no acts by them were alleged that furthered coercion. 147 Cal. App. 3d at 267-69. *See also Redwood Theatres v. Festival Enterprises*, 200 Cal. App. 3d 687 (1988) (agreement between movie exhibitor and certain film distribution companies to boycott another exhibitor evaluated under the rule of reason).

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

## **IX. MONOPOLIZATION**

Monopolization and attempted monopolization consists of conduct by a single firm with market power to attain or maintain that power by exclusionary or predatory conduct. California has no monopolization statute analogous to Section 2 of the Sherman Act (15 U.S.C. § 2). One court of appeal has held that the prohibition of “trusts” in Section 16720 includes monopolization. *Lowell v. Mother’s Cake & Cookie Co.*, 79 Cal. App. 3d 13, 23 (1978). In 1988, however, the California Supreme Court held that Section 16720 only applies to combinations among multiple firms that continue as separate entities. *State ex. rel. Van de Kamp v. Texaco, Inc.*, 46 Cal. 3d 1147, 1164 n. 17 (1988). While the court did not reach the issue of whether Section 16720 covers monopolization by individual firms, subsequent decisions have interpreted *Texaco* as holding that the Cartwright Act does not reach single firm conduct, such as monopolization. *Freeman v. San Diego Assn. of Realtors*, 77 Cal. App. 4th 171, 202 (2000). The Ninth Circuit has also held that Section 16720 does not reach monopolization or attempted monopolization, but does encompass conspiracies to monopolize among multiple firms. *Dimidowich v. Bell & Howell*, 803 F. 2d 1473, 1478 (9th Cir. 1986).

## **X. MERGERS AND ACQUISITIONS**

In *State ex. rel. Van de Kamp v. Texaco, Inc.*, 46 Cal. 3d 1147 (1988), the California Supreme Court held that neither the Cartwright Act nor Section 17200 of the UCL reach mergers and acquisitions. The basic rationale of the court was that Section 16720 of the Cartwright Act applies only to combinations of entities that

are ongoing. The Court held that Section 17200 was limited to “business practices,” with that phrase envisioning something more than a single transaction. 46 Cal. 3d at 1169-70.

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

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

The California Attorney General, either independently or through the National Association of Attorneys General (“NAAG”), of which it is a signatory, also sometimes conducts pre-filing merger investigations and requests data gathered from the federal premerger notification process. NAAG has its own merger guidelines, which vary in some respects from the federal merger guidelines. The NAAG Voluntary Pre-Merger Disclosure Compact allows parties to *voluntarily* file with a designated “liaison state” a copy of their initial Hart-Scott-Rodino filings, copies of any subsequent requests for information by the federal enforcement authorities and, upon the request of any member state, the additional materials provided in response to subsequent requests. The initial filing is often simultaneous with those of the Department of Justice and the FTC. The information so obtained is kept confidential, and NAAG signatories agree not to serve parties with requests for additional information during the HSR waiting period. For practical reasons, merging parties often consent to disclosure of their HSR data under the NAAG Compact since it helps avoid separate information requests from the state enforcement authorities during the HSR review process.

NAAG signatories do not, however, agree to be bound by the decisions of the federal enforcement agencies. A federal agency’s decision not to challenge a merger does not prevent a state attorney general from challenging a merger or acquisition in court. In fact, California is one of the few states to do so. *California v. American Stores Co.*, 495 U. S. 271 (1990). In that case, the Attorney General challenged as a private party under federal antitrust laws a merger that had gone through the HSR process and been, subject to a consent decree, approved by

the FTC. The Attorney General obtained an injunction, including divestiture of certain assets, in the District Court but the Ninth Circuit vacated the injunction on the ground that private parties could not obtain divestiture under the antitrust laws. The Supreme Court reversed the Ninth Circuit holding that, so long as the state could show threatened loss or damage to its own interests as required by Section 16 of the Clayton Act, it could obtain injunctive relief, including divestiture. It did note, however, that equitable defenses such as unclean hands and laches would apply, and the concurring opinion noted that failure to act until after the HSR waiting period has expired may constitute laches. California state enforcement authorities have often joined with the federal enforcement agencies and other states to challenge mergers based on information obtained in the HSR process.

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

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

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

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

### **A. Below Cost Pricing and Loss Leaders**

Section 17043 prohibits selling a product below its cost for the purpose of injuring competitors or destroying competition. The California Supreme Court has held that this means that the defendant must act with “the desire of

injuring competitors or destroying competition” as the defendant’s “conscious objective,” not merely the “knowledge that the injury or destruction will occur.” *Cel-Tech Communications v. L.A. Cellular*, 20 Cal. 4th 163, 175 (1999). There is also a statutory meeting competition defense. Bus. & Prof. Code § 17050(d).

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

In *Western Union Financial Services, Inc. v. First Data Corporation*, 20 Cal. App. 4th 1530 (1993), the court held that a defendant did not violate Section 17043 by targeting its substantially larger competitor, and selling one of its products below cost and on a promotional basis for a five month period where, during the period covered, its sale on all products sold was profitable. In addition, the court held that it did not violate Section 17043 to target a larger rival with below cost sales, where the intent was not to injure or destroy the competitor, but simply to take market share and enhance its own business base. Section 17043 and Section 17044 require a specific intent to injure or destroy a competitor, and not just an intent to divert customers from a competitor. *Id.* at page 1540, note 10. *See also, Hladek v. City of Merced*, 69 Cal. App. 3d 585, 591 (1977) (intent to injure competitors or destroy competition essential element). A persuasive argument can be made that harm to competition is an essential element of Section 17043 and 17044 violations. *See, e.g., Cel-Tech*, 20 Cal. 4th 163, 186 (citing, *inter alia*, Section 17001 of the Unfair Practices Act for the proposition that “[i]njury to a competitor is not equivalent to injury to competition; only the latter is the proper focus of the antitrust laws”); *Turnbull & Turnbull v. ARA Transportation, Inc.*, 219 Cal. App. 3d 811, 826 (1990) (the Unfair Practices Act’s “purpose is basically the same as the Sherman Act”).

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

*Food Giant*, 21 Cal. App. 3d 513 (1971); *Ellis v. Dallas*, 113 Cal. App. 2d 234 (1952).

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

The proper method to allocate costs among multiple products was also the subject of the court’s opinion in *Pan Asia Venture Capital Corp. v. Hearst Corp.*, 74 Cal. App. 4th 424 (1999). In *Pan Asia*, both parties sold newspapers with advertising, and plaintiff alleged that defendant had obtained a contract from the City and County of San Francisco to publish legal notices by submitting a bid below its cost. At the trial, court ruled that defendant produced two relevant products -- newspapers and advertising -- and the plaintiff’s expert allocated costs based on the revenues generated by those two products. Using this “revenue method to allocate costs,” he thus allocated nearly 85% of defendant’s total costs to the advertising side. By contrast, the defendant’s expert allocated costs based on the number of inches in the newspaper devoted to advertising and thus allocated only 45% to advertising. 74 Cal. App. at 437-38. While the *Pan Asia* court severely criticized plaintiff’s revenue method, it was not barred as a matter of law under the UPA. Thus, the appropriate cost model was a fact issue for the jury. Since the trial court had refused to submit defendant’s cost model to the jury, the Court of Appeal reversed the judgment in favor of plaintiff based on the flawed jury verdict. See also *Kentmaster Manufacturing Co. v. Jarvis Products Corp.*, 146 F. 3d. 691 (9th Cir. 1998) (no predatory intent where original equipment was sold at an artificially low price and losses made up on replacement equipment as they were treated as a single unit for purposes of determining prices and costs).

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

## **B. Locality Price Discrimination**

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

The scope of the locality discrimination law was severely reduced in *Harris v. Capitol Records Distributing Corp.*, 64 Cal. 2d 454 (1966). In *Harris*, the court held that an alleged violator must sell from two *different* locations and must sell at a lower price in one location than another. This effectively exempts single outlet sales at differing prices from the scope of the law. *Harris* also held that a plaintiff claiming locality discrimination must operate at the same level as the seller, thus eliminating claims by disfavored purchasers. These two limitations have operated to substantially reduce the scope of viable claims under the locality discrimination law.

## **C. Secret Discounts and Rebates**

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

A key predicate for Section 17045 to apply, however, is that the discount or rebate must be *secret*. In *Diesel Electric*, this element was satisfied since the manufacturer had expressly told plaintiff that it was getting the “same pricing” as the favored distributor when this was not the case. 16 Cal. App. 4th at 121-23. Absent such misrepresentations, however, it is not necessary for the manufacturer to affirmatively disclose the terms of the favored deal to the disfavored purchaser to avoid a secrecy finding. Rather, it is sufficient to disclose

the preferential rebates and unearned discounts to the public or the trade generally. *ABC International, supra*, 14 Cal. 4th at 1253. Thus a manufacturer may be able to avoid a secrecy finding by simply making its discount/rebate list available to all dealers or distributors. *Nicolosi Dist. Co. v. Finishmaster, Inc.*, 2000 WL 41222 at 3 (N.D. Cal. 2000); *California Wholesale Electric Co. v. MicroSwitch, Honeywell, Inc.*, 1983-1 CCH Trade Cas. ¶ 65,253 (C.D. Cal. 1984).

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

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

#### **D. Meeting Competition**

The UPA contains a statutory meeting competition defense. Bus. & Prof. Code §§ 17040, 17050. For example, Section 17050(d) exempts prices offered to meet the lawful prices of a competitor from the prohibitions of the Act. *People v. Pay Less Drug Stores*, 25 Cal. 2d 108, 117 (1944) (defense established when “defendants shall have endeavored ‘in good faith’ to meet the legal prices of a competitor”).

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

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



question of the legality of the low prices of his competitors”). The meeting competition defense also may not apply if the competitor’s price is itself below cost and illegal. *Page v. Bakersfield Uniform & Towel Supply Co.*, 239 Cal. App. 2d 762 (1966).

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

## **XII. UNFAIR COMPETITION LAW**

Perhaps the most far reaching aspect of California antitrust law is the Unfair Competition Law (“UCL”) found at Section 17200 *et seq.* of the Bus. & Prof. Code. It defines “unfair competition” as any “unlawful, unfair, *or* fraudulent business practice “and any unfair, deceptive or misleading advertising plus any act prohibited by Section 17500 *et seq.* It is not necessary to show scienter or that the defendant intended to injure anyone. *State Farm Fire & Casualty Co. v. Superior Court*, 45 Cal. App. 4th 1093, 1102 (1996).

With a series of amendments in 1992, the UCL now applies to a single act of unfair competition, as well as past *and* ongoing conduct. The UCL does not reach claims of nonresidents based on transactions occurring outside of California. *Norwest Mortgage, Inc. v. Superior Court*, 72 Cal. App. 4th 214, 227 (1999). Where, however, the transactions have sufficient interests with California a nationwide class may be permitted subject to the resolution of choice of law issues. *See Washington Mutual Bank v. Superior Court*, 24 Cal. 4th. 906 (2001)

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

The “unlawful, unfair *or* fraudulent” prongs of the UCL include a wide range of conduct. An unlawful business activity includes “anything that can properly be called a business practice and that at the same time is forbidden by law.” *Barquis v. Merchants Collection Ass’n*, 7 Cal. 3d. 94, 113 (1972). To meet the “unlawful” prong, the person suing under Section 17200 just “borrows” violations

of other laws and treats them as unlawful practices independently actionable under Section 17200. *Saunders v. Superior Court*, 27 Cal. App. 4th 832 (1994). Any law, civil or criminal, state or federal, can serve as the predicate. *State Farm fire and Casualty Co. v. Superior Court*, 45 Cal. App. 4th. 1093, 1102-03; *Roskind v. Morgan Stanley Dean Witter & Co.*, 80 Cal. App. 4th 345, 352 (2000). The UCL provides a remedy even where the underlying statute has no private right of action. *Stop Youth Addiction v. Lucky Stores*, 17 Cal. 4th. 553, 561-567.

The California Supreme Court has cautioned, however, that the UCL is not “an all purpose substitute for a tort or contract action.” *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th.1134, 1151 0(2003). Conduct which merely creates nonstatutory civil liability may not be sufficient to satisfy the unlawful prong of the UCL. *Klein v. Earth Elements*, 59 Cal.App. 4th 965 (1997). Likewise, a breach of contract involving only private harm may not be actionable. *Rosenbluth Int’l v. Superior Court*, 101 Cal. App. 4th 1073 (2002). The unlawful prong is not satisfied where the predicate statute does not define unlawful conduct but merely entrusts regulation of the conduct to a public agency. *Samura v. Kaiser Foundation Health Plan*, 17 Cal.App.4th 1284, 1299-1302 (1993). If a statute does not have explicit language proscribing a particular act, then the unlawful prong cannot be satisfied. *California Medical Assn. v. Aetna Healthcare of California*, 94 Cal. App. 4th. 151 (2002).

Under the UCL, however, lawful conduct may still be “unfair” and thereby actionable. In *Cel-Tech Communications v. L.A. Cellular*, 20 Cal. 4th 163 (1999), the Supreme Court formulated some general standards as to the meaning of unfair under the UCL. In *Cel-Tech*, it held that below cost pricing not actionable under the UPA may constitute “unfair” conduct under the UCL. While the court concluded that plaintiff may not bring an action under the UCL if some other provision of law bans such a claim, the other provision must actually bar it, however, and not merely fail to allow it. 20 Cal. 4th at 182. *See also Schnall v. Hertz*, 78 Cal. App. 4th. 1144 (2000) (avoidable refueling charge not “unfair” under UCL since the Civil Code specifically authorized the charges). If no statute provides such a “safe harbor,” then a court must determine whether the challenged conduct is unfair under the following test (20 Cal. 4th at 186):

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

In formulating this test, the court criticized as “amorphous” the formulation of unfair conduct in earlier decisions by courts of appeal such as those

in *State Farm & Casualty v. Superior Court*, 45 Cal. App. 4th 1093 (1996) and *People v. Casa Blanca Homes*, 159 Cal. App. 3d 509 (1954). *Casa Blanca*, for example, described “unfair” conduct as conduct that offends public policy, or is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.

The *Cel-Tech* court, however, limited this standard for “unfair” conduct to actions by competitors alleging anticompetitive conduct. 20 Cal. 4th at 187, n. 12. Subsequent cases have used the *Cel-Tech* standard to dismiss competitor claims under the UCL. *Carter v. Variflex*, 101 F. Supp. 2d. 1261, 1270 (C.D. Cal. 2000). Courts have continued to apply the broader unfairness test from cases such as *Casa Blanca* to consumer actions. *Renne v. Servantes*, 86 Cal. App. 4th. 1081 (2001); *Smith v. State Farm Auto Ins. Co.*, 93 Cal. App. 4th. 700, 720 n. 23 (2001); *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F. 3d 979, 993 (9th Cir. 2000) (*Cel-Tech* unfairness test does not apply to action by sellers alleging horizontal price-fixing); *Sun Microsystems v. Microsoft*, 87 F. Supp. 2d. 992, 999 (N. D. Cal. 2000). One case suggested, however, that the *Cel-Tech* limitation on the unfair prong should extend to consumer cases. *Churchill Village v. General Electric Company*, 169 F. Supp. 2d. 1119, 1130 n. 10 (stating that the lack of distinction between competitor and consumer actions in the language of the UCL renders *Cel-Tech*'s definition equally valid in the consumer context).

In *Chavez v. Whirlpool Corporation*, 93 Cal. App. 4th. 363 (2001), however, the court held that the unfair prong of the UCL did not reach conduct in a consumer action which it concluded as a matter of law was permissible under the Cartwright Act. In *Chavez*, the plaintiff consumer alleged that the minimum resale price policy of defendant with respect to its retailers violated the Cartwright Act. Citing *U. S. v. Colgate & Co.*, 250 U. S. 300 (1919) and *Monsanto v. Spray-Rite Service Corp.*, 465 U. S. 752 (1984), the court held that there was no unlawful combination under the Cartwright Act because the manufacturer only unilaterally announced its resale prices in advance and refused to deal with those who failed to comply. As to the claim that the conduct violated the “unfair” prong of 17200 even if it was not unlawful, the court held that, although it did not decide whether *Cel-Tech* applied to consumer actions, “conduct permissible under the *Colgate* doctrine cannot be deemed unfair under the unfair competition law.” 93 Cal. App. 4th. at 368.

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

The “fraudulent” prong of the UCL does require a showing that the statement is likely to deceive the public from the standpoint of the reasonable consumer. *Haskell v. Time, Inc.*, 857 F. Supp. 1392, 1398 (1994). In *Lavie v. Proctor & Gamble*, 105 Cal. App. 4th. 496 (2003), the court, held that the reasonable consumer standard applied to UCL claims, and rejected an argument by the Attorney General as *amicus curiae*, that the “least sophisticated consumer” standard should apply. In doing so, the court held that RTC interpretations of the standards under its act were persuasive authority under the UCL. 105 Cal. App. 4th. at 503. *See also Searle v. Wyndham Int’l*, 102 Cal. App. 4th. 1327 (2002) (failure of a hotel to tell its patrons that a 17% service charge was actually a gratuity paid to the server was neither unfair nor fraudulent). Unintentional or accidental conduct that is quickly remedied by the defendant also does not constitute unfair or fraudulent conduct. *Klein v. Earth Elements*, 59 Cal. App. 4th 965 (1997).

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

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

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

Actions for injunctive relief and restitution under the UCL can be brought by “any person acting for the interests of itself, its members or the general public” (§ 17204), as well as the Attorney General, district attorneys, and certain city attorneys. Injunctive relief is not, however, a prerequisite to restitution. *ABC Int’l Traders*, 14 Cal. 4th at 1268-71. Such actions, however, need not be brought as class actions and this has led to a number of court decisions concerning the nature of these “nonclass” representative actions, particularly as to standing and how due process safeguards should apply.

Private actions for injunctive relief may be brought even though plaintiff was not harmed by the alleged conduct. *See, e.g., Stop Youth Addiction v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 561 (1998). When plaintiff seeks restitution,

however, injury may be required for a plaintiff to have standing to bring a representative action on behalf of the public. *See, e.g., Kraus v. Trinity Broadcasting*, 23 Cal. 4th 116 (2000) (noting that courts have discretion to impose a “competent plaintiff” requirement in representative actions). *Lazar v. Trans Union LLC*, 195 F.R.D. 665 (C.D. Cal. 2000).

Federal courts have concluded, however, that an individual who has suffered no injury cannot maintain a UCL claim for either injunctive or restitutionary relief in federal court. *MAISys. Corp. v. UIPS*, 856 F. Supp. 538, 541 (N.D. Cal. 1994). *Mangini v. R.J. Reynolds Tobacco Co.*, 793 F. Supp. 925, 928-30 (N.D. Cal. 1992). The rationale of such federal court decisions is that, absent injury, there is no constitutional standing under Article III of the Constitution, and states cannot expand standing to sue in federal court beyond the Article III requirements.

In *Rosenbluth Int’l, Inc. v. Superior Court*, 101 Cal. App. 4th 1073 (2002), the court held that an individual could not bring a UCL representative action on behalf of large, sophisticated corporations who could themselves bring their own contract actions to remedy defendants alleged fraud. It held that UCL actions were to protect the public interest in general, and not to remedy private harm to entities that had direct contracts with the alleged wrongdoers and were capable of bringing their own actions.

Representative or “private attorney general” actions on behalf of the general public under the UCL also raise special issues with respect to the due process protections afforded defendants and nonparties. Because no class need be certified, principles of *res judicata* and collateral estoppel may not apply to bar subsequent actions by other plaintiffs. This raises serious due process concerns, in that defendants could be subject to multiple liability for the same wrong. The *res judicata* effect of a judgment entered in a “private attorney general” suit has not been definitively addressed. One court reversed a lower court decision awarding restitution to absent persons holding that it violated the due process rights of both defendant and the injured non-parties. *Bronco Wine Co. v. Frank A. Logoluso Farms*, 214 Cal.App.3d 699, 720-21 (1989).

In *Kraus v. Trinity Management Services, Inc.*, 23 Cal. 4th 116 (2000), the Supreme Court addressed the due process concerns in a non-class representative action. The *Kraus* court stated that trial courts have the inherent power to dismiss representative actions, either because there is a “potential for harm” or because “the action is not one brought by a competent plaintiff . . .,” a concept analogous to the adequacy of representation or typicality requirements of a class action. 23 Cal. 4th at 138. The court also pointed out that a defendant could condition payment of restitution on the execution of an acknowledgment of payment and otherwise present evidence to the court to avoid paying twice. 23 Cal. 4th at 138-39.

*Cortez v. Purolater Air Filter*, 23 Cal.4th 163 (2000), a companion case to *Kraus*, suggested further procedural protections for defendants in the form of equitable defenses, such as laches, waiver or estoppel, in assessing the appropriate remedy under the UCL. 23 Cal. 4th at 179-81. Consideration of equitable defenses, for example, could permit a court to deny relief based on the same business conduct that was the subject of an earlier action in which defendant had already paid restitution, thus alleviating some of the due process concerns arising from the risk of multiple liability in non-class representative actions. Thus, while the door is still open to multiple liability in non-class representative action, the *Kraus* and *Cortez* decisions provide procedural mechanisms by which defendants may protect themselves.

California courts have also shown some reluctance to permit non-class representative actions where proof of liability or injury will vary among members of the public. In *South Bay Chevrolet v. General Motors Acceptance Corp.*, 72 Cal. App. 4th 861, 894-97 (1999), the court affirmed dismissal of a private attorney general claim because proof of knowledge of defendant's practice would require mini-trials for each of the dealerships. *Accord Lazar v. Trans Union LLC*, 195 F.R.D. 665, 672-74 (C.D. Cal. 2000) (citing *Kraus* and noting that non-class representative actions should be limited to cases in which the circumstances of individuals in the proposed class are similar).

### C. Monetary Relief Under The UCL

In contrast to the broad liability and lax standing requirements, the monetary remedies under the UCL are limited to restitution and civil penalties. *Korea Supply v. Lockheed Martin*, 29 Cal. 4th. at 1144 (2003). Traditional compensatory and punitive damages are not available to a private plaintiff. *Bank of the West v. Superior Court*, 2 Cal. 4th. 1254, 1266 (1992); *Dean Witter Reynolds v. Superior Court*, 211 Cal. App. 3d. 758 (1989). Recovery of attorney fees is also not permitted unless certain public interest standards are satisfied. *Notrica v. State Compensation Ins. Fund*, 70 Cal. App. 4th. 911, 954-55 (1999) (permitting recovery of attorney fees as "private attorney general" under CCP 1021.5 if injunctive relief confers a significant benefit on the public). Public law enforcement officials may impose civil penalties of up to \$2,500 per violation, and \$6,000 per violation for intentional violations issued pursuant to Section 17203. Bus. & Prof. Code § 17206, 17207.

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

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

In *Kraus v. Trinity Management Services, Inc.*, 23 Cal.4th 116 (2000), the California Supreme Court restricted the type of monetary relief available in non-class UCL representative actions. It held that, absent a certified class action, the monetary relief in UCL representative actions is limited to restitution to identifiable victims who actually suffered a loss as a result of the challenged conduct. 23 Cal.4th at 137, 172. Accordingly, in *Kraus*, the Supreme Court set aside a disgorgement award into a fluid recovery fund.

*Kraus* and the companion *Cortez* case also dealt with the nature of the restitution remedy under the UCL. Both cases described the restitution remedy as one limited to the return of money taken from a person who has an ownership interest in it. Disgorgement, by contrast said the court, is a broader remedy which may compel a defendant to surrender all money or profits obtained from an unfair business practice even though not all is to be restored to the persons from whom it was obtained. In *Kraus* and *Cortez*, the court then went on to limit the monetary relief in nonclass representative actions to restitution excluding disgorgement. In *Kraus* the monetary relief authorized was the return of tenant security deposits on apartments, and in *Cortez* the failure to pay overtime wages mandated by law. In both cases the court noted that the plaintiffs, the tenants in *Kraus* and the unpaid employees in *Cortez*, had a property interest in the moneys sought and this meant their claims were for restitution, not disgorgement or compensatory damages. 23 Cal.4th at 171.

Section 17203 itself also limits monetary relief to that necessary to “restore” funds to the victims and makes no mention of disgorgement. One court noted that Section 17203 “operates only to return to a person those measurable amounts which are wrongfully taken by means of an unfair business practice.” *Day v. AT&T*, 63 Cal. App. 4th 325, 338-39 (1998). The “ownership interest” requirement from *Cortez* has also been cited by other courts as the basis to eliminate impermissible compensatory damage claims. *Watson Labs, Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F. Supp. 2d 1099 (C. D. Cal. 2001) (UCL does not authorize restitution where the alleged victim was never in possession of the money sought).

In *Korea Supply Company v. Lockheed Martin Corporation*, 29 Cal. 4th 1134 (2003) the Supreme Court explicitly held that disgorgement apart from restitution was not available under the UCL. The plaintiff in *Korea Supply* was a

broker who represented a company that lost a military hardware sale to the Republic of Korea to the defendant. Plaintiff sought recovery of its lost \$30 million commission alleging that it was restitution. The court reviewed its *Kraus* and *Cortez* decisions and the legislative history of the UCL and concluded that the only monetary relief authorized under the UCL was restitution to those from whom money was directly taken or who otherwise have an ownership interest in withheld funds as in *Cortez*. Since the defendant had not taken the commission from plaintiff, and it was merely a “contingent expectancy of payment from a third party” in which plaintiff had no ownership interest, the court concluded that its recovery was not available under the UCL holding that “nonrestitutionary disgorgement of profits is not an available remedy in an individual action under the UCL.”

Thus, it is quite clear from *Kraus*, *Cortez*, and *Korea Supply* that the monetary relief remedies in private individual or nonclass representative actions under the UCL are limited to restitution and do not include either disgorgement or damages. It is likewise clear from prior decisions, as well as this trilogy, that the prohibition on damages also applies to UCL class actions. Although footnote 6 in the *Korea Supply* decision notes that the issue of whether its reasoning on disgorgement applies to class actions is “not before us”, much of the reasoning of *Korea Supply* would apply to bar the disgorgement remedy in class actions as well. *Cf. Corbett v. Superior Court*, 101 Cal. App. 4th 649 (2002) (a pre-*Korea Supply* case concluding that disgorgement was a permissible remedy in a UCL class action.)

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

In addition to the equitable defenses suggested by *Kraus* and *Cortez*, there are other defenses that may be asserted in UCL actions.

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

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



Where the conduct which allegedly violates Section 17200 is subject to federal law and regulation, there may be preemption. In *Lopez v. Washington Mutual Bank, Inc.*, 302 F. 3d 900 (9th Cir. 2002) the court held that the Federal Home Owner's Loan Act preempted state claims for unfair competition. Likewise, in *Public Utility District No. 1 v. Snohomish County v. Dynegy Power Marketing*, 2003 W.L. 261396 (S.D. Cal. 2003), the court held that exclusive jurisdiction by a federal agency over wholesale electricity rates preempted UCL claims. Compare *Kodadek v. MTV Network*, 152 F. 3d 1209, 1212 (9th Cir. 1998) (unfair competition claim preempted by copyright laws) with *Roskind v. Morgan Stanley Dean Witter & Co.*, 80 Cal. App. 4th 345, 353 (2000) (no preemption in securities law case).

For regulated industries, such as health, banking or insurance, the court may abuse its discretion by granting any relief under Section 17200. See *People v. Duz-Mor Diagnostic Lab. Inc.*, 68 Cal. App. 4th 654, 662 (1998). Imposing injunctive relief may be "an inappropriate exercise of judicial authority" in cases involving economic policy or highly regulated industries. *California Grocers Ass'n v. Bank of America*, 22 Cal. App. 4th 205 (1994); *Wolfe v. State Farm Fire & Casualty Ins. Co.*, 46 Cal. App. 4th 554 (1996). The courts cannot usurp legislative or regulatory oversight. *Samura v. Kaiser Foundation Health Plan*, 17 Cal.App. 1284, 1299-02 (1993).

## **E Advertising**

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

Unlike common law fraud, Section 17500 does not require any showing of intent to defraud, actual deception, reasonable reliance, or damage. See, e.g., *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal. 3d 197, 211 (1983); *People v. Cappuccio, Inc.*, 204 Cal. App. 3d 750 (1988). Instead, the legal standard is the *tendency* or *likelihood* of the statement to deceive or confuse. *Fletcher v. Security Pac. Nat'l. Bank*, 23 Cal. 3d 442 (1979); *Committee on Children's Television, Inc., supra*, 35 Cal. 3d at 211. Negligent dissemination of a statement which is untrue or misleading is enough. See, e.g., *People v. Superior Court (Forest E. Olsen, Inc.)*, 96 Cal. App. 3d 181, 195 (1979) ("the injury to

consumers victimized by false or deceptive advertising is no less when it results from negligence than when knowingly or recklessly made”).

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

In *Kasky v. Nike*, 27 Cal. 4th. 939 (2002) *cert. granted* 71 USLW 3319 (2003), however, the California Supreme Court held a media campaign by defendant Nike in response to media reports that its workers overseas were exploited in substandard working conditions was commercial speech subject to regulation under the unfair competition law. It rejected Nike’s contention that its press releases and other public relations documents were entitled to full First Amendment protection, reasoning that it was enough that Nike was a business engaged in selling a product, the intended audience included customers who may purchase the product, and the content related to the product or to Nike’s business operations. The United States Supreme Court has accepted review of this decision. *Id.*

In determining whether statements are false or misleading, California applies the “reasonable consumer” test derived from the FTC’s interpretation of the Federal Trade Commission Act. *Lavie v. Proctor & Gamble*, 105 Cal. App. 4th 496, 503-06 (2003). Thus, an advertising campaign that “Aleve is gentler to the stomach lining than aspirin” was found to be lawful since it was not likely to deceive reasonable consumers. *Id.* Where advertising targets a particularly vulnerable group, such as preschool children, its truthfulness will be measured by the impact it will likely have on members of that group, not others to whom it was not primarily directed. *See, e.g., Committee on Children’s Television, Inc., supra*, 35 Cal. 3d 197 (defendant’s advertising for sugar-filled cereals was targeted at children).

Section 17500 applies to any person or entity directly engaged in making false or misleading statements or to any employee thereof. Bus. & Prof. Code §§ 17500, 17506. Liability also may be imposed upon those who direct and control the activities of others who make such statements. *People v. Toomey*, 157 Cal. App. 3d 1, 15 (1984). Several appellate decisions had held that those corporate personnel with control over the advertising at issue have a duty of care to investigate claims made and may be liable even absent any direct knowledge of the

misrepresentations. See, e.g., *People v. Dollar Rent-a-Car Systems*, 211 Cal. App. 3d 119, 132 (1989).

### **XIII. DEFENSES TO ANTITRUST LIABILITY**

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

#### **A. Statutory Defenses**

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

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

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

Two decisions have dealt with the issue of whether Section 17200 applies to government entities. In *Trinkle v. California State Lottery*, 71 Cal. App. 4th 1198 (1999) the court held it did not apply to the California State Lottery. In *Notrica v. State Compensation Insurance Fund*, 70 Cal. App. 4th 1198 (1999), however, the court held that Section 17200 applied to the defendant since, even though it was a public entity, it functioned as a private insurance company. 70 Cal. App. 4th at 944.

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

The federal "filed rate" doctrine precludes damage recoveries when rates filed or approved with government agencies are challenged as unreasonable. *Wegoland, Ltd. v. NYNEX Corp.*, 27 F. 3d 17 (2d Cir. 1994). California courts are virtually unanimous in following the doctrine where federal agencies are involved, although one court did reject it where only a state agency was involved. *Cellular*

*Plus, Inc. v. Superior Court*, 14 Cal. App. 4th 1224, 1240-44 (1993). See generally *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F. 3d 979, 991-92 (9th Cir. 2000).

The Ninth Circuit has also reaffirmed that rates filed with *federal* administrative agencies may not be challenged under the Cartwright Act. *County of Stanislaus v. Pacific Gas & Electric Co.*, 114 F. 3d 858, 866 (9th Cir. 1997). In *Public Utility District No. 1 of Snohomish County v. Dynegy Power Marketing*, 2003 W. L. 261396 (S. D. Cal. 2003) the court dismissed claims under both the Cartwright Act and the UCL due to the filed rate doctrine even though defendants' specific prices were not reviewed and approved in advance by a federal agency. The court reasoned that since defendants operated pursuant to market based tariffs approved by the Federal Energy Regulatory Commission, and those rates were subject to the exclusive jurisdiction and review by the agency under a "just and reasonable" standard, that the filed rate doctrine applied to bar antitrust claims based on allegations that the rates were too high.

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

The filed rate doctrine has also been applied to bar civil monetary penalties sought by the Attorney General under UCL. *People ex. rel Lockyer v. Mirant, et al*, Case No. C-02-1787 (N. D. Cal. 2003). In *Mirant*, the Attorney General sought to impose monetary penalties on numerous electricity generators based on their alleged violations of rules promulgated by the Federal Energy Regulatory Commission ("FERC"). The court dismissed on preemption grounds, and also held the filed rate doctrine barred the claims since the \$2500 per day civil penalty claim would effectively change the rate approved by FERC, which has exclusive jurisdiction over rates and other terms of sale with respect to wholesale electricity. *Slip Op.* at 27-30.

### **3. Labor Activities**

The Cartwright Act specifically exempts labor from coverage under the Act. Bus. & Prof. Code § 16703. Accordingly, labor union activities will be exempt from Cartwright Act scrutiny to the extent that the "primary purpose" of the

activity is to obtain a valid labor objective, *e.g.*, collective bargaining, honoring picket lines, or picketing non-union businesses. *See, Los Angeles Pie Bakers Ass'n v. Bakery Drivers, Local 276*, 122 Cal. App. 2d 237, 238 (1953) (collective bargaining does not violate the Cartwright Act); *Schweizer v. Local Joint Executive Board*, 121 Cal. App. 2d 45, 53 (1953) (agreement not to cross picket lines does not violate the Cartwright Act); *Messner v. Journeymen Barbers, Local 256*, 53 Cal. 2d 873, 886 (1960) (agreement to picket non-union business does not violate the Cartwright Act).

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

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

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

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

Both the statutes and the *Guidelines*, however, permit and encourage some collaborative activities by insurers, both with respect exchanging rate and

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

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

## 5. *Agriculture*

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

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

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

Acts done in compliance with the California Marketing Act of 1937, or marketing orders issued pursuant to the Act, cannot be challenged under the Cartwright Act, the Unfair Practices Act, the Fair Trade Act, or under “any rule of statutory or common law against monopolies or combinations in restraint of trade.” Food & Agri. Code § 58655. Sweeping antitrust immunity also applies to acts done in compliance with orders of California’s various agricultural commissions, such as

the Table Grape Commission (Food & Agri. Code § 65671), the Iceberg Lettuce Commission (Food & Agri. Code § 66682), and the Winegrowers Commission (Food & Agri. Code § 74005).

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

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

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

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

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

While prior precedent held that the Cartwright Act does not apply to the professions, in *Cianci v. Superior Court*, 40 Cal. 3d 903, 925 (1980), the California Supreme Court overruled that prior precedent, and specifically held that the Cartwright Act applies to all businesses, including the professions. In *Cianci*, the California Supreme Court also held that the Cartwright Act applies to nonprofit occupations that have a “public service aspect.” This suggests that charitable institutions and associations may also be subject to the Cartwright Act.

#### **9. *Health Care***

While there is no exemption for health care entities, Section 16770 of the Business & Professions Code provides that the formation of groups of providers (*e.g.*, doctors and hospitals) and purchasing groups for the purpose of creating efficient-sized contracting units should be subject to “only those antitrust prohibitions applicable to the conduct of other presumptively legitimate enterprises.” Bus. & Prof. Code § 16770(g). *See also*, Health & Safety Code § 1342.6. Where such groups are at least partially integrated and risk sharing occurs, this has been interpreted to mean that the rule of reason applies. *Reynolds v. California Dental Service*, 200 Cal. App. 3d 590 (1988) (court held that dental plan requirements of copayments and that it would not pay dentist more than “usual fee” for any given service were permissible and affirmed grant of summary judgment to defendant).

## 10. *Statute Of Limitations*

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

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

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

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

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

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

In *Ludwig v. Superior Court, supra*, 37 Cal. App. 4th at 21-22, the Court of Appeal adopted the test articulated by the United States Supreme Court in *Professional Real Estate Investors v. Columbia Pictures*, 508 U.S. 49 (1993), to determine whether a particular lawsuit is a “sham.” *PRE* held that the sham exception did not apply unless the action was objectively baseless and the



subjective motive of defendant was to suppress competition. The objectively baseless standard is analogous to that necessary to prevail in a malicious prosecution action. If the two prong test is *PRE* is not satisfied, then the lawsuit is immune under the *Noerr-Pennington* doctrine.

## **2. Standing**

Bus. & Prof. Code § 16750(a) provides a private right of action to “[a]nyone who is injured in his or her business or property” by a violation of the Cartwright Act. This language is identical to the federal statute creating a private cause of action, and from which federal courts have concluded that standing is limited to those who suffer “antitrust injury,” *i.e.*, the injury must result from lessened competition, not heightened competition, and is generally limited to consumers or competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977). This injury and standing requirement has also been applied to claims under the Cartwright Act. *Morrison v. Viacom*, 66 Cal. App. 4th 534, 548 (1998); *Vinci v. Waste Management*, 36 Cal. App. 4th 1811, 1814 (1995).

However, despite this close parallel to federal law, one court concluded that standing to assert a Cartwright Act violation is broader than federal law. *Cellular Plus*, 14 Cal. App. 4th at 1233. The better view is that the antitrust injury requirement is the same as federal law given the identical statutory language. *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F. 3d 979, 991 (9th Cir. 2000) (noting that, except for indirect purchasers, California standing requirements are same as federal law).

Other courts have also applied the federal antitrust injury requirement and required that the injury to the plaintiff must flow from the “anticompetitive aspect” of the defendant’s conduct. In *Vinci v. Waste Management, Inc.*, 36 Cal. App. 4th 1811 (1995), the Court of Appeal held that a plaintiff employee could not sue his former employer under the Cartwright Act for firing him. *Id.* at 1816. Although the firing allegedly arose from a Cartwright Act conspiracy to engage in predatory pricing, the court held plaintiff lacked standing because “[t]he injury he suffered, the loss of his job, was not the type of loss the antitrust statute was intended to forestall.” *Id.* at 1816. *Accord Morrison v. Viacom, Inc.*, 66 Cal. App. 4th 534, 548 (1998) (plaintiff must show “the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants’ acts unlawful”);

## **3. Primary Jurisdiction**

Primary jurisdiction is a judicially created doctrine whereby a court may dismiss or stay an action pending resolution of some portion of the action by an administrative agency. *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289 (1973). In *Farmers Ins. Exchange v. Superior Court*, 2 Cal. 4th 377 (1992), the court applied

the doctrine to stay a UCL claim pending insurance administrative proceedings, and indicated that a trial court has discretion to invoke it if it will benefit from administrative expertise and it will promote uniform application of regulatory laws. In *Cellular Plus*, however, the Court of Appeal rejected the application of the doctrine of “primary jurisdiction” to a Cartwright Act claim involving a regulated industry, holding that antitrust claims need not first be brought before the administrative agency charged with regulating that industry. *Cellular Plus*, 14 Cal. App. 4th at 1246-47.

#### **4. *In Pari Delicto***

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

#### **5. *Unclean Hands***

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

#### **6. *Indirect Purchasers***

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

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

The California Supreme Court has stated that the legislative repudiation of *Illinois Brick* creates a “mandate to avoid unnecessary procedural barriers to indirect

purchasers' prosecution of California antitrust suits. *Union Carbide Corp. v. Superior Court*, 36 Cal. 3d 15 (1984).

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

#### **XIV. GOVERNMENT ENFORCEMENT**

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

Any violation of the Cartwright Act is subject to criminal penalties. Bus. & Prof. Code § 16755(a). In addition to the business entity involved, criminal penalties may also be imposed on managers, directors, or other employees who knowingly participate in a violation. *Id.* The potential criminal penalties include fines up to \$1 million for a corporation and \$250,000 for individuals and imprisonment up to 3 years. Bus. & Prof. Code § 16755(a)(1) and (2). Although criminal penalties are fairly rare and generally confined to horizontal collusive activities, they have been utilized in several cases. Neither the Cartwright Act nor the UPA provide for civil monetary penalties (but see Bus. & Prof. Code § 16755(c)).

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

Likewise, the Attorney General or district attorneys may bring civil actions to recover damages for injury to the state and its political subdivisions. Bus. & Prof. Code § 16750(c). The Attorney General may also serve as the class representative in a class action brought on behalf of political subdivisions, public agencies, or citizens of the state. Bus. & Prof. Code § 16750(d). As in private actions, damages are automatically trebled, and prejudgment interest may be

recovered if the court finds it is “just in the circumstances.” *Unedus v. California Shoppers, Inc.*, 86 Cal. App. 3d 932 (1978); § 16761. The state also may seek injunctive relief, including such mandatory injunction as may be necessary to restore competition. Bus. & Prof. Code § 16754.7; *People v. Mobile Magic Sales, Inc.*, 96 Cal. App. 3d 1(1979).

The Attorney General also has civil investigative powers under the general provisions of the Government Code (§§ 11180, 11181) and need not first show that a violation has probably taken place. *Younger v. Jensen*, 26 Cal. 3d 397, 404(1980). District attorneys have similar powers but must first show a reasonable belief that there has been a violation of the Cartwright Act, the UPA, or the UCA. Bus. & Prof. Code § 16759.

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

## **XV. PRIVATE ENFORCEMENT**

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

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

As discussed *supra*, the Cartwright Act requires a showing of *Brunswick*-type antitrust injury as a standing requirement under Section 16750(a). *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F. 3d 979, 991 (9th Cir. 2000); *California Dental Assn. v. California Dental Hygienists Assn.*, 222 Cal. App. 3d 49, 61 (1990). Except for indirect purchaser standing discussed *supra*, however, the antitrust injury requirement under Section 16750 is similar to federal law. *Knevelbaard, supra*, 232 F. 3d at 989. *See also Big Bear Lodging Ass’n v. Snow Summit*, 182 F. 3d 1096, 1103 (9th Cir. 1999) (no antitrust injury where competitors benefit from inflated prices).

Private antitrust actions under Section 16750(a) may also be brought as class actions. Section 382 of the California Code of Civil Procedure is the governing statute, and has been interpreted to require predominance of common questions, adequacy of representation and other requirements for class certification similar to Rule 23 of the Federal Rules of Civil Procedure. *Rosack v. Volvo of America*, 131 Cal. App. 3d 741 (1982). Thus, it is likely that horizontal price fixing cases will be certified as class actions, whereas other types of Cartwright Act claims may not be certified. *BWI Custom Kitchen v. Owens-Illinois, Inc.*, 191 Cal. App. 3d 1341 (1987).

In a class action claim based on the Cartwright Act, the claims of individual class members may be not aggregated together to meet the \$75,000 amount in controversy requirement for federal diversity jurisdiction. *Borgeson*, 909 F. Supp. at 718-19. Treble damages under the Cartwright Act do not constitute a “common and undivided” interest belonging to the class as a whole, such that the treble damages claims could be aggregated for diversity jurisdiction purposes. *Id.*

A defendant faced with a Cartwright Act claim filed in a California state court may sometimes seek to remove that claim to federal court based on the “artful pleading” doctrine. *See, e.g., Salveson v. Western Bankcard Ass’n*, 731 F. 2d 1423 (9th Cir. 1984). When the removal is based on the fact that the artfully pleaded claim is really a federal antitrust claim, the Ninth Circuit has held that generally removal is not proper. *Redwood Theatres, Inc. v. Festival Enterprises, Inc.*, 908 F. 2d 477, 480 (9th Cir. 1990). By contrast, the Ninth Circuit permits removal when state law claims raise issues subject to exclusive federal jurisdiction, by reason of a federal agency regulatory framework or otherwise. *Sparta Surgical Corp. v. National Association of Securities Dealers*, 159 F. 3d 1209, 1211 (9th Cir. 1998); *ARCO Environmental Remediation, LLC v. Department of Health and Environmental Quality*, 213 F. 3d 1108, 1113-14 (9th Cir. 2000). The rationale of such cases is that removal is proper when the claim is necessarily federal in character, or the right to relief depends on the resolution of a substantial federal question. 213 F. 3d at 113-14.

Arbitration may be a time-efficient and cost-effective way of resolving complex business disputes. While in the past the arbitrability of Cartwright Act claims was in doubt, recent California authority squarely holds that private parties may agree to binding contractual arbitration of Cartwright Act claims. *Wolitarisky v. Blue Cross of California*, 53 Cal. App. 4th 338, 345 (1997); *Crown Homes, Inc. v. Landes*, 22 Cal. App. 4th 1273, 1283 (1994).

Private actions and remedies under the Unfair Competition Act are discussed *supra* in Section XII.

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