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# THE CARTWRIGHT ACT AT 100 – A HISTORY OF COMPLEMENTARY ANTITRUST ENFORCEMENT – A CELEBRATION

Don T. Hibner, Jr. and Heather M. Cooper\*

## I. Introduction

On March 23, 1907, the California Legislature enacted what was to become known as the “Cartwright Act.”<sup>1</sup> It was described as:

An act to define trust and to provide for criminal penalties and civil damages, and punishment of corporations, persons, firms, and associations, or persons connected with them, and to promote free competition in commerce in all classes of business in this state.<sup>2</sup>

The history of antitrust legislation in the United States, and its relationship to the common law, has had a checkered past. English common law dealt intermittently, and not very comprehensively, with “restraints of trade” and “monopolies.” “Monopolies” were generally presumed to be against public policy, because they raise prices, reduce output, diminish product quality, and generally reduce opportunities for gainful employment.<sup>3</sup>

Certain aspects of English common law had been adapted to use in the colonies, and remained in use subsequent to the formation of the United States. However, the adoption, use and interpretation of “common law” precedents relating to monopolies and restraints of trade was, at best, eclectic.<sup>4</sup> Even during colonial days, and certainly as exacerbated by the Jacksonian legislative battles relating to the establishment of the Bank of the United States, the American public had a deep-seated suspicion, if not radical aversion, to governmental corporate and “monopoly” grants, as providing for special privileges, and in derogation of “States’ rights.”

During the early period leading up to and immediately following the Civil War, most corporate grants were by a special act of the legislature, and in many cases did indeed provide for a privileged status and for discrimination against competing entities.<sup>5</sup> As

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1 Stat. 1907, c. 530, p. 986, §§ 1-12.

2 The act was incorporated into the California Business and Professions Code in 1941 by Stat. 1941, c. 526, § 1.

3 See *Case of Monopolies*, 11 Coke 84, 77 Eng. Rep. 1260 (K.B. 1603). See also IRVING SCHER, ANTITRUST ADVISOR (4th ed. 2007) § 1:2. As opposed to monopolies, “restraints of trade” generally related to contractual restrictions on the ability to engage in a particular trade or profession, where a purchase of the whole or a part of a going concern, had been transferred from one person to another. See *Mitchell v. Reynolds*, 1 P. Williams 181, 24 Eng. Rep. 347 (K.B. 1711).

4 See William L. Letwin, *Congress and the Sherman Antitrust Law: 1887 – 1890*, 23 U. CHI. L. REV. 221 (1956) (“Letwin”).

5 This may have had its genesis in the perceived abuses of the medieval guild system, including the pre-Enlightenment use of crown monopoly grants. See Letwin, *supra* note 4, pp. 228-30.

suggested by Letwin, the concerns over special legislative corporate grants was eliminated by going to the opposite extreme of opening corporate status, including limited liability for the incorporated entity, to general incorporation laws authorizing state officials to issue charters to all qualified applicants, and without any consideration being given for special legislative immunities or privileges.<sup>6</sup>

Following the Civil War, and particularly with the advent and expansion of the railroads, large amalgamations of venture capital produced a series of industrial “combinations,” which caused substantial political concern among both of the main political parties at the time. These industrial combinations were referred to as “trusts,” and gave the name “antitrust” to governmental and judicial regulation and oversight of such entities.<sup>7</sup>

Agitation for legislation against “trusts” had little to do with concern over “restraints of trade,” as that term had been used by the few English common law cases known to the American colonists, and discussed in early judicial opinions. Rather, it was a concern over “monopolies.”<sup>8</sup> Nineteenth century America was predominantly agrarian, as most Americans engaged in commerce lived on freestanding farms, or in a small town environment. As suggested by Professor Bork, the history of competition in America in the nineteenth century did not include competition among numerous small businesses. Rather, western towns were generally established to be a day’s ride by horse and wagon each from the other. Each town would probably consist of not more than one or several general stores, a barber shop, an undertaker’s parlor, a livery stable, a Chinese laundry, and perhaps a vertically integrated hotel/bar/brothel.<sup>9</sup> The economic model in a western town during the period immediately after the Civil War, would have been one of “spacial oligopoly,” and “monopolistic competition,” and basically, pricing interdependence. Because of transportation costs, which would be necessarily incurred in searching between western towns, any geographic relevant market substitutability searches would be inefficient and at best marginal. Thus, in most environments, we would expect to find small firm price and output equilibrium to be the economic model of choice as well as necessity.

Needless to say, this economic model was greatly challenged by the advent of the railroads, and their perceived proclivity for artificially establishing railheads that would promote economic efficiency advantages, over more distant towns. The railroads were also induced to engage in rate discrimination in the transport of basic goods, which were the life

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6 *Id.* at 231. Connecticut, New Jersey, Pennsylvania and Massachusetts passed general incorporation laws between 1837 and 1851. California, Indiana and Minnesota adopted constitutions during this timeframe that prohibited legislatures from creating private corporations in any way other than by general incorporation.

7 LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* § 1-3, pp. 7-8 (2d ed. 2006) (“SULLIVAN & GRIMES”).

8 *Id.*

9 *See, e.g.*, Robert H. Bork, *The Supreme Court v. Corporate Efficiency*, 76 *FORTUNE MAGAZINE* 92 (1967), and Robert H. Bork, “*Antitrust in Dubious Battle*,” 80 *FORTUNE MAGAZINE* 103 (1969). *See also* SULLIVAN & GRIMES, *supra* note 7. As suggested by Hibner and Hasegawa, the integrated hotel/bar/brothel would be efficient in reducing consumer search-costs. The complementary services provided would tend to reciprocally augment the demand functions of each service provided, as well as that of an integrated whole. *See* Don T. Hibner, Jr. & Andrea B. Hasegawa, “*The Silver Anniversary of an Antitrust Sea-Change, Continental T.V. and Brunswick at Twenty-Five*,” *COMPETITION*, 2002, at 32, n.44 (“Hibner & Hasegawa”).

blood of economic well-being in rural America. These concerns certainly included the Standard Oil Company, as well as what were known as the oil, sugar and whiskey trusts. In part, these latter “trusts” raised concerns over the preferential advantages they had enjoyed through seeking and obtaining legislative preferential import tariffs, to the detriment of the expansion of indigenous competing firms.<sup>10</sup>

Agitation for “anti-monopoly” or “anti-tariff laws” was championed by the “Grange Movement,” also known as the “Patrons of Husbandry” movement.<sup>11</sup> This formed the parameters of the debate that accompanied the passage of the Sherman Act.

The movement against trusts was given great emphasis by the increased activity of the trusts themselves, with the formation of new combinations of venture capital enterprises. These included the formation of the Standard Oil Trust.<sup>12</sup> Against the backdrop of the trust movement, and populist political activism in the late nineteenth century, “antitrust” legislation became a political hot button in the election of 1888. The antitrust act introduced by Senator John Sherman of Ohio was signed into law by President Benjamin Harrison on July 2, 1890. However, at the time of its enactment, 13 states had already passed antitrust laws, beginning with Kansas in 1889.<sup>13</sup>

Seventeen years later, the Cartwright Act was passed by the California Legislature. This article will consider the reasons for its enactment, and its contributions to California and national antitrust jurisprudence through its first 100 years. As we will see, it got off to a slow start. We will examine some of the reasons given for this seeming somnolence. As we will also see, however, rudimentary regression analysis would tell us that the Cartwright Act has generally followed the shifts and curves of the development of the Sherman Act, including the resolution of periods of uncertainty, retrenchment and expansion that have accompanied its development.

The salutary benefits derived from the Cartwright Act are not a function of whether the Act was “patterned” on the Sherman Act, or on antitrust laws enacted by various states, including Texas, Michigan and/or Ohio. It is, rather, the evolution of our understanding of the Act’s basic objectives. We conclude that since at least 1960, with the general understanding that the Cartwright Act is currently believed to be “not only harmonious” with the Sherman Act, but shares its “identical objectives,” we may expect the two laws to

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10 Letwin, *supra* note 4, at 225-26. The “trust” issue became generally mixed with concerns over tariff questions. The “tariff” versus “commerce” issue persisted during the legislative discussions that led to the enactment of the Sherman Act, in 1890. There was a substantial debate whether the Sherman bill should be referred to the Senate Finance Committee, which would deal with tariff problems, or to the Commerce Committee, that would deal with constitutional limitations on the ability of Congress to regulate interstate commerce.

11 Letwin, *supra* note 4, at 232. By 1875, when the Grange Movement had reached its peak, it is estimated that one of every ten American farmers was a member. *Id.* at 232.

12 The concept of a trust as a means to control the pricing and output of otherwise competing entities was reportedly the brainchild of Samuel Dodd, an attorney working for Standard Oil Company of New Jersey. The trust was given control of all of the properties of Standard Oil and its numerous affiliates, with each shareholder receiving trust certificates for each share of Standard Oil stock held. The trustees elected the directors and other officers of each of the component companies, and controlled output and pricing. Letwin, *supra* note 4, at 222-23.

13 Letwin, *supra* note 4, at 221.

move forward in the foreseeable future in a complementary fashion, each supporting and augmenting the goals of the other. This also supports the basic objectives of the “law merchant” and of common sense, namely that statutory regimes with substantially similar objectives, should apprise those subject to regulation what is generally expected of them.<sup>14</sup> We conclude, therefore, that at least since Justice Traynor’s opinion in *Speegle v. Board of Fire Underwriters*,<sup>15</sup> and since Stanley M. Mosk became the California Attorney General in the early 1960s, the Cartwright Act has emerged from its status as a “Sleeping Beauty”<sup>16</sup> into a complementary and efficient antitrust enforcement regime.<sup>17</sup> Thus, we join with Justice Mosk in welcoming further coordinated development of California and federal antitrust law and policy, and continuation of the objective of consumer welfare maximization.

## II. The Birth Of The Sherman Act, And Its Early Childhood

### A. The Birth of the Sherman Act – 1887-1890

Through its attorney, Samuel Dodd, the Standard Oil Company of Ohio formed the Standard Oil Trust in 1882. It was enormously popular and encouraged the establishment of approximately 200 “look-a-like” trusts, thus fueling additional and more intense public outcry for legislative relief. Among the largest trusts were the railroads, coal, steel, sugar, tobacco and meat packing. In addition, farmers felt increasingly threatened by railroad rate discrimination which hindered or made more expensive the transport of their goods to railhead communities for transportation to the markets of America.

Notwithstanding the outraged public sentiment against trusts, it took the United States government a long time to take any effective measures to deal with Standard Oil and the other trusts. However, by 1887, Congress passed the Interstate Commerce Act, and thus focused attention towards the constitutional breadth of the Commerce Clause of the United States Constitution, as opposed to its power over the enactment of protective tariffs. However, the judicial reach of the Commerce Clause at that time was limited to activities

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14 See Statement of Don T. Hibner, Jr. before the State of California Senate Judiciary Committee Hearings, COMPETITION, Spring/Summer 2006, at 112; Don T. Hibner Jr. and Heather M. Cooper, *Market Competitiveness: Does State Antitrust Law Need to be Updated?*, *id.* at 59; Transcript of Testimony of Thomas Rosch, *id.* at 66 (“this is not a problem under the Cartwright Act as there is virtually no divergence between state and federal law related to horizontal and vertical concerted activity.”).

15 29 Cal. 2d 34 (1946).

16 Note, *The Cartwright Act – California’s Sleeping Beauty*, 2 STAN. L. REV. 200 (1949) (“2 STAN. L. REV.”).

17 See Honorable Stanley Mosk, *State Antitrust Enforcement and Coordination with Federal Enforcement*, 21 AMERICAN BAR ASS’N SECTION OF ANTITRUST LAW, ANTITRUST L. J. 258 (1962). This is a celebration, however, of the Cartwright Act, and not the California Unfair Practices Act (“UPA”). Developments under the UPA run counter to the consumer welfare objectives of the Cartwright Act. It needs substantial revision. See *Statements of Don T. Hibner, Jr. and Professor Carl Shapiro Before the California Senate Judiciary Committee*, COMPETITION, Spring/Summer 2006, at 111 and 85. See also Julian O. Von Kalinowski & John J. Hanson, *The California Antitrust Laws: A Comparison with the Federal Antitrust Laws*, 6 U.C.L.A. L. REV. 533-34 (1959) (“Von Kalinowski & Hanson”).

that actually took place “in” interstate commerce, and not simply activities that had an “effect” thereon.<sup>18</sup>

Thus, even while 13 states had already passed antitrust bills prior to the enactment of the Sherman Act, there was little action that could be effectively taken at either the state or the federal level.<sup>19</sup> Nevertheless, between 1887 and 1890, the attorneys general of five states initiated lawsuits to dissolve corporations that exceeded their chartered powers, or to destroy associations that exercised corporate powers without having obtained charters.<sup>20</sup> These successes, few in number as they were, led some to believe that because of the ability to use corporate state law to attack violations of state corporate charters, that no new “monopolies” law would be necessary.

A contrary view was held by members of the newly formed American Economic Association.<sup>21</sup> Dialogue within the American Economic Association was to the effect that state regulation of the trust was essential, and that any attempt to outlaw them legislatively, and to prosecute them judicially, would do more harm than good. However, there was a great degree of skepticism.<sup>22</sup> In addition, the common law prohibited some combinations but not others. Only those that exercised “total” restraints were void, and not those that may have encouraged overall allocative efficiency with “partial” or “ancillary” restraints. Thus, agreements by some, but not all producers that resulted in the setting of uniform prices, production quotas, exclusive dealing areas, or profit pooling, might be deemed to be “partial,” and not have a monopolistic effect on markets in general. However, a main defect in the common law relating to whether a restraint was “partial” or “total” was that while a restraint in violation of the common law was “void” in a suit between the parties, it was not necessarily subject to attack by a person who did not belong to or do business with the combination under attack. Thus, public officials, at common law, did not have “standing” to start proceedings to dissolve a combination or punish its members.<sup>23</sup>

With these conflicting approaches, members of Congress sought to achieve both results, by legislation that would allow attacks on some combinations, where the use of common law principles would eliminate “excesses” yet permit “healthy” or “good” combinations or

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18 Compare, *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895) (even though refined sugar was sold in interstate commerce, a monopoly of a sugar manufacturer was not subject to the Sherman Act because all of the refining was done in a single state) with *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194-95 (1974) and *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 558 (1944). A key expansion of the Commerce Clause jurisdiction may be found in *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 229-30 (1948) and *McLain v. Real Estate Board of New Orleans*, 445 U.S. 232 (1980) (interstate commerce affected because brokers commission rates affected the frequency of local residential real estate sales, which in turn affected the interstate demand for financing and title insurance).

19 Letwin, *supra* note 4, at 221.

20 See *Louisiana v. American Cotton-Oil Trust*, 1 RY. & CORP. L.J. 509 (1887) (court declared trust unlawful because it was not a corporation; *California v. American Sugar Refining Co.*, 7 RY. & CORP. L.J. 83 (1890) (corporation dissolved on ground that it had forfeited franchise by surrendering its business to the sugar trust).

21 Letwin, *supra* note 4, at 235.

22 Letwin, *supra* note 4, at 236-37.

23 Letwin, *supra* note 4, at 243.

trusts. Thus, theoretically, they would be allowed to flourish side by side, with the particular facts of a given case determining the outcome.<sup>24</sup>

In January of 1888, Senator John Sherman introduced his bill in Congress. Senator Sherman introduced a resolution directing his Senate Committee on Finance to investigate all of the then-pending “antitrust” bills.<sup>25</sup> He maintained that the Committee would investigate the antitrust bills in connection with tariff bills, which were within its proper domain.

A month later, however, Senator John Reagan, a Democrat from Texas, also introduced an antitrust bill.<sup>26</sup> When Senator Ramson pointed out that Congress derived its jurisdiction over trusts from its constitutional power to regulate commerce, and not to regulate tariffs, Senator Sherman switched his ground, causing the Reagan bill to be referred to the Finance Committee, rather than the Commerce Committee. Senator Sherman thereafter introduced an additional antitrust bill. In March 1890, Senator Sherman introduced a new bill that was to become the Sherman Antitrust Act.<sup>27</sup> Senator Sherman stated before Congress that the bill was intended to destroy combinations, not all combinations, but those which the common law would have condemned as unlawful. Any combination which sought to restrain trade, and any combination of leading corporations in an industry organized in a trust to stifle competition, dictate terms to railroads, command the price of labor, and raise prices to consumers would be a “substantial monopoly” and would be held illegal.<sup>28</sup>

Senator Reagan’s bill contained an explicit definition of the term “trust,” while the then-Sherman bill did not even use the term.<sup>29</sup> The Sherman version was referred to the Senate Judiciary Committee. Within the week, the Committee produced a bill of its own, which was to be the version enacted into law.<sup>30</sup> The Committee Minute Book shows that the various sections of the bill were drafted by Senators Edmunds, George, Hoar and Evarts. According to Letwin, the bill was largely the work of Chairman George Edmunds of Vermont. The term “in the form of a trust or otherwise” was added by Senator Evarts, not for substantive reasons, but for a political statement to demonstrate that the Congress was mindful of the country’s concern for “trusts.”<sup>31</sup> The Senate Judiciary Committee bill was passed by the Senate by a vote of 52 to 1, and unanimously in the House of Representatives. It was signed into law by President Benjamin Harrison on July 2, 1890.

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24 Letwin, *supra* note 4, at 247.

25 19 Cong. Rec. 6,041 (1888); Letwin, *supra* note 4, at 249.

26 19 Cong. Rec. at 7,512 (1888).

27 19 Cong. Rec. at 7,512 (1888).

28 21 Cong. Rec. at 2,456 (1890).

29 Letwin, *supra* note 4, at 254.

30 Letwin, *supra* note 4, at 254.

31 Letwin, *supra* note 4, at 254 n.190.

## B. The Sherman Act in the Courts – 1890-1907

From the passage of the Sherman Antitrust Act of 1890 until the era of *Continental T.V.*,<sup>32</sup> and the publication of Professor Bork's seminal work "The Antitrust Paradox," in 1978, there was a continuing, if simmering, controversy over the purposes to be served by the antitrust laws. The legislative history of the Sherman Act reveals considerable ambiguity concerning its purposes and effects. The selective citation to English common law precedents, coupled with the undeveloped reach of the Commerce Clause, qualify any resolute conclusions as to a single purpose. As is often the case with controversial legislation, its legislative record will contain a substantial number of contradictory statements and hyperbole, that is difficult to qualify or quantify. As noted by a leading commentator, the legislative history of the Sherman Act has supplied a veritable:

... wishing well into which one may peer to glimpse evidence that supports preferred policies.<sup>33</sup>

Nevertheless, a number of commentators have urged that its most consistent and dominant theme is the protection of consumers from restrictions on output and resulting high prices.<sup>34</sup>

However, the early history of the Sherman Act in the courts was not a sanguine one, but a breeder of continued and exacerbated public contempt. The Supreme Court's first interpretation of the Sherman Act threatened to emasculate its utility, by a narrow reading of its jurisdictional reach. In *United States v. E.C. Knight Co.*,<sup>35</sup> the Supreme Court refused to apply the Sherman Act to the sugar trust's acquisition of the stock of four Philadelphia refiners. The completed acquisition gave the trust control of more than 98% of the country's sugar refining capacity.<sup>36</sup> Demonstrating the limited reach of the Commerce Clause during this era, the Court drew a distinction between the control of the manufacture of a product and its sale in commerce. It held that the sale of a product was different from the capacity to manufacture it. According to the *Knight* decision, the acquisition of the refineries:

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32 *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

33 ERNEST GELLHORN, WILLIAM K. KOVACIC AND STEVEN CALKINS, *ANTITRUST LAW AND ECONOMICS* 23 (2004) ("GELLHORN").

34 See William F. Baxter, *Placing the Berger Court in Historical Perspective*, 47 *ANTITRUST L.J.* 803, 816 (1978); ROBERT H. BORK, *THE ANTITRUST PARADOX* 51 (1978) ("the only legitimate goal of American antitrust law is the maximization of consumer welfare.") ("BORK"); Hibner & Hasegawa, *supra* note 9, at 27.

35 156 U.S. 1 (1895).

36 Tariffs protecting the indigenous sugar refining industry in the United States was one of the rationales for channeling the early antitrust bills through the Finance Committee of the Senate, rather than through the recently-formed Commerce Committee.



[B]ore no direct relation to commerce between the States or with foreign nations. ...<sup>37</sup>

Therefore, the Sherman Act had no jurisdiction over the control of manufacturing monopolies. Further confusion and consternation was forthcoming in the wake of the Supreme Court's decision in *United States v. Trans-Missouri Freight Association*<sup>38</sup> in 1897.

In *Trans Missouri*, the Supreme Court declared that “every” trade restraint, without exception, was declared unlawful under Section 1 of the Sherman Act. The government sought to enjoin the members of a railroad association from agreeing upon rates. The case was complicated by the Interstate Commerce Act, which required that all rates were to be “reasonable and just.” The government did not contest defendant's allegations that they had fixed only “reasonable” rates. Writing for the majority, Justice Peckham proposed that the test of legality under Section 1 was the character of the restraint, not its degree. Thus, whether the restraint of trade was “reasonable” was immaterial, as the sole test for legality was whether it was a “restraint.”<sup>39</sup>

If this dictum were taken seriously, the court, of course, would be forced to make an award between producers and consumers. The problem is that in the absence of any discernable standard, the court would be assuming a legislative or administrative role, rather than a traditional judicial one.<sup>40</sup> The “small dealers and worthy men” would be a recurrent theme in antitrust, until put to flight by the sunshine of Professor Bork's declaration that the objective of the antitrust laws was “quite clear” and not in dispute. The sole purpose of the antitrust laws was to promote consumer welfare.<sup>41</sup>

The Court's Section 1 decisions indicated acute hostility to cartels as a means for curbing production and raising prices. However, in *E.C. Knight*,<sup>42</sup> the Court suggested that

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37 156 U.S. 17 (1895). See GELLHORN, *supra* note 33, at 28. The Justice Department welcomed the decision. Soon after the case was decided, Attorney General Richard Olney wrote:

You will have observed that the government has been defeated in the Supreme Court on the trust question. I've always supposed it would be and have taken the responsibility of not prosecuting under a law I believe to be no good. ...

Allen Nevins, GROVER CLEVELAND: A STUDY IN COURAGE 671 (1932). *Knight* was overruled in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948).

38 166 U.S. 290 (1897).

39 However, in a famous dicta, Justice Peckham unnecessarily introduced a fundamental inconsistency as to the objectives of the Sherman Act. He stated that business combinations:

... may even temporarily, or perhaps permanently, reduce the price of the article traded in or manufactured by reducing the expense inseparable from the running of many different companies for the same purpose. Trade or commerce under these circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruining of such a class.

166 U.S. at 323.

40 Hibner and Hasegawa, *supra* note 4, at 28.

41 See Robert H. Bork & Warren S. Bowman, Jr., *The Crises in Antitrust*, 65 COLUM. L. REV. 364, 375 (1965).

42 *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

the Sherman Act nevertheless permitted the use of completed mergers to avoid the condemnation of a “loose” cartel. This would be at least the case where the merger consolidated manufacturing capacity, in an era where the Commerce Clause was strictly and narrowly construed. This ambivalence to the common law doctrine of “partial” restraints helped fuel an extraordinary merger wave at the turn of the century. Many small companies were combined into dominant enterprises, including those which eventually grew to be American Tobacco, DuPont, Eastman Kodak, General Electric, International Harvester, United Shoe Machinery, U.S. Steel, and last but not least, Standard Oil of New Jersey.<sup>43</sup> Meanwhile, a more salutary result was obtained in the Sixth Circuit in Judge Taft’s decision in *United States v. Addyston Pipe & Steel Co.*,<sup>44</sup> Judge William Howard Taft made a valiant attempt to settle the issue of goals and objectives and to provide the Sherman Act with a more workable formula for judging restraints. The court carefully delineated “naked” from “ancillary” restraints. This analysis has survived well into the modern era. Professor Bork has cited it as “one of the greatest if not the greatest, antitrust opinions in the history of the law.”<sup>45</sup>

Despite Judge Taft’s decision in *Addyston Pipe*, anti-monopoly agitation continued to swell. The public perceived an indifference on the part of the Department of Justice towards the abuses of the merger wave. Matters took a swift turn however with the election of Theodore Roosevelt as president. The Supreme Court soon thereafter decided *Northern Securities Co. v. United States*.<sup>46</sup> There, the Court addressed the situation in which a state statute permitted a practice prohibited under the Sherman Act. This was the formation of a holding company, which controlled the operations of competing railways. The holding company was lawful under New Jersey law. The issue was whether the New Jersey statute precluded application of the Sherman Act as an infringement on state sovereignty. The Court held that federal antitrust law applied, and could outlaw “mergers to monopoly.” *Northern Securities* is credited as the beginning of the end of the merger wave.<sup>47</sup>

### III. The Birth Of The Cartwright Act And Its Early Childhood

#### A. An Overview – Its Parentage

On March 23, 1907, the California Legislature enacted what has become known as the Cartwright Act.<sup>48</sup> The Act became effective on May 23, 1907. It was widely reported in the press.<sup>49</sup>

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43 GELLHORN, *supra* note 33, at 30.

44 85 F. 271 (6th Cir. 1898), *aff’d as modified*, 175 U.S. 211 (1899).

45 BORK, *supra* note 34, at 26.

46 193 U.S. 197 (1904).

47 GELLHORN, *supra* note 33, at 31.

48 Stats. 1907, ch. 530, p. 984, §§ 1-12. The Cartwright Act was added to the Business and Professions Code as Section 16720, *et seq.* in 1941.

49 ANTITRUST AND UNFAIR COMPETITION SECTION, STATE BAR OF CALIFORNIA, CALIFORNIA ANTITRUST AND UNFAIR COMPETITION LAW 32 nn.97-98 (3d ed. 2003).

For almost forty years, very little was said in the California cases as to its origin. In *Speegle v. Board of Fire Underwriters*,<sup>50</sup> Justice Traynor characterized the Cartwright Act as follows:

The Cartwright Act merely articulates in greater detail a public policy against restraint of trade that has long been recognized at common law. Thus, under the common law of this state combinations entered into for the purpose of restraining competition and fixing prices are unlawful.<sup>51</sup>

In *Speegle* the issue before the court was whether an agreement among insurance agents not to place insurance with other than member companies violated the Cartwright Act. Plaintiff accused defendants of engaging in a group boycott, in refusing to deal with him on the ground that he had done business with unaffiliated companies. Plaintiff contended that the complaint stated a cause of action under the Cartwright Act as well as common law rules against restraints of trade.<sup>52</sup> The defendants contended that insurance was not “commerce”, or at least was not so regarded at the time the Cartwright Act was passed. Therefore, defendants argued that the Cartwright Act could not apply to a combination in restraint of the insurance trade. In rejecting this argument, Justice Traynor recognized that insurance was determined to be “commerce” with the then-recent case of *United States v. South-Eastern Underwriters Association*, decided in 1944.<sup>53</sup>

Defendants argued that if insurance was not “commerce” within the meaning of the Commerce Clause when the Sherman Act was passed, then insurance could not have been “commerce” as that word is used in the Cartwright Act.<sup>54</sup> Justice Traynor put this argument to rest by stating:

Congress did not intend “to freeze the prescription of the Sherman Act within the mold of the then current judicial decisions defining the commerce power,” but intended on the contrary to go to the utmost extent of its power. *The Cartwright Act is couched in similarly comprehensive language; it forbids combinations of the kind described with respect to every type of business.*<sup>55</sup>

From this language from *Speegle*, courts and commentators assumed, for another 40 years, that the Cartwright Act and the Sherman Act shared a common bond of having been derived from the general common law prohibition against restraints of trade, and that the Cartwright Act was “patterned” after the Sherman Act, and that Sherman Act cases were

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50 29 Cal. 2d 34 (1946).

51 *Id.* at 44.

52 A collateral issue in the case was the defendant’s claim that the Cartwright Act was unconstitutional. This will be discussed below.

53 322 U.S. 533 (1944).

54 46 Cal. 3d at 43. In defining the term “trust” the Cartwright Act speaks in terms of “merchandise,” “commodities,” “produce,” and “articles.” By its terms, it does not include “services” within the definition of “trust.”

55 29 Cal. 2d 43 (emphasis added).

applicable in Cartwright Act cases. See, e.g., *Corwin v. Los Angeles Newspaper Service Bureau, Inc.*<sup>56</sup> This became a mantra that was repeated over and over again in a number of Cartwright Act cases, until the publication of a law review article by Moses Lasky.<sup>57</sup> The Lasky article pointed out that the judicial statements made as to the origins of the Cartwright Act, and its relationship to the Sherman Act, were “folklore and myth.” Mr. Lasky argued that the Cartwright Act was derived from substitute bill offered by Senator Reagan, at the time when Senator Sherman’s bill was still before Congress. Mr. Lasky pointed out that Senator Reagan’s model was a Texas statute of 1889, entitled “An Act to Define Trusts.”<sup>58</sup>

Drawing upon the Lasky article, the California Supreme Court explored further the relationship between the Cartwright Act and the common law in *State ex. rel. Van de Kamp v. Texaco*.<sup>59</sup> Based upon the Lasky analysis, and further research, the court concluded that the Cartwright Act was “patterned closely after the original 1889 Texas Act and its progeny, most notably the 1899 Michigan Act.”<sup>60</sup> The court concluded that under the Texas and Michigan statutes, the term “combination” did not embrace mergers, and that accordingly, the Cartwright Act did not either.<sup>61</sup>

Additional research suggests, however, that there is yet another basis for the enactment of the Cartwright Act. Newspaper articles contemporary with the enactment of the Cartwright Act, in 1907, suggest that Senator Cartwright copied the bill from Ohio law.<sup>62</sup> An article in the Los Angeles Daily Times, May 16, 1907, reports:

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56 4 Cal. 3d 842 (1971).

57 Moses Lasky, *Folklore and Myth in Judicial Opinions – Some Reflections Inspired by Texaco-Getty*, 20 U.C. DAVIS L. REV. 591 (1987) (“Lasky”).

58 *Id.* at 592. The Texas statute of 1889 was declared unconstitutional in 1897, in a habeas corpus proceeding arising after the convictions of John D. Rockefeller and others. The federal court held that the Texas statute violated the 14th Amendment as “vicious class legislation.” See *In re Grice*, 79 Fed. 627 (N.D. Texas 1897). Texas antitrust law was revised substantially with the passage of the Texas Free Enterprise and Antitrust Act of 1983. See AMERICAN BAR ASS’N SECTION OF ANTITRUST LAW, STATE ANTITRUST PRACTICE AND STATUTES, Ch. 46-1 “Texas” (2004). The purpose is “to maintain and promote economic competition.” The Act is to be “construed in harmony with federal judicial interpretation.” See Tex. Bus. & Com. Code Ann. § 15.04 (Vernon 1987).

59 46 Cal. 3d 1147 (1988) (“*Texaco*”).

60 *Id.* at 1160.

61 It is interesting to note, however, that modern day reliance on Texas antitrust decisions would be as misplaced as would reliance on Michigan cases. Michigan passed the Michigan Antitrust Reform Act in 1985. See Mich. Comp. Laws Ann. §§ 445-771 to 788 West (1989). The Michigan Act was based largely on the Uniform State Antitrust Act, promulgated by the National Conference of Commissioners on Uniform State Laws, §§ 1-17, 10 U.L.A. 771-726 (1979). The statute required Michigan courts to “give due deference to interpretations given by the federal courts to comparable antitrust statutes, including, without limitation, the doctrine of per se violations and the rule of reason.” Mich. Comp. Laws Ann. §§ 445-784 (2) West (1989) see II AMERICAN BAR ASS’N SECTION OF ANTITRUST LAW, STATE ANTITRUST PRACTICE AND STATUTES, Ch. 24-1 “State of Michigan” (1990).

62 ANTITRUST AND UNFAIR COMPETITION SECTION, STATE BAR OF CALIFORNIA, CALIFORNIA ANTITRUST AND UNFAIR COMPETITION LAW § 1:32 n.98 (3d ed. 2003). Indeed, the Cartwright Act contains a grant of transactional immunity for persons compelled to testify in prosecutions under the Act. See Stat. 1907, c. 530, p. 986, § 6. This section was codified in 1941 as Business and Professions Code Section 16758.

The fact that the Cartwright Act is practically an exact duplicate of the Ohio law, which has been declared constitutional, and which has brought many trusts to book, probably has had its salutary influence.<sup>63</sup>

The Los Angeles Daily Times article is interesting in several respects. The article is entitled “Trusts Go ‘Bust’ in Just One Week.”

The article states that many local combinations, having been notified of the Act’s effective date by the District Attorney’s office, have given notice that they will abandon their “combinations” and “give up the ghost.” It states:

So many trade combinations have been broken within the last few weeks that there apparently will be few trusts to “bust” on the 23rd inst. The desire of the members of old trusts to cut off the tentacles of the large and small octopi is more pronounced as the terms of the law become better understood. Scores of local trusts have given up the ghost – a labor union among them. Many more contemplate doing so ere the dawn of next Thursday.

It reports further:

Just what will happen when the various illegal combinations are “busted” is a matter only of conjecture. A prominent lawyer expressed the belief yesterday that there will be a general formation of big companies that will monopolize the trade in various lines. Instead of organizing trusts, the smaller concerns, manufacturers, producers or dealers, will form companies similar to those that operate the chains of drug stores, cigar stores and the like. Thus they may escape the provisions of the anti-trust law and yet will share benefits that they have enjoyed under the present system. When the people get tired of the monopolies they will have to seek some remedy that has not yet been tried.<sup>64</sup>

It is noteworthy that the Los Angeles District Attorney was prescient enough to give notice to businesses known or suspected to be engaged in combinations that would be in violation of the Cartwright Act. Section 2 of the Act directs the attorney general or the district attorney of the proper county to institute proper suits or *quo warranto* proceedings to seek the forfeiture of corporate or association charter rights, franchises or privileges.<sup>65</sup>

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63 L.A. DAILY TIMES, May 16, 1897, at 1.

64 Perhaps this was a reference to the “merger to monopoly” race that ensued after the Supreme Court’s decision in *E.C. Knight Co.*

65 See Cal. Bus. & Prof. Code § 16752.

## B. The Purposes and Objectives of the Cartwright Act

### 1. Preservation of the Competitive Process

Whether the Cartwright Act was “patterned” after the Texas Act, the Michigan Act, the Ohio Act, the Sherman Act, the common law, or all or none of the above, is clearly subsidiary to the overarching conclusion of Mr. Lasky that antitrust laws in general share a salutary and common purpose – namely the preservation of competition. As we will see, whatever the derivation of a specific antitrust statute, they may be read and interpreted *in pari materia*, if they share a common purpose and objective.

Here, we will demonstrate that indeed, from very early on, and continuing to the present, the Sherman Act and the Cartwright Act, while they may not necessarily be hitting the same musical notes, are still in “harmony.”<sup>66</sup>

The Cartwright Act, however, was soon amended by provisions that substantially narrowed its application to “combinations of capital”. In 1909, two sections were added. Section 1 of the 1909 amendment exempted certain marketing agreements, combinations and associations the objective of which was to conduct operations at a “reasonable profit.”<sup>67</sup>

Given the sparsity of legislative history under many California statutory enactments, and particularly under the Cartwright Act, we can only speculate why these sections were added. Perhaps the 1907 Los Angeles Daily Times newspaper article is a bit too sanguine concerning the wide acceptance given to the law by the trusts under attack. Perhaps there was sufficient concern that either the Cartwright Act itself was too broad, or that the approach taken by Justice Peckham in *Trans-Missouri Freight Association*, applying Section 1 of the Sherman Act to “every” contract in restraint in trade, was overly broad, and needed remediation. Or, we can conjecture whether concerned citizenry wanted to statutorily preserve and enforce the common law distinction between “partial” and “total” restraints on alienation, and thus preserve, or even anticipate, the doctrine of ancillary restraints. Nevertheless, as we can see, the constitutional issue was soon joined as to the “reasonable” profit enactment. In the 1909 amendment, Section 1, paragraph 5 of the Act was amended to provide:

... *provided* that no agreement, combination or association shall be deemed to be unlawful or within the provisions of this act, the object and business of which are to conduct its operations at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed,

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66 “The federal and California antitrust laws having identical objectives, are harmonious with each other.” *Partee v. San Diego Chargers Football Co.*, 34 Cal. 3d 378, 382 (1983); see ANTITRUST AND UNFAIR COMPETITION SECTION, STATE BAR OF CALIFORNIA, CALIFORNIA ANTITRUST AND UNFAIR COMPETITION LAW 368 (3d ed. 2003).

67 Stat. 1909, ch. 362, p. 593, § 1. This section was declared unconstitutional in *People v. Building Maintenance Contractors Association*, 41 Cal. 2d 719 (1954). It is not unlawful to enter into agreements or form associations or combinations, the purpose and effect of which is to promote, encourage or increase competition in any trade or industry, or which are in furtherance of trade. Stat. 1909, ch. 362, p. 594, § 2½. This is currently California Business & Professions Code Section 16724.

One can also wonder whether this was designed to preserve and enhance the common law rule on ancillarity, and whether it was anticipatory of the 1911 Supreme Court decision in *Standard Oil Co. of New Jersey v. United States*.<sup>68</sup> This decision clarified the basic architecture of the federal antitrust laws, and arguably, to enhance and clarify the goal of consumer welfare maximization as its primary, if not sole, purpose.

Whether historically accurate or not, California cases have, until recent times, stated that the Cartwright Act “merely articulates in greater detail the common law rules governing restraints of trade.”<sup>69 70</sup>

## 2. Enactment of Sections 1673-1675 of the California Civil Code – 1872

In order to have a better understanding of the state of the law at the time of the enactment of the Cartwright Act, and its 1909 amendments, it is instructive to review the history of Sections 1673-1674 of the California Civil Code. These sections were incorporated as Section 16600-16602 of the California Business & Professions Code in 1941. Section 1673 provided that “every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void.” Section 1674 codified the ancillary restraints doctrine. Many of the pre-1907-08 California cases relate to the common law doctrine of ancillary restraints, as codified in these 1872 Civil Code sections.

However, there are several early cases that dealt with combinations in restraint of trade, where the horizontal competitors in an agreement constituted a less than significant portion of the producers for the goods in question and the relevant geographic market involved. These cases tend to illustrate the concern at the time that local “partied restraints” in isolated markets were not the concern of the law. Rather, it was the amalgamation of large venture capital combines which came to be generally referred to as “trusts” or “monopolies.”

In *San Diego Water Co. v. Flume*,<sup>71</sup> the California Supreme Court held that a “loose” merger of a company operating in San Diego with another company that owned a pumping plant and a systems of mains and pipes for water distribution, was not unlawful. However, in *Mill and Lumber Co. v. Hayes*,<sup>72</sup> the Supreme Court held that where an agreement among

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68 221 U.S. 1 (1911).

69 See, e.g., *Rolley, Inc. v. Merle Norman Cosmetics, Inc.*, 129 Cal. App. 2d 844 (1954); Von Kalinowski and Hanson cite *Milton v. Hudson Sales Corp.*, 152 Cal. App. 2d 418 (1957), as an example of the “persuasiveness of Sherman Act cases in interpreting the Cartwright Act.” See Von Kalinowski & Hanson, *supra* note 17, at 533. The earliest California case involving a restraint in trade is *California Steam Navigation Co. v. Wright*, 6 Cal. 258 (1856). In *Wright*, the court held that an agreement not to operate a boat in competition with the plaintiff was lawful. But, 12 years later, in *Wright v. Ryder*, 36 Cal. 342 (1868) the court held that an agreement by a buyer of a boat not to use the boat in competition with the seller for a 10-year period was an unlawful restraint of trade. These early California common law cases involved the validity of covenants not to compete made by the seller of a business. A key issue involved is the doctrine of ancillary restraints and whether the overriding business objective is competition enhancing, and whether the restraint is “ancillary” to the main purpose, and will better assist in its pro-competitive objectives. As recognized by Von Kalinowski and Hanson, these are generally fact specific cases.

70 Von Kalinowski & Hanson, *supra* note 17, at 537 n.33.

71 108 Cal. 549 (1893).

72 76 Cal. 387 (1888).

competitors involved most of the competitors in an industry fixed prices and eliminated competition, it was an unlawful restraint under common law. Again, the *rationale* seems to be a comparative analysis between monopoly power and incidental horizontal agreements, but with no potential for serious anti-competitive effects.

In *Herriman v. Menzies*,<sup>73</sup> we see the common law doctrine of partial restraints in full flower. *Herriman* involved the formation of an association of firms providing stevedore service in the City of San Francisco. The association's agreement provided for the fixing of a schedule of prices or charges for any and all work to be performed as stevedores. Each of the association members agreed that they would not perform work for lower prices, or grant any discounts from the agreed-upon schedule. Plaintiff argued that the agreement contemplated an illegal scheme to stifle competition in the stevedore business.

The California Supreme Court affirmed that the complaint did not state a cause of action. The court held that the object of the agreement was not to create a "monopoly," as the members of the combination were insignificant in the market for the supply of stevedore services in the San Francisco community. It held that:

A monopoly exists where all, or so nearly all, of an article of trade or commerce within a community or district is brought within the hands of one man or set of men, as to practically bring the handling or production of the commodity or thing within such control to the exclusion of competition or free traffic therein.<sup>74</sup>

In addition, the court stated that a monopoly is unlawful, but only if it relates to some staple commodity, and not to something that is mere luxury or convenience.

Of interest is the court's citation from *Skrainka v. Scharringhausen*<sup>75</sup>:

The old doctrine of the common law that contracts in restraint of trade are void, is no longer to be rigorously insisted upon, precisely as it was insisted upon in the earlier cases in which it was announced. *It has been modified by the more recent decisions as the laws of trade have become better understood during the development of our commercial system, and the changes which have been introduced in the social system.*

The *Herriman* court continued:

It is not that contracts in restraint of trade are any more legal or enforceable now than they were in any former period, but that the courts look differently at the question as to what is a restraint of trade.<sup>76</sup>

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73 115 Cal. 16 (1896).

74 *Id.* at 20-21.

75 8 Mo. App. 522 (1880) (emphasis added).

76 115 Cal. at 22. Is this a precursor of *Leegin*? See *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).



In *Grogan v. Chaffee*,<sup>77</sup> the court held that a resale price maintenance agreement was not illegal under Civil Code Section 1673, relying in part on *Herriman*. In *Grogan*, the plaintiff produced olive oil through a proprietary process. Plaintiff affixed a resale price maintenance notice to each bottle or package of the olive oil that it sold. The notice stated that the article was sold on the condition that the purchaser, if it retails these goods, shall maintain “my fixed retail selling price on them; and that if he wholesales them, he will sell them subject to the same condition.” The defendant was a retail grocer, who purchased olive oil from plaintiff, but resold it at prices less than the resale price set by plaintiff.

The Supreme Court held that the resale price maintenance condition was not a restraint of trade, as the plaintiff had no monopoly power over fungible olive oil, citing *Herriman*.

Between the parties to the agreement, the court held the agreement to be valid. It noted that the defendant is not precluded from engaging in any lawful trade, and may sell other olive oil at any price and on any conditions satisfactory to him. The court stated further that the plaintiff had the right to sell or not sell his oil to the defendant, and when he did sell it, he had the right to exact a promise by the purchaser that he would not sell it at less than a stipulated price. The court intimated that this was nothing more than the right of a manufacturer to maintain a standard price for its goods. The court stated:

It is simply a means of securing the legitimate benefits of the reputation, which his product may have attained.<sup>78</sup>

The court again noted that:

The tendency of the courts is to regard contracts in partial restraint of competition with less disfavor than formerly, and the strictness of the ancient rule has been greatly modified by the modern decisions.<sup>79</sup>

It continued:

[I]t must be taken to be settled that the sections of the Civil Code, sections 1673, 1674, 1675 relating to contracts in restraint of trade are to be construed in the light of these principles.<sup>80</sup>

Finally, in *D. Ghirardelli Co. v. Hunsicker*,<sup>81</sup> the issue before the court was again resale price maintenance. As in *Grogan*,<sup>82</sup> the plaintiff sought to enjoin defendants from selling its chocolates at prices other than as set forth in the notice on the label which declared the fixed minimum resale price. The court noted the Supreme Court’s ruling in *Dr. Miles*,<sup>83</sup> but

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77 156 Cal. 611 (1909).

78 *Id.* at 614.

79 *Id.* at 615.

80 *Id.* (citing *Herriman*).

81 164 Cal. 355 (1912).

82 *Grogan v. Chaffee*, 156 Cal. 611 (1909).

83 *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

found it to be distinguishable. This was on the ground, as set forth in *Grogan*, that “there were many competing substitutes available to consumers, and thus, no restraint of trade.” In *Dr. Miles*, the patented medicines, in effect, had no substitutes and was thus a “monopoly,”<sup>84</sup> Here, in a market for “chocolate,” there can be no restraint of trade, and the restraint would be considered at common law to be only “partial.”

The *Ghirardelli* court also cited *Dr. Miles* for the proposition that whether a contract is a restraint of trade, is a function of “adaptation to modern conditions.”<sup>85</sup> In effect, the *Ghirardelli* court gave *Dr. Miles* a rule of reason and not a *per se* interpretation. The court concluded “we see no reason for modifying the rules expressed in *Grogan*.”<sup>86</sup>

In addition, the defendant in *Ghirardelli* urged that the agreement violated the “so-called Cartwright Act.”<sup>87</sup> The court noted that this question had not been decided in *Grogan*. It conceded for purposes of argument that the agreement would be in violation of the Cartwright Act as it stood unamended, in 1907. The court held that the 1909 amendment to Section 1, “entirely answers the contention of the defendants.” The court held that the complaint in issue sufficiently showed that the only object of the plaintiff was to conduct its operations at a “reasonable profit.” Accordingly, the judgment enjoining defendant from reselling plaintiff’s chocolate below the RPM price was affirmed.<sup>88</sup>

#### IV. The Cartwright Act As A Complimentary Antitrust Enforcement Regime

##### A. The Long Sleep

In *People v. Sacramento Butchers Association*,<sup>89</sup> the court upheld the constitutionality of the Cartwright Act. In so doing, it made several important observations. The first related to the purpose of the Act. A criminal information charged various meat companies in Sacramento with forming the Sacramento Butchers Protective Association. Its individual members executed and carried out agreements which set the prices at which meat could be resold at retail in the City of Sacramento. The information alleged that as a result of the agreement, purchasers of meat at retail paid higher prices than would have been paid absent the agreement. In effect, the Sacramento Butchers Protective Association engaged in a group boycott to refuse to deal, and to price discriminate, against non-association members who would buy meat from members, and sell in competition with association members.

In beginning its opinion, the court set forth with particularity the purpose of the statute. It stated:

The act concerned here is what is commonly known as the ‘Cartwright Anti-Trust Law,’ and, as its title and provisions clearly indicate, its purpose is to prevent such business combinations as will result

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84 164 Cal. at 361-62. Another precursor of *Leegin*?

85 *Id.* at 361.

86 *Id.*

87 *Id.* at 362.

88 *Id.* at 363.

89 12 Cal. App. 471 (1910).

in restrictions in trade or commerce, or, in other words, in the destruction of free competition in the manufacture, sale and purchase of merchandise and other commodities for domestic use.<sup>90</sup>

The court also recognized that a prohibition of conspiracies, implied “incipiency” effects, and would operate against combinations that were less than monopolies. In making it clear that a finding of “monopoly” is not essential to a violation of Section 1 of the Cartwright Act, the court cited to and quoted from *United States v. E.C. Knight Co.*<sup>91</sup> It stated:

Again, all the authorities agree that, in order to vitiate a contract or conspiracy, it is not essential that its result shall be a complete monopoly. It is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition.<sup>92</sup>

Having determined that the Cartwright Act was constitutional, the light goes out for almost 40 years. How can this be so? Commentators have addressed this question without any definitive answer. In a law review note, “The Cartwright Act – California’s Sleeping Beauty,”<sup>93</sup> the editor notes that from 1907 to 1949, 42 years produced only three reported cases brought by the State of California. The last was in 1919.<sup>94</sup> During the same period, the editor notes that only seven private actions had been reported.<sup>95</sup>

The editor posits four possibilities for the lack of enforcement. First, he asks is there really an antitrust problem in California?<sup>96</sup> Second, has the Cartwright Act been so unfavorably treated by the courts that its use has been discouraged? Third, have economic developments impeded enforcement? Fourth, has enforcement machinery been adequate? Unasked, but perhaps germane, is the chilling effects “reasonable profit” exemption of the 1909 amendment. The editor notes that the federal Antitrust Division in its California enforcement efforts, demonstrates that there has indeed been an antitrust “problem” in California. The Cartwright Act has not been treated unfavorably by the courts, such that we might surmise that its use has been discouraged. For whatever reason, or reasons, few cases were brought by private parties, and fewer by the State of California, and its subdivisions. Did economic developments impede enforcement? Notable, of course, was

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90 12 Cal. App. at 476.

91 156 U.S. 16 (1895).

92 12 Cal. App. at 482 (emphasis added). The case was decided a year before *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), which articulated the basic tenets of a rule of reason analysis.

93 2 STAN. L. REV. 200 (1949).

94 See *People v. H. Jevne Co.*, 179 Cal. 621 (1919).

95 See 2 STAN. L. REV. 201, footnote 13 (collecting cases).

96 Was the Los Angeles Daily Times article of May 16, 1907 correct, that with the District Attorney of Los Angeles County putting the “trusts” on notice of the enactment of the Cartwright Act, that the trusts would go “bust” in “just one week.” The article states:

So many trade combinations have been broken within the last few weeks that there apparently will be few trusts to bust on the 23rd inst. ... Scores of local trusts have given up the ghost – a labor union among them. Many more contemplate doing so ere the dawn of next Thursday.

the Great Depression, and the “Blue Eagle” codes.<sup>97</sup> Finally, in answer to the question of whether enforcement machinery was adequate, the editor concludes that it was not.<sup>98</sup> The editor notes that while responsibility for the administration of the Cartwright Act rests both with the Attorney General and the county district attorneys, there is no evidence that the Attorney General’s office attempted to obtain any additional enforcement funds prior to 1946. In 1946, the Attorney General recommended the establishment of an Antitrust Unit within his office.<sup>99</sup>

This sentiment is shared by Attorney General Stanley Mosk, in a speech and article before the American Bar Association, Section of Antitrust Law.<sup>100</sup>

Although the constitutionality of the Cartwright Act was upheld in *People v. Sacramento Butchers Association*,<sup>101</sup> serious concerns reappeared in 1927. Colorado had passed an antitrust law that had been copied from the Cartwright Act. It had a provision identical to the 1909 Cartwright Act amendment. In *Cline v. Frink Dairy Co.*,<sup>102</sup> the United States Supreme Court, in an opinion by Chief Justice Taft, held that the Colorado statute was unconstitutionally vague and indefinite, and thus violated the due process clause of the 14th Amendment. In holding the Colorado antitrust statute unconstitutional, Chief Justice Taft cited his own decision, while a federal circuit court judge, in *United States v. Addyston Pipe Company*,<sup>103</sup> as well as *United States v. Trans-Missouri Freight Association*,<sup>104</sup> and *United States v. Joint Traffic Association*.<sup>105</sup> Chief Justice Taft distinguished the notion that “every” restraint of

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97 The National Industrial Recovery Act (NIRA), 15 U.S.C. § 703 (1933), was enacted to combat the Great Depression. Its purpose was to prevent the continued downward spiraling of consumer prices that were hindering industrial growth. To stabilize economic conditions, the NIRA established the National Recovery Administration (NRA), which administered NIRA orders for various local and national industries. The NRA “Blue Eagle” codes allowed each trade to formulate a code of conduct, that in effect, stabilized pricing, regulated output, and controlled “unfair methods of competition.” The United States Supreme Court overturned NIRA in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). The Court held that the NIRA infringed on the states’ authority, unreasonably stretched the Commerce Clause, and constituted an unlawful delegation of legislative powers to the executive branch. The case became known as the “Sick Chicken” case. California, among other states, enacted legislation in support of the National Agricultural Adjustment Act, which also allowed for the establishment of local codes that would regulate prices and output. See Stat. 1933, c. 1028, p. 2619, operative October 25, 1933. The act provided for the suspension of the antitrust and unfair competition laws of the state.

98 See 2 STAN. L. REV. at 207.

99 2 STAN. L. REV. 208. See California Biannual Report of the Department of Justice 1944-46, p. 9.

100 See Hon. Stanley Mosk, *State Antitrust Enforcement and Coordination with Federal Enforcement*, 21 AMERICAN BAR ASS’N SECTION OF ANTITRUST LAW, ANTITRUST L. J. 358 (1962). Attorney General Mosk notes, as did the Stanford Law Review editor, that a key issue to enforcement under the Cartwright Act has been uncertainty as to its constitutionality, particularly the “reasonable profit” proviso added in 1909. The District Attorney of Los Angeles County seems to have done much better, at least according to the Los Angeles Daily Times article of 1907. When giving notice of an intention to prosecute under the Act, he was apparently successful in achieving assurances of compliance from a number of trusts within Los Angeles County.

101 12 Cal. App. 471 (1910).

102 274 U.S. 445 (1927).

103 271 (6th Cir. 1898), *aff’d as modified*, 175 U.S. 211 (1899).

104 166 U.S. 290 (1897).

105 161 U.S. 505 (1898).

trade was an unlawful restraint of trade, and held that pursuant to *Standard Oil Company v. United States*<sup>106</sup> and *United States v. American Tobacco Company*,<sup>107</sup> the common law recognized the legality of “partial,” or “ancillary” restraints.<sup>108</sup> The Court then pointed out that a “reasonableness” test was no test at all. The Court stated:

The manifest danger in the administration of justice according to so shifting, vague and indeterminative a standard would seem to be a strong reason against adopting it.<sup>109</sup>

The Court also noted that:

This same view, when directed to the question of judging restraints of trade by reference to reasonableness of prices effected [sic] by the restraint is confirmed by the latest decision of this Court on the subject in *United States v. Trenton Potteries Company*, 273 U.S. 392,<sup>110</sup> where it was said:

The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. *The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. . . .* Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restrictions, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions.<sup>111</sup>

In 1938, in *Blake v. Paramount Pictures*,<sup>112</sup> District Judge Leon Yankwich held, on the authority of *Cline*, that the Cartwright Act, in its entirety, was void for vagueness. He specifically rejected the argument, raised by counsel, that the language of the 1909 proviso could be severed from the remainder of the Cartwright Act, and that it could thus continue in force.

Arguably, this placed the Cartwright Act in a further state of limbo, at least for another eight years. But then, however, Justice Roger Traynor wrote for the California Supreme Court in *Speegle v. Board of Fire Underwriters*.<sup>113</sup> As discussed above, Justice Traynor’s opinion

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106 221 U.S. 1 (1911).

107 221 U.S. 106 (1911).

108 274 U.S. at 462.

109 *Id.* at 462.

110 273 U.S. 392 (1927).

111 *Trenton Potteries*, 273 U.S. at 397-98 (emphasis added).

112 22 F. Supp. 249 (S.D. Cal. 1938).

113 29 Cal. 2d 34 (1946).

in *Speegle*, as supplemented by the advent of Stanley Mosk as Attorney General, was the “kiss” that substantially woke the “Sleeping Beauty.” The next section explains that the history of development under the Cartwright Act since *Speegle* has remained in basic “harmony” with that of federal antitrust law under Section 1 of the Sherman Act. For each of the decades since 1946, the two regimes have remained relatively harmonious, if not always in a single voice. Thus, with the exception of *Illinois Brick*<sup>114</sup> and the indirect purchaser controversy, California and federal antitrust law under Section 1 of the Sherman Act have been generally able to apprise businessmen and women of that which is expected of them, and what types of contacts and conduct should be avoided to minimize antitrust exposure.

Provided below is a cursory analysis of Cartwright Act developments in each of the decades since *Speegle*.<sup>115</sup> We continue to agree with Attorney General Mosk that the regimes remain complementary one to the other, and serve a common purpose, namely the preservation of consumer welfare.

## **B. The Awakening**

The Stanford Law Review note comes to no definitive conclusion why the “Sleeping Beauty” slept for so long, or so soundly.<sup>116</sup> None of the proffered reasons definitively answer why so few decisions, either public or private, were forthcoming in the period from 1907 through 1946. While federal antitrust enforcement certainly had its high and low points during this same period, this does not seem to be a very good “fit” either.<sup>117</sup>

While the Stanford Law Review Note does not offer a plausible explanation for the “long sleep in,” both the Note and Attorney General Mosk suggest that the time for invigorated Cartwright Act enforcement is nigh. In an article in the American Bar Association Antitrust Section Journal, Attorney General Mosk reports that under his administration, an antitrust law enforcement unit had been established within the Attorney General’s office, and that

All that remains is need for sensible coordination of state and federal forces and this as I have said, is a practical and not a legal problem.<sup>118</sup>

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114 *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

115 29 Cal. 2d 34 (1946).

116 See 2 STAN. L. REV. 200 (1949).

117 See Sullivan & Grimes, *supra* note 7, at 7 (describing the major shifts in U.S. antitrust policy from the presidency of William Howard Taft, from 1909-1913 (“tepid”); 1920-1935 (the Great Depression, and the NIRA); 1936-1960 (the resurgence of antitrust enforcement in the second term of the Roosevelt administration, with the advent of Thurman Arnold, as head of the Antitrust Division). The authors conclude that the period of active antitrust enforcement under the Sherman Act “probably reached its peak in the 1960’s.” By the mid-1970’s, they argue that there is a sense that some court decisions has suppressed conduct that was efficient, as evidenced by the growth and influence of the so-called “Chicago school,” which tempered enforcement policy. We should not make the leap of logic, however, that reduced “enforcement” means less commitment to free market principles. Rather, it evidences an appreciation that increases in economic learning warrant the elimination of “bad” cases, which may thwart the goals of allocative efficiency, by the chilling of vigorous competition.

118 Honorable Stanley Mosk, *State Antitrust Enforcement and Coordination with Federal Enforcement*, 21 AMERICAN BAR ASS’N SECTION OF ANTITRUST LAW, ANTITRUST L. J. 358, 368 (1962).

A “quick-look” walk through some of the more significant decisional history of the Cartwright Act follows.

## V. The 1950s

The 1950s saw a dramatic increase in cases of significance under the Cartwright Act. Three cases are discussed below.

### A. *People v. Building Maintenance Contractor's Association*<sup>119</sup>

Defendants were a building maintenance contractor's association, that provided building maintenance services for buildings in San Francisco. Of the 44 maintenance contractors in San Francisco, only 14 were members. However, members employed approximately 90 percent of the total number of employees employed by all maintenance contractors.

Members of the association agreed among themselves that if bids were called for by any person having an existing, unexpired contract with any member of the association, the members whose bids were solicited would report this fact to the association. The association would then determine whether the prices under the existing contract were “reasonable.” If it concluded that they were, members were not allowed to bid for the renewal. If the association determined that the prices were “unreasonable,” members were allowed to submit bids as they saw fit. The defendants declared that they entered this agreement

... with the intent and for the object and purpose of conducting operations at a reasonable profit, or marketing at a reasonable profit products and services that could not otherwise be so marketed ... and for no other intent whatever nor for any other object or purpose whatever.<sup>120</sup>

The court made it clear that the agreement constituted a “trust,” as defined in Section 16720. Defendants contended however, that the 1909 amendment that had been codified as Business and Professions Code 16723 was controlling. The court noted that this was the issue that had been decided in *Cline*,<sup>121</sup> as to the identical amendment to the Colorado antitrust statute. It also noted, however, that in *Speegle*,<sup>122</sup> the California Supreme Court, in an opinion by Justice Traynor, held that because the exemption had been added to the statute by amendment, it was severable from the remainder of the act.<sup>123</sup>

The *Building Maintenance* court had no difficulty in holding that the vagueness of the words “reasonable profit” infected the 1909 amendment, and found the amendment was unconstitutional. It noted that “reasonableness” provided no guidance to those who would be affected by the statute. It stated:

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119 41 Cal. 2d 719 (1953).

120 *Id.* at 722-23.

121 *Cline v. Fink Dairy Co.*, 274 U.S. 445 (1927).

122 *Speegle v. Board of Fire Underwriters*, 29 Cal. 2d 34 (1946).

123 *Id.* at 48.

Moreover, an industry may be inefficient or producing a product about to be driven from the market by a superior substitute. In such cases, to obtain profits sufficient to permit payment of reasonable wages and provide a reasonable return on capital would require suppression of efficient competitors or elimination of the competitive substitute. We did not believe that the Legislature intended that reasonable profits should carry a meaning that would permit such a result. . . . The amendment presupposes that the free market is to be interfered with by an agreement to secure reasonable profits. It would be superfluous if it permitted only those agreements that have no effect on a free market.<sup>124</sup>

**B. *Rolley, Inc. v. Merle Norman Cosmetics***<sup>125</sup>

*Rolley* is essentially a “full line forcing” case. Today it would be categorized as a “franchise format” case. Merle Norman Cosmetics (“Norman”) sold its products to retailers and assigned each an exclusive franchise with a designated area of responsibility. Norman called a meeting of certain of its franchisees and instructed them to cease purchasing cosmetic products manufactured by competitors, allowing the existing franchise retailers a six month period during which to dispose of competing products. Anyone who failed or refused to comply would be terminated as a franchisee.

On an appeal from a judgment entered after sustaining a demurrer to a third amended complaint, without leave to amend, the court of appeal affirmed. In paying homage to *Speegle*, the court stated:

At the common law combinations and contracts in restraint of trade are illegal and void as against public policy. California courts had long recognized this public policy before the advent of the Cartwright Act and, as a matter of fact, the latter act is considered basically merely a statutory enactment of the common law of the state.<sup>126</sup>

The court noted that there were no “monopolistic aspects” in the contract between Norman and the plaintiff. The court stated:

There are no specific allegations of fact to indicate that Norman is a monopoly or has the ability to become one, that Norman is engaged in price fixing or has the ability to do so, or that defendants are restraining competition.<sup>127</sup>

In the absence of such allegations, the court noted that nothing prevented the dealers from substituting away from Norman and engaging in business relationships with competitors. The court stated:

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124 41 Cal. App. 2d at 725. A more cogent description of consumer welfare maximization, as the sole if not principal rationale for a competition policy would be hard to imagine, even with the eloquence of a Professor Bork. BORK, *supra* note 34, at 51 (1978) (“the only legitimate goal of American antitrust law is the maximization of consumer welfare.”). See also William F Baxter, *Placing the Burger Court in Historical Perspective*, 47 ANTITRUST L.J. 803, 816 (1978).

125 129 Cal. App. 2d 844 (1954).

126 *Id.* at 846.

127 *Id.*



The defendant Norman is one competitor in a field occupied by many, and the four defendant retailers are even more insignificant in relation to the number of retailers in this business. To say that this relationship would prevent competition is unrealistic. It should prompt the plaintiff to build a better mousetrap, and that after all it is the essence of competition.<sup>128</sup>

**C. *Milton v. Hudson Sales Corp.***<sup>129</sup>

*Milton* involved a refusal by defendant, a subsidiary sales outlet of an automobile manufacturer, for its refusal to renew plaintiff's dealership. Plaintiff brought an action for breach of contract and for breach of the Cartwright Act. The court affirmed a judgment for the plaintiff on the contract count, and reversed a judgment for plaintiff on the Cartwright count.

As to the Cartwright count, Milton alleged that Hudson conspired with other retail dealers to refuse to renew his dealership, and to eliminate him as a competitor at retail.<sup>130</sup> The court of appeals then "punted," in effect, to federal antitrust cases under the Sherman Act. It stated:

There have been relatively few California cases construing the Cartwright Act. As a result the parties quite properly refer principally to the federal law. There is little doubt that cases decided under the Sherman Act and the common law policy against restraint of trade are applicable to problems arising under the Cartwright Act.<sup>131</sup>

Citing *Chicago Board of Trade v. United States*<sup>132</sup> the *Milton* court pointed out that:

Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.<sup>133</sup>

Citing from *People v. Building Maintenance Association*<sup>134</sup> the court stated:

[I]t may be assumed that the broad prohibitions of the Cartwright Act are subject to an implied exception similar to the one that validates

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128 *Id.* at 852 (emphasis added).

129 152 Cal. App. 2d 418 (1957).

130 Consider what the import of these allegations would have been in light of the subsequent United States Supreme Court's decision in *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959) (group boycott activities *per se* unlawful, at least for most of the next generation).

131 152 Cal. App. 2d at 441, citing *Building Maintenance*, 41 Cal. 2d 719 (1953), *Speegle*, 29 Cal. 2d 34 (1946) and *Rolley*, 129 Cal. App. 2d 844 (1954).

132 246 U.S. at 231, 238 (1918).

133 152 Cal. App. 2d at 441-42.

134 41 Cal. 2d 719, 727.

reasonable restraints of trade under the federal Sherman Antitrust Act.<sup>135</sup>

The court noted that on the facts of the case at bar, a refusal to deal would only be unlawful if it produced an unreasonable restraint of trade. This would not be the case here, where the articles being sold were in direct competition with the products of other manufacturers, and where there were no allegations that the alleged conspiracy caused a dearth of automobiles in general in the East Bay area of California, or even of Hudson automobiles in particular.<sup>136</sup> Accordingly, the court concluded that there could be no injury to the public or to competition.<sup>137</sup>

## VI. The 1960s

The 1960s saw a dramatic further increase in cases of significance under the Cartwright Act. In general, the cases reflect the tightening of “per se” rules in response to the antitrust decisions of the Warren and Burger Courts. Following are three exemplars.

### A. *People v. Inland Bid Depository*<sup>138</sup>

The Inland Bid Depository (IBD) was a combination of general contractors organized for the purpose of processing subcontractor bids. Under its rules, participating subcontractors agreed not to submit bids to general contractors who did not use the depository. Nor were they allowed to submit bids after the closing of solicited bids, or to submit additional bids or offers outside of “business hours.”

The Attorney General’s office brought an action for injunctive and equitable relief, alleging that the depository was a combination in violation of the Cartwright Act. Although the increase in building cost attributable to the depository was found to be *de minimis*, the court concluded that it constituted an unreasonable restraint of trade, in violation of Business and Professions Code § 16720. The court entered an injunction, after allowing the defendants to submit proposed new rules. On appeal, the court found that the proposed rules themselves were in violation of the Cartwright Act, and reversed. One of the new rules was that contractors could not submit lower or competing bids more than four hours or more prior to the time set by the awarding authority for the closing of bids. The court held that this was a continuation of an illegal group boycott.

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135 152 Cal. App. 2d 442 (citing *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911)).

136 *Id.* at 443.

137 Perhaps with a premonition of *Monsanto*, yet unborn, the court noted that “simply because the manufacturer and the dealers discussed the matter before the expiring agency or dealership agreements terminate and are not renewed,” is of no legal significance. *Id.* at 444. See *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984). The court also cites to *United States v. E. I. duPont de Nemours & Co.*, 351 U.S. 377 (1956), for the proposition that where commodities are reasonably interchangeable by consumers for the same purposes, agreements restraining trade as to a portion of the general product are not illegal. For an additional pre-*Klor’s* refusal to renew case, see *A.B.C. Distrib. Co. v. Distillers Distrib. Corp.*, 154 Cal. App. 2d 175 (1957) (foreclosure of 7% not actionable).

138 233 Cal. App. 2d 851 (1965).

In so finding, the court cited a number of United States Supreme Court cases, including *Silver v. New York Stock Exchange*,<sup>139</sup> *Northern Pac. Ry Co. v. United States*,<sup>140</sup> and *Klor's Inc. v. Broadway-Hale Stores, Inc.*<sup>141</sup>

In the group boycott area, California had joined the “*per se*” club.<sup>142</sup>

**B. *People v. Santa Clara Valley Bowling Proprietor's Association***<sup>143</sup>

Defendants were members of the Bowling Proprietor's Association of America (BPAA). One of the purposes of BPAA was to foster the formation of state, city and district bowling proprietor associations and to coordinate the rules for the operation of local tournaments. Eligibility to participate in local tournaments required member establishments and bowlers to sign agreements to desist from participating in organized bowling in any non-affiliated competing bowling establishments who were not members of BPAA.

The Attorney General brought an action for injunctive relief under the Cartwright Act, alleging that the BPAA eligibility rules constituted a group boycott, in violation of the Cartwright Act.

The trial court specifically found that the term and eligibility rules did not have an adverse effect on nonmember competition, but concluded that the rules were “secondary boycotts” and tie-ins in violation of the Cartwright Act. The trial court, however, approved a modified eligibility rule. On appeal, the Attorney General contended that the modified eligibility rule was not substantially different from its predecessor, and also constituted an illegal *per se* group boycott.<sup>144</sup> Defendants urged that the determination be made on a “rule of reason” basis.

Affirming in part and reversing in part, the court of appeal, citing *Speegle*<sup>145</sup> and *Milton v. Hudson Sales Corp.*,<sup>146</sup> held that cases decided under the federal Sherman Act, as well as the common law policy against restraints of trade, are applicable to problems arising under the Cartwright Act. It noted that pursuant to the principles of *United States v. Trans-Missouri Freight Association*,<sup>147</sup> and *United States v. Joint Traffic Association*<sup>148</sup> the justification of “reasonableness” was not originally available as a defense to a combination which had the

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139 373 U.S. 341 (1963).

140 356 U.S. 1 (1958).

141 359 U.S. 207 (1959).

142 Defendants argued that the depository rules were designed for efficiency, and to prevent a form of “unfair competition” known as “bid peddling.” The court disposed of this claim and noted that “bid peddling” was a form of price competition. The court mandated open competition to be available to all bidders, whether a member or not of the depository.

143 238 Cal. App. 2d 225 (1965).

144 238 Cal. App. 2d 231.

145 29 Cal. 2d 34 (1946).

146 152 Cal. App. 2d 418 (1957).

147 166 U.S. 290 (1897).

148 170 U.S. 505 (1898).

effect of restraining trade. However, it also noted the development of the rule of reason in *Standard Oil*<sup>149</sup> and *American Tobacco Co.*<sup>150</sup> There, the Supreme Court held that only those restraints that are undue or unreasonable would be unlawful. The court held that these authorities supported an implied exception under the Cartwright Act. See *People v. Building Maintenance Ass'n.*<sup>151</sup> The court noted that the California courts have adopted four “*per se*” categories, from analogous, federal antitrust decisions. These include price fixing, division of markets, group boycotts, and tying.<sup>152</sup> The court determined that the BPAA tournament eligibility rule is akin to the bid depository restraint struck down as *per se* illegal under *People v. Inland Bid Depository*, discussed above.<sup>153</sup> The court noted that the leading and controlling case (also followed in *People v. Inland Bid Depository, supra*) was *Klor's Inc. v. Broadway-Hale Stores, Inc.*<sup>154</sup> Anticompetitive effects were now irrelevant, as was “public injury.” Under a “*Klor's*” analysis, “purpose” to restrain trade is all that is required. “In addition, the character and effects of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.”<sup>155</sup>

Thus, by 1965, the court of appeal had cited with approval and had adopted the rationale of the litany of United States Supreme Court cases narrowing the categories of acceptable behavior, and delineating tighter and narrower *per se* rules.

### C. *Carl S. Swenson v. E. C. Braun Co.*<sup>156</sup>

*Swenson* is also a bid depository case. Plaintiff was a licensed general building contractor and defendant a licensed subcontractor engaged in the plumbing and heating business. Defendant was a member of the Greater Bay Area Bid Service (“Bid Service”). The bid service required all members to submit bids on a construction project pursuant to its lock box rules. Once deposited, a subcontractor bid cannot be withdrawn and a new bid may not be submitted.

The defendant subcontractor submitted bids on a construction project through the Bid Service, and plaintiff received the bids. Plaintiff was awarded the general contract. Defendant, however, prior to the opening of the bids, purported to withdraw its plumbing bid. Plaintiff refused to recognize the right of the defendant to withdraw its bid, contending that this would be in violation of the Bid Service rules. Plaintiff initiated a dispute before the Bid Service “Fair Trade Committee.” A hearing was held and the Committee ruled that the defendant was bound to honor its subcontract bid. Plaintiff filed a petition for an order confirming the award. Defendant, in opposing confirmation, moved for vacation on the ground that the bid depository rules were an illegal restraint of trade under both federal and

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149 *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

150 *United States v. American Tobacco Co.*, 221 U.S. 106 (1946).

151 41 Cal. 2d 719, 727 (1953).

152 238 Cal. App. 2d 225, 235 (1965).

153 *People v. Inland Bid Depository*, 233 Cal. App. 2d 851 (1965).

154 359 U.S. 207 (1959).

155 Citing *Continental Ore v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962).

156 272 Cal. App. 2d 366 (1969).

state antitrust law. The trial court found that the bid depository rules constituted an illegal group boycott, and that the award was likewise illegal and unenforceable under the Cartwright Act.

The court of appeal under the now familiar mantra stated:

The California antitrust law, commonly known as the Cartwright Act, is patterned upon the federal Sherman Antitrust Act, and federal cases construing the Sherman Act as well as the common law policy against restraint of trade are applicable with respect to the Cartwright Act. [Citing cases.]<sup>157</sup>

## VII. The 1970s

By the end of the 1960s, the United States Supreme Court had expanded its use of *per se* analysis to its highest level. In *United States v. Arnold, Schwinn & Co.*,<sup>158</sup> the Supreme Court held that all vertically imposed territorial restraints were *per se* unlawful.<sup>159</sup> *Schwinn* was described by professors Bork and Bowman as the high watermark in the “crisis of antitrust.”<sup>160</sup> In *Albrecht v. Herald Co.*,<sup>161</sup> the Supreme Court ruled that the *per se* ban on resale price maintenance encompassed vertical agreements to establish maximum resale prices. *Albrecht* was criticized extensively by antitrust scholars.<sup>162</sup> In *United States Steel Corp. v. Fortner Enterprises*,<sup>163</sup> the Supreme Court held that “uniqueness” was “sufficient economic power” over the product in issue, credit, to support the “conditioning” of the purchase of an unwanted tied product.<sup>164</sup> In the 1970s, these chickens found a place to roost in Cartwright Act decisions.

### A. *Oakland-Alameda County Builders v. F.P. Lathrop Construction Company*<sup>165</sup>

This was yet another bid depository case. Pursuant to the bid depository rules, all bids must be submitted to the owner or awarding authority by depositing them in a lock box. After a cut-off point, or closing time, no more bids could be received, amended or withdrawn. Although not a case of first impression,<sup>166</sup> the court, in an opinion by Justice Mosk, held that restrictive bid depository rules were unlawful *per se*. The practice complained of was described as “bid peddling” or “bid shopping,” by which a general

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157 272 Cal. App. 2d at 368-69.

158 388 U.S. 365 (1967).

159 The Supreme Court did so on the basis of *Dr. Miles Medical Co. v. John D. Parke & Sons, Co.*, 220 U.S. 373 (1911).

160 See Robert H. Bork and Ward S. Bowman, Jr., *The Crisis in Antitrust*, 65 COL. L. REV. 364 (1965).

161 390 U.S. 145 (1968), overruled by *State Oil Co v. Kalm*, 522 U.S. 3 (1997).

162 See, e.g., BORK, *supra* note 34, at 281-82; PHILLIP AREEDA AND HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 1635-39 (1989); Frank Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886, 901 (1981).

163 394 U.S. 495 (1969) (*Fortner I*).

164 This heresy was put to flight by the sunshine of *Jefferson Parish Hospital Dist. Number 2 v. Hyde*, 466 U.S. 2 (1984).

165 4 Cal. 3d 354 (1971).

166 See, e.g., *People v. Building Maintenance Contractors' Ass'n*, 41 Cal. 2d 719, 272 (1953).

contractor would use a subcontractor's bid as an inducement to secure a lower bid from a competing subcontractor, after the close of bidding. The court held that:

Instead of being a vice . . . it is readily apparent that the practice defined as "bid peddling" is illustrative of open price competition in its purest form.<sup>167</sup>

Justice Mosk held that the Sherman Act and the Cartwright Act had the same objectives, and were designed to combat the same competitive abuses. In citing *United States v. Socony-Vacuum Oil Co.*, Justice Mosk quoted Justice Douglas writing for the Court:

[F]or over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense. . . .<sup>168</sup>

He then stated that pursuant to *Speegle*<sup>169</sup>

[W]e delineated a similar policy underlying the Cartwright Act: "The Cartwright Act merely articulates in greater detail a public policy against restraint of trade that has long been recognized in common law. . . . The public interest requires free competition so that prices are not dependent upon an understanding among suppliers of any given commodity, but upon the interplay of economic forces of supply and demand."<sup>170</sup>

The court also cited *Klor's* and *Keifer Stewart* with approval.<sup>171</sup> Again, the Court articulated:

Because the Cartwright Act is patterned after the federal Sherman Act and both have their roots in the common law, federal cases interpreting the Sherman Act are applicable in construing the Cartwright Act.

*Chicago Title Insurance Co. v. Great Western Financial Corp.*, 69 Cal. 2d 305, 315 (1968).<sup>172</sup>

Do we discern a "pattern"?

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167 4 Cal. 3d at 362.

168 4 Cal. 3d 363 (quoting 310 U.S. 218 (1940)).

169 29 Cal. 2d 34, 44 (1946).

170 4 Cal. 3d 363 (quoting from *People v. Building Maintenance Contractor's Ass'n.*, 41 Cal. 2d 719, 727 (1953)).

171 See *Klor's v. Broadway-Hale Stores*, 359 U.S. 207 (1959) (group boycotts illegal *per se* under traditional antitrust principles); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 213 (1951) (lack of effect on price or output irrelevant).

172 4 Cal. 3d at 369 n.3.

**B. *Corwin Co. v. Los Angeles Newspaper Service Bureau Inc.***<sup>173</sup>

In *Corwin*, the plaintiffs operated a publication service dealing almost exclusively with notices of sales by trustees under deeds of trust. The defendant Los Angeles Newspaper Service Bureau Inc. (“Bureau”) was an association organized to enable member newspapers in Los Angeles County to acquire a share of the legal advertising market which had been effectively monopolized by a single publisher. At year end, profits from the publications of notices were distributed back to the newspaper members. Plaintiff claimed that the Bureau’s rules and sharing agreement constituted a conspiracy in violation of the Cartwright Act.

The court again articulated the mantra that the Cartwright Act and the Sherman Act were “patterned” on each other, and that Sherman Act decisions are “applicable” to Cartwright cases.<sup>174</sup> The court then noted the rule of reason as announced by *Standard Oil Co. v. United States*.<sup>175</sup> In building on its citation to *Standard Oil*, however, the court cited with approval, *Chicago Board of Trade v. United States*.<sup>176</sup> The court noted that while the Bureau’s agreements were restraints of trade, they would nevertheless not be illegal unless “unreasonable”. The court stated that it should consider the percentage of business controlled, the strength of remaining competition, and whether the action sprang from business requirements or purpose to monopolize.<sup>177</sup>

The court held that this general rule was particularly appropriate in the instant case. The Bureau contended that the restraint was *de minimis* because the relevant line of commerce was *all* classes of legal advertising, and not simply notices relating to trust deeds. The court held that the definition of the relevant market presented an issue of fact to be decided after a plenary trial.<sup>178</sup>

**C. *Lafortune v. Ebie***<sup>179</sup>

Here, the parties were adjoining Chicken Delight franchisees. Each had an exclusive territory which provided that the franchise shall be conducted and operated only at a location within the franchised territory. Defendant Ebie delivered chicken to homes in plaintiff’s franchised territory, and plaintiff brought an action for intentional interference with advantageous relationships and for violations of the Cartwright Act. The court reversed a judgment for plaintiff, and held that the case was determined by the principles of *United States v. Arnold, Schwinn & Co.*<sup>180</sup> It held that under the Sherman Act:

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173 4 Cal. 3d 342 (1971).

174 4 Cal. 3d at 852.

175 221 U.S. 1 (1911).

176 246 U.S. 231, 238 (1918).

177 4 Cal. 3d at 856.

178 As to the tying claim, however, the court cited *Fortner Enterprises v. U.S. Steel Corp.*, 394 U.S. 495 (1969), with approval, and noted that “even absent a showing of market dominance, the crucial economic power [to effect a tying arrangement] may be inferred from the tying product’s desirability to consumers or from “uniqueness” of its attributes. 4 Cal. 3d at 856-67.

179 25 Cal. App. 3d 72 (1972).

180 26 Cal. App. 3d 74 (citing 388 U.S. 365 (1967)).

[I]t is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded, after the manufacturer has parted with dominion over it.<sup>181</sup>

The court noted that the Cartwright Act is “patterned” on federal law, and that both have the roots of the common law. It then expanded, however, on the more usual “applicable” language and stated that:

[C]ases construing the Cartwright Act follow the law as interpreted in the Sherman Act.<sup>182</sup>

Although the court had already noted that the franchise contracts violate the antitrust laws, and that they were contracts in restraint of trade under *Schwinn*, the court also noted a line of authorities which was developing that even the rule in *Schwinn* was not a true *per se* rule, but evidenced a strong presumption.

It cited *United States v. Topco Associates, Inc.*,<sup>183</sup> for the proposition that there, the court differentiated between horizontal territorial limitations, and vertical territorial limitations, whose validity remained the subject to the rule of reason, *Schwinn* notwithstanding.<sup>184</sup> The court also noted the developing distinctions in federal cases subsequent to *Schwinn*, which limited its broader, and perhaps, *per se* application to initial analysis under the rule of reason.<sup>185</sup>

In effect, the court noted that bicycles were not necessarily economically equivalent with fried chicken, and that the matter should be remanded for a new trial, where the rule of reason inquiry could be fleshed out. In more modern antitrust parlance, it could be argued that the court was inviting the application of at least a “quick look” rule of reason.

Even while federal Sherman Act *per se* rules were deeply embedded into the fabric of the Cartwright Act, the loosening of *per se* rules by the federal courts was also making its way into interpretation of the Cartwright Act.

#### **D. *R.E. Spriggs Co. v. Adolph Coors Co.***<sup>186</sup>

Adolph Coors Company (“Coors”) manufactured beer in Colorado, and sold it to wholesalers in the Western United States, including California. The written distributorship agreements between Coors and its wholesalers designated a specific territory within which each distributor could distribute Coors beer. Coors terminated plaintiff Spriggs’ distributorship agreement, and plaintiff brought an action under the Cartwright Act,

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181 *Id.* (citing *Schwinn*, 388 U.S. at 379).

182 26 Cal. App. 3d at 75.

183 405 U.S. 596 (1972).

184 *Id.* at 75.

185 See *Tripoli Company v. Wella Corp.*, 425 F.2d 932, 936-37 (3d Cir. 1970). This rule operated as a “quick-look” mechanism in cases where strong public policy concerns warranted strong franchisor oversight, such as public safety in the use of hair care products.

186 37 Cal. App. 3d 653 (1974).



claiming that termination was unlawful as it was taken pursuant to an unlawful territorial restraint.

The trial court found that as interstate commerce was directly involved in the sale of Coors beer, the Sherman Act precluded the application of the Cartwright Act.

The court of appeal reversed. It held that the Cartwright Act is “complementary” to the Sherman Act, and that the application of the Cartwright Act in the case at issue would not be a burden on interstate commerce.<sup>187</sup> The Cartwright Act is complementary in the sense that it may be justified as a reasonable means of protecting a significant state interest, namely the prevention of unfair competition. The court cited *Schwinn* with approval<sup>188</sup> and noted that both the Cartwright Act and the Sherman Act have a legitimate stake in the outcome.

Significantly, the court noted the congruence of purpose between the two regimes. It stated:

The act is not in conflict with federal policy or law. To the contrary, in this area, the objective of each entity of government is the same. The state seeks to protect its citizens and the national government seeks to protect interstate commerce from a long recognized unlawful activity.<sup>189</sup>

While only “complementary,” *Schwinn* carried the day.

#### **E. *Marin County Board of Realtors, Inc. v. Palsson*<sup>190</sup>**

In *Marin County Board of Realtors*, the California Supreme Court, in an opinion written by Justice Mosk, invalidated a real estate association multiple listing service rule that denied access to part-time agents. However, it did so under the rule of reason, and not under a *Klor's* “*per se*” rule.<sup>191</sup> The court distinguished *Klor's* and *Fashion Originators' Guild* on the grounds that the concerted activity involved access through association bylaws, and not an agreement to engage in clearly exclusionary conduct. The court noted:

*Klor's* and *Fashion Guild* have been extensively analyzed both in legal journals and in the courts. Most of the commentators conclude that the practices condemned in the two cases represent a particular type of predatory activity distinguishable from many alleged boycotts ... When the element of purpose to coerce the trade policy of third parties or to secure their removal from competition is absent, the policy question raised by agreements under which the parties mutually limit their own freedom to deal with outsiders becomes more difficult, and the courts

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187 *Id.* at 659.

188 *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

189 *Id.* at 664.

190 16 Cal. 3d 920 (1976).

191 *Klor's v. Broadway-Hale Stores*, 359 U.S. 207 (1959). The court also discusses at length *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941).

have appropriately outlined wider limits before declaring such agreements illegal.<sup>192</sup>

The court also cites the litany of cases which have concluded that the Cartwright Act is “patterned” after the Sherman Act and that both statutes have their roots in the common law. Nevertheless, the opinion is the first that we have found that raises the question whether the Cartwright Act in fact was patterned after the Sherman Act. The defendants argued that the legislative history of the Cartwright Act showed that it was worded identically to the Michigan statute, and that both statutes were a near carbon copy of an earlier amendment to the Sherman Act, and that the record of congressional debates reveal that this unsuccessful amendment was designed not to narrow the scope of the Sherman Act, but to broaden it.<sup>193</sup> The argument was then made that the Cartwright Act did not intend to apply to “services.” In sidestepping this suggestion, the court pointed out that, according to Michigan antitrust law, the Michigan Act is patterned after the Sherman Act . . .,”<sup>194</sup> and applied to the activities of a multiple listing service operated by real estate brokers.

A salutary reading of *Marin County* demonstrates that while the federal law assault on the application of the rule of reason in antitrust cases was at its highwater mark, the court nevertheless made a careful assessment of the applicability of the federal authorities and their relationship to the ability of the court to vindicate the state’s interest in its policies.<sup>195</sup>

#### F. *Mailand v. Burckle*<sup>196</sup>

In *Mailand*, we see another example of the transference of federal *per se* authorities to the Cartwright Act. Plaintiffs were franchisees of a drive-in dairy/gasoline station. The franchise agreement provided that the defendants could set the price of gasoline sold at retail, in exchange for a “guaranteed profit” of 7% to plaintiffs on gasoline sales. Plaintiffs operated under the agreement for several years, but thereafter, purchased gasoline from other sources, and set their own prices. They filed an action alleging that the agreement violated the Cartwright Act. The trial court found that the agreement was reasonable, and that, in addition, plaintiffs were barred by the doctrine of *in pari delicto*.<sup>197</sup>

The California Supreme Court reversed. In an opinion by Justice Mosk, it held that the franchise agreement was a *per se* violation of the Cartwright Act. It noted that “since

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192 16 Cal. 3d at 932 (citing Charles F. Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847, 876 (1955)). The court also seems to suggest that a “quick-look” rule of reason analysis might be appropriate. See *id.* at 941 n.10 (“We recognize that in rejecting a *per se* rule in this case we are sacrificing some advantages, *i.e.*, the facilitation of judicial certainty and the saving of litigation costs. *But the cost need not be significant.*”) (emphasis added, citations omitted).

193 See 16 Cal. 3d at 926-97.

194 *Barrows v. Grand Rapids Real Estate Board*, 51 Mich. App. 75 (1974).

195 It is interesting to note that *Marin County* was decided one year prior to *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), and two years prior to the publication of THE ANTITRUST PARADOX, *supra* note 34, in 1978.

196 20 Cal. 3d 367 (1978).

197 Plaintiffs thereafter filed an action in federal court under the Sherman Act. It was dismissed on the jurisdictional ground that the gasoline purchased by plaintiffs did not involve interstate commerce.

the Cartwright Act is patterned after the Sherman Act, federal cases interpreting the Sherman Act are applicable in construing our state laws.”<sup>198</sup> After discussing *Socony-Vacuum* and *Trenton Potteries*,<sup>199</sup> the court adopted the rule in *Dr. Miles Medical Co. v. Park & Sons Co.* for the proposition that all vertical price fixing agreements, as well as horizontal agreements, were *per se* unlawful.<sup>200</sup> The court stated:

The federal law in this regard is too well established to require excessive discussion.<sup>201</sup>

It distinguished the then-recent case of *Continental T.V.* as only involving non-price vertical restrictions and that “the per se illegality of price restrictions has been established firmly for many years . . .”<sup>202</sup> The court also noted:

[F]ederal cases interpreting the Sherman Act are applicable in construing the Cartwright Act. Section 16720 refers to a combination of ‘two or more persons’ to fix prices, and its language is not limited to combinations among competitors.<sup>203</sup>

The court rejected the argument that the parties were engaged in a “joint enterprise,” arguably that would invoke a rule of reason analysis. The court refused to entertain this argument on the ground the defendants did not assume the risk of losses on gasoline sales to any substantial extent. As the conduct was *per se* unlawful on the authority of *Dr. Miles*, the court held that it was unnecessary to inquire whether the arrangements had any actual anticompetitive effect.<sup>204</sup> The court also rejected the doctrine of “*in pari delicto*”, based on *Perma-Life Mufflers v. International Parts Co.*,<sup>205</sup> on the ground that the caveat to a *per se* rule in *Perma-Life* was that the parties have “equal responsibility.”

### VIII. The 1980s

By the 1980s, it cannot be said that there was a “sparcity” of Cartwright Act decisions. Rather, the law was becoming increasingly robust, and because of the commonality of purpose with the Sherman Act, the two regimes were found to be harmoniously compatible

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198 20 Cal. 3d at 378. The court cited *Marin County Board of Realtors, Inc. v. Palsson*, 16 Cal. 3d 920, 925 (1976) and *Oakland-Alameda County Builders Exchange v. F.P. Lathrop Construction Co.*, 4 Cal. 3d 354, 362 (1971).

199 *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940); *United States v. Trenton Potteries*, 273 U.S. 392 (1927).

200 *Dr. Miles*, 220 U.S. 373 (1911).

201 20 Cal. 3d at 377. The court then cited *Perma-Life Mufflers v. International Parts Corp.*, 392 U.S. 134 (1968), and *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

202 *Continental T.V.* at 51, note 18.

203 20 Cal. 3d at 377.

204 20 Cal. 3d at 380 n.15 (“Thus, the fact that defendant set the price at which plaintiff sold gasoline at approximately the level of plaintiff’s competitors is not important.”).

205 392 U.S. 134 (1968). The court found it unnecessary to address the allegations relating to an illegal tying arrangement, in light of the finding as to a *per se* violation for vertical price fixing. *Id.* at 383. Justice Clark dissented, as it was clear that the franchise agreement was designed to promote competition, and to stimulate output. Thus, a rule of reason analysis should have been applicable.

with, as we will note, several key exceptions.<sup>206</sup> Accordingly, we will discuss only a few of the more salient cases.

**A. *Younger v. Jensen***<sup>207</sup>

*Younger* is a good example of the California courts noting the spirit of “cooperative federalism” between the two regimes. In *Younger*, the key issue was the preemption of the Cartwright Act by federal law for the regulation of the natural gas industry. The California Supreme Court held that there was no preemption, as there was no repugnance between the complementary nature of federal and state law working together in a cooperative and cohesive fashion. The court stated:

Obviously there is an overlap between coverage of the Sherman Act and state antitrust laws that prohibits substantially the same conduct, such as California’s Cartwright Act. . . . Neither the Sherman Act nor the federal prohibition of undue burdens on interstate commerce prevents those state laws from reaching transactions that have interstate aspects but significantly affect state interests. (Citing *Speegle*) . . . Accordingly, the coordination of federal and state antitrust enforcement has become a prime example of “cooperative federalism.”<sup>208</sup>

**B. *Kolling v. Dow Jones & Co.***<sup>209</sup>

*Kolling* is essentially a dealership termination case. Defendant Dow Jones entered into an oral distributorship with plaintiff for the distribution of the *Wall Street Journal* and *Barrons* in the San Francisco Bay Area. The plaintiff had extended his area of sales south to San Jose. However, Dow Jones deleted certain areas from the territory. Dow Jones also suggested maximum resale prices to its dealers. The Dow Jones manual also provided:

In accordance with our historical policy, Dow Jones further reserves the right to refuse to deal with any distributor who will not abide by our suggested retail price schedule as issued from time to time by the Company.<sup>210</sup>

Thereafter, Dow Jones became dissatisfied with plaintiff’s performance as a distributor, and further limited his assigned territory. When performance did not improve, and when plaintiff did not adhere to the reduced territorial assignment, Dow Jones began searching

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206 See Section 11 “Conclusion and Prognosis,” *infra*, on the States’ rejection of the “direct purchaser rule” of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

207 26 Cal. 3d 397 (1980).

208 26 Cal. 3d at 405 (emphasis added) citing Stephen Rubin, *Rethinking State Antitrust Enforcement*, 26 U. FLA. L. REV. 653, 680 (1974); Hon. Stanley Mosk, *State Antitrust Enforcement and Coordination with Federal Enforcement*, 21 AMERICAN BAR ASS’N SECTION OF ANTITRUST LAW, ANTITRUST L.J. 358 (1962). See also *Younger*, 26 Cal. 3d 397, n.4 (“federal cases interpreting the Sherman Act generally apply to construction of the Cartwright Act.”).

209 137 Cal. App. 3d 709 (1982).

210 *Id.* at 713.

for a replacement dealer.<sup>211</sup> In response, plaintiff purported to sell his distributorship to another dealer, without permission of Dow Jones. Dow Jones treated the attempted transfer as a resignation, and appointed a new distributor. Litigation ensued.

Not surprisingly, the court reiterated the mantra that the Cartwright Act is “patterned” on the Sherman Act, so that decisions under the Sherman Act are “applicable.”<sup>212</sup>

The court also recognized, citing a series of federal Sherman Act decisions, that a manufacturer and a distributor can form a “combination” in restraint of trade, in the context of a distributorship vertical agreement.<sup>213</sup> The principal authority cited was *Albrecht v. Herald Co.*<sup>214</sup> The court also cited with approval, *United States v. Parke, Davis & Co.*<sup>215</sup> and *Guild Wineries & Distilleries v. Jay Sosnick & Son.*<sup>216</sup> While a producer may normally choose its distributors, cancellation of a distributorship for anticompetitive reasons violates the antitrust laws and is thus actionable.

However, the court also invoked the authority of *Continental T.V., Inc. v. GTE Sylvania, Inc.*,<sup>217</sup> and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*<sup>218</sup> The court held that it would apply a rule of reason analysis, but after doing so, concluded that the restraint was unreasonable, and thus unlawful.<sup>219</sup>

Significantly, the court recognized the importance of consumer welfare in determining whether there had been an anticompetitive injury to the market. It stated:

The antitrust laws are designed to protect the public, as well as more immediate victims, from a restraint of trade or monopolistic practice which has an anticompetitive impact on the market.<sup>220</sup>

### **C. *Partee v. San Diego Chargers Football Co.***<sup>221</sup>

In *Partee*, a professional football player brought an action under the Cartwright Act against the San Diego Chargers football team alleging that the National Football League constitution and bylaws contained unlawful restraints of trade on the rights of players. The California Supreme Court reversed a trial court award of damages, and held that the application of the Cartwright Act to interstate sports would be in conflict with the

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211 *Id.* at 715.

212 *Id.* at 717.

213 *Id.* at 719.

214 390 U.S. 145 (1968).

215 362 U.S. 29 (1960).

216 102 Cal. App. 3d 627, 633 (1980).

217 433 U.S. 36 (1977).

218 429 U.S. 477 (1977).

219 The court found that plaintiff had demonstrated “antitrust injury,” as required by *Brunswick*.

220 137 Cal. App. 3d at 724 (citing *Simpson v. Union Oil Co.*, 377 U.S. 13, 16 (1964)) (emphasis added).

221 34 Cal. 3d 378 (1983).

Commerce Clause of the United States Constitution. Accordingly, it reversed and ordered that the action be dismissed. The court stated:

The Chargers do not claim federal antitrust laws, the Sherman and Clayton Act ‘occupy’ the field of antitrust regulation, or that the federal and state antitrust laws so conflict as to require preemption of the state scheme. *The federal and California antitrust laws having identical objectives, are harmonious with each other.*<sup>222</sup>

For this proposition, the court cited *Chicago Title Insurance Co. v. Great Western Financial Corp.*<sup>223</sup> Justice Reynoso dissented. He stated:

The Cartwright Act parallels and is in harmony with the Sherman Antitrust Act. A conflict would arise only if compliance with both federal and state regulations were impossible ... Nothing in the case before us even remotely suggests that application of the Cartwright Act conflicts with or is hostile to federal antitrust enforcement. To the contrary, federal courts have held the same National Football League (NFL) rules and practices challenged by Partee to be violative of the Sherman Act.<sup>224</sup>

**D. *Bert G. Gianelli Distributing Co. v. Beck & Co.***<sup>225</sup>

*Gianelli* involved a dealer termination/substitution case. Plaintiffs were eight local beer wholesalers terminated as distributors for defendant Beck & Co. (Beck). On appeal from a judgment entered on the granting of a motion for summary judgment, the court of appeal held that the trial court properly sustained summary judgment as to the parties’ Cartwright Act claims, but reversed as to breach of contract and tortious interference claims. The action arose because Beck terminated the plaintiff distributors, and appointed new distributors in each terminated distributors territory.

The plaintiffs claimed that Beck had combined with the distributors who replaced the plaintiffs in a group boycott, that they contended to be illegal *per se* on the authority of *Klor’s*.<sup>226</sup> In rejecting the *Klor’s* analysis, the court relied upon the United States Supreme Court decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*<sup>227</sup> The court held that departure from the rule of reason standard is only appropriate where the conduct in issue is “manifestly anticompetitive,” and where the agreements or practices have a “pernicious” effect on competition and “lack any redeeming virtue.”<sup>228</sup> The court held that in a vertical non-price restraint case, any “departure from the rule of reason standard must be based upon

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222 34 Cal. 3d at 382 (emphasis added).

223 69 Cal. 2d 305 (1968).

224 *Id.* at 386-87.

225 172 Cal. App. 3d 1020 (1985).

226 *Klor’s v. Broadway-Hale Stores*, 359 U.S. 207, 212 (1959).

227 433 U.S. 36, 50 (1977).

228 172 Cal. App. 3d at 1044-45 (citing *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958)).

demonstrable economic effects rather than ... upon formulistic line drawing.”<sup>229</sup> Citing the Ninth Circuit’s decision in *Cascade Cabinet Co. v. Western Cabinet & Mill Work*,<sup>230</sup> it stated:

The per se rule should never be applied automatically when the concerted refusal to deal is vertical rather than horizontal. ... Indeed, generally, it will not be applied.

Plaintiffs’ vertical restraint allegations were found to be fatally deficient and the court held:

In order to sustain a group boycott theory of per se illegality with respect to restraints that are vertically imposed, there must be a showing that the restraint imposed by the manufacturer was not only conceived of and initiated by those in direct competition with the plaintiff, but that those competitors used their economic power or position to influence the manufacturer to act, not for its own advantage, but solely for the advantage of those competitors. Such a showing cannot here be made.<sup>231</sup>

Finally, the court noted the language from the Ninth Circuit’s decision in *Ron Tonkin Gran Turismo, Inc.* that:

It is interbrand competition which is the primary concern of the antitrust laws.<sup>232</sup>

A good argument can be made that *Gianelli* evidences the “sea-change” in the repudiation, or at least remission, of wooden *per se* rules, where advances in economic analysis and theory demonstrate that the application of the *per se* rule might deter aggressive but lawful practices, and produce “false positives.” This debate continues from the middle of the 1980s until the present. But for now, *Klor’s* is back in the bottle.

#### **E. *Blank v. Kirwan***<sup>233</sup>

*Blank v. Kirwan* is another opinion by Justice Mosk delving deeply into antitrust policy and the complimentary relationship between the Sherman Act and the Cartwright Act.

The case involves allegations that competing poker clubs in the City of Bell induced the City Council to enact an ordinance which resulted in the denial of a poker club license. The plaintiff filed a complaint alleging a number of causes of actions, including a Cartwright Act claim. The California Supreme Court affirmed the dismissal of the complaint by applying the federal *Noerr-Pennington* doctrine.<sup>234</sup>

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229 *Continental T.V.* at 58-59.

230 172 Cal. App. 3d at 1045 (quoting from 710 F.2d 1366, 1371 (9th Cir. 1983)).

231 172 Cal. App. 3d at 1047.

232 172 Cal. App. 3d at 1047 (quoting *Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors*, 637 F.2d 1376, 1385-86 (9th Cir. 1981), and citing *Continental T.V.*, 433 U.S. at 52).

233 39 Cal. 3d 311 (1985).

234 *Eastern R.R. President’s Conference v. Noerr Motor Freight Co.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

Again, we are greeted by the familiar “patterned” mantra. The court stated:

In interpreting the Cartwright Act, we properly look to the Sherman Act and cases construing it: ‘the Cartwright Act is patterned after the Sherman Act and both statutes have their roots in the common law.’... As we conclude and all parties agree, the cases relevant here are those that have articulated and construed what is commonly referred to as the *Noerr-Pennington* doctrine or immunity.<sup>235</sup>

The court stated that the *Noerr-Pennington* doctrine rests upon statutory interpretation. Citing a law review article by Professor Milton Handler, the court stated:

In other words, the doctrine states that efforts to influence government action ‘do not fall within the scope of the Sherman Act in the first place, not that [they are] removed from the act by an exemption.’<sup>236</sup>

Being applicable to an interpretation of the Sherman Act, Justice Mosk found it equally applicable to the Cartwright Act.

#### **F. *Cianci v. Superior Court***<sup>237</sup>

In *Cianci*, the issue before the court was whether the Cartwright Act applied to the medical profession. It involved a dispute among medical doctors over the rules applicable to the establishment and operation of a hyperbaric medicine department at Brookside Hospital in San Pablo.<sup>238</sup>

The court made a number of observations that are difficult to reconcile. For example, Justice Mosk observed that there were no direct sources for the legislative history of the Cartwright Act. Accordingly, the court must “assume” the intent of the California legislature by an off-hand remark by United States Senator John Reagan of Texas, who authored an unsuccessful version of what became the Sherman Act. The court stated:

While no direct sources for the legislative history of the Cartwright Act exist, we may reasonably assume that the Legislature’s intent was substantially similar to that of United States Senator John Reagan. The Cartwright Act is a ‘near carbon copy’ of the Reagan bill.<sup>239</sup>

Notwithstanding the lack of direct sources for the legislative history of the Cartwright Act, Justice Mosk nevertheless concluded that the Cartwright Act “reaches beyond the

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235 39 Cal. 3d at 320 (emphasis original).

236 39 Cal. 3d at 320 (citing Milton Handler, *The Noerr Doctrine and its Sham Exception*, 6 CARDOZO L. REV. 1, 3-5 (1984)).

237 40 Cal. 3d 903 (1985).

238 In *Willis v. Santa Ana Hospital Association*, 58 Cal. 2d 806 (1962), the California Supreme Court held that the professions were not within the Act’s coverage. The *Cianci* court concluded that *Willis* was unsound, and was thus to be rejected and overruled. 40 Cal. 3d at 925.

239 *Id.* at 919 (citing *Marin County Board of Realtors, Inc. v. Palsson*, 16 Cal. 3d at 926).



Sherman Act to threats to competition in their incipiency – much like section 7 of the Clayton Act, which prohibits mergers. ...<sup>240</sup> He also concludes, however, that the Cartwright Act “speaks solely in terms of economic effects,” and that it would thus do violence to the language to read in an exclusion to the medical profession.

Of interest, he then adopts, for the court, a consumer welfare model as the “principle, if not sole, goal of the antitrust laws.”<sup>241</sup> He cites for this proposition not only Areeda & Turner, but Professor Bork.<sup>242</sup> Justice Mosk does not address, and much less explain how the Cartwright Act can be “broader and deeper” than the Sherman Act, where the principal, if not sole purpose of each, is allocative efficiency and the elimination of restrictions on output, in order to maximize consumer welfare rents.

### G. *State ex rel. Van de Kamp v. Texaco*<sup>243</sup>

In *Texaco*, the Attorney General brought an action under the Cartwright Act and the Unfair Practices Act to enjoin defendant Texaco from acquiring the California assets of Getty Oil Co. The court of appeal held that the action was preempted by federal antitrust law and the Supremacy Clause of the United States Constitution, and affirmed judgment for defendants. The California Supreme Court affirmed, but on the narrower ground that the Cartwright Act did not extend to mergers.

The Attorney General had argued that, as Justice Mosk seemed to have suggested in *Cianci*, the Cartwright Act could be used to attack “incipient” threats to competition, as well as consummated restraints of trade.

In disapproving the “pattern” language of prior cases, the court cited the Moses Lasky article,<sup>244</sup> and held that the article, or at least “a variation of it – is most historically correct.”<sup>245</sup> The court then went on to discuss the Reagan bills of 1888 and 1890, and other state laws that predated the passage of the Sherman Act. In reviewing the case law under the Texas and Michigan Acts, the court concluded that the Cartwright Act was not intended

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240 *Id.* at 918.

241 *Id.* at 918.

242 *Id.* at 918-19. As pointed out by Mr. Lasky, and by Chief Justice Lucas in *Texaco*, these observations by Justice Mosk were dicta, and superfluous to the holding in the case. In confirming the accuracy that the “broader and deeper” language was dicta, Justice Mosk wrote: “But even if the Cartwright Act were merely coterminous with the Sherman Act, our conclusion would be the same.”<sup>243</sup> See Moses Lasky, *Folklore and Myth in Judicial Opinions – Some Reflections Inspired by Texaco – Getty*, 20 U.C. DAVIS L. REV. 591, 603 (1978); *State ex. rel. Van de Kamp v. Texaco Inc.*, 46 Cal. 3d 1147, 1166 (“this is not to say, however, that the Act is defined by, or is broad as, the common law; instead, the Act stands on its own, and courts must interpret the words as best they can in order to effectuate the intent, not of the common law, but of the Act’s drafters.” See also *Texaco*, 46 Cal. 3d at 1169 (“the Attorney General also rests on dicta from our recent decision in *Cianci* ... to the effect that the Cartwright Act is ‘broader in range and deeper in reach than the Sherman Act’ and that it reaches beyond the Sherman Act to threats to competition in their incipiency . . .”). Finally, the *Texaco* majority concluded “In view of the evidence to the contrary, *Cianci*’s . . . suspect dicta simply cannot support the Attorney General’s claim.” *Id.* see also *id.* at 920 (citing *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975)).

244 46 Cal. 3d 1147 (1988).

245 Moses Lasky, *Folklore and Myth in Judicial Opinions – Some Reflections Inspired by Texas-Getty*, 20 U.C. DAVIS L. REV. 591 (1987).

to address mergers. In any event, it could not be applied as an “incipiency” measure to a consummated merger. The court recognized:

To the extent the Cartwright Act could be said to be patterned after the Sherman Act, a merger challenge under the state Act would require the same showing, i.e., that the merger “effected” an unreasonable restraint of trade.<sup>246</sup>

Justice Mosk concurred and dissented. He dissented from the judgment as to the complaint’s cause of action under the Cartwright Act. He would hold that contrary to the majority’s position, the Cartwright Act did apply to mergers, incipient or otherwise. He agreed with the court, however, that “consumer welfare is a principal, if not the sole goal of the antitrust laws.”<sup>247</sup> Thus, the majority opinion and Justice Mosk’s dissent agree that the purpose of the Cartwright Act and the Sherman Act are at least, complementary, and are concerned with economic effects, which is another way of saying “consumer welfare”, or “allocative efficiency.”

## IX. The 1990s

Perhaps in light of the disagreements and inconsistencies expressed by *Cianci* and *Texaco*, it may not be surprising that the state of the law remained seemingly confusing. Nevertheless, in the 1990s, we continued to see a “Chicago School” retrenching of many of the earlier “*per se*” cases decided under the authority of the Warren Supreme Court.<sup>248</sup> Let’s take a “quick look.”

### A. *Biljac Associates v. First Interstate Bank*<sup>249</sup>

In *Biljac*, plaintiffs had taken out commercial loans from one or more of the various defendant banks, and paid prime-rate based interest on the loans. Plaintiffs filed a complaint for a violation of the Cartwright Act, alleging that the defendant banks had “conspired” by exchanging information and ideas relating to rate movements for the traditional prime rate, but also including new and more volatile base rate products. The banks allegedly established “benchmarks” for commercial loans to so-called “middle market” borrowers, and thereby suppressed or eliminated competition among themselves, thus resulting in the plaintiffs paying higher rates.

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246 *Id.* at 1154.

247 *Id.* at 1165. The court then goes on to note that the Act may not be “confined by the common law, or as broad as the common law. It stands on its own . . .” *Id.* at 1166.

248 *Id.* at 1183.

249 To borrow from the entertaining article by Richard M. Steuer, *Monsanto and the Mothball Fleet of Antitrust*, 30 ANTITRUST BULLETIN 1 (1985), a number of these cases can be said to have been transferred to a virtual mothball fleet of obsolete cases. While oftentimes not explicitly overruled by the Supreme Court, they should not be expected to be cited with vitality during at least the current, and perhaps future generation of antitrust. Examples would include, without limitation, *Fortner Enterprises, Inc. v. United States Steel Corp.* (*Fortner I*), 394 U.S. 495 (1969); *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967); and *United States v. Von’s Grocery Co.*, 384 U.S. 270 (1966).

The trial court granted summary judgment to defendants, finding no genuine issue that there had been any agreement, or anything more than an exchange of information to be acted upon in the unilateral self-interest of each of the defendants. The court of appeals affirmed. The trial court and the court of appeal expressly declined to apply the principle in *Celotex Corp. v. Catrett*,<sup>250</sup> on the ground that that case involved the interpretation of Rule 56 of the Federal Rules of Civil Procedure, while the California courts were bound by California Civil Code Section 437(c).

In a variation on the theme of “parallelism,” the court of appeal characterized the relationship between the Cartwright Act and the Sherman Act as follows:

In antitrust actions brought under the Cartwright Act, we look to interpretations of its federal law counterpart, the Sherman Antitrust Act [citation omitted] for guidance, since the federal act was a model for our own in most respects.<sup>251</sup>

An additional reason given, however, was “comparative sparsity”. The court stated: “Comparative sparsity of state court precedent often means that we must rely heavily on federal cases.”<sup>252</sup>

The court held that declarations submitted by the defendants negated the element of concerted activity. The court held that the conspiracy allegations had been rebutted by a showing by the defendants of justifiable reasons for practices that were consistent with independent business practice.<sup>253</sup>

The court held that the key authorities cited by plaintiffs, *Poller v. Columbia Broadcasting*,<sup>254</sup> were largely inapposite. The court held that this authority had been partly undermined by two recent cases under the Sherman Act. The court cited and discussed *Monsanto v. Spray-Rite Services Corp.*<sup>255</sup> and *Matsushita Elec. Industrial Co. v. Zenith Radio*.<sup>256</sup> Relying on *Monsanto* and *Matsushita*, the court held that:

The antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the [defendant] and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.<sup>257</sup>

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250 218 Cal. App. 3d 1410 (1990).

251 477 U.S. 317 (1986).

252 218 Cal. App. 3d 1420 (citing *State ex rel. Van de Kamp v. Texaco, Inc.*, 46 Cal. 3d 1147, 1153-64 (1988)).

253 *Id.* at 1421 (citing *Redwood Theatres, Inc. v. Festival Enterprises, Inc.*, 200 Cal. App. 3d 687 (1988)).

254 *Id.* at 1424 (citing *Richard v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987); *O.S.C. Corp. v. Apple Computer, Inc.*, 792 F.2d 1464, 1468 (9th Cir. 1986)).

255 368 U.S. 464, 473 (1962).

256 465 U.S. 752 (1984).

257 475 U.S. 574, 587-88 (1986).

In essence, the court of appeal held that the plaintiffs had failed to produce evidence that would support an inference of conspiracy. Reaching back in time to *Maple Flooring Association v. United States*,<sup>258</sup> the court of appeal also held that the mere fact that there were discussions at trade association meetings, even if the information disseminated would tend towards industry uniformity, is not sufficient to raise an inference of concerted activity. Under *Monsanto*, a defendant could well have acted in its unilateral self-interest in taking advantage of the information disseminated at such meetings.

**B. *Cellular Plus, Inc. v. Superior Court***<sup>259</sup>

In *Cellular*, a number of individual consumer and corporate sales agents brought an action of the Cartwright Act against two licensed providers of cellular phone service in San Diego County. The trial court granted demurrers for wholesale and retail price fixing, on the authority that the California Public Utilities Commission (PUC) regulates the rates charged, so as to preclude a violation. On appeal, the court reversed, and held that the Cartwright Act extended to certain third parties, including “sales agents,” who were not otherwise “consumers or competitors” in a relevant market.<sup>260</sup> The court held that an independent agent, as opposed to an employee, could have standing to bring an action under the Cartwright Act, and that the “antitrust injury” requirements under the Cartwright Act were “broader.”

The court cites *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,<sup>261</sup> and *Atlantic Richfield Co. v. U.S.A. Petroleum Co.*<sup>262</sup> with approval.

Its authority for the proposition of the Cartwright Act standing requirements being “broader” is California Business and Professions Code Section 16750(a), which provides that lawsuits may be maintained by injured persons who dealt either “directly or indirectly” with the antitrust law offenders.<sup>263</sup> The court noted that pursuant to *Kolling v. Dow Jones & Co.*,<sup>264</sup>

The exact perimeters of ‘antitrust injury’ under Section 16750 have not yet been established through either court decisions or legislation.<sup>265</sup>

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258 *Id.* at 1425 (citing *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984)).

259 268 U.S. 563, 582 (1925).

260 14 Cal.App. 4th 1224 (1993).

261 For a discussion of “antitrust injury,” including under *Cellular Plus*, see 1 ANTITRUST AND UNFAIR COMPETITION SECTION, STATE BAR OF CALIFORNIA, CALIFORNIA ANTITRUST AND UNFAIR COMPETITION LAW § 7.03, at 160-62 (3d ed. 2003).

262 429 U.S. 477, 489 (1977).

263 495 U.S. 328 (1990).

264 The court cites *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), as the rationale and support for the difference. Thus, it concludes, the more restrictive definition of “antitrust injury” under federal antitrust law does not apply to cases brought under Business and Professions Code Section 16750.

265 137 Cal.App. 3d 709, 723 (1982).

### C. *Roth v. Rhodes*<sup>266</sup>

In *Roth*, the operators of medical buildings limited acceptable tenants to medical doctors, to the exclusion of a podiatrist. *Roth*, an excluded podiatrist, brought an action under Section 16720 of the Cartwright Act for a “concerted refusal to deal,” or “group boycott.” The trial court granted summary judgment, and the court of appeals affirmed.

As an initial matter, the court of appeal returned to the “pattern” litany of *Palsson*.<sup>267</sup>

[A] long line of California cases have concluded that the Cartwright Act is patterned after the Sherman Act and both statutes have their roots in the common law. Consequently, federal cases interpreting the Sherman Act are applicable to problems arising under the Cartwright Act.<sup>268</sup>

Citing *Redwood Theatres*,<sup>269</sup> the court notes that pursuant to *Continental T.V.*,<sup>270</sup> a threshold inquiry is the defendant’s market power. Citing *Bhan v. NME Hospitals, Inc.*,<sup>271</sup> the court noted that:

Ordinarily a plaintiff to do this [demonstrate market power] must delineate a relevant market and show that defendant plays enough of a role in that market to impair competition significantly.

The court then imposed what can best be described as a “quick look” market power screen, to determine that the relevant market would consist of at least medical buildings in the adjacent area, and that the buildings controlled by Mr. Rhodes and his partners would be insufficient to make a showing of the necessary market power.<sup>272 273</sup>

### D. *Exxon Corp. v. Superior Court*<sup>274</sup>

*Exxon* is another case where the court of appeal embraced the teachings of *Continental T.V.*<sup>275</sup> In *Exxon*, franchise service station operators filed a complaint alleging violations of

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266 14 Cal. App. 4th 1224, 1234 (1993). For a discussion of the saga of *Illinois Brick*, see Section 11, *infra*.

267 25 Cal. App. 4th 530 (1994).

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

269 24 Cal. App. 4th at 542.

270 *Redwood Theatres, Inc. v. Festival Enterprises, Inc.*, 200 Cal. App. 3d 687 (1988).

271 *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

272 929 F.2d 1404, 1413 (9th Cir. 1991).

273 The court noted that Rhodes controlled less than 10% of the market for medical building within the Newport Beach, Irvine, Costa Mesa and Huntington Beach areas. 25 Cal. App. 4th at 543. In an alternative holding, the court held that the plaintiffs had also failed to show sufficient duality under the Cartwright Act, as the Rhodes’ respondents jointly engaged in the single enterprise of managing the medical building. Each was the agent of the other, and thus, the doctrine of intracorporate conspiracy would bar plaintiff’s claim.

274 Citing *Bondi v. Jewels by Edvar, Ltd.*, 267 Cal. App. 2d 672, 678 (1968).

275 51 Cal. App. 4th 1672 (1997).

the Cartwright Act and various business torts. The complaint alleged that the dealers were “locked-in” to a franchise relationship with Exxon because they had invested considerable money and effort in acquiring their stations. The plaintiff franchisees claimed injury because Exxon compels its franchisees to buy all their Exxon gasoline from Exxon, at a price higher than the “rack price,” at which it sells gasoline to independent jobbers. Plaintiffs were competitively disadvantaged, and thus suffered a competitive injury. While the plaintiffs agreed that Exxon did not have a dominate share of the petroleum market, the franchisees maintained that the relevant market should be limited to Exxon branded gasoline, citing *Eastman Kodak Co. v. Image Technical Services, Inc.*<sup>276</sup> Thus, the plaintiffs argued that the relevant market should be limited to Exxon branded gasoline, to the exclusion of all substitutable gasoline sold by competitive stations.

Exxon moved for summary judgment on the antitrust claims. The trial court granted the motion as to the horizontal restraint claims, but denied as to the vertical claims. It held that the issue whether the relevant market was “all gasoline,” or “Exxon gasoline,” was a question of fact.

The court of appeal reversed, and entered a writ of mandate that summary judgment be entered as to all of the vertical restraint claims, including those under the Cartwright Act.<sup>277</sup> Discussing *Continental T.V.*,<sup>278</sup> the court emphasized that under California law, an antitrust plaintiff attacking vertical restraints cannot make out a case unless the plaintiff can show anticompetitive effects in a larger, interbrand market.<sup>279</sup> The court embraced *Continental T.V.’s* decision in 1977, and distinguished and disposed of the Supreme Court’s ruling in *Kodak*<sup>280</sup> in 1992.

#### **E. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.***<sup>281</sup>

Our final case of the 1990’s section is highly significant, and focuses on the substantial convergence between decisions under the Cartwright Act and those under the Sherman Act relating to the purposes and objectives of antitrust law. As we will see, the best curve fit through the data supports the proposition that consumer welfare and the preservation of allocative efficiency has remained a cardinal principle from the outset of our journey. This is well-illustrated in *Cel-Tech*.

Los Angeles Cellular Telephone Company (LA Cellular) sold cellular telephones and services. Cellular telephones were also sold separately in an open market. As to the wholesale sale of cellular services, however, LA Cellular had a government-protected

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276 *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

277 504 U.S. 451 (1992).

278 In so doing, the court emphasized that the case concerned a franchise relationship, which is a specific and highly regulated contractual business arrangement. It was on this basis that it distinguished *Kodak*. See 51 Cal. App. 4th at 1685.

279 *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

280 51 Cal. App. 4th at 1680 (citing *Roth v. Rhodes*, 25 Cal. App. 4th 530, 542 (1994), and *Gianelli v. Beck & Co.*, 172 Cal. App. 3d 1020, 1044, 1048 (1985)).

281 *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992). *Kodak* has had a tough life not only in the courts, but with commentators. See, e.g., David A.J. Goldfine & Kenneth M. Vorrasi, *The Fall of the Kodak Aftermarket Doctrine: Dying a Slow Death in the Lower Courts*, 72 ANTITRUST L.J. 209 (204).

“duopoly” status, conferred by California law. Plaintiffs, however, sold cellular telephones, but were not licensed to sell services. Plaintiffs complained that they could not fairly compete with LA Cellular’s strategy, which consisted of selling telephones below cost, and recouping the losses with profits on the sale of services. Plaintiffs brought suit under the Unfair Practices Act, Business & Professions Code Sections 17043 and 17044, and under the Unfair Competition Law, Business & Professions Code Section 17200.

The California Supreme Court concluded that as to the Unfair Practices Act claims of sale below cost, the allegations were insufficient, as a company must act with the purpose of injuring competitors or destroying competition. There was no showing that LA Cellular’s actions had such a purpose to violate the UPA.

In parsing the law under the Unfair Practices Act and the Unfair Competition Law, the court turned to the antitrust laws in general. Borrowing from the United States Supreme Court’s decision in *Cargill, Inc. v. Monfort of Colorado, Inc.*,<sup>282</sup> the court noted that “the antitrust laws were enacted for protection of competition, not competitors. They “do not require the courts to protect small businesses from the loss of profits due to continue competition, but only against the loss of profits from practices forbidden by the antitrust laws.”<sup>283</sup> Injury to a competitor is not equivalent to injury to competition; only the latter is the proper focus of antitrust laws.”<sup>284</sup>

Through this “antitrust injury” analysis, the court determined that in order for there to be a finding of “unfairness” to competitors under Section 17200, it must be tethered to some legislatively declared policy or proof of some actual or threatened injury to competition. The court then stated:

We thus adopt the following test: When a plaintiff who claims to have suffered injury from a direct competitor’s “unfair” act or practice invokes Section 17200, the word “unfair” in that section means conduct that threatens an incipient violation of an antitrust law, or violates the policy of spirit of any of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.<sup>285</sup>

Thus, the principle of the antitrust laws as articulated by the California Supreme Court is based upon the salient federal antitrust law standard of “injury to competition, and not competitors.”<sup>286</sup>

The court rearticulated this position, and again citing *Cargil*, and noting:

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282 20 Cal. 4th 163 (1999).

283 479 U.S. 104, 115 (1986).

284 *Id.* at 116.

285 20 Cal. 4th at 186 (citing *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 495 U.S. 324, 344 (1977)).

286 20 Cal. 4th at 187.

Courts must not prohibit “vigorous competition” nor “render illegal” any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result, for [i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition.<sup>287</sup>

Thus, from 1907 through at least 1999, we have a consensus position of a unitary purpose and objective of the Sherman Antitrust Act and the Cartwright Act: The preservation of consumer welfare, and the encouragement of vigorous competition in the market as a whole.<sup>288</sup>

## X. 2000 And Beyond

As we move into the twenty-first century, we note that the principle of consumer welfare and allocative efficiency as the primary goal of antitrust law remains intact, with both regimes adapting to changes in current market place traditions. Several more examples follow.

### A. *Chavez v. Whirlpool Corporation*<sup>289</sup>

*Chavez* illustrates that the California courts may not only adopt a rule formulated under the auspices of the federal Sherman Act, but may expand upon it in the realization of its legitimate needs and aspirations. The case involved a garden variety vertical price fixing allegation where the manufacturer, Whirlpool, had instituted a *Colgate*<sup>290</sup> policy pre-announcing that Whirlpool would only do business with dealers who would adhere to a prescribed minimum resale price schedule for Kitchen Aid products. In addition, however, Whirlpool informed dealers, including plaintiff, that it would monitor their compliance and would refuse to sell Kitchen Aid products to any retailer who failed to comply.<sup>291</sup>

Whirlpool demurred to the complaint on the ground that it had implemented a lawful *Colgate* RPM policy, which absent coercive tactics to enforce compliance, lacks the duality required to state a claim under Section 1 of the Sherman Act. The trial court granted the demurrer and dismissed the complaint without leave to amend. The court of appeals affirmed.

The court of appeal noted that both the Cartwright Act and the Sherman Act required “duality,” in that each required “a combination of capital, skill or acts by two or more persons” under the Cartwright Act, and a “contract, combination ... or conspiracy, in restraint of trade” ... under the Sherman Act.

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287 *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 115 (1986).

288 20 Cal. 4th at 189 (citing *Cargill Inc.*, 479 U.S. at 116).

289 See also *Freeman v. San Diego Association of Realtors*, 77 Cal. 4th 171, 199 (1999) (excessive prices based upon unilateral interaction do not violate the antitrust laws).

290 93 Cal. App. 4th 363 (2001).

291 *United States v. Colgate & Co.*, 250 U.S. 300 (1919).



The court concluded:

The similar language of the two acts reflects their common objective to protect and promote competition.<sup>292</sup>

The court then concluded:

Since the Cartwright Act and the federal Sherman Act share common language and objectives, California courts often looked to federal precedents under the Sherman Act for guidance.<sup>293</sup>

The court of appeal noted that the California courts have adopted the *Colgate* doctrine for purposes of applying a Cartwright Act and approved the distinction drawn in *Monsanto Co. v. Spray-Rite Service Corp.*,<sup>294</sup> restricting and conditioning the drawing of inferences from a body of circumstantial evidence, were necessary to protect a manufacturer's right to select with whom to do business and on what terms. The court recognized and adopted the *Monsanto* rationale recognizing that a manufacturer and its distributors may have legitimate reasons to discuss resale prices and marketing strategy and to maintain reasonable nonprice restrictions that may affect resale prices.<sup>295</sup> "If an inference of such an agreement may be drawn from highly ambiguous evidence, there is a considerable danger of the doctrines enunciated in *Sylvania* and *Colgate* will be seriously eroded."<sup>296</sup> In addition, the court credited the *Monsanto* requirement that "evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer."<sup>297</sup>

In an extension and liberalization of the rule in *Colgate*, and in distinguishing the more restrictive analysis of *United States v. Parke, Davis & Co.*,<sup>298</sup> the court held that *Colgate* does not mutate into an agreement where the manufacturer advises the dealer that it will be monitoring performance by reviewing advertising, collecting sales receipts, or even sending "mystery shoppers" to retail stores to monitor compliance. The court stated:

Just as the announcement of a resale price policy and refusal to deal with dealers who do not comply is permissible, measures to monitor compliance that do not interfere with the dealer's freedom of choice are permissible. To hold otherwise would render the manufacturer's

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292 The complaint also alleges that Whirlpool advised the retailers that there would be no "second chances," and that any single violation of the price policy would result in termination not only at the particular retail store that failed to follow the policy, but at all of a retailer's other outlets.

293 Citing *State ex rel. Van de Kamp v. Texaco, Inc.*, 46 Cal. 3d 1147 (1988) and *Business Electronics v. Sharp Electronics*, 485 U.S. 717, 726 (1988) (emphasizing interbrand competition as the concern of antitrust).

294 93 Cal. App. 4th at 369 (citing *Morrison v. Viacom, Inc.*, 66 Cal. App. 4th 534, 541 n.2 (1998)).

295 *Id.* at 371 (citing 465 U.S. 752 (1984)).

296 *Id.* See 465 U.S. at 762 (citing *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 55 (1977)).

297 *Id.* (citing *Monsanto* at 763).

298 *Monsanto* at 764, n.9.

announced policy ineffective and undermine rights protected by the *Colgate* doctrine, and could also result in the mistaken and arbitrary termination of dealers.<sup>299</sup>

Again, articulating the congruency of purpose between federal and state antitrust law, the *Chavez* court stated:

The purpose of federal and state antitrust law is to protect and promote competition for the benefit of consumers.<sup>300</sup>

Again, the court has come full circle as to the objective and purpose of the Cartwright Act, its common law ancestors, and its federal Sherman Act uncles and cousins.

### **B. *Aguilar v. Atlantic Richfield Company***<sup>301</sup>

In an opinion written by Justice Mosk, the California Supreme Court thoroughly embraced the economics of oligopolistic interdependence, as articulated by United States Supreme Court in *Matsushita Elec. Industrial Co. v. Zenith Radio*.<sup>302</sup> However, it was able to do so aided by the 1992 and 1993 amendments to the California Code of Civil Procedure.<sup>303</sup> In light of these amendments, the court concluded that summary judgment in California now conforms largely to its federal counterpart, as clarified and liberalized in a trio of cases, culminating in *Matsushita*.<sup>304</sup> Ms. Aguilar brought an action on behalf of 24 million retail consumers of California Air Resources Board (CARB) gasoline. She presented evidence on a motion for summary judgment that the defendant oil companies had gathered and disseminated information to each other relating to the capacity, production and pricing of CARB gasoline, produced in accordance with the CARB formula mandated by the California Air Resources Board. Plaintiffs argued that the sharing of information in a concentrated industry had an effect on and stabilized prices. Plaintiffs also introduced evidence that the defendant oil companies had used common consultants.

Defendants produced evidence that the information exchange was in the economic individual self-interest of each of the companies, and was efficient. The court agreed. The court stated:

But, in an oligopoly, such as obtains here, interdependence is altogether consistent with independence, and is not necessarily indicative of collusion. [I]n a market served by a few large firms like the market for CARB gasoline served by the petroleum companies, each firm must know that if it reduces its price and increased its sales at the expense of

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299 362 U.S. 29, 44 (1960).

300 93 Cal. App. 4th at 373.

301 93 Cal. App. 4th at 375 (citing *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 106-07 (1984) and *Cianci v. Superior Court*, 40 Cal. 3d 903, 918-19 (1985)).

302 25 Cal. 4th 826 (2001).

303 475 U.S. 574 (1986).

304 25 Cal. 4th at 848. See Assembly Bill No. 2616 (1991-1992 Reg. Sess.), and Assembly Bill No. 498 (1993-1994 Reg. Sess.).

its rivals, they will notice the sales loss, identify the cause, and probably respond. In short, each firm is aware of its impact upon the others. Though each may independently decide upon its own course of action, any rational decision must take into account the anticipated reaction of the others. ... Because of their mutual awareness, “their” decisions may be interdependent although arrived at independently.<sup>305</sup>

The court continued:

We recognize that Aguilar did indeed present evidence that the petroleum companies may have possessed a motive, opportunity, and means to enter into an unlawful conspiracy. But that is all. And that is not enough. Such evidence merely allows speculation about an unlawful conspiracy. Speculation, however, is not evidence.<sup>306</sup>

Interestingly, gone is the notion that the Cartwright Act was “patterned” on the Sherman Act. Rather, Justice Mosk had reformulated the relationship, and described it as analogous to Section 1 of the Sherman Act,<sup>307</sup> as in “common purpose and objective.”

The holding in *Aguilar* that “conscious parallelism,” without more, is not unlawful, is repeated in the more recent case of *Eddins v. Sumner Redstone*.<sup>308</sup> There, the court followed *Aguilar* and affirmed summary judgment for defendants on the alleged conspiracy issues. The court noted that conscious parallelism alone is not sufficient to show a conspiracy, and that the failure of defendants to offer similar deals to the plaintiffs as were offered to other dealers was not contrary to their individual economic self interest, absent a showing of “plus factors” that would tend to exclude the possibility of independent action.<sup>309</sup>

## XI. Conclusion And Prognosis

It is now over a century since the Cartwright Act was enacted. In the intervening 100 years, there have been substantial changes not only in the case law developed under the Cartwright Act, but under the Sherman Act as well. This is not surprising, as the economic conditions of the 1880s are certainly not of those today. In the intervening 100 years, there have also been significant developments in economic thinking about competition issues.

Perhaps one of the most recent recognitions of the changing pace of antitrust law, in relationship to increased awareness and economic understanding of market behavior, is the recent United States Supreme Court in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*<sup>310</sup>

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305 *Id.* at 850 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)).

306 25 Cal. 4th at 864 (citing 6 AREEDA & HOVENKAMP, ANTITRUST LAW, Section 1429a at 175 (2008)).

307 *Id.* at 864.

308 *Id.* at 838. *Aguilar* was the last of Justice Mosk’s antitrust opinions. He passed away five days after filing the *Aguilar* decision.

309 134 Cal. App. 4th 290 (2005).

310 See also *RLH Industries, Inc. v. SBC Communications, Inc.*, 133 Cal. App. 4th 1277, 1286 (2005) (“Antitrust law is concerned with the protection of competition, not competitors . . .”) (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

There, in overruling the 1911 decision in *Dr. Miles*,<sup>311</sup> the Supreme Court commented that *stare decisis* is not as significant in cases decided under the Sherman Act, as the court has treated the Sherman Act as a common law statute from its inception. It stated just as the common law adapts to modern understanding and greater experience, so has the Sherman Act's prohibition on "restraints of trade" evolved to meet the dynamics of present economic conditions.<sup>312</sup>

And so it is here. Since at least the 1977 decision in *Continental T.V.*,<sup>313</sup> there has been a sea-change in the qualitative analysis applicable to cases brought under the Sherman Act. Because the Cartwright Act and the Sherman Act at least bear a strong genetic link to an overriding common purpose and objective, namely that of consumer welfare and the promotion of allocative efficiency, it is not surprising that the Cartwright Act and the Sherman Act remain in at least loose congruency, one with the other.

The "hole in the boat," it might be argued, appears to be the revolt of California and numerous other states against the Supreme Court's decision in *Illinois Brick v. Illinois*.<sup>314</sup> *Illinois Brick* reflects a federal antitrust policy designed to empower "private attorney general's" to bring actions for treble damages, and to reduce or eliminate evidentiary issues that could border on unmanageability. To promote the bringing of private enforcement actions, it limited antitrust standing to "direct purchasers." This has been legislatively determined in California to be contrary to its goals of consumer redress, and thus resulted in an amendment to California Business and Professions Code Section 16750(a) to allow an action to be brought by any person who is injured in his or her business or property ... regardless of whether such injured person dealt directly or indirectly with the defendant.<sup>315</sup>

A spirited debate as to the best approach has now been with us for almost 40 years. Recently, it was the subject of recommendations of the Antitrust Modernization Commission, in its April, 2007 Report and Recommendations. The Commissioners recommended that Congress overrule the Supreme Court's decisions in *Illinois Brick* and *Hanover Shoe*<sup>316</sup> to the extent necessary to allow both direct and indirect purchasers to recover for their injuries, and that the full adjudication of such claims occurs in a single federal forum.<sup>317</sup>

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311 127 S. Ct. 2705 (2007).

312 *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

313 127 S. Ct. at 2721.

314 *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

315 431 U.S. 720 (1977).

316 As of April, 2007, 36 states and the District of Columbia allow indirect purchasers to sue under state law for damages.

317 *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

In light of the recent court of appeal decision in *Clayworth v. Pfizer*,<sup>318</sup> we may see yet another shoe drop. In *Clayworth*, the court of appeal held that in addition to a legislative *Illinois Brick* repealer, through Business and Professions Code Section 16750(a), *Hanover Shoe* was never adopted into California law. If an alleged overcharge has been passed on to a purchaser at the next succeeding level in a chain of distribution, the preceding purchaser has not suffered injury to “business or property.” Thus, we may see additional commentary and litigation on the manageability and double recovery issues that were attendant to the Supreme Court’s thinking in *Illinois Brick*, now so many years ago.

Stay tuned. And, let us be mindful of the old adage, “Be Careful What You Wish For.” Whatever the next 100 years will bring to the antitrust table, we must give credit where credit is due. Our many thanks to Justice Traynor in his revival of the Cartwright Act in *Speegel*.<sup>319</sup> Justice Traynor should be credited with the wakening of “Sleeping Beauty,” and giving the Cartwright Act a new lease on life. Our thanks and appreciation also to Justice Mosk. First, in his role as California Attorney General, and in invigorating and bringing leadership to active prosecution of claims under the Cartwright Act, as well as under the Sherman Act. And, second, in appreciation for his scholarship and insight in his many antitrust opinions.

And finally, thanks and appreciation to all of the judges, enforcement officials, and members of the bar who have labored in the changing landscape of competition policy, and who have made the Cartwright Act one of the leading state enforcement regimes in the country, and a substantial contributor to competition policy.

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318 ANTITRUST MODERNIZATION COMMISSION, REPORTED RECOMMENDATIONS 265-284 (April 2007). See also Statement of the Honorable Vaughn Walker, United States District Judge Northern District of California, *Market Competitiveness: Does State Antitrust Law Need to be Updated*, COMPETITION, Spring/Summer 2006, at 69. But see, Statement of Professor Mark A. Lemley, *id.* at 95.

319 No. A116798 (July 25, 2008).

320 *Speegle v. Board of Fire Underwriters*, 29 Cal. 2d 34 (1946).