# ENFORCEMENT AND IMMUNITIES WORKING GROUP REPORT

## Executive Summary

This report discusses the principal issues affecting Cartwright Act enforcement by both public and private sector actors, with particular attention to the differences between California and federal antitrust laws and the unique challenges they present. As described herein, the ability of private sector enforcers to access California courts, including the California Supreme Court, has been restricted since 2006, thus creating a greater need for explicit legislative articulation of what conduct is barred, standing to sue, which standards of liability should apply, what procedures (including presumptions and burdens of proof) should be followed, and the policy purposes of each. This would enable the federal judges who now most often are those called upon to interpret the law with regard to Cartwright Act claims, to do so with unambiguous guidance. This report also discusses several specific areas which have generated the greatest confusion for federal courts, including standing, vertical price fixing, employment restrictions, standards of proof of violations and permissible defenses thereto, and antitrust exemptions. As to those, further clarifying or revised language are suggested as options for consideration.

## Federal and State Enforcement

### Bringing federal claims.

Both criminal and civil enforcement is available under federal antitrust law. Criminal enforcement is limited to the US Department of Justice Antitrust Division and is further limited to prosecution of combinations and conspiracies under Section 1 of the Sherman Act, not to single firm conduct made unlawful under Section 2. The Antitrust Division as well as the Federal Trade Commission, state Attorneys General, and private parties may all bring civil suits to enforce the Sherman Act. State AGs may sue civilly in their law enforcement capacities and may also seek monetary relief on behalf of the state and/or on behalf of natural persons (consumers) as *parens patriae*. Unlike the federal agencies, state AGs and private parties are required to allege and demonstrate harm to support their standing to sue in federal court, as a separate threshold matter from any consideration of damage claims. The federal agencies are presumed to meet the requisite standing requirements, a presumption that does not extend to other enforcers, public or private.

**Mergers.** Mergers are a major, and separate, focus of antitrust enforcement in federal court. Section 7 of the Clayton Act declares to be unlawful mergers and

acquisitions the effect of which "may be substantially to lessen competition, or to tend to create a monopoly." Such transactions are generally challenged before they are consummated, so as to avoid having to "unscramble the eggs", although post-merger challenges are possible. They are pursued on a fast track compared with conduct-related violations, so as not unduly to hold up the transaction. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act) requires the merging parties to report in detail the proposed transactions to the federal enforcement agencies in advance and suspends their closing during a statutory waiting period to allow the agencies to investigate the potential impacts on competition. There is no required premerger reporting to non-federal enforcers such as state Attorneys General or private litigants. Nonetheless, state AGs and private litigants may also sue under Section 7 of the Clayton Act to block the transaction. State AGs have subpoena authority under state law that permits them to conduct extensive premerger investigations, but private parties must file suit before securing the confidential documentary materials provided to the federal agencies under the HSR Act.

In the case of state AGs, joint investigation and sharing of investigative documents is commonly done under a voluntary state-federal Protocol for Coordination of Merger Investigation, with the consent of the merging parties.[1] Such coordination can benefit the merging parties by minimizing the burden of compliance with multiple document disclosure obligations and generally expediting review of the transaction. It can benefit state and local enforcers facing the explosion of mergers and acquisitions of the last two decades, by allowing them to share the considerable investigative burdens of reviewing complex transactions within a short timeline. Nevertheless, coordination under the Protocol has proven slower and less effective than hoped, with state AGs often not obtaining full access to the strictly confidential HSR materials until many weeks after the federal review process has begun. This has at times led California to short-cut the Protocol process by obtaining its own direct access to documents and witnesses either by subpoena or voluntarily, and by coordinating its review with the federal agencies separately from other states. The recent Uniform Law Commission proposals to substitute the Protocol with legislation is discussed below under Mergers.

**Bringing state claims.**

The Cartwright Act explicitly contemplates multiple enforcers, as well as treble damages and the right to seek attorney fees as well as costs, all to maximize enforcement. But there are differences between government prosecutors, both state

[1] https://www.ftc.gov/advice-guidance/competition-guidance/protocol-coordination-merger-investigations)

and municipal, and private parties in their powers and the remedies they may seek. The California Attorney General has the broadest range of powers. He or she may bring either criminal or civil charges and may seek damages on behalf of the state itself and, as *parens patriae*, on behalf of California natural persons. District Attorneys have a similar range of powers, although some limits apply along with an obligation to notify the Attorney General of certain undertakings. Private parties may bring civil claims on behalf of injured individuals, companies, or classes thereof.

Private litigation has been the principal means of Cartwright Act enforcement for many decades, encouraged (intentionally) by Cartwright's provisions for treble damages and recovery of attorneys fees. Since passage of the federal Class Action Fairness Act of 2005, most consumer class actions to enforce Cartwright have been heard in federal court. This has had several unfortunate side effects. One such effect, because the claims often appear alongside Sherman Act claims, has been a tendency of federal judges to conflate Cartwright claims with federal ones, presuming that they are the same for all practical purposes even when they are not.[2] The California Supreme Court has taken pains to articulate clearly such differences on the few occasions it has had the opportunity, and the California legislature would be well-advised to do the same. Another unfortunate effect has been to encourage dismissal of the lawful claims of consumers who did not purchase directly from wrongdoers, but to whom unlawful overcharges were passed on by dealers or wholesalers. Such disenfranchisement of claimants whose rights the Cartwright Act is specifically designed to protect is a policy issue that deserves the Commission's careful consideration, as discussed in detail later in this report.

Several state agencies with regulatory powers have the ability to consider competition-related issues, but those powers do not generally displace the Cartwright Act. In some instances the agencies are explicitly directed to consult with or engage the Attorney General for enforcement purposes.[3] This is discussed further in the report's section on exemptions and immunities.

California has no general regulatory agency for competition nor are there regulatory guidelines of the sort that exist in Europe and many other jurisdictions, meaning that the only actual interpretation or development of the Cartwright Act lies in courtroom litigation before state or federal judges. There is no bar on a potential regulatory

[2] This mistaken conflation has been observed by California antitrust practitioners, both public and private, over many years and many lawsuits in federal district courts both inside and outside California. Specific examples can be provided should the Commission wish for them.
[3] The list includes Insurance Code section 790.03 (Unfair Insurance Practices Act), Public Utilities Code 854(b)(3), and the newly created Office of Healthcare Affordability.

presence in this area though, should the legislature wish to consider it. Examples of such a regulatory structure lie much closer to home than Europe, such as the CCPA and CPRA with respect to enforcement of California's privacy laws, and Cal. Code Regs. Tit. 11, section 999.5, with respect to Attorney General review of nonprofit hospital mergers. Whether the relatively greater success of the European Union and others compared to the US in effective enforcement is attributable to this regulatory structure or to other factors is a question without a definitive answer at this moment, but it should be acknowledged.

**Enforcement Policy Purposes**

The U.S. Supreme Court recognized over forty years ago—in a case in which California was a plaintiff[4]—that states may adopt their own antitrust laws, as California has done. The similarities with the Sherman Act include treble damages and attorneys fees for successful plaintiffs as a strategy to promote vigorous private enforcement. But the Cartwright Act's doctrine varies in important ways from federal law, including, for example, by permitting indirect purchasers (i.e. buyers not in privity with the offender) to recover damages, or by condemning vertical price restraints as *per se* unlawful. Noncompete clauses in employment contracts have only recently received attention as possible violations of federal antitrust law, but they have been unlawful for decades in California under Bus. & Prof. Code Section 16600. Tying arrangements are treated as *per se* unlawful under the Cartwright Act, though much less has been said about their close companion, bundled discount arrangements, whose impacts in many cases may also tend to exclude other competitors from access to markets.

The California Supreme Court has generally looked carefully at legislative history in interpreting the Cartwright Act. In so doing, the Court has articulated several points that distinguish the Act from federal antitrust enforcement and from the approaches taken under the laws of most other states. Federal precedent can be informative but is not binding upon courts interpreting the Cartwright Act[5], a point that was acknowledged by the US Supreme Court in the *ARC America* case. Moreover, because the overriding interest of the legislature was in deterrence of anticompetitive conduct, in close cases overdeterrence may be preferable to underdeterrence as an outcome. (See, *Clayworth v. Pfizer*, discussed further below). Even in the area of

[4] *California v ARC America*, 49 U.S. 93 (1989)

[5] *Aryeh v.Canon Bus. Solutions, Inc.*, 55 Cal.4th 1185, 1195 (2013) ("Interpretations of federal antitrust law are at most instructive, not conclusive, when construing the Cartwright Act, given that the Cartwright Act was modeled not on federal antitrust statutes but instead on statutes enacted by California's sister states around the turn of the 20th century.") See also *Speegle v Board of Fire Underwriters*, 29 Cal.2d 34 (1946), and others.

federal patent rights, the Court has chosen not to back away categorically from Cartwright Act enforcement, carefully preserving it against erosion when the scope of the patent, clearly a federal matter, is not at issue. (See,further discussion of *In re Cipro I and II*)

It may be argued that the divergences between federal and California law exemplify ways in which California can contribute to effective antitrust enforcement. California law can enhance compensation and deterrence for conduct that also violates federal antitrust law. Often, indirect purchasers—and end-user consumers in particular—bear the brunt of antitrust violations, but federal law rarely affords them a means to recover their losses. Further, the prospect of liability to indirect purchasers under California law—in addition to legal exposure to direct purchasers under federal law—can help to deter antitrust violations before they occur. Moreover, retention of *per se* treatment of generally harmful exclusionary practices affords speedier and more effective relief and the fairness of a level playing field that has always been a hallmark of California's competition policy.

The Court has cited as further evidence of the legislature's determination to prevent harms to competition the potentially broad sweep of the Unfair Competition Law to outlaw novel practices that may not rise to the level of a Cartwright Act violation but carry within them the seeds of competitive harm. (*Cel-Tech Communications v. Los Angeles Superior Court,* 20 Cal. 4th 163 (1999); see also *Epic Games v Apple, Inc.* 67 F.4th 946 (9th Cir. 2023).

Public policy is often frustrated by the widespread use of arbitration clauses in commercial contracts and their application to antitrust disputes. Standardized arbitration provisions in business contracts can work a severe handicap on the bringing of private antitrust actions because they can, depending on their terms, *inter alia* waive treble damages, eliminate attorney fee recovery, severely limit discovery, shorten the statute of limitations and avoid injunctive relief. In addition, because they are non-public their results are generally unknown to public enforcers and public policymakers, thereby reducing the overall deterrent effect of the antitrust laws, both state and federal.[6] Solutions to this problem are complex due to countervailing policies favoring alternative dispute resolution and are beyond the scope of the present report; however formal identification of this type of widespread undercutting of state policies could appropriately be identified legislatively.[7]

[6] See, e.g. https://scholarlycommons.law.northwestern.edu/nulr/vol110/iss1/1/

[7] Bus. & Prof. C. 16600's simple articulation of contractual restraints on employees' ability to compete for work might serve as an example.

**Liability Standards and Burdens of Proof**

Given the fact that Cartwright Act jurisprudence is currently developed in large part by federal court judges who may be relatively unfamiliar with the statute, the Legislature may wish to articulate more specifically not only the conduct that is to be prohibited but also the procedural standards that should be implemented by the courts in deciding claims brought under the Cartwright Act, especially in areas that may differ from federal antitrust laws.

In 2015 the California Supreme Court considered the two liability standards that generally prevail under federal law, *per se* and "rule of reason", and further identified a third approach which some federal courts have denominated "quick look" analysis lying in between the two. It embraced its own third, middle ground approach as the most appropriate one for courts to employ on the pharmaceutical settlements before it and described a sliding-scale judicial approach to liability determination that some academics have also discussed as a "structured rule of reason".[8] The Court implied that this standard could be applied appropriately to other areas of anticompetitive conduct as well, although it did not go further.

The particular emphasis on deterrence as the overriding policy goal of the Cartwright Act makes some form of in-between standard an especially desirable option for California courts to have available, especially when faced with newer or less familiar business practices that have many of the harsh impacts and characteristics of recognized per se violations but have never been classified as such themselves. Like the *per se* standard, it can convey that there is a relatively bright line between lawful and unlawful business practices as full rule of reason cases cannot, and thus is more likely to move the needle forward regarding deterrence of harm to consumer welfare. The absence of *per se* treatment of single-firm conduct under federal law has incentivized academic discussion of structured rule of reason tests particularly in connection with harshly exclusionary single-firm practices; hence, the Commission (and legislature) may wish to consider creating such an option for courts should the Cartwright Act be amended to include single-firm offenses.

There is not a uniform approach to this type of analysis, but several characteristics are common to all. First, as with *per se* violations, the plaintiff's prima facie case is made with a demonstration of such clear and harmful real-world effects on competition that consumer harm is obvious. Whether or not this gives rise specifically to a

[8] *In re Cipro Cases I & II*, 61 Cal. 4th 116 (2015). In 2019 the California legislature confirmed the Court's conclusion with regard to pharmaceutical "pay for delay" agreements in AB 824.

presumption of violation, it at least allows the court to conclude that there is no need for plaintiff then additionally to define and prove (through detailed economic testimony) the existence of a specific product market and geographic market within which competition exists.[9] Second, the burden of proof as to pro-competitive effects is affirmatively on the defendant, rather than placing it (as federal courts often do under rule of reason) on the plaintiff to either disprove the existence of such effects or show that there is no less-anticompetitive alternative. Third, it is within the court's discretion to disallow certain defenses. And finally, the court's balancing of pro-competitive against anti-competitive effects to determine if the conduct is in fact procompetitive should be vigorous.

As an alternative, or in addition, to prescribing this type of enabling language for the courts, the report of the Single-Firm Conduct Working Group contains suggestions for language, both general and specific, that might go a long distance toward accomplishing the same purposes. That language is true to traditional California policy purposes in its focus both on consumer harm and the seriousness of exclusionary effects on competitors.

**Standing to Sue**

Another area that may benefit from a careful review for clarity is the standing analysis under the Cartwright Act. Standing under the Cartwright Act is not coextensive with standing under the federal antitrust laws. But in the wake of the Class Action Fairness Act of 2005, most consumer class actions seeking to enforce the Cartwright Act end up in federal (rather than state) court. And federal (as well as state) courts at times (mis)apply federal antitrust standing requirements to Cartwright Act claims, thus effectively narrowing the reach of the Cartwright Act.

A brief discussion of federal antitrust standing principles highlights the importance of the distinctions in play. Section 1 of the Sherman Antitrust Act declares illegal all conspiracies in restraint of trade.[10] Section 4 of the Clayton Antitrust Act, passed by Congress to give some teeth to Sherman Act enforcement, provides a private right of action in federal court to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws … without respect to the amount in controversy," and entitles successful litigants to trebled damages and

[9] *Cipro* notes, at page 157: "We also observe that the outlined prima facie showing will suffice, without more, to raise a presumption of the patentee's market power. Proving that a restraint has anticompetitive effects often requires the plaintiff to " 'delineate a relevant market and show that the defendant plays enough of a role in that market to impair competition significantly,' " i.e., has market power. (Roth v. Rhodes, supra, 25 Cal.App.4th at p. 542, 30 Cal.Rptr.2d 706.)"

[10] 15 U.S.C. § 1.

attorney fees.[11] Federal courts have long recognized that this language is broad enough that, read literally, it "could afford relief to all persons whose injuries are causally related to an antitrust violation."[12] Courts have since read limitations into the language of Section 4 on the premise that "Congress did not intend [it] to have such an expansive scope."[13] Where a plaintiff's injury, for example, is derivative of a more direct injury to some other person, and that more-directly-injured person would have a strong motivation to pursue her own antitrust claim against the defendant, the antitrust standing of the more-remotely-injured plaintiff is likely to be denied. It is under this same rationale that the United States Supreme Court held in *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977) that indirect purchasers are too remote to suffer true "antitrust injury," and therefore lack standing to pursue federal antitrust claims.

In recognition of *Illinois Brick* and other considerations impacting the antitrust standing analysis, the Supreme Court fashioned a general balancing test to be used in determining whether a plaintiff is a proper party to assert a federal antitrust claim. *See Assoc. Gen. Contractors of Cal. v. Cal. State Council of Carpenters,* 459 U.S. 519, 535 (1983) ("*AGC*"). Under the *AGC* test, the court "evaluat[es] the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them" to determine standing. *Id.* To determine whether an injury is "too remote" to allow recovery under the antitrust laws, federal courts applying federal antitrust law look to: "(1) whether there are more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general; (2) whether it will be difficult to ascertain the amount of the plaintiff's damages attributable to defendant's wrongful conduct; and (3) whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries."[14]

*AGC* involved federal courts deciding whether claimants had standing to assert federal antitrust claims. But federal courts must also sometimes grapple with whether to apply the *AGC* test to the Cartwright Act and other antitrust claims asserted under state law. The California Supreme Court has not directly addressed this issue, and absent an authoritative holding from the California Supreme Court, federal courts sitting in diversity must "predict how the state's highest court would decide the question."[15]

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[11] 15 U.S.C. § 15(a)
[12] *Lucas v. Bechtel Corp.*, 800 F.2d 839, 843 (9th Cir. 1986) (internal quotation marks omitted).
[13] *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of California*, 190 F.3d 1051, 1054 (9th Cir. 1999)

[14] *Oregon Laborers-Emps. Health & Welfare Tr. Fund v. Philip Morris Inc.*, 185 F.3d 957, 963 (9th Cir. 1999) (citing *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 269-70 (1992); *AGC*, 459 U.S. at 545).
[15] *Murray v. BEJ Minerals, LLC*, 924 F.3d 1070, 1071 (9th Cir. 2019).

Traditionally, any party within the "target area" of the challenged anticompetitive conduct has standing to sue under the Cartwright Act.[16] Under this test, the plaintiff's business or transactions must come within the zone of the market endangered by the antitrust violation, as opposed to being "incidentally injured." The target area test incorporates the concept of reasonable foreseeability, resembling the common-law proximate cause standard.[17]

A recent federal district court decision authored by the Honorable Jaqueline Scott Corley of the Northern District of California examines standing and causation questions under the Cartwright Act. Judge Corley notes at the outset that the California Supreme Court has clarified that "[i]nterpretations of federal antitrust law are at most instructive, not conclusive, when construing the Cartwright Act, given that the Cartwright Act was modeled not on federal antitrust statutes but instead on statutes enacted by California's sister states around the turn of the 20th century."[18] And the California Supreme Court has consistently held that "[t]he Cartwright Act is broader in range and deeper in reach than the Sherman Act."[19] Legislative history illustrates the point: around the time the Sherman Act was passed, an alternative bill was advanced that was "intended to reach further" than the Sherman Act.[20] Though that alternative was not passed as federal law, the later-passed Cartwright Act was a "near cop[y]" of it.[21] And the fact that the Cartwright Act is an "*Illinois Brick* repealer" statute that expressly grants indirect purchaser plaintiffs the right to sue itself undercuts the rationale behind *AGC*.[22]
Given that the Cartwright Act is "broader in range and deeper in reach" than its counterparts under federal law, many federal courts have acknowledged that federal antitrust standing requirements do not govern the Cartwright Act standing analysis.[23]

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[16] *Saxer v. Philip Morris, Inc.*, 54 Cal. App. 3d 7, 26 (1975).
[17] *See id.*; *Kolling v. Dow Jones & Co.*, 137 Cal. App. 3d 709, 723 (1982).
[18] *In re California Gasoline Spot Mkt. Antitrust Litig.*, No. 20-CV-03131-JSC, 2022 WL 3215002, at *2 (N.D. Cal. Aug. 9, 2022) (citing *Aryeh v. Canon Bus. Solutions, Inc.*, 55 Cal.4th 1185, 1195 (2013)).
[19] *In re Cipro Cases I & II*, 61 Cal. 4th 116, 160 (2015) (internal citation omitted).
[20] *Cianci v. Superior Ct.*, 40 Cal. 3d 903, 919 (1985).
[21] *Id.*
[22] *See Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758, 763 (2010) ("In 1978, in direct response to *Illinois Brick*, the Legislature amended the state's Cartwright Act (Bus. & Prof. Code, § 16700 *et seq.*) to provide that unlike federal law, state law permits indirect purchasers as well as direct purchasers to sue (§ 16750, subd. (a)).").
[23] *E.g., In re California Gasoline Spot Mkt. Antitrust Litig.*, No. 20-CV-03131-JSC, 2022 WL 3215002, at *3 (N.D. Cal. Aug. 9, 2022) ("[T]he Court declines to find that federal antitrust standing principles govern cases brought exclusively under the Cartwright Act."); *Los Gatos Mercantile, Inc. v. E.I. DuPont*

Instead, antitrust standing under the Cartwright Act merely requires a plaintiff show that an antitrust violation was the proximate cause of its injuries.[24] The "antitrust injury" must be the type of injury the antitrust laws were intended to prevent and within the area of the economy that is endangered by a breakdown of competitive conditions.[25] But under the Cartwright Act, "[t]he alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury."[26] This standard is broader than the *AGC* test, and federal antitrust standing, would allow.[27]

There is still a substantial margin for error, given some courts' continued reliance on an outdated authority[28] that applied the multi-factor *AGC* test based on the erroneous view that California's antitrust statute and related standing doctrine are coextensive with the Sherman Act.[29] The Second Circuit, for example, recently held that "California law substantially incorporates the *AGC* factors," relying on an outdated California Court of Appeals decision, discounting the California Supreme Court's directive that federal antitrust law is at most instructive, and ignoring that the Cartwright Act is "broader in range and deeper in reach" than the Sherman Act. Because there is a split in the authority, the Legislature may wish to clarify that the antitrust standing requirement under the Cartwright Act is based on general proximate cause rules, *i.e.*, the target area test.[30]

## Enforcement Against Single Firm Conduct

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*De Nemours & Co.*, No. 13-CV-01180-BLF, 2015 WL 4755335, at *19, n.10 (N.D. Cal. Aug. 11, 2015); *In re Capacitors Antitrust Litig.*, 106 F. Supp. 3d 1051, 1073 (N.D. Cal. 2015); *In re Lithium Ion Batteries Antitrust Litig.*, No. 13-MD-2420 YGR, 2014 WL 4955377, at *11 (N.D. Cal. Oct. 2, 2014).

[24] *Kolling*, 137 Cal.App.3d at 723.

[25] *Id.* at 807.

[26] *Saxer*, 54 Cal. App. 3d at 23.

[27] *Compare California Gasoline*, 2022 WL 3215002, at *3 (permitting umbrella damages under the Cartwright Act) *with In re Coordinated Pretrial Proc. in Petroleum Prod. Antitrust Litig.*, 691 F.2d 1335, 1338-41 (9th Cir. 1982) (finding umbrella damages unavailable under the Sherman Act).

[28] *Vinci v. Waste Mgmt., Inc.*, 36 Cal. App. 4th 1811 (1995).

[29] *In re WellPoint, Inc. Out-of-Network "UCR" Rates Litig.*, No. MDL092074PSGFFMX, 2013 WL 12130034, at *11 (C.D. Cal. July 19, 2013); *Dang v. San Francisco Forty Niners*, 964 F. Supp. 2d 1097, 1110–11 (N.D. Cal. 2013); *In re Aftermarket Auto. Lighting Prod. Antitrust Litig.*, No. 09 MDL 2007-GW PJWX, 2009 WL 9502003, at *4 (C.D. Cal. July 6, 2009); *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1151–52 (N.D. Cal. 2009); *In re Dynamic Random Access Memory (Dram) Antitrust Litig.*, 516 F. Supp. 2d 1072, 1086–87 (N.D. Cal. 2007); *see also Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 987 (9th Cir. 2000) (applying the *AGC* test to Cartwright Act claims but noting "California law affords standing more liberally than does federal law").

[30] *See Saxer*, 54 Cal. App. 3d at 26; *Kolling*, 137 Cal. App. 3d at 724; *see also Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 363 (9th Cir. 1955) (an antitrust plaintiff must be situated "within that area of the economy which is endangered by a breakdown of competitive conditions") (citation omitted).

The two areas of greatest public concern and criticism over competition enforcement are merger review and monopolization. While the concerns have most frequently targeted the inability of the federal antitrust laws to rein in the power of the largest internet technology companies, much has also been said about failures to preserve competition in many other markets, such as gasoline, telecom, waste disposal, airlines and food/agriculture. Other working group reports have documented in more detail their nature and background and outlined the economic evidence of their impact on California consumers. Neither topic is addressed by the Cartwright Act, although they are both part of the laws of numerous other states[31], and amendments seeking to add a federal-style monopolization violation to the Cartwright Act have been proposed without success at least three times in the past. (See the Single Firm Conduct working group paper.). A broad judicial view of "combination" and "contract" under Cartwright has allowed some conduct forced by a dominant entity upon an unwilling and coerced business partner to qualify as a Trust under the current definition. But for many effectively single-firm practices California's public and private enforcers must rely solely upon relatively anemic federal law and federal judges for relief.

**Mergers and Acquisitions**

Merger review under federal law in California has largely been conducted by the California Attorney General, working in tandem with other state AGs and with the USDOJ's Antitrust Division and the Federal Trade Commission in order to accelerate the pace and reduce the considerable cost. The AG's Antitrust Law Section has done a thorough review of, on average, no more than five proposed mergers a year over the last two decades, a tiny fraction of the number reviewed by the federal agencies.[32] Given that the federal agencies are required to review all mergers of a certain size, the far more limited caseload of the AG has been the result of an informal filter, weeding out transactions that do not: (a) have significant impacts on California consumers, (b) affect specifically local markets, (c) involve California employers, (d) affect areas of recognized state policy or regulatory interest, or (e) offer a distinctive "value-added"

[31] Of particular note is the recent filing, on January 16, 2024, of a lawsuit by the Washington Attorney General seeking to block the proposed merger of Kroger and Albertsons Stores. Filed in King County, Washington superior court, the complaint is grounded on a combination of Washington state constitution and consumer protection law provisions.

[32] This estimate, along with other general information concerning AG Office practice, is based on information supplied by former Senior Assistant Attorney General Kathleen Foote. The federal agencies annually report premerger review and merger prosecution statistics, which show that they receive HSR notice of over 2000 mergers per year, and take enforcement actions on 30 or more of them annually.

role for California investigators to play. To illustrate, mergers and acquisitions by oil companies, supermarkets, department stores, hospitals, waste haulers and beer/wine makers meet all of these criteria and have been a consistent part of the AG's antitrust portfolio over the years.

The competitive analysis and litigation decisions of state and federal enforcers in the vast majority of cases have been aligned, resulting in jointly-signed settlements (consent decrees) and sometimes jointly-won trials.[33] The effectiveness of state efforts to block mergers they believe would be harmful in the absence of parallel action by the federal enforcement agencies has been problematic, however. When the federal agency has separately resolved its concerns or published the basis of its own decision to take no action, the state Attorney General's credibility before the federal court is weakened even where the subject merger is in a market of paramount policy interest to California.[34]

Partnership with USDOJ and the FTC has been highly advantageous, giving the Attorney General the ability to review and have input into the resolution of many transactions of great economic importance without the need to engage and fund large numbers of attorneys, paralegals and economists to do the work. This has allowed the Attorney General the ability to deploy only 2 or 3 staff members to handle each one, leaving half or more of his 26-attorney Antitrust Section free to prosecute the acts of misconduct that have been the bread-and-butter of Cartwright Act enforcement over the years.

Concerns specifically regarding healthcare consolidation have recently been addressed directly by the legislature through expansion of regulatory powers of the Attorney General and other state health agencies.

**Uniform Law Commission proposals** on Premerger Review by States. Some other states do have laws banning anticompetitive mergers, but they do not address the inability to coordinate with the federal HSR review apart from the Protocol. Some states, such as New York, are currently considering proposals for legislation that

[33] Major CAAG-federal consent decrees in merger cases include Republic/Allied Waste (2008) and Ticketmaster/LiveNation (2010). Major joint trial victories include Anthem/Cigna (2017) and American Airlines/Jet Blue (2022).

[34] For example, the non-action of the FTC was raised explicitly and repeatedly with the court in the Attorney General's unsuccessful challenge to AG Lockyer's Sutter suit against Health's acquisition of Summit Medical Center (1999) and later in his successful challenge to AG Becerra's suit against Valero's proposed acquisition of Plains All-American's Northern California refined petroleum products terminal (2017).

would create a state-specific pre-merger notification requirement. The differences among the proposals, and concerns over further compartmentalization of state merger review, have recently led the Uniform Law Commission to develop a draft uniform Antitrust Pre-Merger Notification Act ("Act"), intended to address the concerns of both the state AGs and business communities by creating a simple, non-burdensome mechanism for AGs to receive access to HSR filings at the same time as the federal agencies, and subject to the same confidentiality obligations.

Adoption of such a uniform law by the California Legislature might well be helpful to merger enforcement efforts by the California Attorney General in the federal courts especially as a cooperative effort with the federal agencies. However, such a law may be more symbolic than meaningful in the absence of any additional law concerning its enforcement, such as exists under Gov. Code 11180 et seq. for the issuance of subpoenas in connection with civil investigations. Further, it may be less than meaningful unless it is coupled with significant additional financial support for enforcement. The federal agencies receive and must review compendious HSR notices of over 2000 mergers per year, and take enforcement actions on 30 or more of them annually, whereas the Attorney General receives HSR notice information under the existing voluntary Protocol on no more than half a dozen of them, as discussed in more detail later in this report, and takes action on even fewer. The cost of this task is defrayed by filing fees paid to the federal agencies. No such fees for state enforcers are provided in the draft Act, which thus creates an unfunded burden upon the state Attorney General and may in fact nullify legislative efforts to provide for filing fees.[35] This concern is likely to be significant should the legislature consider adoption of the Act.

**Applying the Cartwright Act to Resale Price Maintenance**

Vertical minimum resale price maintenance ("RPM") is a practice that was *per se* unlawful under both federal and state law until 2007, when a controversial U.S. Supreme Court decision abandoned *per se* treatment and declared a much weaker "rule of reason" standard under the Sherman Act. The greater difficulty of enforcement under rule of reason has discouraged any effort to do so by federal enforcers, and the greater freedom of manufacturers and distributors to set and control high retail prices

[35] For example, on October 8, 2023, California Governor Gavin Newsom signed AB 853, which requires parties to submit a filing and pay a filing fee to the California attorney general for any acquisition of voting securities or assets of any retail grocery or pharmacy firm that generates a HSR Act filing under federal law.

has led them to do so, to the detriment of consumers. In California, however, the *per se* rule has remained in effect based on the clear language of the Cartwright Act, which targets vertical price-related agreements clearly in its definition of "Trust". In California, prices must be set independently – and competitively – by distributors and by retailers. [36] Efforts were made and litigation undertaken by Attorney Generals Brown and Harris to make the California rule clear to the business world through both news releases and litigation. See, https://oag.ca.gov/news/press-releases/attorney-general-halts-online-cosmetics-price-fixing-scheme More recently, the Attorney General joined other state Attorney Generals in three letters to Congress advocating for a legislative reinstatement of the *per se* rule against RPM under federal law.

Although the antitrust legal community appears well-aware of the California standard regarding RPM, it is unclear whether the business community and consumer groups are equally aware. Thus, the Commission may wish to consider recommending a clarification that underscores the applicability of the *per se* standard to these practices.

**Applying the Cartwright Act to Labor Issues**

In January 2023, in response to an Executive Order by President Biden to address non-compete clauses in employment contracts that may unfairly limit worker mobility, the FTC issued a proposed rule prohibiting the use of noncompete clauses and preempting all state laws providing lesser protection. Currently, the legality of such non-compete agreements is left to the states, creating confusion for workers and distorting labor markets that cover more than one state.

This is another area where California law is distinct not just from federal, but from almost all other states. In California, Bus. & Prof. C. 16600 has long prohibited employers, including those who operate out of state but employ California residents, from enforcing noncompete agreements.[37] Yet, as the California legislature has recently found, even when invalid these agreements are routinely included in employee contracts, including contracts for lower-wage workers. This can discourage workers from seeking new opportunities, causing workers in a variety of professions to mistakenly believe that they cannot pursue or accept a competitor's offer of better pay or working conditions in fear of facing legal repercussions. Such anticompetitive

[36] At least one other state (Maryland) has adopted language similar to California's.

[37] The much-envied vibrancy of California's tech market has been attributed in part to the ability of California workers to switch from job to job and company to company, or to start their own companies. Studies as early as the 1980's show that employee turnover in Silicon Valley is far more rapid than anywhere else, and connect it with the proliferation of startups. See, e.g. https://hbr.org/2016/11/the-reason-silicon-valley-beat-out-boston-for-vc-dominance.

provisions also harm the economy by depriving businesses of the opportunity to hire workers who may otherwise be available or qualified. Noncompete agreements also prove to be harmful to wages, entrepreneurship, market concentration in the labor force, and equality among the workforce. Noncompete agreements are often buried in fine print and go unmentioned in discussions between workers and employers or are added to the terms of employment after a worker has accepted a job or begun work.

In the last session the California legislature acted to both clarify and strengthen the existing rule through two related new laws that will go into effect on January 1, 2024. SB 699 makes it unlawful for employers to enforce agreements that are void and unenforceable under Business and Professions Code Section 16600 *regardless* of where the agreement was signed or where the employee worked when the agreement was signed. SB 699 also prohibits employers from entering into a contract with an employee or prospective employee that includes a provision that is void and unenforceable under Business and Professions Code Section 16600 and confirms that agreements restraining trade are void and unenforceable regardless of where and when the agreement is signed, and regardless of whether the employment was maintained outside of California. Moreover, SB 699 provides that an employee, former employee, or prospective employee may bring a private right of action for injunctive relief and/or actual damages to enforce the law and may recover reasonable attorney fees and costs.

AB 1076 further strengthens California's established public policy against noncompete agreements, and also goes into effect on January 1, 2024. It imposes notice requirements and also amends Section 16600 to expressly state that these provisions are applicable to contracts where the person being restrained from engaging in a lawful profession, trade, or business is not a party to the contract. AB 1076 also adds a new Section 16600.1, which makes it **unlawful** (not just unenforceable) to include a noncompete clause in an employment contract, or require an employee to enter into one, that does not satisfy an exception to Section 16600. A violation of Sections 16600 and 16600.1 is *per se* an act of unfair competition under California's Unfair Competition Law (UCL), California Business and Professions Code §§ 17200 et seq. Violators of the UCL may be subject to an injunction, an award of restitution, or enforcement actions by the attorney general.

Given these changes, a wave of enforcement efforts and legal challenges to the new laws can be expected. Should parts of them be deemed infirm, some legislative revisions may be appropriate. However, none of that can be known at this time.

**Applying the Cartwright Act to Big Tech**

Without a provision outlawing monopolization, the Cartwright Act is poorly suited to addressing complaints about the dominance of the Big Tech companies, as discussed in the report of Working Group 5. Yet many commentators believe that a monopolization law alone will be as ineffective as the federal Sherman 2 monopolies provision, due to the relative absence of consumer pricing mechanisms, the power of "network effects", and the speed at which new practices evolve and change.

An unavoidable practical consideration when contemplating changes to the Cartwright Act to better enable enforcement in the tech sector is the sheer cost of undertaking major litigation in a sector whose markets are enormous in scope, complexity, and pace of change. Moreover, courts themselves have raised questions as to whether they can be sufficiently swift and nimble to provide adequate relief for victims of anticompetitive practices in that sector, given both its technicality and its rapidity of transformation. (c.f. *US v. Microsoft*, 253 F.2d 34 DC Cir. 2001). An *ex ante* regulatory approach of the kind being implemented in other jurisdictions may afford more effective as well as more economical enforcement with regard to certain practices and therefore should be explored.

Should consideration be given to formulating special rules under the Cartwright Act to address Big Tech market power, a review of several existing models[38] suggest certain practices that should be explicitly considered. Those models are either quite new, or not yet adopted at all, so their effectiveness is still somewhat speculative. Nonetheless, much thought by many experts and stakeholders has gone into them, and they therefore make a good starting point from which to formulate a California approach.

All of the proposals do the following:

-Limit application of the law to the very largest tech companies offering digital platforms and/or services dependent on digital technologies, by size, revenues, and/or number of consumers using the products within the jurisdiction;

-Designate certain special obligations that those companies will have to government (reporting) or competitors (access) or consumers (choice);

-Establish a regulatory agency or specialized group within an existing agency to promulgate rules and administer them;

[38] The existing models include recently adopted laws and implementing regulations of the European Union and the United Kingdom's Digital Markets agency, as well as the proposed statutes that have been before the Congress these last several years, and the proposed New York law.

-Specify a set of business practices known to have exclusionary effects to be the primary (but not exclusive) focus of regulation. They include: (a) impeding data portability, (b) self-preferencing on the platform, (c) discriminatory platform access, and (d) undue interference with pricing or payments.

-Lay out something akin to a "structured rule of reason" framework, as discussed above in this report, for enforcement actions.

Purely from an enforcement perspective, given the rapidity of change in the tech sector, there is much to recommend this type of "rules of the road" approach, which does not wait for lawsuits to set precedents for the industry to follow. Indeed, under the general "rule of reason" liability standard, it could be argued that no lawsuit could effectively do so because every case involves unique facts. Conversely, it be argued that California's antitrust enforcement system, like the federal one, is based on case and controversy, from which a major deviation could lead to unanticipated negative consequences.

The regulatory approach embodied in the CCPA and CPRA in managing consumer rights in the online privacy area may be instructive over the next several years as to those arguments, and the costs and benefits to California consumers of applying a regulatory approach to enforcing antitrust laws in internet platform markets. Such an approach in the antitrust context could certainly borrow from it, at least as to applicability and notice obligations, if not also to other matters.

**Immunities and Exemptions**

Private and public enforcement of antitrust laws in response to anticompetitive conduct that harms Californians is limited by numerous antitrust exemptions in both federal and California law. The legal basis for many of these exemptions dates from very different eras and in some cases reflects economic circumstances and regulatory solutions that are long out of date. The result of this galaxy of provisions is an array of exemptions (not contained in the Cartwright Act itself) that are inconsistent at best, and at worst may in some cases be counterproductive to their intended goals. The Cartwright Act was from its inception supported by strong public policy, and there is a strong reluctance of California courts to recognize exemption from it without clear legislative direction that a repealer is intended.[39] It is not the purpose of

[39] Manufacturers Life Ins. Co. v. Superior Court (1995) 10 Cal.4th 257; Roberts v. City of Palmdale (1993) 5 Cal.4th 363, 379; Kennedy Wholesale, Inc. v. State Bd. of Equalization (1991) 53 Cal.3d

this memorandum to catalogue all of the exemptions the Legislature has created, let alone the areas where it has not done so. Although a thorough review and possible revision of this body of law may be desirable, such a reassessment would implicate state policies extending well beyond the scope of this report. The Commission should nevertheless be aware of some areas of concern.

**The Sources and Range of Exemptions**

California has created two types of antitrust exemptions for economic activity within its jurisdiction. The first is statutes that exempt entities in a specific line of business from some or all provisions of state antitrust laws. The second is to create a basis for federal exemption under the State Action doctrine by enacting a statute to regulate entry, output, and/or prices in a line of business within the state. The idea behind federal State Action "immunity"[40] is that a state should be free to substitute regulation for a market in which a business entity is free to enter or exit and to set its prices without consulting any public authority.

**Federal Law.** Narrowing the exemptions from federal antitrust laws has been a focus area for federal enforcers, particularly the FTC, for the last two decades.[41] The extent of federal exemption often turns on what the state law provides as an alternative. As a rule, antitrust exemption under the State Action doctrine is not warranted unless there is some other regulatory structure to replace the one the judicial system would provide. In most circumstances care is taken by the Legislature to assure that no

245, 249, 279; Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist. (1989) 49 Cal.3d 408, 419–420; Hays v. Wood (1979) 25 Cal.3d 772, 784; Fuentes v. Workers' Comp. Appeals Bd. (1976) 16 Cal.3d 1, 7.

[40] While often referred to as an immunity (which can block a plaintiff from even making a claim), the State Action doctrine is more properly viewed as an exemption (which a court can find after reviewing the factual basis of the claim). The FTC has recently taken the position that it may be merely a defense (which may not be decided until the end of a case rather than the beginning).

[41] The Federal Trade Commission has devoted substantial resources to identifying and fighting anticompetitive state occupational licensing programs. For a more comprehensive discussion of this issue, see the FTC's staff reports on the topic: Carolyn Cox and Susan Foster, "The Costs and Benefits of Occupational Regulation," Federal Trade Commission (1990), at https://www.ftc.gov/system/files/documents/reports/costs-benefits-occupational-regulation/cox_foster_-_occupational_licensing.pdf, and Karen A. Goldman, "Options to Enhance Occupational License Portability," Office of Policy Planning, Federal Trade Commission (2018), at https://www.ftc.gov/system/files/documents/reports/options-enhance-occupational-license-portability/license_portability_policy_paper_0.pdf.

daylight exists between regulatory authority and the jurisdiction of the courts.[42] Daylight would effectively create a zone of *carte blanche* that no other person or business entity enjoys.

A 2015 US Supreme Court opinion reduced the zone of immunity from federal antitrust liability of members of state-appointed boards consisting of marketers or practitioners who exercise regulatory powers over competition-related matters in their respective areas.[43] Certain actions of such California state-appointed boards thought to be immunized as actions taken by the state itself may not enjoy exemption from the Sherman Act in the absence of demonstrable active supervision by the Departments within which they are situated. A comprehensive discussion of this was presented to the Legislature in Attorney General's Opinion 15-402 (2015)[44] and reflects current practice.

**State Law.**

One of the difficulties of adopting a comprehensive and coherent policy regarding antitrust exemptions is that the circumstances in which they arise are very heterogeneous. The importance of the case for regulatory intervention varies enormously. In the case of occupational licensing, for example, health risks and the potential benefits of regulation differ between neurosurgeons and manicurists. Similarly, the ability of sellers of regulated goods and services to impose anticompetitive harm on consumers via collusive prices and local production limits also varies enormously. For example, the ability of a California-based agricultural marketing board to sustain anticompetitive prices in California depends on the availability and transportation costs of substitutes from other states. Although sunset clauses require legislative review and reauthorization of each board occurs at intervals, a more comprehensive review of the effects of antitrust exemptions in California would need to take into consideration such variables on a program-by-program basis.

The California Department of Consumer Affairs (CDCA) in BCSHA is home to one

[42] However, several courts have concluded that Uber was exempt from UPA claims as Uber is a "transportation network company" subject to regulation of the California Public Utilities Commission, and the fact that the CPUC never exercised its rate-setting authority with regard to Uber did not alter Uber's exempt status. That conclusion is at variance with the general rule of the State Action doctrine, which among other things calls for examination of whether the conduct, as opposed to the entity, is in fact regulated.

[43] The California Business, Consumer Services and Housing Agency contains departments that regulate over fifty industries in California, including beer and cannabis.

[44] https://oag.ca.gov/system/files/opinions/pdfs/15-402_1.pdf

of the most contentious types of regulation: occupational licensing. This area of regulation is controversial because it can have both significant benefits and significant costs. A large fraction of the occupations that are licensed by the CDCA pose easily cognizable risks to the health and safety of their customers. Examples of such occupations are various types of medical professionals and providers of cosmetic services. Less clear is the consumer benefit from occupational licensing of real estate agents, one of the most fiercely contested domains of occupational licensing. The well-documented cost to consumers of occupational licensing is that it often restricts competition by limiting entry by qualified workers who pose no greater risk to consumers than those who are licensed. One proposed solution to this problem is for states to accept licenses that are issued by other states that adopt similar standards.

California's agricultural marketing boards offer a useful example of explicit, but inconsistent, antitrust exemption. Under the California Marketing Act[45], each marketing board regulates some aspect of the production and sale of specific agricultural products in the state. Typically, the members of these boards are businesspeople who produce or market the crops within the board's jurisdiction. They thus closely resemble trade associations, which enjoy no exemption from antitrust scrutiny.[46] Their proposals concerning marketing orders (which are advisory to the Secretary of Food and Agriculture) are often procompetitive in nature but can also have powerful exclusionary effects upon other producers or marketers. Both federal and state statutes afford exemption from the antitrust laws provided there is compliance with the laws' specific directives governing their operation.[47] In a belt-and-suspenders effort to further immunize them, the legislature has conferred even broader statutory protection on some marketing boards, their participants and their employees without clearly addressing their oversight by state regulators.[48] Such a broad-brush approach is inconsistent with contemporary antitrust enforcement trends

[45] California Marketing Act (2019), https://www.cdfa.ca.gov/mkt/mkt/pdf/mrktact07.pdf.

[46] Trade associations have often been characterized as "walking antitrust conspiracies", and their actions are lawful only when they are demonstrably procompetitive.

[47] See, Department of Agriculture Rule interpreting Marketing Agreement Act of 1937 (an FDR initiative to aid struggling farmers during the Depression), and Cal. Food & Ag. C. (FAC) section 58655.

[48] See, e.g. FAC 77710 re the Date Commission: "No action taken by the commission, or by any individual in accordance with this chapter or with the rules and regulations adopted under this chapter, is a violation of the so-called Cartwright Act (Chapter 2 (commencing with Section 16700) of Part 2 of Division 7 of the Business and Professions Code), the Unfair Practices Act (Chapter 4 (commencing with Section 17000) of Part 2 of Division 7 of the Business and Professions Code), or any statutory or common law against monopolies or combinations in restraint of trade."

and could face court challenges by federal enforcers.

Immunities associated with the regulation of beer by the Alcoholic Beverage Control Board are another area that could be brought to the attention of the legislature. A decades-old three-tier strategy to separate manufacturers from retailers through establishment of an independent wholesale market (with rate regulation and licensing by geographic area) has morphed over the last two decades into a very different economic picture in which a very small number of very large wholesalers may exert wide control over the shelf space of retailers, raising concerns about consolidation in this sector and complaints of market exclusion on the part of craft breweries among others. The immunities created by the ABC statute as to wholesale pricing may need reevaluation but the broader market changes suggest that any inquiry look beyond the immunity question alone.

In many regulated markets in California, however, there is recognition that antitrust liability may apply under both federal and state law notwithstanding a regulatory framework, except with regard to rate regulation and conduct associated with it. This is true of non-rate-related business practices in insurance, health care, waste management, and many utilities, to name a few.

**Summary of potential actions by legislature:**

- Amend Cartwright to be applicable to single firm conduct.

- Create an option for the courts to utilize a "structured rule of reason" standard or burden-shifting process where warranted in Cartwright cases.

- Clarify that antitrust standing requirement under Cartwright is based on general proximate cause rules, i.e. the target area test.

- Clarify that resale price maintenance remains per se unlawful under the Cartwright Act notwithstanding the US Supreme Court's ruling in the *Leegin* case.

- Adopt a Pre-Merger Notification law only in conjunction with additional measures relating to payment of fees, expanded staffing of the Antitrust Law Section, penalties for violations.

- Add Cartwright amendment declaring that contractual waivers (in boilerplate arbitration clauses) of treble damages, attorneys' fees, and statute of limitations are unenforceable as against public policy.

- Consider amending Cartwright to apply to mergers and acquisitions.

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