#B-750

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Antitrust Law:
Single Firm Conduct

December 2025

The purpose of this tentative recommendation is to solicit public comment on the Commission's tentative recommendation. A comment submitted to the Commission will be part of the public record. The Commission will consider the comment at a public meeting when the Commission determines what, if any, recommendation it will make to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made to it.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION BY **JANUARY 12, 2026.**

Submit comments to Sharon Reilly, sreilly@clrc.ca.gov

The Commission will often substantially revise a proposal in response to comments it receives. Thus, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

California Law Revision Commission

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SUMMARY OF TENTATIVE RECOMMENDATION

In 2022, the Legislature passed Assembly Concurrent Resolution 95 (2022 Cal. Stat. res. Ch. 147), which tasked the California Law Revision Commission with a substantive review of California's antitrust laws. Specifically, the Legislature directed the Commission to study and report on three antitrust topics:

> (1) Whether the law should be revised to outlaw monopolies by single companies as outlawed by Section 2 of the Sherman Act, as proposed in New York State's "Twenty–First Century Anti–Trust Act" and in the "Competition and Antitrust Law Enforcement Reform Act of 2021" introduced in the United States Senate, or as outlawed in other jurisdictions.
>
> (2) Whether the law should be revised in the context of technology companies so that analysis of antitrust injury in that setting reflects competitive benefits such as innovation and permitting the personal freedom of individuals to start their own businesses and not solely whether such monopolies act to raise prices.
>
> (3) Whether the law should be revised in any other fashion such as approvals for mergers and acquisitions and any limitation of existing statutory exemptions to the state's antitrust laws to promote and ensure the tangible and intangible benefits of free market competition for Californians.

To assist the Commission, the staff retained an antitrust expert and assembled eight Working Groups comprised of leading antitrust academics and practitioners to examine various aspects of antitrust law. After considering these reports and presentations by the Working Groups and public comment, the Commission recommends that California's laws be revised to outlaw anticompetitive conduct by single companies, but those laws should not be revised in the context of technology companies. While the Commission is also considering recommendations to address mergers and acquisitions, the present recommendation reflects only its deliberations on single firm conduct. This recommendation also includes ancillary language describing the proposed statute's purpose and guidance to the judiciary for its interpretation.

This recommendation was prepared pursuant to Resolution Chapter 147 of the Statutes of 2022.

ANTITRUST LAW: SINGLE FIRM CONDUCT

ANTITRUST LAW: SINGLE FIRM CONDUCT

BACKGROUND

LEGISLATIVE ASSIGNMENT AND COMMISSION PROCESS

The Legislature enacted Assembly Concurrent Resolution 95[1] in 2022, which directed the California Law Revision Commission[2] to study California's antitrust laws and determine the following:

> (1) Whether the law should be revised to outlaw monopolies by single companies as outlawed by Section 2 of the Sherman Act, as proposed in New York State's "Twenty–First Century Anti–Trust Act" and in the "Competition and Antitrust Law Enforcement Reform Act of 2021" introduced in the United States Senate, or as outlawed in other jurisdictions.
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> (2) Whether the law should be revised in the context of technology companies so that analysis of antitrust injury in that setting reflects competitive benefits such as innovation and permitting the personal freedom of individuals to start their own businesses and not solely whether such monopolies act to raise prices.
>
> (3) Whether the law should be revised in any other fashion such as approvals for mergers and acquisitions and any limitation of existing statutory exemptions to the state's antitrust laws to promote and ensure the tangible and intangible benefits of free market competition for Californians.

To facilitate the Commission's understanding of these issues, the staff retained an antitrust expert and assembled eight Working Groups of leading academics and practitioners to examine different aspects of antitrust law.[3] These economists and attorneys were selected to represent a range of perspectives on Single Firm Conduct, Mergers and Acquisitions, Concerted Action, Consumer Welfare Standard, Technology Platforms, Enforcement and Exemptions, Concentration in California, and Artificial Intelligence.[4]

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[3] The Commission's eight Working Groups and the Commission's antitrust expert, Ms. Cheryl Johnson, have contributed extensive and deep academic and practical knowledge of federal and California antitrust law. See Memoranda 2023-37, pp. 2-4; 2023-16; 2023-11; and 2023-07, pp. 2-5.

Also note that this recommendation often refers to Memoranda in footnotes, which are Staff Memoranda that were provided to the Commission throughout the study and provide further background and analysis.

[4] The working groups were composed of the following individuals: *Single Firm Conduct*: Professor Aaron Edlin, UC Berkeley Law; Professor Doug Melamed, Stanford Law School; Sam Miller, UC Law San Francisco (visiting scholar); Professor Fiona Scott Morton, Yale School of Management; and Professor Carl

The Working Groups produced their reports independently of the Commission and each is different in form and substance. After the Working Groups finished their individual reports, they circulated them to the other Working Groups for comments prior to submitting them to the Commission. Although the groups were initially directed not to advocate for ultimate results,[5] the groups interpreted this direction variously.[6]

While the Working Groups prepared their reports, the Commission received an overview of antitrust law during a series of lectures from January through December 2023.[7] Representatives of each Working Group presented their reports to the Commission over a series of Commission meetings in 2024.[8] Following each presentation, the Commission heard from panels of individuals and organizations providing different perspectives on the same topics addressed by the Working Groups. Throughout the Antitrust Law Study process, the Commission received and considered robust public commentary from a wide range of individuals and organizations, with approximately 100 written submissions as of November 2025.[9] In addition, the Antitrust and Consumer Protection Section of the California

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Shapiro, UC Berkeley Law; *Mergers and Acquisitions*: Professor Richard Gilbert, UC Berkeley Economics; Professor Prasad Krishnamurthy, UC Berkeley Law; Professor John Kwoka, Northeastern University, Economics; Professor Daniel Sokol, USC Gould School of Law, Marshall School of Business; and Professor Guofu Tan, USC Dornsife, Economics; *Concerted Action*: Professor Peter Carstensen, University of Wisconsin School of Law; Professor Josh Davis, UC Law San Francisco; Professor Joseph Farrell, UC Berkeley Economics; Professor Christopher Leslie, UC Irvine School of Law; Julie Pollock, Berger Montague; Sarah Van Culin, Zelle LLP; and Judith Zahid, Zelle LLP; *Consumer Welfare Standard:* Professor Jorge Contreras, University of Utah College of Law; Professor Warren Grimes, Southwestern Law School; Professor Douglas Melamed, Stanford Law School; Heather Nyong'o, Cleary Gottlieb; and Professor Barak Orbach, University of Arizona, James E. Rogers College of Law; *Technology Platforms:* Abiel Garcia, Kesselman Brantly Stockinger LLP; David Kesselman, Kesselman Brantly Stockinger LLP; Professor Mark Lemley, Stanford School of Law; Professor Justin McCrary, Columbia Law School; Brantley Pepperman, Quinn Emanuel; Professor Steve Tadelis, UC Berkeley Economics; and Kevin Teruya, Quinn Emanuel; *Enforcement and Exemptions:* Kathleen Foote, California Department of Justice, Antitrust Section (ret.); Professor Roger Noll, Stanford Economics (emeritus); Marc Seltzer, Susman Godfrey LLP; and Dena Sharp, Girard Sharp; *Concentration in California:* Dean Harvey, Leiff Cabraser Heimann & Bernstein; Cheryl Johnson, California Department of Justice (ret.); Diana Moss, Progressive Policy Institute; Professor Barak Richman, Duke Law School; and Shana Scarlett, Hagens Berman; *Artificial Intelligence:* Abiel Garcia, Kesselman Brantly Stockinger, LLP; David Kesselman, Kesselman Brantly Stockinger, LLP; Professor Sam Miller, UC Law San Francisco; Diana Moss, Progressive Policy Institute; and Professor Fiona Scott Morton, Yale School of Management. For additional biographical information, see Memoranda 2023-11, 2023-16, and 2023-22.

[5] Memorandum 2023-7, p. 1.

[6] See e.g., Memoranda 2024-15, pp. 15-18 and 2024-26, pp. 11-12.

[7] See Antitrust Law Study Page and Memoranda 2023-7, 2023-37, 2023-49.

[8] Single Firm Conduct: Memorandum 2024-15; Mergers and Acquisitions: Memorandum 2024-25; Concerted Action: Memorandum 2024-34; Consumer Welfare Standard: Memorandum 2024-33; Technology Platforms: Memorandum 2024-26; Enforcement and Exemptions: Memorandum 2024-35; Concentration in California: Memorandum 2024-14; Artificial Intelligence: Memorandum 2024-47.

[9] A list of written public comments with links can be found in the Index of Public Comments on the Antitrust Law Study Page.

Lawyers Association dedicated its Spring 2023 Competition Law Journal to articles relevant to the Commission's antitrust study.[10]

At its October 2024 meeting, to prepare the Commission for decisions at its next meeting, the staff presented a memorandum that summarized the reports, materials and written and public comments received to date during the course of the Antitrust Law Study, including arguments for and against reform.[11] In January 2025,[12] the Commission directed the staff to propose draft statutory language to regulate single firm conduct (SFC) at the state level. The Commission further specified that this language should be distinct from federal law and not be industry specific.[13] At its September 2025 meeting, the Commission voted to bifurcate its SFC recommendation from its deliberations on mergers and acquisitions and directed staff to draft a Tentative Recommendation on Single Firm Conduct for its meeting in December 2025.[14]

SINGLE FIRM CONDUCT

Current Federal and California law

The SFC Working Group explored how California and federal antitrust laws treat anticompetitive conduct by an individual company. Their report explains:

> [Single firm] conduct can be purely unilateral, as when a firm designs its product to exclude rivals, discriminates against its rivals, or refuses to deal with them. Such conduct also can involve an agreement between the firm in question and other firms.[15]

The main law addressing SFC is Section 2 of the federal Sherman Antitrust Act, which states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony…"[16]

California's main antitrust law, the Cartwright Act,[17] generally does not apply to conduct by a single firm to monopolize, exclude its competitors, or cause other anticompetitive harms. Rather, it focuses on the actions of "two or more persons."[18]

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[10] California Lawyers Association, *Competition,* Vol. 33, No.1 (Spring 2023). .

[11] Memorandum 2024-46.

[12] Minutes of Commission Meeting on January 23, 2025, p. 4; see also Memorandum 2025-11, pp. 3-7.

[13] *Id.*

[14] Memorandum 2025-44, p. 5.

[15] Memorandum 2024-15, p. 4.

[16] 15 U.S.C. § 2.

[17] Bus. & Prof. Code §§ 16700 - 16770.

[18] Bus. & Prof. Code § 16720; see also *Asahi Kasei Pharma Corporation v. Cotherix, Inc*. (2012) 204 Cal.App.4th 1, 8 ("[t]he Cartwright Act bans combinations, but single firm monopolization is not cognizable under the Cartwright Act"); *Flagship Theaters of Palm Desert LLC v. Century Theaters, Inc*. (2011) 198 Cal.App.4th 1366, 1386 ("[T]he Cartwright Act contains no provision parallel to the Sherman Act's

California also has the Unfair Practices Act, (UPA) [19] which was designed to "safeguard the public against the creation or perpetuation of monopolies,"[20] and the Unfair Competition Law (UCL),[21] which protects the fairness of business practices. However, neither is written to effectively address the behavior targeted by the Sherman Act's Section 2. Although the UPA explicitly prohibits below cost pricing,[22] locality discrimination,[23] secret rebates and allowances,[24] and loss leaders,[25] each prohibition has its own specific limitations and defenses. This complex statutory scheme, together with its lack of singular focus on overall competition, hinders its usefulness as an enforcement vehicle.[26] Similarly, while expansive, the UCL is not an effective tool against single firm conduct because, among other reasons, it does not allow for compensatory damages or automatic attorney's fees, unlike existing provisions of the Cartwright Act and the federal antitrust laws.[27] This significantly limits the feasibility of pursuing most antitrust cases under the UCL.[28] Accordingly, despite the UCL, most efforts to challenge the anticompetitive conduct of a single company are brought in federal court under Section 2 of the Sherman Act.[29]

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prohibition against monopolization (15. U.S.C. § 2), and the Cartwright Act applies only to a 'combination' involving 'two or more persons' (§ 16720), not to unilateral conduct."); *Freehand Corp. v. Adobe* (N.D.CAL. 2012) 852 F.Supp.2d 1171, 1185 (Cartwright Act does not address unilateral conduct); Memorandum 2024-15, pp. 9-20.

[19] Bus. & Prof. Code §§ 17000 - 17101.

[20] Bus. & Prof. Code § 17001. However, this retroactive declaration of purpose was made after the individual provisions of the UPA were enacted between 1913 and 1939; all were codified as the UPA in 1941. California Lawyers Association, *California Antitrust and Unfair Competition Law*, Section 17.01 (2023 LexisNexis).

[21] Bus. & Prof. Code §§ 17200 - 17210.

[22] Bus. & Prof. Code §§ 17043, 17048.5.

[23] Bus. & Prof. Code § 17040.

[24] Bus. & Prof. Code § 17045.

[25] Bus. & Prof. Code § 17044.

[26] See generally California Lawyers Association, *California Antitrust and Unfair Competition Law*, Section 17.01 (2023 LexisNexis); Second Supplement to Memorandum 2024-13, EX 6.

[27] Bus. & Prof. Code § 16750 (a), (d), (i); see also *Carver v. Chevron U.S.A. Inc.* (2004) 119 Cal.App.4th 498, 504 (Noting that the public policy implicit in the unilateral fee shifting provision of Cartwright Act is to encourage injured parties to broadly and effectively enforce Cartwright Act in situations where they otherwise would not find it economical to sue.) The Clayton Act, which governs enforcement of federal antitrust laws, mandates that successful plaintiffs are entitled to treble damages and reasonable attorney fees. Specifically, the statute states: "...any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (15 U.S.C. §15(a). This provision ensures that plaintiffs who successfully enforce antitrust laws are compensated for their legal expenses, encouraging private enforcement of these laws. See also *Uneedus v. California Shoppers, Inc.* (1978) 86 Cal.App.3d 932.

[28] Memorandum 2024-15, p. 11.

[29] Federal courts have exclusive jurisdiction to hear cases brought under the Sherman Act or other federal antitrust laws. See 15 U.S.C. §15; *Gen. Inv. Co. v. Lake Shore & Mich. S. Ry.* (1922) 260 U.S. 261, 287. Moreover, as noted by the Enforcement and Exemptions Working Group, "Since passage of the federal Class Action Fairness Act of 2005, most consumer class actions to enforce Cartwright [Act claims] have been heard

Section 2 generally prohibits anticompetitive conduct by a single firm that results in substantial market power or that creates a "dangerous probability"[30] of obtaining substantial market power.[31] Substantial market power is not illegal if it is obtained through fair means, like creating a better product.[32] However, it is unlawful if someone obtains a substantial market power through anticompetitive exclusionary conduct, like prohibiting a competitor from obtaining the materials it needs to create a rival product.[33]

Section 2 is very brief, and in the absence of specific statutory direction, the federal courts have developed case law that explains which types of behaviors are anticompetitive.[34] Despite the fact that Section 2 has remained basically unchanged since its enactment in 1890, judicial interpretations have varied considerably over time and narrowed the scope of its application.[35] Moreover, the antitrust laws have not kept up with modern developments, as noted by the SFC Working Group:

> For example, the United States Supreme Court has held that low prices are lawful if the prices remain above cost. Although the Supreme Court acknowledged that aggressive price cuts can harm competition even if the prices remain above cost, it reasoned that a rule that required courts to make case-by-case determinations of the lawfulness of above cost prices would lead to too many mistakes and uncertainty about the law and would thus deter desirable price reductions. Thus, under federal antitrust law, a plaintiff asserting a claim for predatory pricing must show that the defendant's prices are below cost and that the market structure is such that the defendant has a reasonable probability of recouping its losses from below-cost sales once rivals are driven from the market. However, the continued usefulness of the federal predatory pricing rule is questionable when we observe that a rule created thirty years ago, when the digital economy was in its infancy, is poorly suited to products and services with very low or zero marginal costs, as it immunizes virtually all prices from predation claims for such products.[36]

The widespread recognition of the increasing inadequacy of state and federal antitrust laws to assure free and fair competition prompted the California Legislature's request to study antitrust law reform in the context of the modern

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in federal court." Memorandum 2024-35, p. 3. Further, it is "...federal court judges who now most often are those called upon to interpret the law with regard to Cartwright Act claims...." Memorandum 2024-35, p. 1.

[30] *Spectrum Sports, Inc. v. McQuillan* (1993) 506 U.S. 447, 456.

[31] Memorandum 2024-15, pp. 4-5.

[32] Memorandum 2024-15, p. 3.

[33] See Memorandum 2024-15, p. 4.

[34] Memorandum 2024-15, pp. 6-7.

[35] Memoranda 2024-15, pp. 6-7; 2024-34, p. 12-13.

[36] Memorandum 2024-15, p. 6, citing *Brooke Group v. Brown & Williamson Tobacco* (1993) 509 U.S. 209.

economy.[37] Among other issues, current federal case law was not designed to address companies who offer their products for free.[38] The goal of antitrust law is to protect robust market competition in all markets,[39] and federal court rulings like the one described above have made effectuating that purpose more difficult.

Public Comments Urging Antitrust Reform and Cautioning Against Antitrust Reform

Throughout the Antitrust Law Study process the Commission received numerous public comments that range from urging the Commission to draft legislation reforming California Antitrust law to comments questioning the need for any reform.[40]

Comments urging reform generally assert that it is essential to rein in the market power of many dominant companies not only in our digital markets, but in our many other market sectors including food, agriculture, gasoline, health care, labor and entertainment and to address the barriers that thwart new entry and business opportunities for many.[41] Labor organizations generally agreed that antitrust law has ignored and failed labor while allowing employers to increase their market power and secure advantages denied them by the labor laws.[42]

Comments arguing for no reform or very limited reform often referred to economic uncertainties that could result from any change in the law.[43] One commenter objected that "there has been no empirical or analytical analysis showing that California consumers or businesses are suffering from reduced competition, higher prices or lessened innovation because of gaps in California law."[44] Commenters also argue that changes in the law produce uncertainty for the business community that could in turn chill innovation.[45]

Need for a SFC Provision in California Law

Congress has not made any substantive changes to the Sherman Act since it was enacted in 1890. California adopted the Cartwright Act in 1907, and despite the fact that case law has determined that it does not apply to SFC, the Act has not been

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[37] 2022 Cal. Stat. res. Ch. 147 (ACR 95, Cunningham & Wicks).

[38] Memorandum 2024-15, p. 6, referring to *Brooke Group v. Brown & Williamson Tobacco* (1993) 509 U.S. 209.

[39] Memorandum 2024-33, p. 7.

[40] See Antitrust Law Study webpage, Index of Public Comments.

[41] Memorandum 2024-46; see also the First, Second, and Third Supplements thereto.

[42] *Id.*

[43] See e.g. Memorandum 2025-30 EX. 12, EX. 102.

[44] See Memorandum 2025-30, EX. 12. Other commentators expressed similar views; see e.g. Memorandum 2025-30, EX 102-104; Second Supplement to Memorandum 2024-13, EX. 34; First Supplement to Memorandum 2024-13, EX. 47; First Supplement to Memorandum 2025-11, EX. 12-13, 35; Second Supplement to Memorandum 2024-46, EX. 19.

[45] *Id.*

amended to add an explicit SFC provision. The vertical integration[46] of some of California's largest industries,[47] as well as the sheer scale of certain digital platforms[48] present unique competitive challenges not foreseen by the original antitrust law drafters. While successful challenges by the government against market malfeasants do occur under the current legal framework,[49] these successes are rare and require considerable resources to surmount the hurdles favoring the status quo.[50] Indeed, representatives in the federal government[51] and states including New York,[52] New Jersey,[53] Minnesota,[54] and Pennsylvania[55] have recently attempted to augment their antitrust laws to address modern circumstances.

The Commission was persuaded by arguments, which echo majorities in the academic and enforcement communities,[56] that California should adopt legislation reaching SFC.[57]

Another motivating factor for developing a state SFC antitrust law is to allow California courts to adjudicate California antitrust matters. Currently, because California does not have its own SFC laws, any SFC claim is typically alleged under federal antitrust law and must be brought in federal court. At a minimum, adopting a state law would allow such matters to be brought under state law, even if the claims are litigated in federal court,.[58]

The Commission then had to decide how to draft a state SFC law. Most other states with a SFC provision mirror federal law[59], but multiple Working Groups cautioned against this.[60] By simply mirroring federal law, California would

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[46] The Mergers and Acquisitions Working Group defines a vertical merger as "one between a downstream firm which produces some final good and an upstream firm which supplies some input necessary to the production of the downstream good. A PC manufacturer might merge with a chip manufacturer." Memorandum 2024–25, p. 7.

[47] See, e.g., Memorandum 2024-14, pp. 10-12, 20, 36..

[48] See Memorandum 2024-26, pp. 2-3.

[49] See e.g., *U.S. v. Microsoft* (D.C. Cir. 2001) 253 F.3d 34; United States et al. v. Google (D.D.C. Sept. 2, 2025) No. 1:2020cv03010, ---F.Supp.3d ---, 2025 WL 2523010.

[50] See Memorandum 2024-33, pp. 5-6, in which the Consumer Welfare Working Group states "There is a broad consensus among scholars that these presumptions have eroded the capacity of the antitrust enterprise to protect competition." See also Seventh Supplement to Memorandum 2024-24, EX. 2, in which Professor John M. Newman writes "In litigation, defendants can out-spend enforcers by orders of magnitude."

[51] See, e.g. Sen. No. 225, 117th Cong., 1st Sess. (2021).

[52] See, e.g. S6748B (Gianaris, 2023).

[53] See, e.g. S3778 (Singleton, 2023).

[54] See, e.g. HF 1563 (Greenman, 2023).

[55] See, e.g. HB 2012 (Pisciottano, 2023).

[56] See e.g., Memorandum 2024-15 and Seventh Supplement to Memorandum 2024-24, EX 7.

[57] Minutes of Commission Meeting on January 23, 2025, pp. 3-4.

[58] As indicated in n. 29, supra, the federal Class Action Fairness Act of 2005, Pub. L. 109.2, requires most consumer class actions brought under the Cartwright Act to be heard in federal court. Also, if the state antitrust claim is coupled with a federal claim, it must be filed in federal court.

[59] Memorandum 2025-21, p. 3-4.

[60] See e.g., Memoranda 2024–35, pp. 16, 21; 2024-15, pp. 1-2, 13. Other states with SFC provisions closely mirror the Sherman Act and/or contain harmonization provisions that require conformance with federal case law. See Memorandum 2025-21, EX. A-2-3.

effectively import the decades of federal jurisprudence that has diluted the Sherman Act Section 2's original scope and strength.[61] Accordingly, many Working Groups recommended, and the Commission agreed, that California should adopt a SFC provision that distinguishes itself from federal law and those decisions that unduly hinder the competitive marketplace.[62]

The Commission, however, decided against adopting completely new antitrust language.[63] Many stakeholders argued that a new, untested antitrust framework could be risky and invite uncertainty, potentially chilling innovation and business growth.[64] Further, new antitrust provisions without federal precedent might also pose a significant challenge to state courts, which would be required to essentially build a new body of antitrust jurisprudence. As a result, the Commission settled on a hybrid approach that selectively draws on federal statutory and case law to ground the new California standard while reflecting California's values and enforcement priorities by tailoring guidelines, definitions, and presumptions to California's specific concerns.

Technology Companies and Firms with Substantial Market Power.

ACR 95 also asked the Commission to decide "[w]hether the law should be revised in the context of technology companies so that analysis of antitrust injury in that setting reflects competitive benefits such as innovation and permitting the personal freedom of individuals to start their own businesses and not solely whether such monopolies act to raise prices."[65] This question required an analysis of the current law's ability to rein in the negative competitive effects of major technology firms' conduct while preserving its benefits.

The Technology Platform Working Group report,[66] Congressional investigations and reports[67] and many public comments[68] detailed the unprecedented footprint of several digital platform companies, many of which are headquartered or have a substantial presence in California. These stakeholders shared concerns that certain practices by dominant companies such as self-preferencing,[69] discriminatory

[61] See Memorandum 2024-15, p. 13.

[62] Memoranda 2024-15, pp. 6-7, 13; 2024-33, p. 8; 2024-26, pp. 7-8.

[63] Minutes of Commission Meeting on June 26, 2025, p. 5.

[64] See, e.g., Memorandum 2025-30, pp. 12-13.

[65] 2022 Cal. Stat. res. ch. 147 (ACR 95, Cunningham & Wicks).

[66] Memorandum 2024-26, p. 2; Technology Platforms Working Group Presentation transcript, June 20, 2024, p. 3.

[67] These issues are discussed in the Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, *Investigation of Competition in Digital Markets*, Majority Staff Report and Recommendations October 2020, Pt. I, pp. 391–98, and Pt. II, pp. 395-97 and Congressional Research Services, *Antitrust Reform and Big Tech Firms*, Nov. 21, 2023, pp. 11, 22, 58.

[68] See e.g., First Supplement to Memorandum 2024-32, EX 13; Seventh Supplement to Memorandum 2024-24, EX 7.

[69] This generally refers to a company preferring its own products over those of competitors.

access,[70] exclusionary contracting,[71] restraints on data portability,[72] tying,[73] and killer acquisitions[74] may escape liability under Section 2's restrictive judicial interpretations.[75] The Commission was persuaded that current law is insufficient to curb abuses among technology firms, but the law's failures are not unique to technology.[76] The Commission concluded that exclusionary practices by dominant companies in every industry have the capacity to harm competition, so any new law should not single out individual sectors but apply to all.[77]

The Commission also considered whether to create an adjusted SFC framework for companies holding significant market power. Both proposed reforms noted in ACR 95,[78] the New York State Twenty-First Century Antitrust Act[79] and the Competition and Law Enforcement Reform Act,[80] contain "abuse of dominance" (AOD) provisions that make it unlawful for a dominant entity to abuse that position to its competitive advantage. This concept is based upon a European Union (EU) law that prohibits "any abuse by one or more undertakings of a dominant position within the internal market or on a substantial part of it…."[81] Such a provision has long been a fixture of European and Canadian antitrust laws, which rest within very different legal, political, and enforcement frameworks from the United States.[82]

The Commission received numerous public comments arguing against adopting an abuse of dominance provision in California law.[83] The Commission ultimately decided against crafting separate laws for dominant companies, expressing concern about the vagaries and arbitrary nature of establishing thresholds for substantial market power and use of differing standards of conduct and was wary of failed efforts in the United States to adopt this approach.[84]

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[70] This generally refers to a company excluding potential competitors from access to their platforms. See Memorandum 2024-26, p. 2.

[71] This generally refers to a company entering into exclusive contracts with customers or suppliers.

[72] This generally refers to a company prohibiting, or making it quite difficult, for a customer to move their information between platforms.

[73] Tying refers to the practice of requiring the purchase of a second item to purchase the first.

[74] This refers to the practice of a company buying a competitor to prevent competition.

[75] See Memoranda 2024-15, pp. 6-7, 14; 2024-33, pp. 6-7; 2024-26, pp. 7-8.

[76] See e.g., Memorandum 2024-14, which discusses concentration in certain California markets.

[77] Minutes of Commission Meeting on January 23, 2005, pp. 3-4.

[78] 2022 Cal. Stat. res. ch. 147 (ACR 95, Cunningham & Wicks).

[79] S933 (Gianaris, 2021).

[80] Sen. No. 225, 117th Cong., 1st Sess. (2021).

[81] *Treaty on the Functioning of the European Union*, Document 12008E102. The EU Court of Justice defines a dominant position as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers." European Parliament, Fact Sheets on the European Union, *Competition Policy*.

[82] See Memorandum 2024-26, p. 8.

[83] See e.g. Memorandum 2025-43, pp. 3-5. First Supplement to Memorandum 2025-43, First Supplement to Memorandum 2025- 31, EX. 2.

[84] Video of Commission Meeting on September 18, 2025.

BACKGROUND ON TENTATIVE RECOMMENDATION

SINGLE FIRM CONDUCT OPERATIVE PROVISION

The Commission evaluated and considered three options to address SFC within the Cartwright Act. The first option used language similar to the Sherman Act,[85] but the Commission rejected this over concerns that tracking federal law too closely would risk implicitly endorsing its entire body of problematic jurisprudence.[86] The third option, which was rejected by the Commission, drew from the SFC Working Group's report,[87] which proposed language defining unlawful SFC in relation to its harm to trading partners, balanced against the benefits of the conduct. While attractive as a fresh alternative, this option received only support from its authors, with other commentators noting the risks inherent in pursuing a novel regulatory framework.[88]

The Commission instead supported the second option presented:

> **Section 16729 is added to the Business and Professions Code to read:**
>
> (a) It is unlawful for one or more persons to act, cause, take or direct measures, actions, or events:
>
> (1) In restraint of trade; or,
>
> (2) To monopolize or monopsonize, to attempt to monopolize or monopsonize, to maintain a monopoly or monopsony, or to combine or conspire with another person to monopolize or monopsonize in any part of trade or commerce.
>
> (b) As used in this section, "restraint of trade" shall include, but not be limited to, any actions, measures, or acts included or cognizable under Section 16720, whether directed, caused, or performed by one or more persons.
>
> (c) Anticompetitive effects in one market from the challenged conduct may not be offset by purported benefits in a separate market; and the harm to a person or persons from the challenged conduct may not be offset by purported benefits to another person or persons.

Subdivision (a) describes the effects that make certain conduct illegal and clarifies that the law applies to conduct carried out both directly and indirectly.

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[85] Memorandum 2025-21, p. 2.

[86] Video of Commission Meeting on September 18, 2025; see also Memoranda 2025-41, pp. 7-8; 2025-30, pp. 5-6; 2025-21, p. 3; 2024-15, p. 15.

[87] Memorandum 2024-15, p. 16.

[88] Memorandum 2025-30, pp. 10-13. The SFC Working Group submitted a public comment urging the Commission to adopt the third option. *Id.*, EX. 110-111.

Paragraph (1) of Subdivision (a) uses the phrase "restraint of trade" which is used both in the Cartwright Act[89] and in the federal Sherman Act Section 1[90] and is intended to capture the full range of anticompetitive conduct by a single firm that may not fall within the currently restricted scope of federal or state law for multiple actors.[91] Some commentators asserted that the term "restraint of trade" could not be placed in a single firm context because it relates to multi-firm conduct.[92] However, the Commission did not find this argument compelling, as the "restraint of trade" language is intended to refer to a negative effect on competition[93] and the United States Supreme Court affirmed that restraints of trade can be performed by single firm actors as well as multiple companies.[94] Further, some argued that "restraint of trade" was too vague.[95] The Commission concluded, however, that while "restraint of trade" is on its face broad and general, both the federal and California courts have substantial experience adjudicating this term.[96]

Paragraph (2) of subdivision (a) uses language similar to Sherman Act Section 2[97] and adds "monopsony" and "to maintain monopoly or monopsony" to distinguish state law, highlight its application to all buyer-side transactions, including those in

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[89] Bus. & Prof. Code § 16720 (outlawing trusts that "create or carry out restrictions in trade or commerce"): Bus. & Prof. Code § 16721.5 establishes additional circumstances constituting an unlawful trust and unlawful restraint of trade.

[90] 15 U.S.C. § 1 provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal…."

[91] *Cianci v. Superior Court* (1985) 40 Cal.3d 903, 917-18.

[92] See Memoranda 2025-41, p. 41; 2024-34, p. 8 citing *Ben-E-Lect v. Anthem Blue Cross Life & Health Ins. Co*. (2020) 51 Cal. App. 5th 867, 872, as modified on denial of reh'g (July 22, 2020) ("The Cartwright Act prohibits all combinations created for or carrying out unreasonable restrictions in trade or commerce.") and *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.* (2020) 55 Cal.App.5th 381, 398–399, ("The distinction between per se and rule of reason analysis stems from the fact that the Cartwright Act, like its federal counterpart the Sherman Act, prohibits not all agreements restraining trade, but rather agreements that unreasonably restrain trade.").

[93] See e.g., *Am. Needle, Inc. v. Nat'l Football League* (2010) 560 U.S. 183, 186 ("The question whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it unreasonably restrains trade.").

[94] *Copperweld Corp*. v. *Indep. Tube Corp.* (1984) 467 U.S. 752, 775. ("[A]n unreasonable restraint of trade may be affected not only by two independent firms acting in concert; a single firm may restrain trade to precisely the same extent if it alone possesses the combined market power of those same two firms. Because the Sherman Act does not prohibit unreasonable restraints of trade as such—but only restraints affected by a contract, combination, or conspiracy—it leaves untouched a single firm's anticompetitive conduct (short of threatened monopolization) that may be indistinguishable in economic effect from the conduct of two firms subject to § 1 liability.") *Am. Needle, Inc. v. Nat'l Football League* (2010) 560 U.S. 183, 186.

[95] See Memorandum 2025-30, pp. 7-8.

[96] See Memorandum 2025-41, pp. 9-10. "Restraint of trade" means "unreasonable" restraint of trade as recognized by the California Supreme Court in *In re Cipro Cases I & II* (2015) 61 Cal.4th 116, 136.

[97] 15 U.S.C. § 2 states in part, "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony…."

the context of employers and labor,[98] and prohibit the anticompetitive maintenance of monopoly power.[99] This structure, combining "restraint of trade" with Sherman Act Section 2 language, also borrows from other states that have both a SFC provision banning restraints of trade and a ban on monopoly conduct.[100]

Subdivision (b) clarifies that "restraints of trade" under this section includes but is not limited to any of the unlawful acts proscribed in the Cartwright Act, whether done by one person or multiple persons, directly or indirectly.[101]

Subdivision (c) was not originally considered by the Commission,[102] but rather was suggested by multiple stakeholders[103] who argued that despite it being existing law,[104] courts sometimes permit an anticompetitive effect in one market to be offset by a pro-competitive benefit in another (also known as cross-market efficiencies) in SFC cases. The Commission included this provision to emphasize to the judiciary that anticompetitive effects may only be offset by benefits in the same market and to the same persons originally affected by the anticompetitive conduct.

PURPOSE STATEMENT

Many statutes, particularly those establishing a new legal framework,[105] begin with a statement of legislative findings and declarations to explain the purpose of enacting the law. These statements are not always codified in statute,[106] but are still

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[98] The inclusion of "monopsonize," although commonly understood as encompassed within the broader term "monopolize," is intended to help address the historical underenforcement of buyer-side monopolies that impact labor, among others. See Memoranda 2024-14, pp. 4-6; 2024-25, p. 17.

[99] See e.g. *UFCW Local 1776 & Participating Employers Health and Welfare Fund v. Takeda Pharmaceutical Co. LTD*. (2nd Cir. 2021) 11 F.4th118, 137; *Bloyer v. St. Clair County of Illinois* (S.D.Ill. 2016) 179 F.Supp.3d 843, 859-50.

[100] See e.g., Haw. Rev. Stat. Ann §§ 480-4, 480-9 and Idaho Code §§ 48-104, 48-105.

[101] *Copperweld Corp. v. Indep. Tube Corp.* (1984) 467 U.S. 752, 775 "([A]n unreasonable restraint of trade may be affected not only by two independent firms acting in concert; a single firm may restrain trade to precisely the same extent if it alone possesses the combined market power of those same two firms.").

[102] Memoranda 2025-21, 2025-30.

[103] Memorandum 2025-41, EX. 9.

[104] Cross-market efficiencies are prohibited in mergers, see *United States v. Philadelphia National Bank* (1963) 374 U.S. 321, but courts have sometimes permitted it in SFC cases. See e.g., *Epic Games, Inc. v. Apple, Inc.* (2023) 67 F.4th 946, 989 (U.S. Supreme Court "precedent on cross-market balancing is unclear."); *NCAA v. Alston* (2021) 594 U.S. 69, 87 (declining to consider argument by amici that "review should instead be limited to the particular market in which antitrust plaintiffs have asserted their injury," when the parties had agreed in the trial court that cross-market balancing was appropriate). While the courts have refused to engage in cross-market balancing in cases of per se violations, *United States v. Topco Assocs., Inc.* (1972) 405 U.S. 596, 609-10 ("Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated per se rules."), one court considered with little discussion whether procompetitive benefits in one market justified anticompetitive conduct in a related one. See *NCAA v. Bd. of Regents of Univ. of Okla*. (1984) 468 U.S. 85, 104-108 (considering a procompetitive rationale regarding the college football tickets market when assessing anticompetitive conduct in the market for college football television).

[105] See e.g., the Digital Equity Bill of Rights, Civ. Code §§ 3120 - 3123; the California Whistleblower Protection Act, Gov't Code §§ 8547 – 8547.15.

[106] See e.g., 2025 Cal. Stat. ch. 782 (SB 720, Ashby).

relied on to interpret the statute. The Cartwright Act, within which the Commission's recommendation would be placed, presently has no such directive.

Although the Commission also drafts Comments that explain the reasoning behind each new or amended code section, these Comments are not available in all publicly accessible codes[107] and do not carry the same weight as codified law.[108] Nor would a member of the public necessarily know how to research the bill underlying the code section to find uncodified law. For these reasons, the Commission recommends including language in the Business and Professions Code that establishes the Legislature's intent in revising California's antitrust laws and provides guidance for the new laws' interpretation.[109]

The Commission recommends including this purpose statement in he proposed legislation:

> **Section 16730 is added to the Business and Professions Code to read:**
>
> (a) The purpose of this section and Sections 16729 and 16731 is the promotion and protection of free and fair competition, which is fundamental to a healthy marketplace that protects all trade participants, including workers and consumers, and to an environment that is conducive to the preservation of our democratic, political, and social institutions.
>
> (b) Protecting competition includes protecting competition between businesses when they compete for workers by prohibiting anticompetitive business practices that impede workers' freedom to choose employment.
>
> (c) The California Supreme Court has determined that the Cartwright Act is "broader in range and deeper in reach" than the federal Sherman Act;[110] courts shall liberally interpret California's antitrust laws to best promote free and fair competition and be mindful that California favors "maximizing" effective deterrence of antitrust violations;[111] and that the Cartwright Act is not modeled on the Sherman Act.[112] Further, California courts have recognized that the

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[107] For example, the Office of Legislative Counsel's Legislative Information website provides public access to all of California codes, but it does not include relevant case law or Commission comments.

[108] Commission Comments are, however, given substantial weigh by courts. See *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 770, 288 P.3d 1237, 149 Cal.Rptr.3d 614 ("Comments of a commission that proposed a statute [referring to Commission] are entitled to substantial weight in construing the statute, especially when, as here, the Legislature adopted the statute without change."); *Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1137 n. 20 (Commission's official comments deemed to express Legislature's intent); *Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1132 (official comments of California Law Revision Commission are declarative of intent not only of drafters of code but also of legislators who subsequently enacted it).

[109] The Commission also believed it was not necessary to preface the purpose statement with the phrase, "the Legislature finds and declares," because it is redundant, should the Legislature enact this recommendation as law.

[110] *Cianci v. Superior Court* (1985) 40 Cal.3d 903, 920.

[111] *Clayworth v Pfizer, Inc.* (2010) 49 Cal.4th 758.

[112] See Memorandum 2024-15, p. 8, n. 16, in which the SFC Working Group stated:

Cartwright Act departs from the Sherman Act in many respects, including, but not limited to, inclusion of indirect purchaser recovery,[113] use of a proximate cause test for Cartwright Act standing,[114] recognition of broader harms and per se conduct,[115] lower actionable market shares,[116] structured rule of reason analysis,[117] and differing burdens of proof.[118]

(d) Federal case law on the subject of this article is not binding on California courts, but courts may consider federal case law as persuasive authority to the extent they find it consistent with California law, including Section 16729.

(e) California agrees with the U.S. Department of Justice and Federal Trade Commission in recognizing that unilateral action and multiparty actions, horizontal and vertical relationships, and various forms of corporate entities can interfere with free and fair competition as reflected in the 2023 Federal Trade Commission and Department of Justice Merger Guidelines.

Subdivision (a) reiterates the fundamental goal of California's antitrust law, which is the promotion and protection of free and fair competition.[119] This subdivision also integrates portions of a California Supreme Court decision that describes the Cartwright Act as premised on the idea that "the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."[120]

Subdivision (b) reiterates the law's dedication to workers' rights, also mentioned in subdivision (a), and as affirmed by the inclusion of "monopsony" in the statute containing the operative language.[121]

As the California Supreme Court confirmed in the later case of *Aryeh v. Canon Bus. Sols., Inc*., 55 Cal. 4th 1185, 1195 (2013), ("[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 anti-trust statutes but instead on statutes enacted by California's sister states around the turn of the 20th Century.").

[113] Bus. & Prof. Code § 16720.

[114] Antitrust standing under the Cartwright Act requires a plaintiff show that an antitrust violation was the proximate cause of its injuries. See *Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 723; Memorandum 2025-35, pp. 7-10.

[115] Bus. & Prof. Code §§ 16720, 16750(a), 16600.1. Memorandum 2024-35, pp.13-14.

[116] *Fisherman's Wharf Bay Cruise v. Superior Ct*. (2003) 114 Cal.App.4th 309, 326. In this case addressing, among other things, exclusive dealing under the Cartwright Act, the court held that a 20% market foreclosure was enough to pursue a cause of action against a competitor.

[117] Memorandum 2024-35, p. 7; *In re Cipro Cases I & II*, (2015) 61 Cal.4th 116, 147-148.

[118] *In re Cipro Cases I & II*, (2015) 61 Cal.4th 116, 147-148.

[119] *See Clayworth v. Pfizer, Inc*. (2010) 49 Cal.4th 758, 783.

[120] *In re Cipro Cases I & II* (2015) 61 Cal.4th 116, 136.

[121] Proposed Bus. & Prof. Code §16729; see Memorandum 2025-21, p. 7; see also Memoranda 2024-

Subdivision (c) emphasizes the differences between the Cartwright Act and the Sherman Act. Although one of the goals in establishing a state SFC law is to allow state courts to adjudicate these cases, a case including a Cartwright Act claim may still be heard in federal court in some circumstances. For example, a case may be litigated in federal courts if it also includes a federal antitrust claim, is a class action, or is removable on diversity grounds.[122] Throughout the Antitrust Law study, the Commission heard from the working groups and multiple practitioners that federal courts frequently and incorrectly conflated the Cartwright Act with the Sherman Act.[123] This subdivision is designed to address those circumstances by making it clear the state and federal antitrust laws are distinct in multiple ways.

Subdivision (d) clarifies that courts do not have to follow federal case law when interpreting California antitrust statutes, but they may consider federal case law persuasive to the extent it is consistent with California's laws and aligned with the Cartwright Act's purpose.

Subdivision (e) aligns California with themes in the 2023 Federal Trade Commission and Department of Justice Merger Guidelines.[124] Of note, the 2023 Guidelines "rely more on the theme of 'lessening competition' than on the language in the 1982, 1992, and 2010 Guidelines, which emphasized market power and its exercise."[125]

JUDICIAL GUIDANCE

As noted above, California courts are not bound to federal antitrust case law, though the purpose statement notes they may use it as guidance to the extent the federal case law aligns with California state law. The Commission found certain federal precedents particularly restrictive, which could limit the effectiveness of

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14, pp. 4-6; 2024-25, p. 17. See also Bus. & Prof. Code §§ 16600 – 16600.5 relating to California's broad prohibition on noncompete agreements.)

[122] See, supra, n. 29 and Memorandum 2024-35, pp. 3, 6, in which the Enforcement and Exemptions Working Group stated:

> 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 attorney's fees. Since passage of the federal Class Action Fairness Act of 2005, [Pub. L. 109.2] 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.

[123] See e.g. Memorandum 2024-35, p. 6, in which the Enforcement and Exemptions Working Group stated:

> 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.

[124] Federal Trade Commission and Department of Justice, 2023 Merger Guidelines (December 18, 2023).

[125] *Id.*, p. 3.

state antitrust enforcement.[126] Accordingly, the Commission chose to include in statute a nonexclusive list of elements from various federal antitrust law cases that do not need to be proved to establish liability under California antitrust law.[127] This list also includes restatements of existing law, reminding the courts that various types of evidence can substantiate an antitrust allegation, and that defining a relevant market is unnecessary when there is direct evidence of market effects or market power.

Section 16731 is added to the Business and Professions Code to read:

Although the following nonexclusive list may constitute evidence of a violation of Sections 16729 and 16730 , California law does not require a finding of any of the following to establish liability:

(a) The unilateral conduct of the defendant altered or terminated a prior course of dealing between the defendant and a person subject to the exclusionary conduct.

(b) The defendant treated persons subject to the exclusionary conduct differently than the defendant treated other persons.

(c) The defendant's price for a product or service was below any measure of the costs to the defendant for providing the product or service required under federal antitrust law.

(d) The defendant's conduct makes no economic sense apart from its tendency to harm competition.

(e) The conduct's risk of harming competition or actual harm must be proven with quantitative evidence.

(f) In cases where a defendant's business is a multi-sided platform, that the defendant's conduct presents harm to competition on more than one side of the multi-sided platform, or that the harm to competition on one side of the multi-sided platform outweighs any benefits to competition on any other side(s) of the multi-sided platform.

(g) In a claim of predatory pricing, the defendant is likely to recoup the losses it sustains from below-cost pricing of the products or services at issue.

(h) The rivals whose ability to compete has been reduced or harmed are as efficient, or nearly as efficient, as the defendants.

(i) A single firm or person has or may achieve a market share at or above a threshold recognized under Section 2 of the Sherman Act or any specific threshold of market power.

(j) A definition of "relevant market" where there is direct evidence of market effects or power.

This section is intended to provide guidance to courts when interpreting this section and proposed Business and Professions Code Sections 16729 and 16730 and

[126] Memoranda 2024-15, pp. 6-7, 14; 2024-33, pp. 6-7; 2024-26, pp. 7-8.

[127] Memoranda 2024-15, pp.1, 6, 7, 13, 14-18; subdivisions (a)-(g) are similar to those listed in Sen. No. 130 119th Cong. 1st Sess. (2025), Section 26A.

includes in statute a nonexclusive list of elements from various federal antitrust law cases that do not need to be proved to establish liability under those sections. Most of these subdivisions reflect prior federal rulings outlining various criteria that must be met before a court determines a person has violated federal antitrust laws. Often, courts have interpreted these criteria as prerequisites for liability when instead they could be read as possible, but not mandatory, indicators of anticompetitive conduct. By advising judicial officers that they are not required to make a finding of these elements to determine fault under California antitrust law, California is setting wider boundaries than federal case law to find unlawful conduct.

Subdivision (a) ("The unilateral conduct of the defendant altered or terminated a prior course of dealing between the defendant and a person subject to the exclusionary conduct") addresses the ruling in *Verizon Communications v. Law Offices of Curtis V. Trinko (Trinko)*, a refusal to deal case.[128] *Trinko* was brought by telephone customers against a carrier who alleged that the carrier's failure to provide connection services violated the Sherman Act. In its opinion denying relief, the Court noted that *Trinko's* fact pattern did not match those of a prior case, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp. (Aspen Skiing).*[129] *Aspen Skiing* was an action by a ski resort owner against a neighboring ski resort which had stopped participating in a multi-resort ski lift pass. In *Aspen Skiing*, the court found an antitrust violation because, among other elements, the defendant had previously participated in the multi-resort pass.[130]

Subdivisions (b) and (d) address the holding in *Aspen Skiing*. In addition to its previous participation, the defendant refused to provide lift tickets to the plaintiff when the tickets were commercially available to others[131] (subdivision (b): "The defendant treated persons subject to the exclusionary conduct differently than the defendant treated other persons"), and the defendant's refusal to continue to participate in the multi-resort pass was not based on a reasonable business justification[132] (subdivision (d): "The defendant's conduct makes no economic sense apart from its tendency to harm competition"). *Trinko* and its progeny have, in many instances, elevated the distinguishing facts of *Aspen* to mandatory proof requirements, restricting the universe of actionable refusal-to-deal claims.[133]

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[128] (2004) 540 U.S. 398.

[129] (1985) 472 U.S. 585.

[130] *Id.* p. 604.

[131] *Id*. pp, 607-608.

[132] *Id*. pp. 608-611.

[133] *Verizon Communications v. Law Offices of Curtis V. Trinko* (2004) 540 U.S. 398, 407, 409-16; *New York v. Facebook, Inc.* (D.D.C. 2021) 549 F.Supp.3d 6, 27, aff'd sub nom. *New York v. Meta Platforms, Inc.* (D.C. Cir. 2023) 66 F.4th 288; Memoranda 2024-15, p. 7; 2024-26, pp. 7-8, referencing the Majority Staff Report and Recommendations, Subcommittee on Antitrust, Commercial, and Administrative Law of the Committee on the Judiciary of the House of Representatives, Part I, *Investigation of Competition in Digital Markets*, July 2022, p. 336:

> The Subcommittee's investigation uncovered several instances in which a dominant platform used the threat of delisting or refusing service to a third party as leverage to extract greater value or

However, refusals to deal in today's economy can be anticompetitive for reasons beyond *Aspen Skiing's* fact pattern.[134] While *Aspen* and *Trinko* provide guidance when refusals to deal may be anticompetitive, they do not have to be read as establishing a mandatory list of conditions. Indicators of anticompetitive intent will vary depending on the circumstances, and rigid rules requiring specific fact patterns can unduly restrict enforcement.[135] Further, requiring a prior course of dealing or discriminatory treatment as necessary elements of liability leaves a large body of potential rivals and victims of anticompetitive refusals with no remedy.[136]

While the "no economic sense" requirement in section (d) may seem benign, in application, it can also insulate company's anticompetitive refusals to deal and exclusionary conduct from liability. While lack of economic justification may be useful as evidence of anticompetitive purpose or effect, requiring it as a necessary element of liability creates multiple problems.[137] First, there are many other kinds of evidence that can be used to show anticompetitive purpose. Conduct can be purposely anticompetitive without an immediate economic impact on the defendant. For instance, a "no economic sense" test doesn't work in cases where a monopolist offers products or services for free, which has or has little or no marginal cost to the monopolist. Additionally, this standard requires a court to distinguish between "legitimate" profits from "profits made by eliminating competition," a potentially difficult and costly task. Finally, there may be multiple motivations for the conduct, requiring additional guidance to balance conflicting reasons.[138]

> more data or to secure an advantage in a distinct market. Because the dominant platforms do not face meaningful competition in their primary markets, their threat to refuse business with a third party is the equivalent of depriving a market participant of an essential input. This denial of access in one market can undermine competition across adjacent markets, undermining the ability of market participants to compete on the merits.
>
> To address this concern, the Subcommittee recommends that Congress consider ... overriding judicial decisions that have treated unfavorably essential facilities and refusal to deal-based theories of harm. [citing *Trinko*.]

[134] Memorandum 2024-15, p. 7.

[135] *Steward Health Care System, LLC. v. Blue Cross & Blue Shield of Rhode Island* (D.R.I. 2018) 311 F.Supp.3d 468, 485 ("*Aspen Skiing* and *Trinko*, properly read, provide useful guidance as to whether Blue Cross's conduct amounted to a refusal to deal motivated by anticompetitive animus. While the indicators of anticompetitive animus here vary somewhat from what the Supreme Court identified in *Aspen Skiing* and *Trinko*, those differences are reflective of the very different marketplaces at issue (healthcare and health insurance as opposed to ski resorts and regulated telecommunication. Potentially anticompetitive behavior by market participants is bound to manifest itself differently in different markets.").

[136] *Steward Health Care System, LLC v. Blue Cross & Blue Shield of Rhode Island* (D.R.I. 2014) 997 F.Supp.2d 142, 160 ("To permit the defendant in an unlawful exclusion case to hide behind the presumptive disfavoring of non-market participants would subject plaintiffs in such cases to an insurmountable Catch-22. Were courts to observe a blanket prohibition on claims brought by those excluded from the market by alleged anticompetitive conduct, those firms responsible for the exclusion might never be held accountable.").

[137] Congressional Research Service, *Antitrust Reform and Big Tech Firms* (Nov. 21, 2023), p. 7; *Viamedia, Inc. v. Comcast Corp*. (7th Cir. 2020) 951 F.3d 429, 457-58, 461-62; see also Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard* (2006) 73 Antitrust L.J. 311, 319-20, 355-57.

[138] The practical existence of multiple reasons for conduct runs contrary to case law that recognizes

Subdivisions (c) and (g) address the ruling in *Brooke Group v. Brown & Williamson Tobacco*.[139] In this case, the plaintiff argued that the defendant introduced a rival brand of generic cigarettes and sold them below the defendant's cost, harming the plaintiff's sales. The court held that the plaintiff must show that the defendant's prices were below cost in order to prove predatory pricing (subdivision (c): "The defendant's price for a product or service was below any measure of the costs to the defendant for providing the product or service required under federal antitrust law") and the defendant has a reasonable probability of recouping its losses once its competitors are driven from the market (subdivision (g): "In a claim of predatory pricing, the defendant is likely to recoup the losses it sustains from below-cost pricing of the products or services at issue").

However, the below-cost and recoupment requirements have proven difficult to satisfy, and it is rare for a predatory pricing case to succeed under federal law.[140] These federal judicial restrictions on predatory pricing claims reflect outdated thinking that pricing predation was irrational and competition would enter the market during the recoupment period.[141] Moreover, these requirements make little sense when many digital products are offered for free or with very low marginal costs, as the requirements immunize virtually all prices from predation claims.[142] These requirements also fail to recognize that prices set above defendant's costs can be anticompetitive, too.[143]

The directive that California courts need not follow these federal precedents aligns with existing state law, which expressly rejects federal standards of assessing costs and rejects any need to show recoupment.[144]

Subdivision (e) ("the conduct's risk of harming competition or actual harm must be proven with quantitative evidence") is a reminder that antitrust harm or the risk

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damaging competition as the only possible motivation. See *Federal Trade Commission v. Qualcomm Inc.* (2020) 969 F.3d 974, 993 which says the predatory motivation is "the only conceivable rationale or purpose."

[139] *Brooke Group v. Brown & Williamson Tobacco* (1993) 509 U.S. 209.

[140] First Supplement to Memorandum 2024-32, referencing Lina Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710, 730 (2017).

[141] Congressional Research Service, *Antitrust Reform and Big Tech Firms*, Nov. 21, 2023, p. 8 ("Economists have identified a variety of circumstances in which predation can, in theory, be a rational business strategy—for example, where entry entails large fixed costs, a dominant firm develops a predatory reputation, capital markets are imperfect, or predation can deny rivals minimum efficient scale.").

[142] Memoranda 2024-15, p. 6 ("…the continued usefulness of the federal predatory pricing rule is questionable when we observe that a rule created thirty years ago, when the digital economy was in its infancy, is poorly suited to products and services with very low or zero marginal costs, as it immunizes virtually all prices from predation claims for such products."); 2024-26, pp. 6-7 ("Advocates of this approach [not passing legislation to specifically target technology companies] may also assert that existing antitrust law is sufficient, so long as certain modern federal antitrust decisions are reversed through legislative action. For example, the House Antitrust Subcommittee recommended legislatively overriding ... *Brooke Group* and *Weyerhauser* (to the extent those cases hold that proving predatory pricing or buying requires 'proof of recoupment') ....").

[143] Memorandum 2024-15, p. 6; *ZF Meritor, LLC v. Eaton Corp* (3rd Cir. 2012) 696 F.3d 254, 274-275.

[144] California Unfair Practices Act, Bus. & Prof. Code § 17403. See also *Bay Guardian Co. v. New Times Media LLC* (2010) 187 Cal.App.4th 438, 445; Memorandum 2024-15, p. 12.

of harm can be proven by quantitative *or* qualitative evidence. California law, like much of federal law, recognizes that damages can be shown with a reasonable probability of a causal connection between the challenged conduct and loss, and that damages can be proven with probable and inferential proof.[145]

Subdivision (f) ("In cases where a defendant's business is a multi-sided platform, that the defendant's conduct presents harm to competition on more than one side of the multi-sided platform, or that the harm to competition on one side of the multi-sided platform outweighs any benefits to competition on any other side(s) of the multi-sided platform") is a response to the ruling in *Ohio v. American Express*.[146] This case held that American Express did not violate antitrust laws by prohibiting merchants from discouraging the use of American Express cards in favor of methods of payment with lower transaction fees. In reaching this conclusion, the United States Supreme Court determined that a credit card network platform is a single market with a merchant services side and a consumer cardholder side (a multi-sided platform), and both sides must be analyzed for anticompetitive effects sufficient to establish a violation. This created a confusing precedent as to the type and amount of evidence needed to show harm in cases involving two sided platforms. This case also used assumptions about the interconnectedness of the two sides that may not translate to market realities in other circumstances, and could allow firms to escape antitrust liability for causing harm on one side of a platform and masking it with benefits on the other side.[147]

Subdivision (h) ("The rivals whose ability to compete has been reduced or harmed are as efficient, or nearly as efficient, as the defendants") addresses *Ortho Diagnostic Sys., Inc. v. Abbott Labs, Inc.*[148] which involved rival drug testing firms. In its ruling, the court determined that the plaintiff must allege and prove that it was at least as efficient a producer of the competitive product as the defendant, but that the defendant's pricing made it unprofitable for the plaintiff to continue to produce. This was the court's attempt to ensure its analysis was truly about competitive practices and that the pricing was not due to poor systems control.[149]

However, requiring the plaintiff to be as efficient as the defendant as a precondition to liability in an exclusionary conduct claim has been criticized on

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[145] See *Suburban Mobile Homes, Inc. v. Amfac Communities, Inc*. (1950) 101 Cal.App.3d 532.

[146] *Ohio v. American Express* (2018) 585 U.S. 529.

[147] *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation* (E.D.N.Y. 2024) 714 F.Supp.3d 65, 85 ("... *Amex* offers little guidance to lower courts in terms of what evidence (or how much) must be shown to demonstrate the existence of a triable question of fact as to harm to a two-sided transaction market."); *Epic Games, Inc. v. Apple Inc.* (9th Cir. 2023), 67 F.4th 946, 985 ("*Amex* does not require a plaintiff to [show] harm to participants on both sides of the market."); fundamental antitrust law precludes justifying harmful restraints in one market with justifications from outside the harmed market. *United States v. Topco Assocs. Inc.* (1972) 405 U.S. 596, 610; *Law v. NCAA* (D.Kan. 1995) 902 F.Supp. 1394,1406; Congressional Research Service, *Antitrust Reform and Big Tech Firms*, Nov. 21, 2023, pp. 47-48.

[148] *Ortho Diagnostic Sys., Inc. v. Abbott Labs, Inc.* (SDNY 1996) 920 F.Supp. 455.

[149] *Id.*. p. 465.

multiple grounds, including that it favors dominant firms and requires burdensome and complex litigation about the parties' relative efficiencies. Most importantly, such a requirement denies antitrust protection for harm to plaintiffs without the scale or efficiency of the defendant.[150]

Subdivision (i) ("A single firm or person has or may achieve a market share at or above a threshold recognized under Section 2 of the Sherman Act or any specific threshold of market power") highlights the differences between state and federal law regarding market share and market power. While there is no federal consensus as to market shares that create antitrust concerns, the Federal Trade Commission notes, "Courts look at the firm's market share, but typically do not find monopoly power if the firm (or a group of firms acting in concert) has less than 50 percent of the sales of a particular product or service within a certain geographic area."[151] In contrast, in *Fisherman's Wharf Bay Cruise v. Superior Ct*., [152] a California case addressing, among other things, exclusive dealing under the Cartwright Act, the court held that a 20% market share foreclosure was enough to pursue an action against anticompetitive practices.

Subdivision (j) ("A definition of "relevant market" where there is direct evidence of market effects or power") restates existing case law,[153] because some cases get derailed by questions of relevant market when harm is already evident.[154] Since the purpose of the inquiries into market definition and market share is to determine whether an arrangement has the *potential* for genuine adverse effects on competition, proof of *actual* detrimental effects can obviate the need for that inquiry.

CONCLUSION

Based on the foregoing review and analysis, the Commission recommends that California law should include a SFC provision that is tailored to reflect California's values and enforcement priorities and is not bound to federal antitrust case law. The Commission concluded that codifying language that establishes the Legislature's intent in revising California's antitrust laws and provides guidance for their

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[150] Memorandum 2024-15, p. 17; Congressional Research Service, *Antitrust Reform and Big Tech Firms*, Nov. 21, 2023, p. 7.

[151] Federal Trade Commission, Guide to Antitrust Laws, Single Firm Conduct, *Monopolization Defined*.

[152] *Fisherman's Wharf Bay Cruise v. Superior Ct*. (2003) 114 Cal.App.4th 309, 326. In a Cartwright Act case, the court held that a 20% market foreclosure was enough to pursue a cause of action against a competitor.

[153] Memorandum 2024-35, pp. 6-7; *FTC v. Ind. Federation of Dentists* (1986) 476 U.S. 447, 460-61; *Diaz Aviation Corp. v. Airport Aviation Services, Inc.* (1st Cir. 2013) 716 F.3d 256, 265; *In re Loestrin 24 Fe Antitrust Litigation* (2019) 433 F.Supp.3d 274, 299; *In re Nexium III* (D.Mass. 2013) 968 F.Supp.2d 367, 388 n.19.

[154] See e.g., *Ohio v. American Express* (2018) 585 U.S. 529 in which the Supreme Court ruled in favor of the defendants based on the government's failure to properly define the relevant market, despite the district court finding direct evidence of significant anticompetitive effects.

interpretation would ensure a durable framework for this new body of law. Finally, the Commission found certain federal precedents particularly restrictive, which could limit the effectiveness and enforcement of state law if followed by state or federal courts. Accordingly, it chose to include in statute a nonexclusive list of elements from various federal antitrust law cases that do not need to be proved to establish liability under California antitrust law.

PROPOSED LEGISLATION

Bus. & Prof. Code § 16729 (added) Single Firm Conduct

SEC. ___. Section 16729 is added to the Business and Professions Code, to read:

(a) It is unlawful for one or more persons to act, cause, take or direct measures, actions, or events:

(1) In restraint of trade; or

(2) To monopolize or monopsonize, to attempt to monopolize or monopsonize, to maintain a monopoly or monopsony, or to combine or conspire with another person to monopolize or monopsonize in any part of trade or commerce.

(b) As used in this section, "restraint of trade" shall include, but not be limited to, any actions, measures, or acts included or cognizable under Section 16720, whether directed, caused, or performed by one or more persons.

(c) Anticompetitive effects in one market from the challenged conduct may not be offset by purported benefits in a separate market; and the harm to a person or persons from the challenged conduct may not be offset by purported benefits to another person or persons.

Comment. Subdivision (a) describes the effects that make certain conduct by single persons illegal and clarifies that the law applies to conduct carried out both directly and indirectly.

Subdivision (a)(1) uses the phrase "restraint of trade" which is used in both the Cartwright Act (Bus. & and Prof. Code § 16721.5) and in the Sherman Act (15 U.S.C. § 1) and is intended to capture the full range of anticompetitive conduct by a single person, consistent with the Cartwright Act's general framework. *Cianci v. Superior Court* (1985) 40 Cal.3d 903, 917-18. "Restraint of trade" means "unreasonable" restraint of trade as recognized by the California Supreme Court. *In re Cipro Cases I & II* (2015) 61 Cal.4th 116, 136.

Subdivision (a)(2) uses language similar to Section 2 of the Sherman Act (15 U.S.C. § 2) and adds "monopsony" and "to maintain monopoly or monopsony" to distinguish state law, highlight its application to all buyer-side transactions, and prohibit the anticompetitive maintenance of monopoly power.

Subdivision (b) clarifies that "restraints of trade" under this section includes, but is not limited to, any of the unlawful acts proscribed in the Cartwright Act, whether done by one person or multiple persons, directly or indirectly. *Copperweld Corp. v. Indep. Tube Corp.* (1984) 467 U.S. 752, 775 ("an unreasonable restraint of trade may be affected not only by two independent firms acting in concert; a single firm may restrain trade to precisely the same extent if it alone possesses the combined market power of those same two firms.").

Subdivision (c) clarifies that anticompetitive effects may only be offset by benefits in the same market and to the same persons originally affected by the anticompetitive conduct.

Bus. & Prof. Code § 16730 (added) Purpose Statement

SEC. ___. Section 16730 is added to the Business and Professions Code, to read:

(a) The purpose of this section and Sections 16729 and 16731 is the promotion and protection of free and fair competition, which is fundamental to a healthy marketplace that protects all trade participants, including workers and consumers, and to an environment that is conducive to the preservation of our democratic, political, and social institutions.

(b) Protecting competition includes protecting competition between businesses when they compete for workers by prohibiting anticompetitive business practices that impede workers' freedom to choose employment.

(c) The California Supreme Court has determined that the Cartwright Act is "broader in range and deeper in reach" than the federal Sherman Act; courts shall liberally interpret

California's antitrust laws to best promote free and fair competition and be mindful that California favors "maximizing" effective deterrence of antitrust violations; and that the Cartwright Act is not modeled on the Sherman Act. Further, California courts have recognized that the Cartwright Act departs from the Sherman Act in many respects, including, but not limited to, inclusion of indirect purchaser recovery, use of a proximate cause test for Cartwright Act standing, recognition of broader harms and per se conduct, lower actionable market shares, structured rule of reason analysis, and differing burdens of proof.

(d) Federal case law on the subject of this article is not binding on California courts, but courts may consider federal case law as persuasive authority to the extent they find it consistent with California law including Section 16729.

(e) California joins the U.S. Department of Justice and Federal Trade Commission in recognizing that unilateral action and multiparty actions, horizontal and vertical relationships, and various forms of corporate entities can interfere with free and fair competition as reflected in the 2023 Federal Trade Commission and Department of Justice Merger Guidelines.

Comment. Subdivision (a) expresses the fundamental goal of California's antitrust law, which is the promotion and protection of free and fair competition. *Clayworth v. Pfizer, Inc*. (2010) 49 Cal.4th 758, 783. ("From its inception, the Cartwright Act has always been focused on the punishment of violators for the larger purpose of promoting free competition."). This subdivision also references *In re Cipro Cases I & II* (2015) 61 Cal.4th 116, 136, which describes the Cartwright Act as premised on the idea that "the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."

Subdivision (b) reiterates the law's dedication to worker's rights. (See e.g., Bus. & Professions Code §§ 16600 – 16600.5 relating to California's broad prohibition on noncompete agreements.)

Subdivision (c) emphasizes the differences between the Cartwright Act and the Sherman Act as established in California case law and statutes: The California Supreme Court has determined that the Cartwright Act is "broader in range and deeper in reach" than the federal Sherman Act (*Cianci v. Superior Court* (1985) 40 Cal.3d 903, 920); courts shall liberally interpret California's antitrust laws to best promote free and fair competition and be mindful that California favors 'maximizing' effective deterrence of antitrust violations; *Clayworth v Pfizer, Inc.* (2010) 49 Cal.4th 758, 783 ("As the Cartwright Act's primary concern is with the elimination of restraints of trade and impairments of the free market, we can and should select the damages rule most consistent with that focus … double and treble damages may overcompensate injured plaintiffs, but they do so in order to maximize deterrence."); that the Cartwright Act is not modeled on the Sherman Act. *Aryeh v. Canon Business Sols., Inc.* (2013) 55 Cal.4th 1185, 1195 ("Interpretations of federal antitrust law are at most instructive, not conclusive, when construing the Cartwright Act, given that the Cartwright Act was not modeled on federal antitrust statutes but instead on statutes enacted by California's sister states around the turn of the 20th century."); inclusion of indirect purchaser recovery (Bus. & Prof. § 16720, 16750(a)); use of a proximate cause test for Cartwright Act standing. *Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 723 ("The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries."); recognition of broader harms and per se conduct (Bus. & Prof. Code §§ 16720, 16750(a), 16600.1); lower actionable market shares. *Fisherman's Wharf Bay Cruise v. Superior Ct.* (2003) 114 Cal.App.4th 309, 326 (This case addresses, among other things, exclusive dealing under the Cartwright Act, holding that a 20% market foreclosure was enough to pursue a cause of action against a competitor.); structured rule of reason analysis *In re Cipro Cases I & II,* (2015) 61 Cal.4th 116, 162 ("By ferreting out anticompetitive agreements that limit generic market entry and sustain costly monopolies, a structured rule of reason serves those goals and poses no obstacle to

congressional objectives."); and differing burdens of proof *In re Cipro Cases I & II* (2015) 61 Cal.4th 116 (This case discusses approaches to weighing the burdens of proof that differ from federal case law).

Subdivision (d) clarifies that courts do not have to follow federal case law when interpreting California antitrust statutes, but they may consider federal case law persuasive to the extent it is found to be consistent with California's laws, including the Cartwright Act's purpose statement.

Subdivision (e) is intended to align California with the 2023 Federal Trade Commission and Department of Justice Merger Guidelines in recognizing that unilateral action and multiparty actions, horizontal and vertical relationships, and various forms of corporate entities can interfere with free and fair competition.

Bus. & Prof. Code § 16731 (added) Judicial Guidance

SEC. ___. Section 16731 is added to the Business and Professions Code, to read:

Although the following nonexclusive list may constitute evidence of a violation of Sections 16729 and 16730, California law does not require a finding of any of the following to establish liability:

(a) The unilateral conduct of the defendant altered or terminated a prior course of dealing between the defendant and a person subject to the exclusionary conduct.

(b) The defendant treated persons subject to the exclusionary conduct differently than the defendant treated other persons.

(c) The defendant's price for a product or service was below any measure of the costs to the defendant for providing the product or service required under federal antitrust law.

(d) The defendant's conduct makes no economic sense apart from its tendency to harm competition.

(e) The conduct's risk of harming competition or actual harm must be proven with quantitative evidence.

(f) In cases where a defendant's business is a multi-sided platform, that the defendant's conduct presents harm to competition on more than one side of the multi-sided platform, or that the harm to competition on one side of the multi-sided platform outweighs any benefits to competition on any other side(s) of the multi-sided platform.

(g) In a claim of predatory pricing, the defendant is likely to recoup the losses it sustains from below-cost pricing of the products or services at issue.

(h) The rivals whose ability to compete has been reduced or harmed are as efficient, or nearly as efficient, as the defendants.

(i) A single firm or person has or may achieve a market share at or above a threshold recognized under Section 2 of the Sherman Act or any specific threshold of market power.

(j) A definition of "relevant market" where there is direct evidence of market power.

Comment. This section is intended to provide guidance to courts when interpreting this section and Business and Professions Code Sections 16729 and 16730 and includes in statute a nonexclusive list of elements from various federal antitrust law cases that do not need to be proved to establish liability under those sections.

Subdivision (a) addresses the ruling in *Verizon Communications v. Law Offices of Curtis V. Trinko* (1985) 472 U.S. 585 *(Trinko)*, a refusal to deal case. In its opinion denying relief, the Court noted that *Trinko's* fact pattern did not match those of a prior case, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* (1985) 472 U.S. 585 *(Aspen Skiing).* In *Aspen Skiing*, the court found an antitrust violation because, among other elements, the defendant had previously participated in the multi-resort pass. *Id.,* p. 604.

Subdivisions (b) and (d) address *Aspen Skiing*. In addition to its previous participation, the defendant refused to provide lift tickets to the plaintiff when the tickets were commercially

available to others. *Id.,* pp. 607-608. Subdivision (b) draws from *Aspen Skiing,* pp. 608-611 ("The defendant treated persons subject to the exclusionary conduct differently than the defendant treated other persons"), and that the defendant's refusal to continue to participate in the multi-resort pass was not based on a reasonable business justification references subdivision (d) ("The defendant's conduct makes no economic sense apart from its tendency to harm competition"). *Trinko* and its progeny have, in many instances, elevated the distinguishing facts of *Aspen Skiing* to mandatory proof requirements, restricting the universe of actionable refusal-to-deal claims.

Subdivision (d) allows, but does not require, a plaintiff to prove lack of economic justification for a defendant's conduct because there may be multiple motivations for the conduct. Further, conduct can be purposely anticompetitive without an immediate economic impact on the defendant, and requiring a court to distinguish between "legitimate" profits from "profits made by eliminating competition," is a potentially difficult and costly task.

Subdivisions (c) and (g) address the ruling in *Brooke Group v. Brown & Williamson Tobacco* (1993) 509 U.S. 209. Subdivision (c) addresses the holding in that case that the plaintiff must show that the defendant's prices were below cost in order to prove predatory pricing ("The defendant's price for a product or service was below any measure of the costs to the defendant for providing the product or service required under federal antitrust law"). *Id.* p. 223. Subdivision (g) also addresses the requirement from the case that the plaintiff prove "In a claim of predatory pricing, the defendant is likely to recoup the losses it sustains from below-cost pricing of the products or services at issue." *Id*., p. 224. These federal judicial restrictions on predatory pricing claims reflect outmoded precepts that pricing predation was irrational and competition would enter the market during the recoupment period. See Congressional Research Service, *Antitrust Reform and Big Tech Firms*, Nov. 21, 2023, p. 8. Moreover, these requirements make little sense when many digital products are offered for free or with very low marginal costs, as the requirements immunize virtually all prices from predation claims. Further, these requirements fail to recognize that prices set above defendant's costs can be anticompetitive, too. *ZF Meritor, LLC v. Eaton Corp* (3rd Cir. 2012) 696 F.3d 254, 274-275. The directive that California courts need not follow these federal precedents aligns with existing state law, which expressly rejects federal standards of assessing costs and rejects any need to show recoupment. (Bus. & Prof. Code § 17403; *Bay Guardian Co. v. New Times Media LLC* (2010) 187 Cal.App.4th 438, 445).

Subdivision (e) recognizes that antitrust harm or the risk of harm can be proven by quantitative or qualitative evidence. California law, like much of federal law, acknowledges that damages can be shown with a reasonable probability of a causal connection between the challenged conduct and loss, and that damages can be proven with probable and inferential proof. *Suburban Mobile Homes, Inc. v. Amfac Communities, Inc*. (1950) 101 CalApp.3d 532.

Subdivision (f) addresses the ruling in *Ohio v. American Express Ohio v. American Express* (2018)585 U.S. 529. This ruling created a confusing precedent as to the type and amount of evidence needed to show harm in cases involving two sided platforms assumed interconnectedness between the two sides, which may not translate in other circumstances, and could allow firms to escape antitrust liability for causing harm on one side of a platform and masking it with benefits on the other side.

Subdivision (h) addresses *Ortho Diagnostic Sys., Inc. v. Abbott Labs, Inc.* (SDNY 1996) 920 F.Supp. 455, which involved rival drug testing firms. In its ruling, the court determined that the plaintiff must allege and prove that it was at least as efficient a producer of the competitive product as the defendant, but that the defendant's pricing made it unprofitable for the plaintiff to continue to produce. This was the court's attempt to ensure its analysis was truly about competitive practices and that the pricing was not due to poor systems control. However, requiring the plaintiff to be as efficient as the defendant as a precondition to liability in an exclusionary conduct claim has been criticized on multiple grounds, including that it favors dominant firms and requires burdensome and complex litigation about the parties' relative efficiencies. Most importantly, such a requirement denies antitrust protection for harm to plaintiffs without the scale or efficiency of the defendant. See Congressional Research Service, *Antitrust Reform and Big Tech Firms*, Nov. 21, 2023, p. 7.

Subdivision (i) highlights the differences between state and federal law regarding market share and market power. While there is no federal consensus as to market shares that create antitrust concerns, the Federal Trade Commission notes, "Courts look at the firm's market share, but typically do not find monopoly power if the firm (or a group of firms acting in concert) has less than 50 percent of the sales of a particular product or service within a certain geographic area." (Federal Trade Commission, *Guide to Antitrust Laws, Single Firm Conduct, Monopolization Defined*.) In contrast, in *Fisherman's Wharf Bay Cruise v. Superior Ct*. (2003) 114 Cal.App.4th 309, 326, a California case addressing, among other things, exclusive dealing under the Cartwright Act, the court held that a 20% market share foreclosure was enough to pursue an action against monopolist practices.

Subdivision (j) restates existing case law that proof of actual detrimental effects can obviate the need for inquiries into market definition and market power. *FTC v. Ind. Federation of Dentists* (1986) 476 U.S. 447, 460-61; *Diaz Aviation Corp. v. Airport Aviation Services, Inc.* (1st Cir. 2013) 716 F.3d 256, 265; *In re Loestrin 24 Fe Antitrust Litigation* (2019) 433 F.Supp.3d 274, 299; *In re Nexium III* (D.Mass. 2013) 968 F.Supp.2d 367, 388 n.19.)
