

California's Cartwright Act: A Primer

Howard M. Ullman

California State Bar Annual Meeting
October 9, 2004



LONDON LOS ANGELES MILAN NEW YORK ORANGE COUNTY PACIFIC NORTHWEST PARIS SACRAMENTO SAN FRANCISCO SILICON VALLEY TOKYO
WASHINGTON DC LONDON LOS ANGELES MILAN NEW YORK ORANGE COUNTY PACIFIC NORTHWEST PARIS SACRAMENTO SAN FRANCISCO SILICON VALLE
TOKYO WASHINGTON DC LONDON LOS ANGELES MILAN NEW YORK ORANGE COUNTY PACIFIC NORTHWEST PARIS SACRAMENTO SAN FRANCISCO SILICO
VALLEY TOKYO WASHINGTON DC LONDON LOS ANGELES MILAN NEW YORK ORANGE COUNTY PACIFIC NORTHWEST PARIS SACRAMENTO SAN FRANCISCO
SILICON VALLEY TOKYO WASHINGTON DC LONDON LOS ANGELES MILAN NEW YORK ORANGE COUNTY PACIFIC NORTHWEST PARIS SACRAMENTO SA

Cartwright Act Cal. Bus. and Prof. Code §§ 16700 to 16770

California's main antitrust law

Similar to federal Sherman Antitrust Act, but not
identical



Cartwright Act versus Federal Antitrust Laws

Major differences concern treatment of:

- Mergers
- Monopolization
- Indirect purchaser suits



Purpose of the Cartwright Act

Protection of consumer

Protection of competition



Main Provisions of Cartwright Act

Section 16720:

- Trusts

Section 16727:

- Exclusive dealing

Section 16725:

- Permits agreements, associations or combinations that promote, encourage, or increase competition



Section 16720 - Trusts

Defines and prohibits “trusts”

- A “trust” is a “combination of capital, skill or acts by two or more persons” for certain enumerated purposes



Major Types of Enumerated Unlawful Trusts

- To create or carry out restrictions in trade or commerce
- To limit or reduce the production, or increase the price of merchandise or of any commodity
- To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity
- To fix at any standard or figure, whereby its prices to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in California



Section 16727 - Exclusive Dealing

Prohibits contracts restricting the right of a buyer or lessee to “use or deal in” the products of a competitor of the seller or lessor if the effect of the restriction “may be to substantially lessen competition or tend to create a monopoly in any line of trade or commerce in any section of the State.”



Section 16725

Exemption for “reasonable” restraints of trade



Use of Federal Precedents

Sherman Act cases are generally informative

As to Section 16727, federal precedent construing Section 3 of the Clayton Act is persuasive

However, Sherman Act and Cartwright Act are not identical

- For example, Cartwright Act does not reach mergers

Where there is such a divergence, federal precedent will have little or no weight



The Concerted Action Requirement

A trust exists only where there is a “combination of capital, skill or acts by two or more persons”

Pleading concerted action - low threshold

Summary judgment standard for concerted action (*Aguilar v. Atlantic Richfield Corp.*) - similar to federal summary judgment standard



Standards of Review

Per se illegal arrangements

The Rule of Reason

Other standards (e.g., quick look)



Horizontal Restraints

Price-fixing

Market divisions and customer allocations

Group boycotts

Unilateral refusals to deal

Tying

Tying - Elements

- The sale is linked to the sale of the tied product
- The seller has sufficient economic power to coerce the purchase of the tied product
- A substantial amount of sale is effected; and
- The plaintiff has suffered a pecuniary loss as a consequence

Under Section 16727 (which does not cover real estate), a plaintiff need show either the second or third elements, but not both



Vertical Restraints

Refusals to deal

Resale price maintenance

Tying

Non-price vertical restraints



Monopolization

Unilateral monopolization versus conspiracy to monopolize

Unilateral monopolization not within Cartwright Act (*Dimidowich v. Bell & Howell*)



Mergers

The Cartwright Act does not reach mergers: the Texaco case

- *State ex rel. Van de Kamp v. Texaco, Inc.*



Indirect Purchaser Suits

Hanover Shoe: Rejection of the “pass-on” defense

Illinois Brick: Rejection of “offensive” use of pass-on

- California’s state law repeal of *Illinois Brick*
- Section 16750(a) expressly allows suit “regardless of whether . . . injured person dealt directly or indirectly with the defendant.”
- Problems created by indirect purchaser suits



Enforcement

Private suits

California Attorney General

District attorneys

Criminal enforcement - “hard core” offenses



Remedies

Treble damages
Attorney's fees



ORRICK

LONDON LOS ANGELES MILAN NEW YORK ORANGE COUNTY PACIFIC NORTHWEST PARIS SACRAMENTO SAN FRANCISCO SILICON VALLEY TOKYO
WASHINGTON DC LONDON LOS ANGELES MILAN NEW YORK ORANGE COUNTY PACIFIC NORTHWEST PARIS SACRAMENTO SAN FRANCISCO SILICON VALLEY
TOKYO WASHINGTON DC LONDON LOS ANGELES MILAN NEW YORK ORANGE COUNTY PACIFIC NORTHWEST PARIS SACRAMENTO SAN FRANCISCO SILICON
VALLEY TOKYO WASHINGTON DC LONDON LOS ANGELES MILAN NEW YORK ORANGE COUNTY PACIFIC NORTHWEST PARIS SACRAMENTO SAN FRANCISCO
SILICON VALLEY TOKYO WASHINGTON DC LONDON LOS ANGELES MILAN NEW YORK ORANGE COUNTY PACIFIC NORTHWEST PARIS SACRAMENTO SA

Howard M. Ullman

415-773-5652

hullman@orrick.com