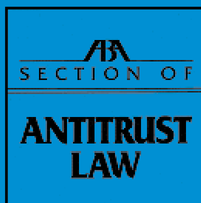

DISTRIBUTION

THE NEWSLETTER OF THE DISTRIBUTION AND FRANCHISING COMMITTEE

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MESSAGE FROM THE CHAIR

Welcome to the latest edition of *Distribution!*

This newsletter contains two timely and informative articles. First, for those of you who missed the Committee's program at the 2013 Spring Meeting, entitled Enforcing Territorial Restrictions in Global Economy, one of the speakers from that panel, Thomas G. Funke, has provided his thoughts on the EU perspective for this newsletter. Second, James M. Mulcahy p rovides an overview of recent developments in California's law of vertical price and other distribution restraints.

We hope you find these articles informative, and we look forward to your feedback! Please contact me or any member of the Committee's leadership with any thoughts on newsletter topics, or programming ideas. We really do appreciate your recommendations and input, and would like to hear more of them!

Erika L. Amarante
Chair, Distribution & Franchising Committee

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DISTRIBUTION welcomes submissions of articles, and case summaries involving significant or interesting decisions, trials, or developments in antitrust law affecting all types of distribution arrangements.
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Territorial Restraints and Distribution in the European Union

*Thomas G. Funke**

The following article arose out of the 2013 ABA Antitrust Spring Meeting panel entitled Enforcing Territorial Restrictions in a Global Economy, in which the author participated.

European Union (EU) antitrust law is based not just on competition economics, but also on the policy objectives of European integration. In particular, EU rules on vertical restraints are strongly influenced by the goal to create a single market comprising all the territories of the EU member states, in which national borders are no longer an obstacle for commerce.[1] Given the ubiquitous nature of the Internet, online retailing is viewed as a tool to promote cross-border commerce between EU member states and enjoys particular protection.[2]

Since the 1950s, the principle of free movement of goods, persons and capital has been enshrined in the treaties on European integration. Therefore, EU rules on vertical restraints are keen to reduce price differentials between different EU member states and generally encourage cross-border trade between EU member states. Where a supplier of goods intends to exclusively allocate territories within the EU to a single distributor, or where a distributor is prevented from selling to EU customers outside its allocated territory, European enforcers will likely consider this an impediment to competition. The EU Commission, in its capacity as the EU's antitrust agency, is not required to prove anti-competitive effects of territorial restraints, as these are considered restrictions "by object". For restricting cross-border trade within the EU, Volkswagen was fined EUR 102 million in 1998 (reduced to EUR 90 million on appeal) and Nintendo EUR 149 million in 2002 (reduced to EUR 119 million on appeal).

This article outlines the issues that North American manufacturers most typically face when devising their distribution strategy for the EU, as doing so will almost always require the manufacturer to adapt its international model distribution contract in several areas.

1. The EU competition framework for distribution agreements

Agreements between companies which may affect trade between the EU's member states and which have the object or effect of restricting competition in the EU are generally prohibited under Article 101 (1) of the Treaty on the Functioning of the European Union (TFEU), unless the economic benefits of the agreement outweigh its anti-competitive effects. Anyone invoking an efficiencies defence will carry the burden of proof, unless they can rely on a safe harbor known as a block exemption. Through a series of block exemption regulations, the EU legislator has defined conditions under which certain categories of agreements are considered compatible with EU antitrust law.

For distribution agreements, the key instrument is Commission Regulation (EU) No 330/2010, which is commonly referred to as the Vertical Restraints Block

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1 This policy goal is illustrated in the title of the speech by Joaquín Almunia, Vice-Président of the European Commission in charge of Competition, Competition serving the achievement of the Single Market (La concurrence au service de l'achèvement du marché unique) (February 22, 2013): *available at* http://europa.eu/rapid/press-release_SPEECH-13-151_fr.htm.

2 The EU's Director-General for Competition, Alexander Italianer, has pointed out: "Our aim … is to allow the Internet to continue to contribute to cross-border trade in the internal market while at the same time preserving existing distribution models whose efficiency enhancing nature has been recognised.", http://ec.europa.eu/competition/speeches/text/sp2010_01_en.pdf.

Exemption Regulation or "VRBER".[3] This instrument applies across all of the 28 EU member states, and has been in force since 2010. It provides a safe harbor, so that any distribution system complying with it will be compatible with EU antitrust law. The VRBER comes with a set of detailed guidelines that are not just applied by the European Commission, but also by the national competition authorities of the EU member states.

An agreement entered into between two or more companies operating at different levels of the production or distribution chain, which relates to the conditions under which the parties may purchase, sell or resell goods or services, may qualify for the VRBER safe harbor, provided that:

a) both the supplier and the buyer (i.e., the distributor) hold market shares of no more than 30%; and

b) the agreement does not contain any hard-core restriction concerning, in essence, the distributor's ability to determine its resale price, the ability of a component supplier to sell its products as spare parts directly to independent repairers and – most notably – certain territorial restraints.

2. An Example of Territorial Restraints in the EU

As an example of the application of territorial restraints in the EU, consider the following:

BananaPhone (Banana)[4] *is a U.S.-based manufacturer of a mobile communications device known as the BPhone. Banana directly sells these internationally via its own website and company owned stores. Now, Banana has decided to appoint resellers with a store-front presence in several European markets. Banana hopes all agreements with the store-front BPhone resellers will contain all of the following provisions:*

a. Each reseller has been given an exclusive geographic territory within the EU;

b. Each reseller is prohibited from selling BPhones except in stores within its territory, i.e. no online sales, no stores outside its territory;

c. The resellers must not sell to other resellers unless those are authorized by Banana; and

d. Resellers receive discounts for purchases above particular volume thresholds.

The exclusive BPhone reseller with the territory of Germany gains a reputation as a low pricer. The German reseller's online store attracts customers not just from Germany but also from France. When discussing a contract renewal with this reseller, Banana indicates they are unhappy with the reseller's low pricing and with it filling orders from outside Germany. To try and reach a compromise, Banana offers a bonus system for the reseller based on volumes of sales to German residents only.

Under the VRBER, Banana would normally be allowed to grant volume discounts and require its distributors not to sell BPhones to non-authorized resellers. And while it is possible to assign a geographic market within the EU (such as Germany) exclusively to one authorized distributor, the German distributor could not be prevented from filling non-solicited orders from France or other EU member states.

According to EU law, where a supplier sets up an exclusive distribution network, it may legitimately prevent its distributors from actively selling into a territory granted exclusively to another distributor or reserved for the supplier itself. Where restrictions on active sales into such territories are agreed between a supplier and distributor having a market share no higher than 30%, the agreement will benefit from the safe harbor of the VRBER.[5]

The distinction between active sales and passive sales is vital, given that a supplier may only limit its European distributor's

3 Commission Regulation No. 330/2010, 2010 O.J. (L102)1 on the application of Article 101 (3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.

4 The hypothetical is modelled after a case study designed by Mr Tom Booth and presented by the author and additional panellists at the 2013 ABA Antitrust Spring Meeting.

5 Where the market share of either party to the distribution agreement is in excess of 30%, the arrangement will not benefit from the VRBER safe harbor, but may nonetheless qualify for individual exemption where the parties can demonstrate overwhelming efficien-cies that could not be achieved through less restrictive means.

ability to *actively* market the products in territories exclusively allocated to other distributors (or to the supplier itself) under the safe harbor of the VRBER. Active selling means actively approaching individual customers, specific groups of customers or customers in a specific territory. To the contrary, passive selling means responding to unsolicited requests from individual customers.

Therefore, a clause requiring the distributor to refrain from advertising or displaying the product in an EU territory exclusively allocated to another distributor or to the supplier itself would be enforceable. In contrast, an outright ban on sales to customers from EU member states that do not form part of the territory allocated to a distributor would prevent passive sales, i.e. sales to customers which approached the distributor on their own initiative, and could not be enforced. Rather, such general territorial restrictions (as well as indirect measures and incentives aiming to achieve the same) can result in significant fines being imposed by the EU Commission or the national antitrust agencies of the EU member states.

3. Internet sales

It is common for EU consumers to find out that there is a better deal from a distributor in another EU member state, so they approach that reseller and order from him rather than from the local reseller. Banana cannot prevent this from happening, at least not fully: the German reseller can be obliged to refrain from any marketing specifically aimed at French customers. But where the French customer takes the initiative and visits the German reseller's website, it is free to buy from it. Under EU law this is called a "passive sale", and must not be obstructed. The EU Commission generally views the operation of an online store as passive selling; since the customer needs to take the initiative to visit the distributor's website, the distributor is deemed to remain passive and therefore cannot be prevented from selling to any EU customer ordering via the Internet.

Attempts by the distributor to specifically target customers outside its allocated territory could be viewed as active selling. Operating a separate website under the top-level domain of another country (e.g., the German BPhone reseller operating a website on the domain ".fr", though France is allocated exclusively to the French distributor) is considered active selling. Similarly, territory-based banners on third-party websites and other advertising specifically addressed to customer groups outside the allocated territory can be prevented. To the contrary, the operation of a multi-language Internet store is not considered active marketing, even where the languages are not official languages of the distributor's place of establishment.

The EU Commission considers anti-competitive any requirement on the distributor to prevent customers located in another territory from viewing its website, or to re-route such customers to the supplier's website or that of another distributor. Similarly, any requirement that the distributor should terminate consumer's transactions over the Internet once the credit card data reveals an address outside the distributor's territory would be viewed critically by the EU antitrust agencies. Against this background, the granting of rebates based on the nationality or domicile of the customer would be considered as unlawfully restricting passive sales. For example, until recently several car companies tried to keep their dealers from selling to customers from another EU member state by subsidizing sales to local residents. These bonus schemes were considered an obstruction of intra-EU commerce, and the EU Commission imposed significant fines.

An outright ban of Internet sales is generally considered incompatible with European antitrust law unless it is objectively necessary either for reasons of public health and safety, or due to the particular type and nature of the agreement. This carve-out can be relied on for the selling of hazardous goods or substances. It is to be interpreted narrowly, though. As the European Court

of Justice recently held, a contractual clause requiring a retailer to sell cosmetics only in a brick-and-mortar store in the presence of a qualified pharmacist impedes Internet sales and amounts to a violation of EU antitrust law.[6] In December 2012, the French competition authority imposed a fine of EUR 900,000 on upscale consumer electronics manufacturer Bang & Olufsen for preventing its authorized distributors from selling online.[7]

While Internet sales cannot be altogether prevented in the EU, a supplier does not need to accept Internet-only distributors into its European sales network. The EU Commission has acknowledged that a supplier may require its distributors to have one or more physical sales outlets. This requirement can be applied in selective as well as non-selective distribution systems. Furthermore, the supplier may require the distributor to sell at least a certain absolute amount in value or volume from its physical sales outlet. Conversely, the distributor's online sales cannot be required to remain below a certain percentage threshold. The distributor cannot be required to respect a maximum ratio of offline-to-online sales.

Neither the legal terms of the distribution agreement, nor the pricing policies or other indirect measures may be designed to foreclose online activities. The EU Commission has emphasized that a supplier cannot make the sales price to the distributor contingent on the product being resold online or offline. At most, the supplier may support the distributor's offline sales efforts through a fixed fee.

Suppliers may require EU distributors to observe qualitative criteria for the design and operation of Internet stores. Legitimate qualitative criteria may apply to the graphic design or functionality of a website (such as page load times, ease of use, detailed information on a product, use of images or animations, availability of secure payment options) as well as customer service-related requirements like maximum delivery times or operation of an online help desk. The requirement not to sell the product via Internet auction sites is also considered acceptable, as auctions differ from regular sales and could be detrimental to the reputation of the supplier or its products.

In sum, Banana would be well advised to check whether the German reseller truly limits its dealings with French customers to "passive sales" or whether its marketing is specifically aimed at foreign customers. And the bonus should not depend on the customer's origin, but should be granted in return for local marketing activities.

4. Other restrictions

Under EU law, distributors appointed within a selected distribution system can be restricted from selling to unauthorized resellers.[8] Wholesalers can be obliged to refrain from selling directly to end users. Furthermore, the distributor can be restricted from selling components supplied for the purposes of incorporation to customers who would use them to manufacture the same type of product as those produced by the supplier.

Resale price maintenance is almost always illegal in the EU. The EU Commission guidelines explain that such agreements could qualify for an individual exemption in theory, but in practice the European agencies have yet to accept an efficiency defense in an RPM case. Any attempt to impose pressure on the reseller's pricing is considered a

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6 Case Comp/C-439/09, Pierre Fabre Dermo Cosmétique SAS V. Président de L'Autorité de la Concurrence, (Oct. 13, 2011), *available at* http://curia.europa.eu and discussed in the February 2013 edition of this newsletter.

7 Autorité de la concurrence, Dec. 12, 2012 Décision no. 12-D-23, (Fr.) relative à des pratiques mises en oeuvre par la société Bang & Olufsen dans le secteur de la distribution sélective de matériels hi-fi et home cinéma, *available at* http://www.autoritedelaconcurrence.fr/user/avisdec.php?numero=12D23.

8 Commission Regulation No. 330/2010, 2010 O.J. (L102)1, Art. 4 (b) (iii). However, under the sector-specific Commission Motor Vehicle Block Exemption Regulation No. 461/2010 vehicle suppliers may not limit sales of spare parts from authorised repairers to independent repairers requiring the spare parts for installation in a specific customer vehicle.

breach. In recent years, the German competition authority has fined Microsoft as well as manufacturers of hearing aids and optical lenses for RPM.[9] On 31 July 2013 it fined cosmetics supplier WALA Heilmittel 6.5 million for imposing pressure on its distributors to observe WALA's recommended resale price.[10]

Finally, certain objectively justifiable territorial restrictions will be permitted where they reflect an overwhelming public interest. This carve-out is narrowly interpreted and primarily serves the protection of minors or trade in dangerous substances.[11]

5. Outside the safe harbor

The EU Commission has set out examples of individual cases in which territorial restrictions will not benefit from the safe harbor of the VRBER, but may still qualify for an individual exemption.

Where one distributor is the first to sell a new product in an EU market and has to commit substantial investment in order to do so, restrictions on passive sales by other distributors may be appropriate for the first two years in which the original distributor sells the contract goods. Similarly, where a distributor is engaged in merely testing a new product in a limited territory, more far-reaching restrictions may be applied.

In sum, North American suppliers will typically need to adapt their EU distribution strategy to the local competition law environment and the specific opportunities it offers.

9 For details, *see* http://www.bundeskartellamt.de/wDeutsch/download/pdf/Presse/090408_PM_Microsoft.pdf; http://www.bundeskartellamt.de/wDeutsch/download/pdf/Presse/091015_Pressemitteilung_Phonak_Final.pdf; http://www.bundeskartellamt.de/wDeutsch/download/pdf/Presse/090925_PM_Ciba_Vision.pdf. For examples from additional jurisdictions, refer to http://www.concurrences.com/Droit-de-la-concurrence/Glossaire-des-termes-de/Resale-price-maintenance-RPM?lang=en.

10 English case summary at http://www.bundeskartellamt.de/wEnglisch/News/press/2013_07_31.php.

11 Commission Notice, Guidelines on Vertical Restraints, SEC(2010) 411 final, para. 60.

California Courts are Beginning to Reexamine their Outdated Decisions Addressing Vertical Price and other Distribution Restraints under the Cartwright Act

*by James M. Mulcahy**

1. Introduction

Thirty-five years ago, the California Supreme Court held that vertical price fixing is *per se* unlawful under California's antitrust statute.[1] Since then, however, modern economic analysis and federal antitrust jurisprudence have evolved dramatically away from the antiquated common law "restraints on alienation" approach to *per se* condemnation. For the past thirty years, the California Supreme Court has not had the opportunity to re-evaluate the ancient – and now repudiated – mechanical labeling of private conduct affecting prices as "price fixing," in *per se* violation of state antitrust law, even though the actors' conduct may have "no [established] invidious purpose or harmful economic consequences, and even though the economic results of the conduct may be of net benefit to consumers."[2]

This article suggests that the time has come for California courts to re-evaluate and modernize their prior judicial precedents, particularly in the areas of (a) both minimum and maximum vertical resale price maintenance; and (b) dual distribution. But, this is not an original thought: within the past four months, two California federal district courts, and the Los Angeles County Superior Court have addressed these issues and the *stare decisis* effect of prior judicial decisions under California antitrust law.[3]

California courts, of course, are free to interpret California's antitrust statute in accordance with state policies which provide the underlying rationale for the legislation. And, there is much current debate about the effect that current federal jurisprudence does – or should – have in the interplay between California state and federal antitrust law.

2. The Cartwright and Sherman Acts

As all California antitrust lawyers know, California's principal antitrust statute is the Cartwright Act (the Act).[4] The Act "generally outlaws any combinations or agreements which restrain trade or competition or which fix or control prices."[5] Section 1 of the federal Sherman Act similarly provides that "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 prohibited.[6]

In order to successfully plead a valid claim under Section 1 of the Sherman Act:

> Claimants must plead not just ultimate facts (such as conspiracy) but evidentiary facts which, if true, will prove: (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or [unreasonably] restrain

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1 *Mailand v. Burckle*, 20 Cal. 2d 367 (Cal. 1978).

2 *See Fisher v. City of Berkeley*, 37 Cal. 3d 644, 666 (Cal. 1984).

3 *Orchard Supply Hardware LLC v. Home Depot USA, Inc.*, 2013 U.S. Dist. LEXIS 53214 (N.D. Cal. 2013); *Darush v. Revision*, 2013 U.S. Dist. LEXIS 60084 (C.D. Cal. 2013); *Kaewsawang v. Sara Lee Fresh, Inc.*, Superior Court of Calif., Case No. BC360109 (May 6, 2013).

4 Cal. Bus. & Prof. Code §§ 16700-16770.

5 *Pac. Gas & Elect. Co. v. County of Stanislaus*, 16 Cal. 4th 1143, 1147 (Cal. 1997).

6 15 U.S.C. § 1.

> trade or commerce among the several states, or with foreign nations; [and] (3) which actually injures competition.[7]

The Cartwright Act, in corresponding fashion, prohibits combinations that "prevent competition in [the] sale or purchase of … any commodity" or agreements "to keep the price of … [any] commodity … at a fixed or graduated figure."[8] In order to successfully plead a valid claim for "restraint of trade" under the Cartwright Act, a plaintiff must plead with particularity that a defendant (1) participated in the formation and operation of an agreement to restrain trade; (2) engaged in illegal acts with the purpose of furthering that agreement; and (3) caused the plaintiff damage as a result of those illegal acts.[9]

Acts that violate both Section 1 of the Sherman Act and the Cartwright Act are *per se* unlawful only when they are "so destructive of competition … and so devoid of redeeming value … that they are conclusively presumed to be unreasonable."[10] Pursuant to modern day economic analysis, the Supreme Court has held that "*per se* rules are appropriate only for conduct that … would always or almost always tend to restrict competition."[11] Stated somewhat differently, "[*p*]*er se* liability is reserved for only those agreements that are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality."[12] This means that per se treatment should be confined to instances where "experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it."[13] California Courts, interpreting the Cartwright Act, agree.[14]

3. A Brief History of Vertical Restraints under the Sherman Act

***Dr. Miles* (1911):** In 1911, the Supreme Court in *Dr. Miles* invalidated an agreement that required a manufacturer's dealers to comply with the manufacturer's mandated minimum resale price.[15] Finding that the practice was *per se* unlawful, the Court announced that the "right of alienation is one of the essential incidents of a right of general property," and that "restraints upon alienation have been generally regarded as obnoxious to public policy."[16] Under the rule of *Dr. Miles*, which remained in effect until 2007,[17] all agreements between a manufacturer and its retailers establishing minimum resale

7 *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008); *see also Sidibe v. Sutter Health*, 2013 U.S. Dist. LEXIS 78521 *28 (N.D. Cal. 2013); *Dominick v. Collectors Universe*, 2012 U.S. Dist. LEXIS 141950 *12 (C.D. Cal. 2012); *GSI Technology, Inc. v. Cypress Semiconductor Corporation*, 2012 U.S. Dist. LEXIS 93888 *8-9 (N.D. Cal. 2012).

8 Cartwright Act §§ 16720(c) and (e)(2); *Dominick, id.* at *12.

9 *Smith v. State Farm Mut. Auto. Ins. Co.*, 93 Cal. App. 4th 700, 722 (Cal. App. 4th Dist. 2001); *see also Marsh v. Anesthesia Services Medical Group, Inc.*, 200 Cal. App. 4th 480, 493 (Cal. App. 4th Dist. 2011).

10 *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 986 (9th Cir. 2000).

11 *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988).

12 *Texaco v. Dagher*, 547 U.S. 1, 5, 6 (2006) (finding that although a joint venture between Shell Oil Co. and Texaco Inc. ("Equilon") "may be price fixing in a literal sense, it [was] not price fixing in the antitrust sense.").

13 *Kahn v. State Oil Co.*, 522 U.S. 3, 10 (internal quotation marks omitted) (1977); *see also Broadcast Music, Inc. v. Columbia Broadcast Sys.*, 441 U.S. 1, 19-20 (1979) (Antitrust *per se* rules must be confined to practices that "always or almost always tend to restrict competition and decrease output."); *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977) ("[D]eparture from the rule-of-reason must be based upon demonstrable economic effect rather than upon formalistic line drawing"); *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1356-57 (9th Cir. 1982) ("[M]odern economic thought indicates that the invalidation of a distribution system, absent a showing of anti-competitive effect, may actually retard competition. Competition is promoted when manufacturers are given wide latitude in establishing their method of distribution . . . .") (internal quotation marks omitted).

14 *See Fisher v. City of Berkeley*, 37 Cal. 3d 644, 668, 670-71 nn. 20-21 (Cal. 1984) (refusing to apply per se rule to new arrangement without benefit of evidence of economic consequences); Marsh, 200 Cal. App. 4th 480 at 495 ("[T]he prevailing standard is the 'rule of reason' which measures whether the anticompetitive aspect of a vertical restraint outweighs its procompetitive effects.") (internal quotation marks omitted).

15 *Dr. Miles Med. Co. v. John D. Parker & Sons Co.*, 220 U.S. 373 (1911).

16 *Id.* at 404 (internal quotation marks omitted).

17 The Supreme Court overturned the *Dr. Miles, id.*, decision in *Leegin Creative Leather Products v. PSKS, Inc.*, 551 U.S. 877 (2007), holding that minimum resale price maintenance agreements would be analyzed pursuant to the rule of reason.

prices for the manufacturer's goods were *per se* unlawful.[18] This *per se* rule was premised upon the common-law rule against "restraints upon alienation," and the then-held view – a view that today is inconsistent with generally accepted economic thought (although not universal) – that resale price maintenance had no conceivable procompetitive effects.

***Schwinn and Albrecht* (1967-1968):** Following *Dr. Miles*, the Supreme Court validated *per se* rules against other types of vertical restraints. In 1967, the Court held that vertical non-price restrictions – i.e., customer and territorial restrictions imposed upon distributors – were also *per se* unlawful.[19] One year later – 1968 – the Supreme Court held that vertical maximum resale price maintenance agreements also were *per se* unlawful.[20] The *Schwinn* and *Albrecht* decisions were predicated upon *Dr. Miles'* acceptance of the common law rule against "restraints upon alienation" – *i.e.*, dealer freedom – and the perhaps antiquarian perception that no economic analysis was required in order to conclude that these vertical practices resulted in anticompetitive effects, absent any countervailing procompetitive virtue.[21]

***Sylvania* (1977):** By 1977, the Supreme Court began what has become a consistent and evolutionary reexamination of its prior decisions which applied *per se* rules to vertical distributional restraints. In 1977, the Court overturned *Schwinn's per se* rule against vertical non-price agreements, and moved away from the common law prohibition of restraints on alienation as a justification for a *per se* rule of antitrust liability.[22] Recognizing the evolution of modern economic analysis, the Court declared that "the state of the common law 400 or even 100 years ago is irrelevant to the issue before us: the effect of the antitrust laws upon vertical distributional restraints in the American economy today."[23] Emphasizing that "[*p*]*er se* rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive,"[24] the Court explained that interbrand competition – not intrabrand competition – "is the primary concern of antitrust law."[25] And, because non-price vertical agreements have significant pro-competitive effects on interbrand competition, the Court found that the reasonableness of these types of restraints should be evaluated on a case-by-case basis under the rule of reason.[26]

***Sharp* (1988):** In 1988, without addressing the continued validity of *Dr. Miles*, the Court nevertheless further limited its application to vertical restraints.[27] In *Sharp*, the Court declined to apply the *per se* rule of *Dr. Miles* to an agreement between a manufacturer and its complaining retailer – pursuant to which the manufacturer terminated another price "discounting" retailer – because the agreement did not impose a specific price or price

18 Nevertheless, in 1919 – eight years after *Dr. Miles* – the Supreme Court made clear that a manufacturer may in fact lawfully seek to achieve this same result – *i.e.*, retailer minimum resale price maintenance – by unilaterally establishing and announcing a suggested resale price, followed by the summary termination of any retailer who thereafter refuses to comply with that suggested price. *United States v. Colgate & Co.*, 250 U.S. 300 (1919). California Courts, relying on federal Sherman Act precedent, have accepted the *Colgate* Doctrine as equally applicable to the Cartwright Act. *See Kolling v. Dow Jones & Company, Inc.*, 137 Cal. App. 3d 709, 720 (Cal. App. 1st Dist. 1982) ("The Cartwright Act, like the Sherman Act, requires an illegal 'combination' or 'conspiracy' to restrain trade . . . [and] [u]nilateral refusal by a producer to deal with a distributor, absent proof that it was pursuant to an illegal conspiracy, does not violate the antitrust laws.") (citations omitted); *R.E. Spriggs Company, Inc. v. Adolph Coors Company*, 94 Cal. App. 3d 419, 426 n. 4 (Cal. App. 2nd Dist. 1979) ("The parties as well as this court have proceeded on the assumption that federal cases interpreting the Sherman Act are applicable to problems arising under the Cartwright Act.") (citations omitted); *Chavez v. Whirlpool Corporation*, 93 Cal. App. 4th 363, 366 (Cal. App. 2nd Dist. 2001) ("We conclude that the complaint fails to state a cause of action for violation of the Cartwright Act because the alleged conduct is permissible under the *Colgate* doctrine . . . and the facts pleaded are insufficient to establish a coerced agreement.") (citation omitted).

19 *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 379-380 (1967).

20 *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

21 *See Schwinn*, 388 U.S. 365 at 380; *Albrecht, id.*, at 152.

22 *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 53 (1977).

23 *Id.* (internal quotation marks omitted).

24 *Id.* at 49-50.

25 *Id.* at 52.

26 *Id.* at 59.

27 *See generally Bus. Elects. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988).

level on the complaining retailer.[28] Recognizing that the agreement between the manufacturer and the complaining retailer certainly had an effect on retail prices – but did not establish any specific prices – the Court found that *per se* treatment was not warranted.[29] Implicitly acknowledging the evolution in economic thought on these issues, the Court explained that the "rules in this area should be formulated with a view toward protecting the doctrine of *GTE Sylvania*."[30]

***Kahn* (1997):** In 1997, the Supreme Court overruled its holding in *Albrecht* that vertical maximum resale price agreements are *per se* unlawful.[31] In Khan, the Court held that vertical maximum price agreements must be evaluated under the rule of reason, concluding that the *per se* rules were no longer appropriate because there is "insufficient economic justification for *per se* treatment."[32] Again, recognizing the continued evolution of mainstream economic thought, the Court made clear that "[i]n the area of antitrust law, there is a competing interest, well-represented in this Court's decisions, in recognizing and adapting to changed circumstances and the lessons of accumulated experience."[33]

***Leegin* (2007):** In 2007, the Supreme Court overruled the *Dr. Miles'* holding that it was *per se* illegal for a manufacturer to agree with its distributor to set the minimum price the distributor can charge for the manufacturer's goods.[34] Consistent with its underlying rationale in *Sylvania, Sharp* and *Khan* that *stare decisis* does not compel continued adherence to the *per se* rule against vertical price restraints, the Court in *Leegin* explained that "respected authorities in the economic literature suggest the *per se* rule is inappropriate, and there is now widespread agreement that resale price maintenance can have procompetitive results."[35] Acknowledging that, like progressive economic analysis itself, the Court's "treatment of vertical restraints has progressed away from *Dr. Miles'* strict approach," the Court held that all vertical price restraints are to be "judged by the rule of reason."[36]

Leegin, then, compels two principal conclusions: (1) "[j]ust as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on 'restraint[s] of trade' evolve to meet the dynamics of present economic conditions;"[37] and (2) all vertical price and nonprice restraints are to be judged under the rule of reason because both types of restraints have potentially procompetitive effects on interbrand competition.[38]

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28 *Id.* at 731.

29 *Id.* at 726.

30 *Id.*

31 *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

32 *Id.* at 18.

33 *Id.* at 20. (Explaining that when the *per se* rule becomes economically unsound, "*stare decisis* is not an inexorable command.").

34 *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 882 (2007).

35 *Id.* at 900. The Court did, however, identify four instances where the use of minimum resale price maintenance might have anticompetitive effects: (1) when used to "facilitate a manufacturer cartel;" (2) when used to "organize cartels at the retail level;" (3) when used by a dominant retailer "to forestall innovation in distribution that decreases costs;" and (4) when used by a manufacturer with market power to "give retailers an incentive not to sell the products of smaller rivals or new entrants." *Id.* at 892-894.

36 *Id.* at 900, 881, 902. ("Our continued limiting of the reach of the decision in *Dr. Miles* and our recent treatment of other vertical restraints justify the conclusion that *Dr. Miles* should not be retained."). The Court, however, left it to the lower courts to establish a "litigation structure" to consider the effects of these restraints and "to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses." *Id.* at 898.

37 *Id.* at 899; *see also id.* at 900 ("Likewise, the boundaries of the doctrine of *per se* illegality should not be unmovable. For it would make no sense to create out of the single term 'restraint of trade' a chronologically schizoid statute, in which a 'rule of reason' evolves with new circumstances and new wisdom, but a line of *per se* illegality remains forever fixed where it was.").

38 *See Id.* at 904. ("There is likewise little economic justification for the current differential treatment of vertical price and nonprice restraints. Furthermore, vertical nonprice restraints may prove less efficient for inducing desired services, and they reduce intrabrand competition more than vertical price restraints by eliminating both price and service competition."); *See also Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 762 (1984) (in many cases, "the economic effect" of price and nonprice restrictions is "similar or identical.").

4. A Brief History of Vertical Restraints Under the Cartwright Act

A. Vertical Price Fixing

***Mailand* (1978):** In *Mailand v. Burckle*[39] – a 35 year old case expressly applying the holding in *Dr. Miles* to its interpretation of vertical minimum resale price maintenance under the Cartwright Act – the California Supreme Court held that vertical price fixing is a *per se* violation of the Cartwright Act.[40] Plaintiffs entered into a franchise agreement with the defendant to operate a drive-in dairy/gas station owned by defendants. The franchise agreement required plaintiffs to purchase gasoline from a specified oil company, and provided that the defendant could set the price of gasoline then sold by the plaintiffs in exchange for a guaranteed profit of 7% to the plaintiffs on the gasoline sales.[41] The defendant then collected a rebate from the oil company for gasoline it sold to the plaintiffs.[42] After two years of operating under the franchise agreement, the plaintiffs filed a lawsuit against the defendant, asserting claims for unlawful vertical price fixing in violation of the Cartwright Act. The defendant cross-complained for declaratory relief, seeking a determination that he had not violated the Cartwright Act.[43] The trial court found that neither the franchise agreement nor the arrangement between the defendant and the oil company violated the Cartwright Act.[44] The trial court found that the price fixing at issue was lawful "because defendant['s] rents and royalties depended on the gross income and sales, the reputation of the [dairy] depended on the gasoline prices, and plaintiffs had no experience at competitive pricing."[45] An appeal ensued.

On appeal to the California Supreme Court, the Court reversed the trial court's decision and found that the franchise agreement permitted the defendant to fix the price at which the plaintiffs could sell gasoline, and the arrangement between the oil company and the defendant – allowing the latter to set the price at which the oil company sold gasoline to plaintiffs – constituted price fixing, "a violation *per se*" of the Cartwright Act.[46]

At the beginning of its analysis, the *Mailand* court cited *Palsson*[47] for the proposition that "federal cases interpreting the Sherman Act are applicable in construing [the Cartwright Act]."[48] The *Mailand* court found that it was not "significant that the prices set pursuant to a price-fixing scheme are reasonable, for the 'reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow.'"[49] Relying on the now outdated and now overturned *Dr. Miles* holding, the *Mailand* court announced that "these rules apply whether the price-fixing scheme is horizontal or vertical; that is, whether the price is fixed among competitors."[50]

39 20 Cal. 3d 367 (Cal. 1978).

40 In *Harris v. Capitol Records Distributing Corp.*, 64 Cal. 2d 454 (Cal. 1966), a case brought under the California Practices Act, Cal. Bus. & Prof. Code §§ 17031, 17040, the California Supreme Court also made the comment, in *dicta*, that "[i]ndeed, a vendor is generally prohibited by law from conditioning his sale to a vendee on an agreement by the latter to maintain a minimum resale price; to do so would violate the Sherman Act and the Cartwright Act…." *Id.* at 463. But, *Harris* is 47 years old, and relied upon outdated and now overturned federal precedent. In the context of current economic thought, the Court's comment may be an intellectual obliquity.

41 *Mailand*, 20 Cal. 3d 367 at 371.

42 *Id.*

43 *Id.* at 372.

44 *Id.* at 374.

45 *Id.*

46 *Id.* at 376.

47 *Marin County Bd. Of Realtors, Inc. v. Palsson*, 16 Cal. 3d 920, 925 (Cal. 1976), holding that cases interpreting the Sherman Act are applicable to the Cartwright Act. *Palsson* is no longer controlling, following the California Supreme Court's decision in *Cal. ex rel. Van de Kamp v. Texaco, Inc.*, 46 Cal. 3d 1147, 1164 (Cal. 1988), *superseded by statute on other grounds*. In *Van de Kamp*, the Court detailed the historical and textual analysis of the Cartwright Act and concluded that it was patterned after the 1889 Texas act and the 1899 Michigan act – not the Sherman Act. *Id.* at 1154-1164. This analysis led the *Van de Kamp* Court to conclude that its "derivation" of the Cartwright Act in *Palsson* "was not completely accurate," and that judicial interpretation of the Sherman Act "is not probative on interpretation of the Cartwright Act." *Id.* at 1164, 1165, 1168, 1169.

48 *Mailand*, 20 Cal. 3d 367 at 376.

49 *Id.* at 377.

50 *Id.*

Rejecting the defendants' argument "that neither California law nor federal law prohibits price-fixing between noncompetitors," the *Mailand* court responded that "[t]he federal law in this regard is too well established to require extensive discussion,"[51] and "the '*per se* illegality of price restrictions has been established firmly for many years ….'"[52] Later in its decision, the *Mailand* court again noted that "federal cases interpreting the Sherman Act are applicable in construing the Cartwright Act. Section 16720 refers to a combination of 'two or more persons' to fix prices, and its language is not limited to combinations among competitors."[53]

Relying ***exclusively*** upon federal case law, *Mailand* held that the franchise agreement between the plaintiffs and the defendant constituted "acts by two or more persons" to fix or establish the price of a commodity within the meaning of the Cartwright Act, and was therefore "unlawful *per se*."[54] Because the agreement was unlawful *per se*, the *Mailand* court found that it was not necessary to "inquire whether these arrangements had an actual anticompetitive effect."[55]

***Spriggs* (1979):** In *R.E. Spriggs Co. v. Adolph Coors Co.*[56] – a 34 year old case applying the Colgate Doctrine to the Cartwright Act, and concluding that Coors was collaterally estopped from relitigating two prior federal appellate court findings that Coors' vertical "territorial restraints were ancillary to a [minimum resale] price fixing scheme" in violation of Section 1 of the Sherman Act[57] – a California appellate court implicitly held that Coors' imposition of territorial restraints upon its distributor (Spriggs) in order to facilitate a vertical price fixing scheme also was a *per se* violation of the Cartwright Act.[58]

But, the *Spriggs* decision also expressly relied on outdated and now overturned federal precedent.[59] *First*, the Court explicitly predicated its decision on the assumption that the interpretation of the Cartwright Act is consistent with federal cases interpreting the Sherman Act.[60] *Second*, the Court also explicitly predicated its decision on *Mailand*.[61] Because federal jurisprudence and current economic thought now are otherwise, and because Mailand provides no precedential effect, *Spriggs* also has no current precedential value.

***Kolling* (1982):** In *Kolling v. Dow Jones & Co.*[62] – a 31 year old case also applying the Colgate Doctrine to the Cartwright Act – another California appellate court, affirming a judgment following a jury trial below, held that the evidence presented by Kolling (Dow Jones & Co.'s distributor) was sufficient to support the jury's finding that Dow Jones & Co. engaged in coercive vertical minimum resale price fixing in *per se* violation of the Cartwright Act.

But, again, the *Kolling* decision was explicitly predicated upon outdated and now overruled federal case law, which in turn, was based upon now discredited economic analysis.[63] *Kolling* explicitly predicated its opinion upon the California Supreme Court's decision on *Mailand*. But, in what might

51 *Id.*

52 *Id. (citing, inter alia, Dr. Miles and Albrecht).*

53 *Id.*

54 *Id.* at 377-378, 380.

55 *Id.* at 300.

56 94 Cal. App. 3d 419 (Cal. App. 2nd Dist. 1979).

57 *Copper Liquor Inc. v. Adolph Coors Co.*, 506 F.2d 934 (5th Cir. 1975); *Adolph Coors Company v. F.T.C.*, 497 F.2d 1178 (10th Cir. 1974).

58 *Spriggs*, 94 Cal. App. 3d 419 at 431.

59 *Id.* at 426 n. 4.

60 *Id.* ("The parties as well as this court have proceeded on the assumption that federal cases interpreting the Sherman Act are applicable to problems arising under the Cartwright Act.") (citation and internal quote omitted).

61 *Id.* at 426.

62 137 Cal. App. 3d 709 (Cal. App. 1st Dist. 1982).

63 *Id.* at 717. ("The Cartwright Act is patterned after the federal Sherman Antitrust Act, so that decisions under the latter act are applicable to the former.") (citations omitted); *Id.* at 724. ("[T]he case will be quite rare in which a *per se* violation such as price fixing does not cause competitive injury.") (internal quotation marks omitted).

be described as tertiary jurisprudential misprision, *Kolling* also expressly found *Spriggs* to be "[p]articularly persuasive" as the underpinning rationale for its conclusion that Dow Jones & Co. had violated the Cartwright Act.[64]

***Chavez* (2001):** In *Bill Chavez v. Whirlpool Corporation*[65] – a 12 year old case applying the federal *Colgate* and *Monsanto*[66] Doctrines to the Cartwright Act – a California appellate court affirmed a lower court's dismissal of a consumer's claim against Whirlpool and one of its dealers, alleging that Whirlpool had required its dealer to maintain minimum resale prices for its products in *per se* violation of the Cartwright Act.[67] Not unlike *Mailand, Spriggs* and *Kolling*, the Court in *Chavez* predicated its decision on the then-applicable ancient federal antitrust jurisprudence.[68] And, not surprisingly, *Chavez* also paid judicial homage to the holdings in *Mailand, Spriggs* and *Kolling*, all of which – like *Chavez* – based their interpretation of the Cartwright Act on its harmonization with the Sherman Act.[69]

***Kunert* (2003):** In *Jon. L. Kunert v. Mission Financial Services Corporation*[70] – a 10 year old case that only indirectly involved the Cartwright Act[71] – a California appellate court, simply reiterating what it previously stated in *Chavez*, noted, in *dicta*, that "[a] vertical price-fixing or resale price maintenance agreement between supplier and distributor 'destroys horizontal competition as effectively as would a horizontal agreement among distributors or retailers [*citing Chavez*] and is *per se* unlawful under the Cartwright Act.'"[72]

Given that the California vertical price restraints cases under the Cartwright Act are not only dated, but also, were expressly predicated upon now repudiated prior federal economic and jurisprudential assumptions – which today no longer apply per se treatment to vertical price fixing – it stands to reason that *Mailand* and its progeny must be viewed as outdated, and no longer have precedential value.

B. Dual Distribution

Generally, "dual distribution" refers to a manufacturer's or supplier's decision to market goods using both independent distributors and its own distribution system in potential competition with its independent distributors. In dual distribution, a manufacturer simultaneously sells to independent distributors and to those who might otherwise be customers of those distributors. Typically, a manufacturer engaged in dual distribution will carefully delineate the customer classification or groups and the product and geographic markets for which the distributor will be responsible. The manufacturer's own distribution system may involve direct selling or sales through the manufacturer's company-owned subsidiaries or outlets.

***Guild Wineries* (1980):** In *Guild Wineries & Distilleries v. J. Sosnick & Son*[73] – a 33 year old opinion applying federal

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64 *Id.* at 722-723. ("Particularly persuasive in this respect is the case of *Spriggs v. Adolph Coors Co.* [citation omitted], where this court found evidence of price fixing by Coors in its dealings with beer distributors.").

65 93 Cal. App. 4th 363 (Cal. App. 2nd Dist. 2001).

66 *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984). In *Monsanto*, the Supreme Court held that a manufacturer's termination of one of its distributors in response to complaints from other distributors concerning the price discounting activities of the terminated distributor was not sufficient to infer a conspiracy to set resale prices in violation of the Sherman Act. *Id.* at 759, 763. Instead, there must exist additional evidence that "tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently" and that "reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Id.* at 764, 768.

67 *Chavez*, 93 Cal. App. 4th 363 at 373-374.

68 *Id.* at 369. ("The similar language of [the Sherman Act and the Cartwright Act] reflects their common objective to protect and promote competition. Since the Cartwright Act and the federal Sherman Act *share similar language* and objectives, California courts often look to federal precedents under the Sherman Act for guidance.") (citations omitted) (emphasis added).

69 *Id.* at 369-370.

70 110 Cal. App. 4th 242 (Cal. App. 2nd Dist. 2003).

71 *Id.* The plaintiffs brought claims under California's Unfair Practices Act (Bus. & Prof. Code § 17000 et seq.), but on appeal, argued that were the Court to permit it, plaintiffs could amend their complaint to state a valid claim for vertical price fixing in *per se* violation of the Cartwright Act. It was in that context that the appellate court noted as an aside that the Cartwright Act prohibits vertical resale price maintenance. *Id.* at 263.

72 *Id.*

73 102 Cal. App. 3d 627 (Cal. App. 1st Dist. 1980).

antitrust law to the Cartwright Act in the context of a dual distribution arrangement – a California appellate court held that it was *per se* unlawful "for a manufacturer who also distribute[d] its own products in one geographic area to terminate an independent distributor, when a substantial factor in bringing about the termination [was] the distributor's refusal to accept the manufacturer's attempt to enforce or impose territorial or customer restrictions among distributors."[74]

In *Guild Wineries*, the defendant (Guild) was a wine marketing cooperative controlled by its member growers, and had assigned to its 14 distributors territorial "areas of primary responsibility" (APRs).[75] The distributors' assigned territories were not "airtight" exclusive territories and, not infrequently, a distributor handled various accounts located within another distributor's assigned APR.[76] The plaintiff (Sosnick), a Guild wine products distributor, was assigned a territory in San Mateo County (the San Mateo APR), but historically distributed other products – *i.e.*, kosher food products – to the Lucky Stores chain located in the San Leandro APR.[77] During that period of time, the Guild wine products distributor who was assigned the Fresno APR, also handled the Lucky Stores chain.[78]

In 1975, the Fresno APR Guild wine products distributor stopped selling Guild wine products.[79] At that point, Sosnick began to sell Guild wine products to the Lucky Stores chain in the San Leandro APR, along with his other kosher food products.[80] At the same time, Guild decided to go into the wholesale distribution business too, and took over the Fresno APR.[81] In doing so, Guild also began handling the Lucky Stores chain in the San Leandro APR, and demanded that Sosnick stop distributing the Guild wine products to the Lucky Stores chain.[82] Sosnick refused to do so, and Guild thereafter terminated Sosnick's distributorship agreement.[83] Guild also sued Sosnick in an effort to collect money due on liquor that Guild had previously sold to Sosnick.[84]

In response to Guild's lawsuit, Sosnick filed a cross-complaint, alleging that Guild terminated Sosnick's distributorship agreement because Sosnick refused to cease selling Guild wine products to the Lucky Stores chain – *i.e.*, Guild wanted to handle the Lucky Stores account itself – and that Guild's conduct therefore constituted a *per se* unlawful *horizontal* restraint under the Cartwright Act.[85] The alleged *horizontal* restraint, according to Sosnick's cross-complaint, was between Sosnick and Guild alone, and the requisite "agreement, combination or conspiracy" could be inferred from Guild's "coercive" conduct – *i.e.*, seeking to effect an unlawful "territorial or customer allocation" arrangement between Guild and Sosnick.[86] Following the entry of judgment in accordance with a jury verdict in favor of Sosnick, Guild appealed.[87]

74 *Id.* at 630.

75 *Id.* at 630-631.

76 *Id.* at 631.

77 *Id.*

78 *Id.*

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.*

84 *Id.* at 630.

85 *Id.* at 636.

86 *Id.* Sosnick conceded that were the "rule of reason" made applicable to his claims, he could not prove any antitrust violation.

87 *Id.* at 630. *Guild Wineries* did not involve any claim that there was a "concert of action among distributors, or an overt conspiracy between Guild and the several distributors, in order to establish a *per se* violation of the antitrust laws." *Id.* at 636. Instead, *Guild Wineries* involved the alleged "coercive" conduct of Guild *alone* – *i.e.*, termination of the Sosnick distributorship agreement – and in affirming the judgment below, the California appellate court made what in today's evolved economic and antitrust jurisprudence would be an astonishing comment: "[i]f the arrangement or combination…is put together through the coercive tactics of the *seller alone*, this is sufficient" to find a horizontal *per se* violation of the Cartwright Act. *Id.* (quoting outdated federal antitrust case law) (internal quotation marks and citations omitted) (emphasis added).

The appellate court held that if Guild terminated Sosnick's distributorship agreement because Sosnick "refus[ed] to agree to turn the Lucky [Stores] account over to [Guild], then Guild's decision to terminate Sosnick's agreement was an unlawful refusal to deal – *i.e.*, a *horizontal per se* violation of the Cartwright Act.[88]

Recognizing that "[t]here may be occasional problems in differentiating vertical restrictions from horizontal restrictions originating in agreements among the retailers,"[89] the court nevertheless found that "Guild could not lawfully coerce a fellow distributor into allocating customers anymore than Sosnick and other distributors could lawfully agree to such an allocation."[90] Noting that "the Cartwright Act is patterned upon the federal Sherman Act and both have their roots in common law; hence federal cases interpreting the Sherman Act are applicable with respect to the Cartwright Act,"[91] the appellate court announced that *any* vertical customer or territorial restraint imposed by a manufacturer upon its distributor automatically becomes a *per se* unlawful horizontal restraint if, and when, the manufacturer also operates at the distributor's functional distribution level, and thereafter seeks to enforce the otherwise vertical territorial or customer restraints against the distributor.[92]

Today, however, these findings, based upon the ancient common law prohibition against "restraints on alienation," are viewed as outdated and inconsistent with the evolution of modern economic analysis.[93] Moreover, the federal case law that *Guild Wineries* relied upon is no longer an accurate reflection of federal jurisprudence in this area of antitrust law.[94]

5. The California Cartwright Act Cases Must be Reexamined

The California Supreme Court has not addressed vertical price fixing under the Cartwright Act since its decision in *Mailand* more than 35 years ago. Since then, there have been few California appellate court decisions addressing any type of price or non-price vertical restraints under the Cartwright Act. In stark contrast, during the past three decades, both the United States Supreme Court and a plethora of federal appellate and district courts have consistently vitiated the ancient "common law rule against restraints on alienation" approach to all vertical restraints – both price and non-price – under the Sherman Act. And, during that time, modern mainstream economic analysis evolved to the point where it now concludes that all vertical restraints, including price restraints, can have procompetitive effects on interbrand competition.

At some point, then – and it already is beginning to happen – the California courts will be asked to address the question whether – in today's economic world – there exists insufficient economic justification for the *per se* treatment

88 *Id.* at 633.

89 *Id.* at 635.

90 *Id.*

91 *Id.* (quoting the California Supreme Court in *Chicago Title Ins. Co. v. Great Western Financial Corp.*, 69 Cal. 2d 305(1968)).

92 *Id.* at 633-634 (relying upon *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F. 2d 1230 (3rd Cir. 1975); *Hobert Brothers Co. v. Malcolm T. Guilland, Inc.*, 471 F.2d 894 (5th Cir. 1973); *Krehl v. Baskin-Robbins Ice Cream Co.*, 78 F.R.D. 108 (C.D. Cal. 1978)).

93 Aside from the startling nature of the *Guild Wineries* holding in the context of current economic jurisprudence, even in the 1980's, it was questionable whether *Guild Wineries'* analysis authoritatively represented the proper antitrust approach to dual distribution issues. See *Dimidowich v. Bell & Howell*, 803 F.2d 1473 (9th Cir. 1986). In *Dimidowich*, the Ninth Circuit held, in the context of a similar, but "hybrid" dual distribution arrangement, that "the [*Guild Wineries*] analysis [was] flawed" because "[a]lthough a manufacturer's relationship with its distributors has a horizontal aspect when it acts as a distributor itself, it remains primarily a vertical relationship." Because *Guild Wineries* "ignore[d] the possible benefits to interbrand competition that can result from allowing restrictions in the interbrand market," the Ninth Circuit was "convinced [that] the California Supreme Court…would analyze both dual distribution and [the "hybrid" dual distribution arrangement addressed in *Dimidowich*] under the rule of reason." *Id.* at 1481-1483.

94 For example, recently, the Fifth Circuit outright rejected a dealer's claim that because the manufacturer was a dual distributor, operating both as a manufacturer and retailer in competition with its dealer, its pricing policy was a horizontal restraint in *per se* violation of the Sherman Act. *See PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, 615 F.3d 412, 420-421 (5th Cir. 2010). Both the Fifth Circuit and the district court below noted that, in addition to the Fifth Circuit, at least eight other federal circuits have applied the traditional rule of reason to dual distribution systems. *Id.* at 421 n.8 (2d Cir; 3d Cir; 4th Cir; 6th Cir; 7th Cir; 8th Cir; 9th Cir; and 10th Cir.)(citations omitted). *See also* ABA Section of Antitrust Law, *Antitrust Law Development* at 163 (7th ed. 2012) (explaining that "every decision since [*Sylvania* (1977)] has analyzed restraints imposed by a manufacturer that competes with its distributors under the rule of reason").

of vertical price fixing under the Cartwright Act in light of the dramatic evolution of economic thought since 1978, when the Supreme Court decided *Mailand*.

Recently, both California state and federal courts have begun this reexamination of California's prior precedents. In *Orchard Supply Hardware LLC v. Home Depot USA, Inc.*,[95] on April 12, 2013, the United States District Court for the Northern District of California rejected a plaintiff's argument that "the Cartwright Act *might* permit the plaintiff to allege a [*per se* unlawful] group boycott even in the absence of any arrangement between *horizontal* competitors."[96]

In *Orchard*, the plaintiff operated a chain of retail hardware stores in competition with Home Depot USA, Inc. (Home Depot).[97] On June 7, 2012, Home Depot publicly announced that it would enter into "exclusive supplier contracts with Key suppliers, so that it would become the principal or only supplier of the single most important kind of core hardware product – professional power tools and related accessories."[98] Within one week, two principal suppliers of power tools – Makita and METCo – notified Orchard that they no longer would sell Orchard professional power tools.[99]

Orchard then sued the two suppliers (Makita and METCo) and Home Depot, alleging, among other things, the existence of a horizontal group boycott in violation of both Section 1 of the Sherman Act and the Cartwright Act.[100] The district court granted defendants' motion to dismiss on the ground that Orchard had failed to establish that the suppliers had conspired with each other to boycott Orchard rather than each independently deciding that they would no longer deal with the Orchard chain of hardware stores.[101]

In response, Orchard argued that, although it could not allege a valid vertical group boycott cause of action under the Sherman Act,[102] a vertical conspiracy between Home Depot and one of the suppliers to boycott Orchard could constitute a valid vertical group boycott claim in per se violation of the Cartwright Act, referring the district court to two California state appellate court decisions.[103] The district court's response to this argument was blunt and to the point:

> The Cartwright Act, California's antitrust law, was modeled after the Sherman Act, and therefore the Court's analysis mirrors the analysis under federal law. Plaintiff argues the Cartwright Act might permit it to allege a group boycott even in the absence of any arrangement between horizontal competitors. But in both [*Redwood Theatres* and *Gianelli*] cited by Plaintiffs for that proposition, the California Court of Appeal explicitly based its reasoning on federal law and precedents. The U.S. Supreme Court has, subsequent to those cases, clarified that an unlawful group boycott claim must involve some horizontal arrangement [citing *Discon*]. This Court does not believe that Plaintiff can succeed in establishing a group boycott that constitutes a *per se* Cartwright Act violation on facts that are insufficient to state a violation of the Sherman Act. Therefore the Court finds that the Complaint fails to state sufficient facts to establish a viable Cartwright Act claim for the same reasons it has failed to state a violation of the Sherman Act.[104]

95 2013 U.S. Dist. LEXIS 53214 (N.D. Cal. 2013).

96 *Id.* at *17-18.

97 *Id.* at *2.

98 *Id.* at *3.

99 *Id.*

100 *Id.* at *6.

101 *Id.* at *6-10.

102 *See Nynex Corporation v. Discon, Inc.*, 525 U.S. 128 (1998).

103 *Id.* at *17-18. (referring the district court to *Redwood Theatres, Inc. v. Festival Enters., Inc.*, 200 Cal. App. 3d 687, 699 (Cal. App. 1st Dist. 1988); and *Bert G. Gianelli Distrib. Co. v. Beck & Co.*, 172 Cal. App. 3d 1020, 1044 (Cal. 2006).

104 *Id.* at *17-18.

On April 10, 2013, in *Darush v. Revision*,[105] the United States District Court for the Central District of California ostensibly went the other way: "[u]nder current California Supreme Court precedent, [pursuant to *Mailand*], vertical price restraints are *per se* unlawful under the Cartwright Act. [As evidenced by *Chavez*,] there is no indication that precedent is changing."[106]

In *Darush*, a retailer of skin care products (Darush) sued a competing retailer (Lovely Skin) and their supplier (Revision), alleging that Revision stopped selling its skin care products to Darush because it refused to comply with Revision's minimum resale price maintenance policy, following complaints by Lovely Skin about Darush's price discounting practices.[107] Darush's complaint alleged that Revision and Lovely Skin conspired with each other to eliminate retailers of Revision, like Darush, who refused to participate in the price-fixing agreement, in *per se* violations of the Cartwright Act.[108] Both defendants moved to dismiss.

In response to Lovely Skin's argument that the 2007 ruling in *Leegin* now applies to the Cartwright Act, and that, therefore, "the alleged price-fixing agreement [was] not *per se* unlawful, and should instead be judged by the rule of reason,"[109] the court commented that "it is unclear … whether [*Leegin*], which interpreted the Sherman Act, applies to the Cartwright Act."[110] According to this federal district court:

> [u]nder current California Supreme Court precedent, vertical price restraints are *per se* unlawful under the Cartwright Act [citing *Mailand*]. There is no indication that precedent is changing [citing *Chavez*]. While the Supreme Court's decision in *Mailand* did rely on Supreme Court authority, there is some indication that the opinion was derived from California authority as well. In any event, simply because the Supreme Court has changed course regarding the Sherman Act does not mean the California Supreme Court will regarding the Cartwright Act. Until the California Supreme Court has given a persuasive indication that it will, the Court cannot simply disregard its decision.[111]

6. The California Lower Courts are Not Bound by *Mailand*

The district court in *Darush* also stated that "[u]ntil the California Supreme Court has given a persuasive indication that it will [overrule *Mailand*], the Court

105 2013 U.S. Dist. LEXIS 60084 (C.D. Cal. 2013).

106 *See Id.* at *17 (citations omitted).

107 *Id.* at *2-6.

108 *Id.* at *3.

109 *Id.* at *15.

110 *Id.* at *16. (citing *Dimidowich*, 803 F. 2d 1473 at 1477, "The California Supreme Court has said that the Cartwright Act is similar in spirit and substance to the Sherman Act, but similar does not mean identical.") (internal quotations and citations omitted).

111 *Id.* at *16-17. (citations omitted). The "some indication that [the *Mailand*] opinion was derived from California authority as well" refers to the 67 year old California Supreme Court opinion in S*peegle v. Board of Fire Underwriters*, 29 Cal. 2d 34 (Cal. 1946). In *Speegle* (called into doubt by statute as stated in *Manufacturers Life Inc. Co. v. Superior Court*, 10 Cal. 4th 257, 279 (Cal. 1995)), the plaintiff, an insurance agent, had written agency contracts with defendants, an association of fire insurances and its members. *Id.* at 37. In early 1939, the defendants accused the plaintiff of violating his agency contracts by placing insurance with non-board members and, as a result, terminated the contracts. *Id.* The question presented to the *Speegle* court was whether the plaintiff stated a valid claim under the Cartwright Act – *i.e.* whether the application of the Cartwright Act to the business of insurance was unconstitutional. *Id.* at 38. The defendants asserted that the state statute was an unconstitutional regulation of interstate commerce. The *Speegle* court upheld the constitutionality of the Cartwright Act, finding it to be an implementation of *the common law prohibition against combinations in restraint of trade*, and held that it was applicable to the business of insurance. *Id.* at 42. In its underlying analysis, the *Speegle* court commented, in *dicta*, that "[t]he Cartwright Act merely articulates in greater detail a public policy against restraint of trade that has long been recognized at common law. Thus, under the common law of this state combinations entered into for the purpose of restraining competition and fixing prices are unlawful." (internal citations omitted). Id. at 44. Although the *Speegle* court's analysis generally described the public interest behind the Cartwright Act, it never addressed the issues in *Mailand* (*e.g.*, resale price maintenance). And, of course, *Mailand* was decided 32 years after *Speegle*. Federal case law interpreting the Sherman Act is the only real source of authority underlying the *Mailand* court's decision. Because federal case law now is otherwise, *Mailand* has no precedential value.

cannot simply disregard its decision."[112] But, this statement simply is incorrect. In *Newport Beach Country Club, Inc. v. Founding Members of the Newport Beach Country Club*,[113] a California intermediate appellate court declined to follow the ancient California Supreme Court precedent in *People v. Skidmore*.[114] Recognizing that an inferior court generally is bound by a higher court's decisional law, the court nevertheless noted that *Skidmore* "has not withstood the test of time," and "the authority of an older case may be as effectively dissipated by a later trend of decisions as by a statement expressly overruling it."[115] And a departure from *stare decisis* may be "ripe for renunciation or limitation" when later developments in the law "draw the viability [of the prior precedent] into question and dissipates whatever strength that case once had."[116] Finding "no justification for being bound by *Skidmore*," the court in *Newport Beach* pointedly said:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[117]

Similarly, in *Crown Homes, Inc. v. Neil Landes*,[118] a California appellate court held that antitrust claims arising under the Cartwright Act are arbitrable. In doing so, *Crown Homes* considered and rejected a prior California appellate court opinion holding otherwise,[119] "not because it was wrongly decided in 1982, but [because] the [federal] authority it relied upon is no longer viable and persuasive by reason of subsequent United States Supreme Court decisions."[120]

7. The State of California's Position on this Issue

The California Attorney General actively takes the position that, unlike current federal antitrust law, the Cartwright Act condemns vertical price fixing as *per se* illegal.[121] The Attorney General's position is based not only upon *Mailand*, but also, in reliance on the Cartwright Act's legislative history and the statute's circumscribed terminology.[122] Nevertheless, five points still must be considered in the course of this discussion. *First*, in *Van de Kamp*, the California Attorney General took the contrary position – *i.e.*, that the Cartwright Act *was in fact* modeled after the Sherman Act.[123] *Second*, the case law on this

112 2013 U.S. Dist. LEXIS 60084 at *17.

113 140 Cal. App. 4th 1120, 1123 (Cal. App. 4th Dist. 2006).

114 27 Cal. 287 (Cal. 1865) (holding that when a trial court judgment decides a case on two alternative grounds, but the appellate court affirms on the first ground only, the judgment nevertheless is binding on principles of *res judicata* on both grounds, even though the appellate court did not address the second ground).

115 *Newport Beach Country Club*, 140 Cal. App. 4th 1120 at 1129, 1131 (citations omitted).

116 *Id.* at 1131.

117 *Id.* at 1132 (quoting Justice Holmes).

118 22 Cal. App. 4th 1273 (Cal. App. 2nd Dist. 1994).

119 *Bos. Material Handling, Inc. v. Crown Controls Corp.*, 137 Cal. App. 3d 99.

120 *Crown Homes*, 22 Cal. App. 4th 1273 at 1276.

121 *See California v. Bioelements, Inc.*, 2011-1 Trade Cases (CCH) ¶ 77,306 (Sup. Ct. Riverside Cty. Jan. 11, 2011). (cosmetics company agreed to settle a complaint brought by State of California, alleging that it engaged in vertical price fixing in *per se* violation of the Cartwright Act by entering into dozens of contracts with other companies requiring them to sell the company's online products at prescribed prices); *California v. Derma Quest, Inc.*, 2010-1 Trade Cas. (CCH) ¶ 76,922 (Sup. Ct. Ala. Cty. Feb. 23, 2010). (cosmetics company agreed to terms of consent decree to settle a civil suit brought by the State of California alleging that it entered into distribution agreements with resale price maintenance components in *per se* violation of the Cartwright Act). Both *Bioelements* and *Derma Quest* were resolved by way of voluntary consent decrees. The California courts have not validated – indeed, have not been asked to address – the California Attorney General's position since *Leegin* was decided by the U.S. Supreme Court in 2007.

122 *See generally*, Antitrust and Unfair Competition Law Section, The State Bar of California, *California State Antitrust and Unfair Competition Law, Revised Edition*, Ch. 1 (Cheryl Lee Johnson, ed., Matthew Bender & Co., 2012); *see also Cal. ex rel. Van de Kamp v. Texaco Inc.*, 460 Cal. 3d 1147, 1164 (Cal. 1988) ("Historical and textual analysis reveals that the [Cartwright] Act was patterned after the 1889 Texas act and the 1899 Michigan Act, and not the Sherman Act. [. . . .] Hence judicial interpretation of the Sherman Act, while helpful, is not directly probative of the Cartwright drafter's intent, given the different genesis of the provision under review."); *Aryeh v. Canon Business Solutions, Inc.*, 55 Cal. 4th 1185, 1195 (Cal. 2013) ("We have observed that the Cartwright Act is broader in range and deeper in reach than the Sherman Act ….").

123 *See Van de Kamp*, 460 Cal. 3d 1147 at 1164. (Recognizing that the Attorney General relied upon "authorities stating that the Cartwright Act is modeled after the Sherman Act" in support of the position of the State of California).

legislative intent issue is all over the board.[124] *Third*, the Cartwright Act, just like the Sherman Act, "says nothing of *per se* rules. The *per se* rule is a procedural device created by the federal courts largely for their administrative convenience; it is not a substantive rule of law."[125] Thus, in any event, although the Cartwright Act does prohibit vertical price fixing, there is no prohibition imposed upon California courts – either in the legislative history or statutory terminology –preventing them from recognizing the evolution of economic thought and consonant federal jurisprudence, and thereby adopting a case-by-case rule of reason in evaluating all vertical restraints – both price and non-price – under the Cartwright Act. *Fourth*, when the California Supreme Court (and subsequent state appellate courts) decided *Mailand* and its progeny – and the California appellate court decided *Guild Wineries* – the then-existing federal precedent was the explicit and only basis for those decisions because, as the California Supreme Court stated in *Mailand*, "[t]he federal law in this regard is too well established to require extensive discussion."[126] That, stating it mildly, is no longer the case. Because the then-federal precedent has been overruled for quite some time now, these state court decisions must have no current precedential value either. *Fifth*, the California Supreme Court, *subsequent to Mailand*, has recognized (going as far back as 1984) that "[a]lthough the price-fixing illegal *per se* rule has its adherents, and is asserted to be economically reliable and administratively efficient, it has also suffered steady and growing criticism as an often arbitrary, mechanical, and inconsistently applied rule that ignores the realities of market power and net economic effects."[127]

Thus, *Guild* and *Mailand* and its progeny are no longer viable authority because the mainstream of federal antitrust thought relied on in those California decisions has since changed course with the advent of the United States Supreme Court decisions in *Kahn, Leegin* and other federal circuit decisions. This suggests that inferior California state courts are not bound by the prior 30-33 year old California appellate and Supreme Court cases holding that: (a) vertical price fixing is *per se* unlawful under the Cartwright Act; and (b) dual distribution is always a *per se* horizontal violation of the Cartwright Act. And, following the interregnum in California, precipitated by the *Leegin* decision in 2007, the California Supreme Court may well conclude that the Cartwright Act does not compel continued adherence to the per se rule against vertical price restraints.

Kaewsawang v. Sara Lee Fresh, Inc.

The most surprising development along these lines just recently occurred in the Superior Court for the County of Los Angeles.[128] In *Kaewsawang*, the plaintiffs – independent distributors of the Sara Lee Defendants pursuant to written

124 *See*, Appendix to this article.

125 *See Fisher v. City of Berkeley*, 37 Cal. 3d 644, 670 (Cal. 1984).

126 *See Mailand*, 20 Cal. 3d 367 at 377.

127 *See, Fisher*, 37 Cal. 3d 644 at 666-667. (citations omitted).

128 *Kaewsawang v. Sara Lee Fresh, Inc.*, Superior Court of Calif., Case No. BC360109 (May 6, 2013). On October 10, 2006, plaintiff Rodney Kaewsawang, a distributor of Sara Lee products pursuant to a written franchise agreement, filed a lawsuit against Sara Lee Corporation and its wholly-owned subsidiary, Sara Lee Fresh, Inc. (Sara Lee), alleging that he and other distributors had been misclassified as independent contractors, rather than employees in violation of various provisions of the California Labor Code (the Employee Misclassification Claims). Sara Lee filed an answer to the Employee Misclassification Claims, which denied the allegations. In his First Amended Complaint (October 23, 2006), Kaewsawang alternatively alleged that, in the event that he and other distributors were found not to be Sara Lee's employees, Sara Lee was guilty of having violated the Cartwright Act by imposing unlawful vertical price restraints upon the distributors' resale of Sara Lee products to various retail stores. In his Second Amended Complaint (May 15, 2008), Kaewsawang added Eddie Alsheikh, as a named plaintiff and putative class representative for the Employee Misclassification Claims. In February, 2011, Sara Lee defeated class certification on the Employee Misclassification Claims and, on May 3, 2012, the California Court of Appeal upheld the denial of certification. *Kaewsawang v. Sara Lee Fresh, Inc.*, 2012 Cal. App. Unpub. LEXIS 3386 (Cal. App. 2nd Dist. 2012). At that point, on September 27, 2012, plaintiffs added Sylvia Ingoglia as a named plaintiff and putative class representative for the *alternative* antitrust claims under the Cartwright Act. Plaintiffs also added Bimbo Bakeries USA, Inc. and Earthgrains Distribution, LLC as additional Defendants under a successor in interest theory of liability (together with Sara Lee, collectively referred to as the Sara Lee Defendants). On October 22, 2012, the Sara Lee Defendants filed a demurrer to the plaintiffs' Cartwright Act claims. On December 10, 2012, the trial court sustained the demurrer with leave to amend. On January 11, 2013, plaintiffs filed their Fourth Amended Complaint (the FAC), which is the subject of this article.

franchise agreements – alleged that the Sara Lee Defendants were engaged in the business of "producing, distributing and selling" sliced bread, rolls, danishes, donuts, bagels, cookies, cereal bars, muffins, cakes, pies, bread stuffing and packaged croutons (the Sara Lee Baked Goods).[129] The Sara Lee Baked Goods were sold by the Sara Lee Defendants to plaintiffs, who then resold "virtually all" of the Sara Lee Baked Goods exclusively to large retailers – *e.g.*, supermarkets, food stores and warehouse stores – including Vons, Safeway, Ralphs, Costco, Smart & Final, Sam's Club, Walmart, Target, and Food 4 Less (the Chain Stores).[130] The Chain Stores typically operated multi-unit outlets and their purchasing decisions were centralized – *e.g.*, similar to, if not actually, national accounts.[131]

The plaintiffs were granted the right to purchase and resell the Sara Lee Baked Goods only because they had voluntarily entered into written franchise agreements with the Sara Lee Defendants.[132] Pursuant to the terms of the franchise agreements, the plaintiffs:

- Were assigned a specific geographic territory – *i.e.*, a "Sales Area" or "Route"– and agreed that they would not resell the Sara Lee Baked Goods outside of their assigned territory;[133]
- Delegated to the Sara Lee Defendants the right to negotiate all price and non-price terms with the Chain Stores for the purchase by those retailers of the Sara Lee Baked Goods from the plaintiffs;[134]
- Were required to"use hand-held devices and computer systems that [were] pre-programmed with the prices 'fixed' [–*i.e.*, negotiated –] by [the Sara Lee Defendants] and the Chain Stores;[135]
- Agreed to fulfill the non-price terms of the negotiated agreements between the Sara Lee Defendants and the Chain Stores, such as "arrange goods on the shelves, rotate the stock, display advertising materials," and "keep the shelves neat, full and clean," as well as "remove damaged and 'over-code' goods ('stale' products that are beyond their 'sell-by' date)" and "such other activities that [the Sara Lee Defendants] and the Chain Stores from time to time mandate[d]";[136] and
- Understood that the Chain Stores would pay the Sara Lee Defendants – not the plaintiffs – for their purchases of the Sara Lee Baked Goods; and the Sara Lee Defendants thereafter would remit to the plaintiffs a "settlement" payment.[137]

The Sara Lee Defendants negotiated all price and non-price terms of sale with the Chain Stores. Pursuant to these "Customer Marketing Agreements,"[138] the Sara Lee Defendants, in conjunction with the price setting negotiations, also negotiated a "planogram" with the Chain Stores for their benefit, which included the amount of shelf

129 *Kaewsawang* Case NO. BC360109 (May 16, 2013) FAC at ¶ 27, 31.

130 *Id.* at ¶ 32.

131 *Id.* at ¶ 64.

132 *Id.* at ¶ 38.

133 *Id.* at ¶ 39-40.

134 *Id.* at ¶ 43, 66-70.

135 *Id.* at ¶ 66.

136 *Id.* at ¶ 42.

137 *Id.* at ¶ 73. Rather than sell the Sara Lee Baked Goods to the plaintiffs – *i.e.*, transfer title to them – and allow the plaintiffs to resell to the Chain Stores, the Sara Lee Defendants might simply have retained the plaintiffs as commissioned sales agents to perform the delivery and service fulfillment functions that were set forth in their franchise agreements. *See e.g., Gentis v. Safeguard Gus. Sys.*, 60 Cal. App. 4th 1294 (Cal. App. 2d Dist. 1998) (franchisees were commissioned sales agents who solicited orders, followed leads and provided customer service, but never bought inventory or took title to any goods). This would have obviated any potential vertical price fixing claim in the first instance. *See United States v. General Electric*, 272 U.S. 476 (1926) (holding that the *per se* rule against resale price maintenance does not apply to agency relationships or where a good is sold on consignment).

138 The plaintiffs described the agreements between the Sara Lee Defendants and the Chain Stores as "slotting fee agreements, authorization agreements and/or Customer Marketing Agreements whereby [the Sara Lee Defendants] committed to deliver [the Sara Lee Baked Goods] and the Chain Stores agreed to provide shelf space and displays …." *Kaewsawang* Case No. BC360109 (May 16, 2013) FAC at ¶ 33. Thus, according to plaintiffs, the Sara Lee Defendants acted as the "category manager" or "category captain," for the Chain Stores, and was responsible for "setting the schematics for all products (*i.e.*, both Defendants' products and competitors' products) in a particular area in the Chain Stores." *Id.* at ¶ 46.

space, type and frequency of promotions, deals and in-store demonstrations, and stocking and display arrangements.[139]

The franchise agreements expressly provided that the independent distributors had appointed the Sara Lee Defendants as their "agent" in negotiating the price and non-price terms for the sales of the Sara Lee Baked Goods by the distributors to the Chain Stores.[140] Nevertheless, the plaintiffs alleged that, pursuant to the 35 year old California Supreme Court decision in *Mailand v. Burckle*,[141] the Sara Lee Defendants, by negotiating and establishing with the Chain Stores the price terms of the plaintiffs' sales to the Chain Stores, "engaged in vertical price fixing in *per se* violation of the [Cartwright Act]."[142]

The plaintiffs also alleged that the Sara Lee Defendants engaged in dual distribution of the Sara Lee Baked Goods.[143] The alleged "dual distribution," however, apparently consisted of vertical non-price territorial and customer restraints.[144] The plaintiffs alleged that, because they were not allowed to sell the Sara Lee Baked Goods *outside* of their assigned geographic territories – and, conversely, that the Sara Lee Defendants were not allowed to sell the Sara Lee Baked Goods *within* the distributors' assigned territories – the vertical non-price restraint necessarily "effect[ed] a division of customers and territories that completely eliminate[d] competition between plaintiffs and the [putative] Class members, on the one hand, and [the Sara Lee] Defendants' employee-distributors, on the other, for the business of retail stores."[145]

139 *Id.* at 34, 44. Competition for distribution often involves contracting activity regarding the retailer's decision to carry, promote or place a particular product. This process includes business practices such as manufacturer payments to retailers for floor space in the form of wholesale price discounts, slotting allowances, market share discounts and bundled rebates, coupled with category management. These arrangements are "commonplace among retailers of a wide variety of products." *See Church & Dwight Co., Inc., v. Mayer Laboratories, Inc.*, 2011 U.S. Dist. LEXIS 35969 (N.D. Cal. 2011) *49-50; *see also El Aguita Food Prods., Inc., v. Gruma Corp.*, 301 F. Supp. 2d 612, 620 (S.D. Tex. 2003) ("It is well known that the retailers and manufacturers engage in negotiations that result in the payment of slotting promotionals, co-op advertising, and other allowances or discounts that favor the retailers."). Slotting allowances and analogous payments for promotional displays require the manufacturer to pay the retailer up front for space time per unit, rather than for each unit that the retailer sells. Bundled rebates are another form of manufacturer payment to retailers for distribution. They are characterized by retailer discounts from the manufacturer that increase when the retailer also purchases the manufacturer's products in other markets. A category management arrangement is a business practice by which a retailer plans its strategy on a product category rather than on a brand-by-brand basis. Products are grouped into commonly understood categories and the retailer selects a specific manufacturer to act as the "Category Captain," sometimes in return for a cash payment to the retailer for this privilege. The Category Captain then performs category retail management tasks not only for its own brands, but also for those of competing manufacturers. Such category management tasks include choosing the most appropriate assortment, placement, pricing and promotion of products carried at the retail store level. The practice allows a single manufacturer to control decisions of an entire product category within a given retail chain. These arrangements are generally analyzed under the "rule of reason" framework, assessing whether the defendant has market power – *i.e.*, the ability to restrict output and maintain or raise prices – and whether the challenged conduct forecloses competition in a substantial share of the line of commerce involved, and whether there is likely to be competitive harm. S*ee Church & Dwight Co., Inc.* at *37-38.

140 *See* fn. 134.

141 20 Cal. 3d 367, 377 (Cal. 1978).

142 *Kaewsawang* Case No. BC360109 (May 16, 2013) FAC at ¶ 78. According to the plaintiffs, this vertical price restraint resulted in the maintenance of prices charged by the independent distributors at "supra-competitive levels, which adversely impacts the price ultimately paid by the consumer." *Id.* at ¶ 79. These allegations compel two observations: *first*, it is not "plausible on its face," (*See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)), that the Sara Lee Defendants' negotiation of price and non-price sales terms with the Chain Stores in a competitive interbrand market – on behalf of the independent distributors, who voluntarily delegated that function to the Sara Lee Defendants by contractual agreement – can constitute unlawful "price-fixing" in the first instance. And, *second*, it is similarly implausible and counterintuitive to suggest that the negotiated terms of purchase can result in "supra-competitive" price levels.

143 *Kaewsawang* Case No. BC360109 (May 16, 2013) FAC at ¶ 37.

144 *Id.* at ¶ 83-85.

145 *Id.* at ¶ 83. The plaintiffs also alleged that, "by dividing customers and territories between its own employee-distributors on the one hand, and plaintiffs and [putative] Class members, on the other, the price at which the [Sara Lee] [B]aked [G]oods are sold to retail stores can be maintained at supra-competitive levels, which adversely impacts the price ultimately paid by the consumer." *Id.* at ¶ 85. However, in response, two points are appropriate: *First*, the plaintiffs' allegations suggest nothing more than that the vertical non-price restraint has effects on *intrabrand* competition – but, "[v]ertical restrictions promote *interbrand* competition by allowing the manufacturers to achieve certain efficiencies in the distribution of products. These 'redeeming virtues' are implicit in every decision sustaining vertical restrictions under the rule of reason." *Bert G. Gianelli Distributing Co. v. Beck & Co.*, 172 Cal. App. 3d 1020, 1048 n. 9 (Cal. App. 1st Dist. 1985), disapproved on other grounds in *Dore v. Arnold Worldwide, Inc.*, 39 Cal. 4th 384, 394 (Cal. 2006) (citations omitted) (emphasis added). *Second*, in point of fact, because the plaintiffs designated the Sara Lee Defendants as their "agent" to negotiate their price and non-price terms of sale to the Chain Stores when they voluntarily entered into the franchise agreements, the territorial and customer restrictions could not have an effect on *intrabrand* competition either, as alleged by plaintiffs. Essentially, the plaintiffs' claim was nothing more than contractual – *i.e.*, their real complaint was that they were dissatisfied with the "agency" term of their franchise agreements.

According to the plaintiffs, and expressly predicated upon the 33 year old California appellate court *Guild Wineries* decision,[146] "[s]ince the [Sara Lee] Defendants operate on the distribution level as well as the manufacturing level [– albeit in separate territories –], the territorial and customer restrictions that the [Sara Lee] Defendants impose[d] on [the independent distributors] constitute[d] a horizontal restraint on competition in per se violation of the [Cartwright Act]."[147]

***Sara Lee* Defendants' Demurrer.** The Sara Lee Defendants filed a demurrer to the FAC. In support of its demurrer, the Sara Lee Defendants argued, among other things, that the franchise agreement "in which Plaintiffs agreed to allow [the Sara Lee Defendants] to engage in such negotiations on their behalf should [not] be condemned *per se* as price fixing [or] territorial divisions among horizontal competitors."[148] The Sara Lee Defendants argued further that "[Kaewsawang's] only support [– *i.e.*, *Mailand* and *Guild Wineries* –] is outdated and criticized authority that predates decisions of the U.S. Supreme Court which reject[ ] the earlier cases [– *i.e.*, *Mailand* and *Guild Wineries* –] on which that authority rests."[149] Aiming directly at the ancient and outdated *Mailand* and *Guild Winerie*s cases, the Sara Lee Defendants contended that the *Leegin* decision required that the court now apply the rule of reason analysis to the alleged price-fixing claim and, further, that "[n]o court has ever before applied the *per se* rule to strike down a dual distribution scheme voluntarily agreed to by the manufacturer, distributors and retailer."[150]

The rule of reason, of course, requires an antitrust plaintiff to demonstrate that the defendant's conduct unreasonably restrains competition in a relevant market before it will be found unlawful.[151] In order to make this demonstration, "a plaintiff must allege that the defendant has market power [– i.e., the ability to restrict output and maintain or raise prices –] within a relevant market. That is, the plaintiff must allege both that a relevant market exists and that the defendant has power within that market."[152]

In *Kaewsawang*, as an alternative to the plaintiffs' *per se* antitrust claims, the plaintiffs alleged that the Sara Lee Defendants had "market power" in a defined "relevant market," consisting of the Sara Lee Baked Goods alone. Not surprisingly, the Sara Lee Defendants attacked the plaintiffs' "defined market" on grounds that have become very familiar in franchisee antitrust claims: "[i]n cases like this, the market power of Defendants must be assessed at the 'pre-contract' stage. Plaintiffs do not, and cannot, assert [the Sara Lee Defendants] had market power in the market for franchise opportunities, which is indisputably highly competitive.[153] For this – and other reasons, the Sara Lee

146 *See Guild Wineries* and *Distilleries v. J. Sosnick & Son*, 102 Cal. App. 3d 627, 633 (Cal. App. 1st Dist. 1980).

147 *Kaewsawang* Case No. BC360109 (May 16, 2013) FAC at ¶¶ 84, 211. Although not specifically alleged in the FAC, the plaintiffs implied that the Sara Lee Defendants also sold to the Chain Stores on a few limited routes within the independent distributors' assigned territories. *Id.* at ¶ 211. This, apparently, was the basis for the plaintiffs' claim that the Sara Lee Defendants were engaged in "dual distribution."

148 Sara Lee Defendants' Memorandum in Support of Demurrer to the FAC at 7, *Kaewsawang* Case No. BC360109 (May 16, 2013).

149 *Id.*

150 *Id.* at 9. As the Sara Lee Defendants correctly explained, "[t]o the contrary, virtually every decision since *Sylvania* has analyzed restraints imposed by a manufacturer that competes with its distributors under the rule of reason." (*citing* ABA Section of Antitrust Law, *Antitrust Law Development* at 163 (7th ed. 2012)). (internal quote omitted).

151 *See Texaco, Inc. v. Dagher*, 547 U.S. 1, 4 (2006).

152 *See Oracle America, Inc. v. Cedarcrestone, Inc.*, 2013 U.S. Dist. LEXIS 48538 *18 (N.D. Cal. 2013) (*quoting Newcal Indus., Inc. v. Ikon Office Solutions*, 513 F.3d 1038, 1044 (9th Cir. 2008)).

153 Sara Lee Defendants' Memorandum in Support of Demurrer to the FAC at 10-12, Kaewsawang Case No. BC360109 (May 16, 2013) (*citing Tominaga v. Sheperd*, 682 F. Supp. 1489, 1494 (C.D. Cal. 1988); *Mozart Co. v. Mercedes-Benz of North America, Inc.*, 833 F.2d 1342, 1346-47 (C.D. Cal. 1987); *Exxon Corp. v. Superior Court*, 51 Cal. App. 4th 1672, 1681, 1686 (Cal. App. 6th 1997); and, naturally, the ubiquitous (in franchise antitrust cases) *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 440-41 (3rd Cir. 1997)).

Defendants also demurred to the plaintiffs' California antitrust claims.[154]

***Kaewsawang's* Opposition to the Demurrer.** The plaintiffs' opposition to the demurrer was as simple as it was straightforward:

> At the heart of Defendants' demurrer are two purely legal questions in antitrust law. The first is whether vertical price fixing – also known as resale price maintenance – is (a) *per se* unlawful, or (b) subject to the rule of reason. The second is whether, in the context of a dual-distribution system, territorial restrictions imposed by a manufacturer on its distributors are (a) *per se* unlawful, or (b) subject to the rule of reason.
>
> With respect to both questions, the answer under California law is a per se rule applies. The first question was answered in [*Mailand*], where the Supreme Court held that vertical price fixing is *per se* unlawful under the [Cartwright Act]. This holding has been reiterated in a number of subsequent California appellate decisions. The second question was answered in [*Guild Wineries*] where the Court of Appeal held that in the context of a dual-distribution system, territorial restrictions imposed by a manufacturer on its distributors are *per se* unlawful under the Cartwright Act. This holding has been criticized by the Ninth Circuit, but it has never been overruled.[155]

The Los Angeles Superior Court's Decision.[156] Without any trepidation whatsoever, the court summarily disposed of the plaintiffs' per se vertical price fixing antitrust claim under *Mailand*:

> …Plaintiffs argue that (1) [*Mailand*] is binding on this Court, (2) that the Cartwright Act is broader than the federal Sherman Act […], and (3) that interpretation of federal law are not conclusive… when construing the Cartwright Act […].
>
> The problem with Plaintiffs' argument, however, is that the *Mailand* court (as well as the Court in [*Chavez*]) expressly relies on the U.S. Supreme Court's ruling in [*Dr. Miles*]. It was that case, however, which was expressly overturned by [*Leegin*]. Thus, because the *Mailand* Court expressly relied on a case that has since been overturned by the U.S. Supreme Court, and because interpretations of the federal Sherman Act are applicable to issues arising under the Cartwright Act [citing *Palsson*], it remains unlikely that the *Mailand's* court holding is still applicable in light of *Leegin*.[157]

And, with equal celerity and unequivocalness, the court dispatched the plaintiffs' per se "dual distribution" antitrust claim under *Guild Wineries*:

… [*Guild Wineries*] has been cited by only one published California case and not even for the principle which

154 The Sara Lee Defendants also argued – successfully – that the plaintiffs failed to allege any plausible "antitrust injury" resulting from "the [alleged anticompetitive aspects or effects of [the Sara Lee Defendants'] conduct, as opposed to injury resulting from neutral or even procompetitive aspects." Sara Lee Defendants' Memorandum in Support of Demurrer to the FAC at 5, *Kaewsawang* Case No. BC360109 (May 16, 2013) (*citing Flagship Theaters of Palm Desert, LLC v. Century Theatres, Inc.*, 198 Cal. App. 4th 1366, 1380 (Cal. App. 2d Dist. 2011)).

155 Plaintiffs' Memorandum in Opposition to the Sara Lee Defendants' Demurrer, at 1 [internal citations omitted], *Kaewsawang* Case No. BC360109 (May 16, 2013).

156 At the outset, the Court quickly decided that Kaewsawang's "price fixing" allegations did not constitute "price fixing" in the antitrust sense at all. Court's Ruling on Submitted Matter Re Demurrer at 7, *Kaewsawang* Case No. BC360109 (May 16, 2013). This is intuitive "because the prices are 'negotiated'" and "it is unclear how Defendant and the Chain Stores conspired to engage in price fixing." *Id.* ("Thus it would appear that, in this case, the market sets the relevant prices" and that "the prices have been determined 'by the interplay of the economic force of supply and demand.'") *Id.* The court could have relied on this alone as justification for dismissing Kaewsawang's price fixing and dual distribution antitrust claims, but went on to directly confront the *Mailand* and *Guild Wineries* issues.

157 *Id.* at 8-9 (internal citations omitted). The Court also quickly disposed of Kaewsawang's vertical price restraints claim under the rule of reason, citing the Third Circuit's decision in *Queen City*. ("Plaintiffs still have not defined the relevant market nor have they alleged that [the Sara Lee Defendants have] 'market power'" because the "relationship …, is entirely based on the contractual distribution agreement between the parties….") *Id.* at 10.

Plaintiffs assert. [[158]] Second, the other cases which cite it are federal cases which criticize it. Third, [*Guild Wineries*] relied on only federal law, which has moved away from the *per se* rule to the rule of reason, noting that the *per se* rule is applied when the restraint is manifestly anti-competitive and lacking in any redeeming value.[159]

For these reasons, the Court dismissed the plaintiffs' Cartwright Act claims, without leave to amend.[160] The Employee Misclassification Claims remain.[161]

8. Conclusion

It seems fair to say that *Mailand* and *Guild Wineries* are no longer binding law in California. Still, it is an open question whether the California courts will accept – and find applicable to the Cartwright Act – the U.S. Supreme Court's view that "[j]ust as the common law adapts to modern understanding and greater experience, so too does the . . . prohibition on 'restraints of trade' evolve to meet the dynamics of present economic conditions."[162] And, if so, the question central to that discussion will be whether the California courts will accept the Supreme Court's conclusion that the "economic literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance."[163] What is entirely clear at this point is that the lower California courts are beginning to address all of this, and the California Supreme Court soon will be asked to decide the standard that today is applicable to vertical price fixing under the Cartwright Act.

158 *Id.* at 13 (*citing Kolling*).

159 *Id.* The Court also recognized that the plaintiffs did not even allege any "dual distribution" arrangement at all, given that the franchise agreement demonstrated that the parties were operating in separate and distinct (mutually exclusive) geographic territories. Thus, the Sara Lee Defendants were not operating in competition with the plaintiffs at the same distributional level. *Id.* And, because they failed to allege any cognizable "relevant market," their dual distribution antitrust claim could not, in any event, state a cause of action under the rule of reason. *Id.* at 10.

160 *Id.* at 16. The Court also dismissed the Unfair Competition Law Claim (Bus. & Prof. Code §§ 17200, et al.) because the underlying antitrust claims – constituting the alleged wrongful act – had been dismissed. *Id.*

161 The Sara Lee Defendants still must defend *Kaewsawang's* individual Employee Misclassification Claims. Recently, employee misclassification claims in the franchise context have been proliferous. *See e.g., Awuah v. Coverall North America, Inc.*, 707 F. Supp. 80 (D. Mass. 2010); *De Giovanni, et al. v. Jani-King Int'l, Inc., et al.*, No. 07-10066-MLW (D. Mass. 2012); *Teng Moua v. Jani-King of Minn., Inc.*, 2011 U.S. Dist. LEXIS 104026 (D. Minn. 2011); *Myers v. Jani-King of Phila., Inc.*, 2009 U.S. Dist. LEXIS 68192 (E.D. Pa. 2009); *Juarez v. Jani-King of Cal., Inc.*, 2012 U.S. Dist. LEXIS 19766 (N.D. Cal. 2012). *Terrelle Ford v. Palmden Rests.*, 2012 Cal. App. Unpub. LEXIS 5596 (Cal. App. 4th Dist. July 31, 2012). *Patterson v. Domino's Pizza, LLC*, 2012 Cal. LEXIS 9596, 1 (Cal. Oct. 10, 2012).

162 *Leegin*, 551 U.S. 877 at 899.

163 *Id.* at 889; *see also Id.* at 882 ("Respected economic analyst, furthermore, conclude that vertical price restraints can have procompetitive effects.").

Appendix

Treatment of harmonization between Cartwright Act and Sherman Act by California courts:

Cartwright Act Modeled After Sherman Act

- *Chicago Title Ins. Co. v. Great Western Financial Corp.*, 69 Cal. 2d 305 (Cal. 1968) (The Cartwright Act is "patterned upon the federal Sherman Act and both have their roots in the common law; hence federal cases interpreting the Sherman Act are applicable with respect to the Cartwright Act."); *Id.* at 329 (Mosk, J. dissenting) ("The Cartwright Act […] is patterned after the federal Sherman and Clayton Act, and California decisions consistently rely on federal decisions in interpreting our act.");
- *Mailand v. Burckle*, 20 Cal. 3d 367, 376 (Cal. 1978) ("Since the Cartwright Act is patterned after the Sherman Act (15 U.S.C. § 1 et seq.), federal cases interpreting the Sherman Act are applicable in construing our state laws.");
- *G.H.I.I. v. MTS, Inc.*, 147 Cal. App. 3d 256, 265 (Cal. App. 1st Dist. 1983) (same);
- *Kolling v. Dow Jones & Co.*, 137 Cal. App. 3d 709, 717 (Cal. App. 1st Dist. 1982) (same);
- *Exxon Corp. v. Superior Court*, 51 Cal. App. 4th 1672, 1681 n. 4 (Cal. App. 6th Dist. 1997) ("State courts have liberally applied federal Sherman Act doctrine in interpreting the Cartwright Act.");
- *GSI Tech., Inc. v. Cypress Semiconductor Corp.*, 2012 U.S. Dist. LEXIS 93888, 20-21 (N.D. Cal. 2012) ("The Cartwright Act […] 'was modeled after the Sherman Act.' […] Accordingly, analysis under the Cartwright Act 'mirror the analysis under federal law.' [Internal citations omitted.]);
- *R. E. Spriggs Company, Inc. v. Adolph Coors Co.*, 94 Cal. App. 3d 419, 426 n. 4 (Cal. App. 2nd Dist. 1979) (acknowledging that the court has proceeded on the assumption that the interpretation of the Sherman Act is applicable to problems arising under the Cartwright Act);
- *Crown Homes, Inc. v. Landes*, 22 Cal. App. 4th 1273, 1279 (Cal. App. 2d Dist. 1994) (California appellate court follows the Supreme Court and disregards California precedent that relied upon federal cases later rejected by the Supreme Court);
- *Exxon Corp. v. Superior Court*, 51 Cal. App. 4th 1672, 1680 n. 4 (Cal. App. 6th Dist. 1997) ("State courts have liberally applied federal Sherman Act doctrine in interpreting the Cartwright Act.");
- *Marin County Bd. of Realtors, Inc. v. Palsson*, 16 Cal.3d 920, 925 (Cal. 1976) ("[F]ederal cases interpreting the Sherman Act are applicable to problems arising under the Cartwright Act.");
- *Blank v. Kirwan*, 39 Cal. 3d 311, 320 (Cal. 1985) ("In interpreting the Cartwright Act, we properly look to the Sherman Act and cases construing it….");
- *Morrison v. Viacom, Inc.*, 66 Cal. App. 4th 534, 541 (1998) (Cal. App. 1st Dist. 1998) ("Section 16727, added to the Cartwright Act in 1961, was patterned after section 3 of the federal Clayton Act, and cases interpreting Clayton Act section 3 are applicable when construing section 16727.").

Sherman Act Provides Guidance on Cartwright Act

- *Irving v. Lennar Corp.*, 2013 U.S. Dist. LEXIS 47206, *46 (E. D. Cal. 2013) ("California looks to cases interpreting the Sherman Act for guidance in interpreting the Cartwright Act.");
- *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 369 (Cal. App. 2nd Dist. 2001) ("The similar language of the two acts reflects their common objective to protect and promote competition.");

- *Morrison v. Viacom, Inc.*, 66 Cal. App. 4th 534, 541 (1998) (Cal. App. 1st Dist. 1998) ("Federal law interpreting Sherman Antitrust Act *section 1* (15 U.S.C. § 1) is useful when addressing issues arising under [the Cartwright Act].");
- *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1476 (9th Cir. 1986) (same);
- *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.*, 198 Cal. App. 4th 1366, 1374 (Cal. App. 2d Dist. 2011) ("[A]lthough the Cartwright Act was not patterned after the Sherman Act [internal citations omitted], federal case law interpreting the Sherman Act is often a useful aid in interpreting the Cartwright Act.");
- *Guild Wineries & Distilleries v. J. Sosnick & Son*, 102 Cal. App. 3d 627, 633 (Cal. App. 1st Dist. 1980) (noting that the Cartwright Act is patterned upon the Sherman Act as "both have their roots in common law; hence federal cases interpreting the Sherman Act are applicable with respect to the Cartwright Act") (internal citations omitted.);
- *Vinci v. Waste Management, Inc.*, 36 Cal. App. 4th 1811, 1817 (Cal. App. 1st Dist. 1995) (Because the Cartwright Act has objectives identical to the federal antitrust acts, the California courts look to cases construing the federal antitrust laws for guidance in interpreting the Cartwright Act.").

Cartwright Act Different From Sherman Act

- *Cal. ex rel. Van de Kamp v. Texaco, Inc.*, 460 Cal. 3d 1147, 1164 (Cal. 1988) ("[H]istorical and textual analysis reveals that the [Cartwright] Act was patterned after the 1889 Texas act and the 1899 Michigan act, and not the Sherman Act. […] Hence judicial interpretation of the Sherman Act, while often helpful, is not directly probative of the Cartwright drafters' intent, given the different genesis of the provision under review."), superseded by statute on other grounds;
- *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1477 (9th Cir. 1986) ("'Similar' does not mean identical. California courts have never said that federal authority is *binding* on them, even when there is California authority to the contrary, and California courts occasionally have rejected federal precedent in construing their act.") (emphasis in original); *Id.* ("[T]o the extent the California courts' interpretation of the Cartwright Act is different from federal interpretations of the Sherman Act, we must respect those differences, and follow the California courts' interpretation…");
- *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 985 (9th Cir. Cal. 2000) (citing "differences in statutory wording and legislative history that lead, in some respects, to different results."); *Id.* at 998 (Paez, R. dissenting) (acknowledging that California courts recognize that the Sherman and Cartwright Acts "differ in legislative intent and history, as well as in statutory construction and language");
- *Aryeh v. Canon Business Solutions*, 55 Cal. 4th 1185, 1195 (Cal. 2013) ("Interpretations of federal antitrust law are at most instructive, not conclusive, when construing the Cartwright Act, given that the Cartwright Act was modeled not on federal antitrust statutes but instead on statutes enacted by California's sister states around the turn of the 20th century.");
- *Cianci v. Superior Court*, 40 Cal. 3d 903, 920 (Cal. 1985) ("[W]e have observed that the Cartwright Act is broader in range and deeper in reach than the Sherman Act….");
- *Aryeh v. Canon Business Solutions, Inc.*, 55 Cal. 4th 1185, 1195 (Cal. 2013) ("Interpretations of federal antitrust law are at most instructive, not conclusive, when construing the Cartwright Act, given that the Cartwright Act was modeled not on federal antitrust statutes but instead on statutes enacted by California's sister states around the turn of the 20th century.").