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THE CALIFORNIA LAW REVISION COMMISSION SEEKS COMMENT ON TENTATIVE RECOMMENDATION THAT CALIFORNIA LEGISLATURE ADOPT ANTI-MONOPOLY LAW

Tentative Recommendation Would Revise California's Cartwright Act To Adopt Single-Firm Conduct Prohibitions Substantially Broader Than Federal Antitrust Law and Prohibit Single-Firm Restraints of Trade

December 16, 2025

Pursuant to a request of the California Legislature, the California Law Revision Commission ("Commission")[1] has prepared a tentative recommendation ("recommendation") that the Legislature revise the Cartwright Act[2] ("Act"), California's antitrust statute, to prohibit monopolization (and its buy-side equivalent, acts to monopsonize) and single-firm restraints of trade.[3] The Commission's recommendation, if presented to and adopted by the Legislature as drafted, would direct state courts to develop a body of state law that would likely differ substantially from the Supreme Court's interpretation of Section 2 of the Sherman Act, the federal anti-monopoly law. It is the intention of the Commission to forward a recommendation to the legislature for consideration in the 2026 legislative year.[4]

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1 The California Law Revision Commission is an independent state agency created in 1953, for the purpose of assisting the legislature and the governor in the examination of the common law and statutes of California, and to recommend changes in the law, pursuant to direction by the legislature. Cal. Gov't. Code §§8280-8298. The California Legislature tasked the Commission with a review of California's antitrust laws in 2022. *See* Assembly Concurrent Resolution No. 95 (2022 Cal. Stat. res. Ch. 147 (Aug. 23, 2022)).

2 Cal. Bus. & Prof. Code §§16700-16770. The Cartwright Act does not address single-firm conduct. California's Unfair Competition Law, Cal. Bus. & Prof. Code §§17200-17210, and Unfair Practices Act, Cal. Bus. & Prof. Code §§17000-17100 do not prohibit monopolization, but they can reach conduct by a single firm that has, or may have, an exclusionary or predatory effect.

3 The prohibitions in Federal antitrust law, including the Sherman Act's prohibition on unreasonable restraints of trade and monopolization, and the Clayton Act's prohibition on anticompetitive mergers, exclusive dealing and tying, and the Robinson Patman Act's prohibition on price discrimination, can be enforced by private persons in California and by the government of California, including for conduct having effects only in California (as the interstate nature of most commerce is usually sufficient to allow application of the federal antitrust laws to conduct with only intrastate effects).

4 For legislation to be considered in the 2026 legislative year, a bill must be introduced by February 20, 2026. The Commission's recommendation is not legislation, but the Commission's present intention is to forward a recommendation that can be incorporated into a bill that can be introduced by the legislative deadline.

The Commission is requesting comments from the public before it forwards its recommendation to the legislature. **Comments are due no later than January 12, 2026, and should be submitted to sreilly@circ.ca.gov.** The Commission notes that comments in support of the tentative recommendation "are just as important" as comments suggesting revisions.

The Commission's Tentative Recommendation of a Single-Firm Conduct Prohibition

The Commission's recommendation is that the Cartwright Act be amended to add new §16729, which would read as follows:

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

(1) In restraint of trade; or

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

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

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

Similarities and Differences with Section 2 of the Sherman Act.

The recommendation at §16729(a)(2) for a new anti-monopoly prohibition includes language consistent with Section 2's prohibition on monopolization, attempted monopolization, and conspiracy to monopolize.[5] It also includes a prohibition on monopoly maintenance, and includes a prohibition on acquisition or maintenance (or attempted acquisition) of monopsony power, and on combinations acting to acquire or maintain (or attempting to acquire) monopsony power.[6] Federal law recognizes illegal monopoly maintenance as a violation of Section 2, although it is not specifically referenced in the statute;[7] federal law also recognizes that Section 2 applies to monopsony, although monopsony

[5] §2 of the Sherman Act reads, in its entirety: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court." 15 U.S.C. §2.

[6] Monopsony power is the exercise of monopoly power by a buyer or group of buyers.

[7] *See, e.g.*, *United States v. Grinnell Corp.*, 384 U.S. 563, 570-571 (1966) (the offense of monopolization requires proof of two elements including "the willful acquisition or maintenance of that power as distinguished from growth or development as a

is also not referenced in the text of Section 2.[8] These two principles, standing alone, are unlikely to be controversial. The recommendation does not include a criminal penalty for violations, but the Cartwright Act already includes criminal penalties, which should be expected to apply to any new provision in the Act.[9]

However, in significant ways, the Commission's anti-monopoly recommendations differ substantially from Section 2 of the Sherman Act. They would affect a significant departure from federal monopolization law through the inclusion of legislative guidance to the state judiciary in a new §16731.[10] The draft judicial guidance requires state courts to depart from the analytic framework that the U.S. Supreme Court applied in *Ohio v. American Express*, 585 U.S. 529 (2018) (analysis of illegality of conduct by a two-sided transactional platform requires analysis of the effect of conduct on both sides of the platform); *Verizon Communications v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004) (antitrust law does not generally require a duty-to-deal); *Brooke Group v. Brown & Williamson Tobacco*, 509 U.S. 209 (1993) (single product predatory pricing claim requires pricing below an appropriate measure of cost and ability to recoup losses); and, *Aspen Skiing v. Aspen Highlands*, 472 U.S. 585 (1985) (refusal-to-deal claim may require showing defendant's deviation from prior course of conduct, may require a showing that the defendant dealt with others but not the plaintiff, and/or in the alternative, that the conduct makes no economic sense).[11] While each of these cases have been criticized for making it hard for a plaintiff to obtain relief under Section 2, by directing state courts to diverge from federal monopolization law, the Commission appears to ignore the Supreme Court's emphasis on "clear rules in antitrust law."[12]

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consequence of a superior product, business acumen, or historic accident"); *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001) (affirming district court's decision with respect to monopoly maintenance claim); *United States v. Google*, 747 F. Supp. 3d. 1, 107 (D.D.C. 2024) ("the court concludes that Google's exclusive distribution agreements have contributed to Google's maintenance of its monopoly power in two relevant markets").

8 *See, e.g.*, *Weyerhaeuser Co. v. Ross-Simmons Hardware Lumber Co.*, 549 U.S. 312, 320 (2007) ("large-scale buying … may not … be used to monopolize"). The federal courts also recognize that buyers, acting jointly on the buy-side, can unreasonably restrain trade, in violation of Section 1. *See, e.g.*, *Mandeville Island Farms, Inc. v. American Crystal Sugar, Co.*, 334 U.S. 219 (1948) (three refiners of sugar beets entered into a price-fixing agreement with respect to the prices to be paid to growers of sugar beets).

9 California recently increased the criminal penalties for corporations (up to $6 million) and individuals (up to $1 million) per violation; additional criminal fines of up to two times the gross loss to the victim(s) or two times the gross gain of the violator can be imposed. Individuals can also be incarcerated for violations, and civil penalties can also be imposed (up to $1 million). *See* Senate Bill No. 763, Ch. 426 (Oct. 6, 2025).

10 *See* proposed text of new Bus. & Prof. Code §16731, and accompanying comment.

11 The holdings in *Verizon v. Trinko* and *Brooke Group v. Brown and Williamson* also support the limitation on finding an illegal "price squeeze" as articulated in *Pacific Bell Telephone v. Linkline Communications*, 555 U.S. 438 (2009) (where there is no duty to deal at the wholesale level and no predatory pricing at the retail level, a firm is not required to price both of these services in a manner that preserves its rivals' profit margins).

12 *Pacific Bell Telephone v. Linkline Communications*, 555 U.S. 438, 452 (2009) ("courts are ill-suited to act as central planners, identifying the proper price, quantity, and other terms of dealing").

The judicial guidance proffered by the Commission also rejects any requirement that a rival alleging harm from its competitor's conduct show that it is "as efficient (or nearly as efficient)" as the competitor, rejects a requirement to define a relevant market "where there is direct evidence of market power" and rejects any requirement that a plaintiff prove harm with "qualitative evidence."[13] The Commission's proposed judicial guidance may be read as allowing state courts to find "monopolistic practices" where a firm has a market share of 20%.[14]

The Commission also recommends the adoption of a new prohibition on single-firm conduct that unreasonably restrains trade, at §16729(a)(1).[15] (The Cartwright Act already includes a prohibition on agreements that unreasonably restrain trade.[16]) The prohibition does not require a showing of monopoly power (or a probability of acquiring monopoly power), and the judicial guidance of proposed new §16731 may allow for a finding of illegality even in the absence of a finding of market power by a defendant.[17] Restrictive vertical agreements – *e.g.*, exclusive dealing programs, unilaterally announced pricing policies and other terms of trade, minimum advertising programs, intrabrand distribution restrictions – whether adopted unilaterally or jointly with upstream or downstream trading partners may fall within the scope of this provision and be subject to challenge and prohibition. Although not explicitly repealed in the Commission's recommendation, the adoption of a single-firm restraint of trade prohibition may have the effect of repealing the California courts' adoption of the *Colgate* doctrine in applying the Cartwright Act.[18]

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[13] *See* proposed text of new Bus. & Prof. Code §16731, and accompanying comment.

[14] The comments to the proposed §16731's limitation on reference to federal case law that defines monopoly power using market share thresholds cite *Fisherman's Wharf Bay Cruise v. Superior Court*, 114 Cal. App. 4th 309, 339 (2003) favorably; there, in analyzing an exclusive dealing claim under the Cartwright Act, the court found that foreclosure of 20% of a relevant market "was enough to pursue an action against monopolist practices."

[15] Comments to the recommendation of proposed §16729(a)(1) indicate that the text's reference to restraints of trade should be read as limited to only those restraints that are unreasonable; this is consistent with the treatment of restraints by agreement. *See generally*, *In re Cipro Cases I & II*, 61 Cal. 4th 116, 146 (2015) ("the Cartwright Act … carr[ies] forward the common law understanding that only unreasonable restraints of trade are prohibited").

[16] Cal. Bus. & Prof. Code §16720 (defining "trust" to include combinations of two or more persons to "create or carry out restrictions in trade or commerce"); §16726 (making every trust, except as provided elsewhere in the statute, "unlawful, against public policy and void").

[17] *See* proposed text of new Bus. & Prof. Code §16731 (i) ("California law does not require a finding of any of the following to establish liability [including that] a single firm has or may achieve a market share at or above a threshold recognized under Section 2 of the Sherman Act or any specific threshold of market power.").

[18] "California courts have adopted the *Colgate* doctrine for purposes of applying the Cartwright Act." *Beverage v. Apple*, 101 Cal. App. 5th 736, 750 (Court of Appeal, 6th District, 2024), collecting California state cases. In *United States v. Colgate*, 250 U.S. 300 (1919), the Supreme Court recognized the general right of a person to exercise its own independent judgment or discretion as to parties with whom it will deal. *See also Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984) ("A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently.") A broad application of a single-firm restraint of trade prohibition will likely run up against this principle.

The Commission's recommendation of new §16729(c) affirmatively precludes courts from balancing anticompetitive effects in one market, no matter how small, with procompetitive effects, no matter how large, in another market. This is consistent with general principles of federal antitrust law, but the federal antitrust agencies sometimes do not challenge conduct that causes a small harm in one market but also creates substantial benefits in another market, in an exercise of prosecutorial discretion. The Commission's recommendation to prohibit of out-of-market balancing, if adopted, may pressure the California Attorney General to exercise its prosecutorial discretion more cautiously. The prohibition, if adopted, would prevent balancing harms and benefits across separate but interdependent markets involving multi-sided platforms.

The anti-balancing language goes significantly further: it precludes the balancing of harm to a person against the benefits to another person. Proposed §16729(c) states, in part: "the harm to a person or persons from the challenged conduct may not be offset by purported benefits to another person or persons." The effect of this language may be to prevent a court's consideration of intra-market efficiencies in its analysis of single-firm conduct unless the defendant can show that every person potentially affected by the defendant's conduct is better off.[19] As a matter of proof, this may be impossible. In practice, this provision will likely preclude the California state courts from adopting the balancing approach of the appellate court opinion in *United States v. Microsoft*.[20]

Proposed Codification of An Expansive Purpose of Cartwright Act

In *Cipro Cases I & II*, the California Supreme Court identified the Cartwright Act's principal goal as "the preservation of consumer welfare" and noted that the Act "at its heart is a prohibition against agreements that prevent the growth of healthy, competitive markets for goods and services and the establishment of prices through market forces."[21] It further noted that the Act:

> rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conductive to the preservation of our democratic political and social institutions.[22]

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[19] The Commission's comments indicate that balancing within a market is acceptable. However, the additional language prohibiting balancing across persons undercuts this assertion: "Subdivision [§16729](c) clarifies that anticompetitive effects may only be offset by benefits in the same market and to the same persons originally affected by the anticompetitive conduct."

[20] *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001).

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

[22] *Id.*

The Commission recommends adoption of a new §16730, which, at (a), would codify a version of the Court's language but which might be read to broaden it to define the preservation of democratic, political, and social institutions as a *purpose* of antitrust enforcement, rather than a *result* of enforcement focused on "the preservation of consumer welfare" and "competitive markets":

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

Confusion over whether the Commission is proposing multiple *purposes* be incorporated into the Act may raise concerns that application of the anti-monopoly prohibitions will depart from a focus on consumer welfare and competitive markets towards more abstract goals. Notably, if this is the Commission's goal, its recommendation provides no guidance on how such concerns should be evaluated by courts and understood by firms subject to the reach of a revised Act, nor how these broader goals could be balanced with the economic goals of the Cartwright Act.

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Comments on the recommendation are due to the Commission no later than January 12, 2026, and should be submitted to sreilly@circ.ca.gov.

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