in violation of . . . discharge prohibitions";[70] this could result in jurisdictional conflicts with the commission over power plant discharges. Recently several other regional agencies have been set up that might have or obtain powers that conflict with those of the commission, and the number of such agencies is almost certain to grow. Examples are the Bay Conservation and Development Commission,[71] the California Tahoe Regional Planning Agency,[72] and the Bay Area Rapid Transit Commission.[73] Whether or not the courts decide to extend this decision to any of these agencies, the legislature has been put on notice that the resolution of possible conflicts can be a subject for legislative consideration.

Henry C. Eames, Jr.

II

ANTITRUST LAW

A. Combination in Restraint of Trade; Tie-ins

Oakland-Alameda County Builders' Exchange v. F.P. Lathrop Construction Co.;[1] *Corwin v. Los Angeles Newspaper Service Bureau, Inc.*[2] During the last term the California supreme court decided two cases under the Cartwright Act,[3] California's principal antitrust statute, both involving trade associations. At issue in *Builders' Exchange* were the rules of a bid depository, by which subcontractors sought to regulate the process of submitting subbids to general contractors bidding on large construction jobs. The rules required that participating general contractors accept the lowest bids of the participating subcontractors. The supreme court held that the depository's rules were per se violations of the Cartwright Act, as a combination to restrain open price competition and as a group boycott.[4] *Corwin* involved

70. CAL. WATER CODE ANN. § 13301 (West 1956).
71. CAL. GOV'T CODE ANN. §§ 66600-61 (West 1966).
72. *Id.* §§ 67000-130.
73. CAL. PUB. UTIL. CODE ANN. §§ 28500-9757 (West 1965).

1. 4 Cal. 3d 354, 482 P.2d 226, 93 Cal. Rptr. 602 (1971) (Mosk, J.) (unanimous decision).
2. 4 Cal. 3d 842, 484 P.2d 953, 94 Cal. Rptr. 785 (1971) (Sullivan, J.) (unanimous decision).
3. CAL. BUS. & PROF. CODE ANN. §§ 16700-58 (West 1964). Specifically at issue in each case were section 16720, which defines a trust as "a combination of capital, skill or acts by two or more persons . . . [t]o create or carry out restrictions in trade or commerce" or for other anticompetitive purposes, and section 16726, which declares that "every trust is unlawful, against public policy and void."
4. 4 Cal. 3d at 366, 482 P.2d at 234, 93 Cal. Rptr. at 610.

an association of Los Angeles newspapers, which had been formed initially to enable its members to acquire a share of the legal advertising market.[5] In addition to providing public relations, legal assistance and research, and lobbyist services for its member newspapers, the association processed all forms of legal advertising.[6] In furnishing these processing services, the association found itself in competition with another firm,[7] the plaintiff here, that prepared notices of trustee sales for publication. The supreme court reversed a summary judgment for the defendant-association on the grounds that the competitor-plaintiff might be able to show at trial that the association had unreasonably restrained trade[8] or that it had used an illegal tying arrangement[9] in its agreements with member newspapers.[10]

The practical significance of these two decisions is unclear. Federal antitrust law[11] is comprehensive and would probably have led to the same result in each case.[12] Since California law now parallels federal law on these questions,[13] the result would seem to provide private plaintiffs with a choice between a federal or a state court. The harmony of state and federal antitrust doctrines has the additional consequence, though, that Sherman Act doctrines can be set up as defenses in state cases simply by being phrased in terms of the Cartwright Act,[14] which may encourage antitrust counterclaims in contract ac-

5. 4 Cal. 3d at 848, 484 P.2d at 956, 94 Cal. Rptr. at 788.

6. This processing involved soliciting advertising, working with the advertisers to verify the accuracy of legal descriptions and affidavits of publication, conforming the advertisement to applicable statutes, proofreading the copy, and billing the advertiser. Since these necessary tasks are difficult for publishers to undertake individually by hiring additional employees, this service was particularly useful.

7. The Bureau had been in existence since 1934 as a representative of Los Angeles newspapers whereas Statewide, the plaintiff, only entered the field of legal advertising in 1966. It might be supposed that Statewide's purpose in this litigation was to break down barriers to its entry of the legal advertising processing market.

8. The plaintiff did not allege that the association constituted a per se violation of the Cartwright Act. Therefore, at trial plaintiff will have to show that the defendant-association's agreements with member newspapers "create or carry out restrictions in trade" *and* that such restrictions are unreasonable. 4 Cal. 3d at 853, 484 P.2d at 960, 93 Cal. Rptr. at 792.

9. A tying arrangement apparently is a per se violation of the Cartwright Act "whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product." Corwin v. Los Angeles Newspaper Serv. Bureau, Inc., 4 Cal. 3d 842, 856, 484 P.2d 953, 962, 94 Cal. Rptr. 785, 794 (1971), *quoting* Northern Pac. Ry. v. United States, 356 U.S. 1, 6 (1958). See text accompanying notes 86-98 *infra.*

10. 4 Cal. 3d at 859, 484 P.2d at 964, 94 Cal. Rptr. at 796.

11. The federal law is embodied primarily in the Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7 (1970), and the Clayton Act, 15 U.S.C. §§ 12-27 (1970).

12. See notes 37 & 72 *infra.*

13. See text accompanying notes 20-27 *infra.*

14. Section 4 of the Clayton Act gives the federal courts exclusive jurisdiction in cases under the federal antitrust laws. 15 U.S.C. § 15 (1970). *See* Engelhardt v. Bell & Howell Co., 327 F.2d 30, 35 (8th Cir. 1964).

tions. In addition, it is also significant that trade associations continue to be inherently suspect since the sharing of price information may facilitate price fixing.[15] Though the setting up or regulation of markets in an industry[16] and the furnishing of services by trade associations[17] arguably should not be treated with equal suspicion, the court has apparently elected to treat all three situations under one standard, the restraining effect on competition.[18] Finally, the two decisions indicate a tendency for the California supreme court to follow the lead of federal courts in expanding the scope of antitrust liability to meet new situations, especially in cases involving summary judgments in favor of defendants, since full development of the facts at trial may disclose harmful practices unnoticed during the pretrial proceedings.[19]

This Note discusses each case separately in the context of the problems each trade association was designed to meet: on the one hand, regulating market conduct and, on the other, providing services to members who could not as efficiently provide such services for themselves. Both cases demonstrate the applicability of precedents under the Sherman Act[20] to interpretation of the Cartwright Act.[21] Since both the Cartwright Act and the Sherman Act have been held to have been codifications of the common law covering restraints of trade, California courts have long considered federal cases persuasive.[22] Since 1968, however, the leading case has been *Chicago Title*

15. *See, e.g.*, American Column & Lumber Co. v. United States, 257 U.S. 377 (1921). *But see* Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925). For a more complete discussion of the issues raised by trade association price fixing, see Fly, *Observations on the Anti-Trust Laws, Economic Theory and the Sugar Institute Decisions: I*, 45 YALE L.J. 1339 (1936).

16. *See, e.g.*, Board of Trade v. United States, 246 U.S. 231 (1918). *But see* Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941).

17. *See, e.g.*, Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). *But see* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707-08 (1962).

18. *Cf.* Board of Trade v. United States, 246 U.S. 231 (1918). Justice Brandeis, writing for the Court, laid down the classic test:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Id. at 238.

19. *See* Fortner Enterprises v. United States Steel, 394 U.S. 495, 500 (1969); Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962).

20. 15 U.S.C. §§ 1-7 (1970).

21. *See* Kalinowski & Hanson, *The California Antitrust Laws: A Comparison With the Federal Antitrust Laws*, 6 U.C.L.A.L. REV. 533, 533-35 (1959).

22. *See* Speegle v. Board of Fire Underwriters, 29 Cal. 2d 34, 44, 172 P.2d 867,

Insurance Co. v. Great Western Financial Corp.,[23] in which the court uses more categorical language:

> The California law of antitrust, commonly known as 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.[24]

Both *Corwin* and *Builders' Exchange* cited *Chicago Title* approvingly.[25] Since there was ample federal precedent for each decision and no contradictory California cases, the strength of California's commitment to federal cases remains untested. An article written 9 years before *Chicago Title* suggested that California should not blindly follow the federal Sherman Act cases in interpreting the Cartwright Act.[26] In at least one area, however, the authors' suggestion that California avoid the per se rules of conduct typical of federal cases[27] has not been followed since the results in both *Builders' Exchange* and *Corwin* were based on per se proscriptions.

I. BID DEPOSITORIES: BUILDERS' EXCHANGE

Plaintiffs operated a typical bid despository employing a "locked box" procedure,[28] which allowed for the orderly and secret submission of bids by subcontractors to general contractors. According to the depository's rules, any subcontractor could submit bids through the depository by submitting to the bid custodian a sealed envelope containing his subbid for each general contractor to whom he wished to bid.[29]

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873 (1946); Rolley, Inc. v. Merle Norman Cosmetics, Inc., 129 Cal. App. 2d 844, 849, 278 P.2d 63, 66 (1st Dist. 1954). In *Rolley* the court said:

> [T]he Cartwright Act is basically a codification of common law and the Sherman Antitrust law is also considered to be a restatement of common law. . . . Therefore, while not controlling, the reasoning in the Whitwell case [a Sherman Act case] is persuasive.

Id. at 849, 278 P.2d at 66.

23. 69 Cal. 2d 305, 444 P.2d 481, 70 Cal. Rptr. 849 (1968).

24. *Id.* at 315, 444 P.2d at 487, 70 Cal. Rptr. at 855 (emphasis added).

25. Oakland-Alameda County Builders Exchange v. F.P. Lathrop Constr. Co., 4 Cal. 3d 354, 362 n.3, 482 P.2d 226, 231 n.3, 93 Cal. Rptr. 602, 607 n.3 (1971); Corwin v. Los Angeles Newspaper Serv. Bureau, Inc., 4 Cal. 3d 842, 852, 484 P.2d 953, 959, 94 Cal. Rptr. 785, 791 (1971).

26. Kalinowski & Hanson, *supra* note 21, at 558.

27. *Id.* at 541-42.

28. The term "locked box" means that bids, when received by the depository, are kept secret until they are distributed by the respective general contractors. *See* Orrick, *Trade Associations Are Boycott-Prone—Bid Depositories as a Case Study*, 19 HASTINGS L.J. 505, 520-21 (1968).

29. A general contractor could refuse to accept the bid of a subcontractor if he did not want to deal with him so long as he returned the bid envelope unopened. See rule 9a of the depository's rules, in 4 Cal. 3d at 360, 482 P.2d at 229, 93 Cal. Rptr. at 605.

All subbids thus remained secret. Four hours prior to the prime bid opening time, the bid custodian would deliver all subbids to the respective general contractors, who then had enough time to compute their prime bids. The rules also provided that any general contractor using the depository was obligated, if he obtained the prime contract, to accept the lowest subbid furnished through the depository.[30]

The defendant in *Builders' Exchange* was a general contractor who had received bids both through the depository and on his own, but he accepted the bids of subcontractors who had not used the depository. The depository and two participating subcontractors with the lowest bids sued defendant for declaratory judgment and damages for breach of the depository rules. Defendant countered by claiming the depository's rules constituted per se violations of the Cartwright Act and thus were unenforceable. The trial court granted judgment on the pleadings for defendant, and plaintiffs, the depository and two subcontractors,[31] appealed.

In affirming the trial court, the supreme court relied on three theories: that the bid depository was a combination of subcontractors with the purpose and effect of restraining open price competition among subcontractors; that it was a group boycott by participating general contractors against nonparticipating subcontractors; and that it was a group boycott by participating subcontractors against nonparticipating general contractors.[32] The third theory was unimportant to the court's holding and seems to rest on a strained reading of one of the depository's rules.[33] The second theory appears initially as the most telling condemnation of depositories, which generally require that general contractors accept the bids of participating contractors only.[34] The depository had attempted to escape the thrust of such an argument, however, by means of a rule that general contractors could use the bids of nonparticipating subcontractors provided

30. The depository's rules are set out in the opinion. 4 Cal. 3d at 358-60, 482 P.2d at 229-30, 93 Cal. Rptr. at 605-06.

31. *Id.* at 356-58, 482 P.2d at 227-28, 93 Cal. Rptr. at 603-04.

32. *Id.* at 360, 482 P.2d at 230, 93 Cal. Rptr. at 606.

33. Rule 6a, the rule in question, provides:

> Any subcontractor or supplier desiring to submit a bid to any person or persons through the Bid Depository shall submit . . . a separate and sealed bid addressed to each general contractor to whom . . . [he] . . . desires to bid.

The court took this provision to mean that if a subcontractor wanted to submit any bids through the depository, he had to submit all his bids to the depository. An alternate and more plausible reading of the rule would be that a subcontractor who desired to submit bids to any participating coutractor must do so through the depository. *See* 4 Cal. 3d at 359, 365-66, 482 P.2d at 229, 233-34, 93 Cal. Rptr. at 605, 609-10.

34. *See* Orrick, *supra* note 28, at 519-22.

they first submitted them to the depository.[35] The court swept this argument aside by holding that the depository's secrecy rules rendered it vulnerable to the first theory and that the boycott effect under the second theory only made the restraint of open price competition more effective.[36]

Prior decisions, both federal[37] and California,[38] amply support the court's decision. Moreover, the potential for antitrust violations inherent in bid depositories has long been apparent.[39] Nevertheless, the court's analysis is disturbing for two reasons: a bid depository does not necessarily fix or tend to stabilize prices, and justifications exist for whatever restraints it might entail. First, while price fixing or tampering is illegal per se under both the Sherman[40] and the Cartwright Acts,[41] a bid depository is not necessarily an agreement to fix prices nor is it clearly a restraint on open price competition. In the absence of collusion on bids, open or tacit agreements to divide up the market of subcontracts, or fraud in the depository's operation, a depository permits no direct fixing of or tampering with prices. Moreover, a depository does not necessarily imply a purpose to affect prices, an important factor in *United States v. Socony-Vacuum Oil Co.*,[42] nor does it necessarily fit within the proscriptions against exchanging cost or pricing information.[43] On the contrary, bid depositories operate to preclude such exchanges of price and cost information. It was this feature, however, that the court in *Builders' Exchange* focused on in

35. As the court pointed out, this provision presumed that the bids of nonparticipants would comport with the depository's rules, principally that they be submitted prior to the 4-hour cutoff time. *See* 4 Cal. 3d at 359, 482 P.2d at 229, 93 Cal. Rptr. at 605.

36. *Id.* at 365, 482 P.2d at 233, 93 Cal. Rptr. at 609.

37. Christiansen v. Mechanical Contractors Bid Depository, 230 F. Supp. 186 (D. Utah 1964), *aff'd*, 352 F.2d 817 (10th Cir. 1965), *cert. denied*, 384 U.S. 918 (1966).

38. Carl N. Swenson Co. v. E.C. Braun Co., 272 Cal. App. 2d 366, 77 Cal. Rptr. 378 (1st Dist. 1969); People v. Inland Bid Depository, 233 Cal. App. 2d 851, 44 Cal. Rptr. 206 (5th Dist. 1965).

39. *See* Orrick, *supra* note 28, at 524 and cases cited at 522-23.

40. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940).

41. People v. Building Maintenance Contractors' Ass'n, Inc., 41 Cal. 2d 719, 727, 264 P.2d 31, 37 (1953).

42. 310 U.S. 150, 219-24 (1940). The Court there held illegal an agreement among large oil companies to buy up the supplies of "distress" gasoline in order to stabilize prices. The purpose to place a floor under prices was abundantly clear. *Id.* at 219.

43. *See, e.g.*, United States v. Container Corp. of America, 393 U.S. 333 (1969); United States v. American Linseed Oil Co., 262 U.S. 371 (1923); American Column & Lumber Co. v. United States, 257 U.S. 377 (1921). *But see*, Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588 (1925); Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925). *See generally* Orrick, *supra* note 28, at 509-15.

order to bring it within the per se category.[44] Emphasizing that the depository required that bids be kept secret from the time they were submitted to the depository until they were opened by the respective general contractors, the court reasoned that

> the "economic forces of supply and demand" can have little impact on a bidding system which is conducted in secrecy and which leaves general contractors no alternative but to accept the lowest bids submitted through the Depository or withdraw from the bidding.[45]

Secrecy does not necessarily restrain competition, however. Where there is a limited number of subbidders or a steady stream of jobs on which they bid, each will build up a store of experience on its competitors' bidding behavior.[46] To the extent each subbidder can predict the likely bids of others, he will be able to "pad" his own bid and still be able to obtain sufficient contracts in order to operate profitably. The more bidders that enter the market or the fewer the jobs, the less predictable will be the outcome of any given bidding situation, and the less harmful will be the secrecy of bids. But while these principles hold generally, it is impossible to predict with any accuracy whether secrecy will have a restraining influence in any given bidding market. In fact, in some past cases the exchange of information has promoted collusive pricing.[47]

The simultaneity that characterizes bidding distinguishes *United States v. Gasoline Retailers Association*,[48] on which the court relied heavily, from the present case. There, the Seventh Circuit ruled that an agreement among gas station operators not to advertise their retail prices for gasoline was invalid as a price fixing conspiracy.[49] Underlying the decision in *Gasoline Retailers*, however, was the fact that retail buyers of gasoline cannot or will not go to the trouble of inquiring about gasoline prices at several stations before making a purchase. If each buyer of gasoline were to do so and thus had access to the prices at each station, it would be unimportant that each gas station operator failed to post his prices outside the station.

Since a bid depository involves no outright price fixing or tampering, and since the effect of secrecy on subbids is unclear, the court should have considered possible justifications for depositories rather than characterizing their rules as per se violations. Bid depositories have been formed primarily for two reasons: to give general con-

44. 4 Cal. 3d at 364, 482 P.2d at 232, 93 Cal. Rptr. at 608.
45. *Id.* at 363-64, 482 P.2d at 232, 93 Cal. Rptr. at 608.
46. *See generally* J. BAIN, INDUSTRIAL ORGANIZATION 121-24, 270-87 (1959).
47. See cases cited in note 43 *supra.*
48. 285 F.2d 688 (7th Cir. 1961).
49. *Id.* at 691.

tractors some specified amount of time in which to compute their prime bids and to prevent such practices as bid chiseling, bid shopping, and bid peddling.[50] Bid chiseling refers to the practice of a general contractor, after he has been awarded the prime contract, of revealing the currently low subbids in order to encourage even lower bids. Bid shopping refers to the same practice by a general contractor before being awarded the contract. Bid peddling applies to the attempt by a subcontractor to determine and undercut currently low subbids in return for the assurance of a general contractor that the subcontractor will receive the subcontract if the general is successful as prime bidder. While subbid renegotiation *before* the awarding of the prime contract may operate to reduce the bids of generals and thus may benefit the awarding authority, renegotiation *after* the award only permits the general to drive down his own costs without passing on the saving to the awarding authority. Because it enhances the costs to the public and permits general contractors to increase their profits, bid chiseling on public projects has been effectively eliminated by statute in California.[51]

Bid shopping and peddling, on the other hand, may operate to reduce the bids of generals and thus benefit the awarding authority. Theoretically, these practices may be beneficial forms of pure and open competition, but they involve several disadvantages, especially to subcontractors. First, because preparing a subbid requires time and expense (especially in the mechanical specialty trades such as electrical, plumbing, and sheet metal contracting),[52] subcontractors desire to protect the investment in their own computations by preventing other subcontractors who have made no individual calculations from "pirating," using their bids as starting points. Second, since each subcontractor waits until the last minute to submit his bid in order to cut down the time available for bid shopping, general contractors are handicapped in their computation of bids, with the result that errors occur more frequently.[53] Third, some subcontractors may refrain from bid-

50. The condemnation of these practices by some organizations of interested trades has largely been ineffectual in preventing their occurrence. *See* Scheuller, *Bid Depositories,* 58 MICH. L. REV. 497, 499-503 (1960).

51. CAL. GOV'T CODE ANN. §§ 4104, 4107 (West 1966). These statutes require that prime bidders for public construction contracts list the names of all subbidders and that the consent of the awarding authority is needed in order to make any substitutions. *See* Comment, *Bid Shopping and Peddling in the Subcontract Construction Industry,* 18 U.C.L.A.L. REV. 389, 402-05 (1970).

52. Contractors in the mechanical trades participate most frequently in building projects as subcontractors, and since their work is more technical, their estimates of cost are more difficult to arrive at. *See* H.R. Rep. No. 434, 85th Cong., 1st Sess. 8-10 (1957). *See also* Scheuller, *supra* note 50, at 500-01.

53. The problem of hasty computations usually works against general contractors and depends to some extent on how difficult it is to get relief based on mistake. *See* Comment, *supra* note 51, at 389-94.

ding if they anticipate bid shopping, which would decrease competition and result in higher costs to the awarding authority. Fourth, if subcontractors anticipate bid shopping, they may pad their bids to allow for reductions later, which may result in higher costs and which in any event reduces their usefulness to general contractors, who thus may have to make their own calculations of subcontracting costs in the hope of finding a subcontractor within those figures.[54]

Bid depositories have been the most effective weapons against these practices largely because of their secrecy and exclusivity requirements, the two features that in concert rendered the depository's operation in *Builders' Exchange* illegal.[55] If the exclusivity requirement, that participating general contractors accept the bids only of participating subcontractors, a virtual boycott,[56] were eliminated, a depository would appear much less objectionable in antitrust terms[57] but would still be a violation under *Builders' Exchange*.[58] Such a scheme would eliminate bid piracy[59] and reduce the problem of hasty computation.[60] And, the other harmful effects of preaward bid shopping are not extensive.[61]

In view of the justifications and possible alternative methods of handling these problems, the court could have struck down the present depository without employing a per se rule.[62] But in view of the tendency for depositories to be exclusive, coercive, and collusive[63] and of the difficulties of assessing each variation on the same theme,[64] the result reached in *Builders' Exchange* is far from unsupportable.

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54. *See* Scheuller, *supra* note 50, at 499-503.

55. 4 Cal. 3d at 363-65, 482 P.2d at 232-33, 93 Cal. Rptr. at 608-09.

56. The Supreme Court has been particularly harsh with boycotts. *See, e.g.*, United States v. General Motors Corp., 384 U.S. 127 (1966); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941).

57. Without the boycott effect, a depository would have to be judged under the more liberal tests of the exchange of information cases. See cases cited in note 43 *supra*.

58. The secrecy in bidding would still remain.

59. See text accompanying note 52 *supra*.

60. See text accompanying note 53 *supra*.

61. Comment, *supra* note 51, at 396 & n.32.

62. A depository might require, for example, that subbids be in by 5 hours from the prime bid deadline. Depository officials could then announce the currently low subbids and permit subcontractors to revise their bids, say, for 2 hours, at which time the bidding would cease. This would then give general contractors 3 hours in which to compute their prime bids.

63. See text accompanying note 39 *supra*.

64. On the other hand, bid depository cases turn on the construction and effect of the depository's rules, which are themselves usually complicated. Not adopting a per se rule would mean the court would have to engage in distinguishing between minor differences in carefully drawn documents, and this may not seem worth the effort. *See, e.g.*, United States v. Bakersfield Associated Plumbing Contractors, Inc., 1958 Trade Cas. ¶ 69,087 (S.D. Cal. 1958); Carl N. Swenson Co. v. E.C. Braun Co.,

II. TRADE ASSOCIATIONS PROVIDING SERVICES: CORWIN V. LOS ANGELES NEWSPAPER SERVICE BUREAU, INC.

Defendant-association was organized in 1934 as a representative of those Los Angeles County newspapers permitted to publish legal advertising.[65] Its purpose was to enable them to acquire a share of the legal advertising market that had been monopolized until that time by one printing and publishing company. The association, Los Angeles Newspaper Service Bureau, Inc. (Bureau), accomplished this purpose by soliciting, processing, and preparing for publication all forms of legal advertising. In addition, it furnished public relations, legal research and assistance, and lobbyist services to its members,[66] all of which were financed by a commission of 15 percent of all sums collected on behalf of the publishers from advertisers. Under its representation agreement,[67] the Bureau was entitled to its commission whether or not it had placed the advertising.[68] The agreement also provided for an annual pro rata distribution of any net profits of the Bureau to its members. If a member withdrew any class of legal advertising from the Bureau,[69] however, he would forfeit all rights to

272 Cal. App. 2d 366, 77 Cal. Rptr. 378 (1st Dist. 1969); People v. Inland Bid Depository, 233 Cal. App. 2d 851, 44 Cal. Rptr. 206 (5th Dist. 1965); Associated Plumbing Contractors v. F.W. Spencer & Son, Inc., 213 Cal. App. 2d 1, 28 Cal. Rptr. 425 (1st Dist. 1963).

65. California law requires that legal notices be published in a newspaper of "general circulation." *See* CAL. GOV'T CODE ANN. §§ 6000-78 (West 1966) (setting out the legal requirements applicable to newspapers in California).

66. While membership in Bureau was open to any newspaper qualificd to publish legal advertising, not all such newspapers were members. In 19 of the 26 judicial districts in Los Angeles County, however, every qualified newspaper is a member. Some of these districts have only one qualified newspaper. 4 Cal. 3d at 848, 484 P.2d at 956, 94 Cal. Rptr. at 788.

67. The relevant terms of the representation agreement are set out in the court's opinion. *See* 4 Cal. 3d at 848-49 nn. 1 & 2, 484 P.2d at 956 nn. 1 & 2, 94 Cal. Rptr. at 788 nn. 1 & 2.

68. Paragraph Eighth of the Representation Agreement provided:

> The BUREAU shall and it is hereby authorized to deduct, as compensation for its services, fifteen (15%) per cent of all sums collected for the account of the PUBLISHER . . . . In the event any sums are paid directly to the PUBLISHER for any advertisements covered by this agreement, the PUBLISHER shall render a true and correct account thereof to the BUREAU and shall pay to the BUREAU within thirty days after receipt of said sums, a sum equal to fifteen (15%) per cent of the amount paid to the PUBLISHER.

Id. n.1. With reference to this paragraph of the contract, Telford Work, Secretary-Treasurer of Bureau, states, in his affidavit in support of the motion for summary judgment:

> Advertisers are of course free to go directly to the newspaper and place their legal advertising as many do, just as any other members of the general public also do, and there is no prohibition of any kind against this. However, the BUREAU under its representation agreements would still be entitled to its 15% commission.

Id. n.1.

69. Paragraph Second of the Representation Agreement provided:

participate in the distribution.[70]

Statewide Publication Service (Statewide), a partnership owned and operated by plaintiffs, was organized in 1966. It, too, solicited and processed legal advertising, though it dealt almost exclusively with notices of trustee sales. The plaintiffs filed an action against the Bureau and its member newspapers for an injunction and treble damages, alleging: a combination in restraint of trade in that the commission scheme discouraged publishers from placing ads from other processors because of having to pay double commissions; and a tying arrangement in that a member newspaper lost its right to participate in the annual distribution if it withdrew any class of advertising from the arrangement. The trial court granted defendants' motion for summary judgment, and plaintiffs appealed. The supreme court reversed, ordering a trial on both issues.[71]

The result in this case might be explained on the basis that "a summary judgment in favor of defendants is rarely warranted in antitrust cases."[72] That explanation, however, is not fully instructive here since the court went on at length to frame the issues for the trial court on remand. Thus, even though much of the court's reasoning is dictum, its arguments could hold significant implications for California antitrust law. In reversing the trial court's grant of summary judgment for defendants, the court relied on two general arguments: that the commission and annual distribution provisions may be shown at trial to be unreasonable restraints of trade;[73] and that the annual dis-

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> The PUBLISHER hereby retains the services of the BUREAU as representative of the PUBLISHER for soliciting and servicing of all legal advertising . . . provided, however, the PUBLISHER reserves the right to withdraw, at any time by notification in writing to the BUREAU, from the terms of this agreement, the following classes of legal advertising:
>
> . . . .
>
> In the event the PUBLISHER exercises the withdrawal privilege herein contained, PUBLISHER agrees to and does hereby waive during the period of such withdrawal the right to participate in the distributions and/or credits contemplated under paragraph Ninth hereof.

Id. n.2.

70. In a supplemental brief the Bureau acknowledged that the representation agreement provided for a total waiver of any right to participate in annual distributions. In practice, however, the Bureau claimed that member newspapers had been permitted to participate in the annual distribution to the extent of their nonexcluded ads. The court felt that this fact could not be determined by the record, since it lacked relevant supporting factual data; however, if relevant at trial, the court would allow such facts to be shown. 4 Cal. 3d at 849 n.3, 484 P.2d at 956-57 n.3, 94 Cal. Rptr. at 788-89 n.3.

71. *Id.* at 859, 484 P.2d at 964, 94 Cal. Rptr. at 796.

72. *Id.* at 852, 484 P.2d at 959, 94 Cal. Rptr. at 791. See text accompanying note 19 *supra.*

73. Since plaintiff did not rely on a per se theory of illegality, he will have to show at trial that any restriction of trade is unreasonable, which usually requires an

tribution provision constituted an illegal tying arrangement.[74] Another argument the plaintiffs might have advanced is that, as in *Builders' Exchange,* the association's conduct had an exclusionary effect. In fact, it is surprising that they did not allege that the representation agreement was illegal per se as a boycott by the Bureau against Statewide.[75] They could have argued that the effective requirement of a double commission when a member newspaper published advertising prepared by Statewide operated unfairly to deny it entry into the market.[76]

Since that argument was not made, the plaintiffs will have to rely at trial on showing an unreasonable restraint of trade. The determinations necessary to such a theory will be very difficult in this case. First, as the court noted, the relevant line of commerce[77] must be determined.[78] It may be notices of trustee sales only or all forms of legal advertising; while a notice of a trustee sale is a special form of legal ad, the services necessary to prepare it for publication are nearly the same as those necessary for any form of legal ad. Thus, the Bureau argued, it was providing a single service regardless of the type

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extensive showing of complex facts. *See* Board of Trade v. United States, 246 U.S. 231 (1918); Standard Oil Co. v. United States, 221 U.S. 1 (1911).

74. See note 9 *supra.*

75. *See* Orrick, *supra* note 28, at 515-16, and cases cited therein. The author declares that courts have required trade associations to provide their services to members on nondiscriminatory terms [*id.* at n.79]; and he later continues:

> Trade associations are prohibited from compelling their members to conduct their business in a particular fashion. For example, a jobbers association, by argument, persuasion and promises of increased patronage, could not prevent competition from manufacturers who sell directly to retailers and large consumers.

Id. at 515-16 n.85.

76. Had it charged separately for its services, that is, one fee for its lobbying services and one fee for the advertising it prepared, the Bureau could have blunted this argument. The court referred to the separability issue but left it to be determined on the facts at trial. 4 Cal. 3d at 855, 484 P.2d at 961, 94 Cal. Rptr. at 793.

77. In order to assess the amount of trade restrained in any given market, the market must be defined. United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 391 (1956). Market definition includes a determination of both the geographical and the product markets. Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962). Within a product market there may be submarkets. *Id.* at 324-25.

78. The test laid down in United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377 (1956), focused on the "reasonable interchangeability" of the products at issue with others that could be used instead. To make this assessment, courts consider the cross-elasticity of demand [*id.* at 394] or the product's nature and how people view the market [*see, e.g.,* United States v. Times Mirror Co., 274 F. Supp. 606, 614-18 (C.D. Cal. 1967)]. A third approach is evident in United States v. Grinnell Corp., 384 U.S. 563, 571-75 (1966). There, concerned with services as products, the Court focused on whether competitors sold the services as a unit or separately and whether the defendant could effectively compete if it did not offer its services as a unit.

of advertisement.[79] Statewide, in contrast, to make the Bureau's restraint look more formidable, claimed that the relevant line of commerce, as defined by the cross-elasticity of demand, is the solicitation, placement, and service of notices of trustee sales only.[80]

The leading case on relevant market definition for services, *United States v. Grinnell Corp.*,[81] seems directly in point on this issue. The defendant corporation in *Grinnell* supplied subscribers with both fire and burglar alarm services from a central station on the subscribers' premises. Despite the services' distinctness from each other, the Court held that the unified service constituted the relevant market since to compete effectively, central station companies must offer all or nearly all types of service.[82] Thus, a "cluster of services" could constitute "a distinct line of commerce."[83] *Grinnell,* however, may be distinguished on the ground that a unified service is not necessary in the field of legal advertising,[84] but this, of course, will depend on the facts developed at trial.

Second, and closely related to the first question, will be whether the Bureau could charge directly and separately for its lobbying and other "representative" services. If so, its present scheme may be unreasonable. While initially it seems that the Bureau could charge a commission rate for the advertising it processed and a flat fee for

79. Brief for Respondents at 15-23. The Bureau characterized the market here as "the field of newspaper representation." *Id.* at 15. Since, the argument went, Statewide did not attempt to *represent* newspapers but rather acted as the agent of advertisers in preparing ads, Statewide operated in a wholly separate market. Indeed, as Bureau suggested, nothing prevented Statewide from seeking to compete with Bureau by providing the same full line of representational services. *Id.* at 17.

80. Petition of Harold Corwin and Allen Barr, dba Statewide Publication Service, for Hearing After Decision by Court of Appeal, at 7.

81. 384 U.S. 563 (1966).

82. See discussion of the nature of the competition in *Grinnell,* 384 U.S. at 572 & n.6.

83. *Id.* at 573. *See also* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 356 (1963); Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc., 414 F.2d 506, 514 n.13 (3d Cir. 1969).

84. This distinguishing feature is that subscribers in *Grinnell* generally needed the full line of services simultaneously. In *Corwin* the situation is somewhat different. While newspapers need publication services for all types of ads, it is not necessary that one firm perform all such services. Furthermore, some ads are published without such services at all. The services are performed primarily for the advertisers anyway, not the newspapers, since presumably only the advertiser suffers if an ad is defective. *Cf.* affidavit by Telford Work in support of the motion for summary judgment, where he states:

> Advertisers are of course free to go directly to the newspaper and place their legal advertising as many do, just as any other members of the general public also do, and there is no prohibition of any kind against this.

4 Cal. 3d at 848 n.1, 484 P.2d at 956 n.1, 94 Cal. Rptr. at 788 n.1. Hence the "cluster of services" offered by the Bureau need not be viewed as an essentially unified service at all.

its lobbyist services, this dichotomy is not easily maintainable. The maintenance of a compendium of statutes, for example, seems to fall in between. Moreover, newspapers that carry a great deal of legal advertising presumably have a greater need for and make more use of the lobbyist services than do smaller advertisers; it can be argued they should pay more for such services.[85]

The third major determination involves Statewide's tying arguments, relied upon by the court as an alternate reason for its decision.[86] A tie-in may be defined as an agreement by one party to sell one product (the tying product) only on the condition that the buyer also purchase a different product (the tied product).[87] Since such a practice forces buyers to forgo their free choice among competing products and thus inevitably curbs competition, "tying agreements fare harshly under the laws forbidding restraints of trade."[88] A tying agreement is illegal per se if a party has "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product,"[89] and if the amount of business foreclosed by the tie is "substantial enough in terms of dollar-volume so as not to be merely *de minimis*."[90] In *Corwin* the uniqueness of the Bureau's services gives it sufficient economic power to restrain competition.[91] However, it is also necessary to show that the tying and the tied products are distinct since there can be no tie if Bureau merely sells a single unified product.[92]

Three tying theories can be made out in *Corwin*, though the supreme court chose to focus only on one: that the Bureau was tying the lobbyist services (tied product) to preparation of legal advertising (tying product) by means of the single commission charged for both; that the Bureau was tying the preparation of notices of trustee sales (tied product) to the preparation of all other forms of legal advertising (tying product) also by means of the commission provision; and that the Bureau was tying all of its services together by

85. For a discussion of whether such a scheme may constitute price discrimination operating as a restraint of trade, see United States v. Wichita Eagle Publishing Co., 1959 TRADE CAS. ¶ 69,400 (D. Kan. 1959); United States v. National Linen Serv. Corp., 1956 TRADE CAS. ¶ 68,398 (N.D. Ga. 1956).

86. 4 Cal. 3d at 856-59, 484 P.2d at 962-64, 94 Cal. Rptr. at 794-96.

87. Northern Pac. Ry. v. United States, 356 U.S. 1, 5-6 (1958).

88. *See* Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 606 (1953).

89. Northern Pac. Ry. v. United States, 356 U.S. 1, 6 (1958).

90. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 501 (1969).

91. 4 Cal. 3d at 857-58, 484 P.2d at 963, 94 Cal. Rptr. at 795. *See* Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 503 (1969).

92. The question of separability for purposes of judging a restraint's reasonableness is similar to judging distinctness under a tie-in theory.

means of the annual distribution provision.[93] The first theory seems clearly tenable. The products may be sufficiently distinct to meet the tests of *United States v. Jerrold Electronics Corp.*:[94] first, competitors sell the services separately;[95] second, the number of component services a single newspaper receives may vary from time to time and from newspaper to newspaper, which tends to show that the services are separable. On the other hand, the Bureau could argue that its services are unified because it charges a lump sum rather than for each service separately and because it treated its services as unified by requiring that all services be paid for whether or not the newspaper had utilized them on any particular ad. But the Bureau's treatment alone is not dispositive. The second tying theory is also tenable though it involves difficulties since the basic service is the same even when applied to different kinds of ads.

The third tying theory, however, the one on which the supreme court relied, seems the least persuasive, since it is not possible to identify any distinct product that is being tied to any other. The tied product, presumably, is ads a member wishes to withdraw, while the tying product is ads a member desires the Bureau's services on and on which the member wants a rebate. The distinction here is not in the nature of the services but in the time an ad is placed, its source, and similar factors. Another fact that tends to weaken the third theory is that the Bureau did not refuse to sell its services separately but merely gave a refund if no services were withdrawn from the agreement. The Bureau's arrangement seems analogous to a quantity discount offered to those who purchase the full line of its services, which, if illegal at all, must be judged by different standards than here applied.[96] Moreover, suggestive language from other cases would seem to rule this out as a true tying arrangement.[97] Finally, the normal analysis of tie-in vices, that they permit "minor or inferior items in a seller's line to ride to market on the back of his major superior item,"[98] does not apply in

93. See text accompanying note 71 *supra.*

94. 187 F. Supp. 545, 559 (E.D. Pa. 1960), *aff'd per curiam,* 365 U.S. 567 (1961).

95. Statewide, for example, does not provide lobbyist services.

96. Quantity discounts are judged under the standards applying to price discrimination. *See, e.g.,* FTC v. Morton Salt Co., 334 U.S. 37 (1948).

97. Justice Black wrote in *Northern Pacific*:

> Of course where the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a *single price.*

356 U.S. at 6 n.4. *See also* United States v. Kohler Co., 1953 TRADE CAS. ¶ 67,553 (E.D. Pa. 1953), where the court found that no tie-in would be proved unless the government could show an actual refusal to sell plumbing fixtures separately. *Id.* ¶ 68,643.

98. Turner, *The Validity of Tying Arrangements Under the Antitrust Laws,* 72 HARV. L. REV. 50, 73 (1958).

Corwin under the third theory, again because of the basic similarity in nature of tied and tying products.

To support its finding of a tying arrangement under this theory, the court relied on a case somewhat similar to *Corwin* on its facts,[99] *Associated Press v. Taft-Ingalls Corp.*[100] There, an Ohio newspaper went out of business without giving the required 2 years' notice to the Associated Press, to which it subscribed. The Associated Press then sued for breach of the contract, and the newspaper set up as a defense the plaintiff's illegal tying arrangement, whereby it had been required to subscribe to four AP wires in order to get the one it wanted. The court held there had been an illegal tie-in, which was a complete defense to the contract action. Two important differences between *Taft-Ingalls* and *Corwin*, however, make that case unpersuasive here. The court there found it necessary only to decide that the "Ohio Big Cities" wire (which the newspaper needed) and the other three wires (which they had no use for) were sufficiently distinct products to allow a finding of a tie-in. In *Corwin* no court will be able to specify which legal advertisements are distinct from which others since presumably various newspapers would want to withdraw various kinds of ads at various times. Since, as the court's theory goes, the tying product is all unwithdrawn advertisements and the tied product is the ads desired to be withdrawn, there is no inherent distinction between them at all, as discussed above. Moreover, in *Taft-Ingalls* the court found it significant that by having to purchase all four wires, the newspaper was being forced to give up its independent judgment of which wires to use. In *Corwin*, on the other hand, each publisher is free to process advertising as he wishes—it is simply more costly[101] if he does not use the Bureau exclusively.

Though the court appears to have chosen the wrong theory, its decision seems correct. It is clear that the single commission provision operates to raise barriers to entry[102] and to restrain competition. In fact such motives are common with tying arrangements.[103]

99. *Corwin* and *Taft-Ingalls* both involved newspapers, though on most other grounds the cases are distinguishable.

100. 340 F.2d 753 (6th Cir.) (2-1 decision), *cert. denied*, 382 U.S. 820 (1965).

101. In the briefs, respondent-Bureau discussed a hypothetical example of a newspaper paying $500 in commissions to the Bureau (which received in that year $25,000 in total commissions) and getting a $100 refund as its share of the annual distribution. That the refund is so large, 20 percent, seems to indicate that the 15 percent commission may be unreasonably high to begin with. Brief for Respondents at 4.

102. For Statewide to compete effectively with the Bureau, it would also have to offer a full line of services, although it is possible and may be desirable for it to prepare only limited kinds of legal ads as it now does.

103. *See* Austin, *The Tying Arrangement: A Critique and Some New Thoughts*, 1967 WIS. L. REV. 88, 96-98 (1967).