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BLOG

California's Plan to Criminally Prosecute Cartwright Act Violations Yet Another Sign of Increasing State Antitrust Enforcement

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During a March 6, 2024 panel at the American Bar Association's annual National Institute of White Collar Crime, California Assistant Attorney General Paula Blizzard made the surprise announcement that for the first time in 25 years, California plans to begin prosecuting criminal antitrust cases under the Cartwright Act, California's state antitrust law.

AAG Blizzard's announcement marks the latest in a trend of increasing focus and scrutiny from state-level antitrust enforcement agencies. This change suggests that many states are standing ready to address antitrust enforcement if federal enforcement, which has been reinvigorated under the Biden administration, is weakened. The announcement also reflects a growing effort at the federal and state levels to pursue criminal, rather than just civil, antitrust enforcement.

HOW THE CARTWRIGHT ACT DIFFERS FROM THE SHERMAN ACT

The Cartwright Act has been the pillar of California state-level antitrust since 1907, but in many ways, it varies greatly from its federal counterparts. AAG Blizzard asserted during the panel that the Cartwright Act is "broader and deeper" than federal antitrust laws, echoing what the California Supreme Court previously held.[1] This may be correct in some respects—section 1 of the Sherman Act simply prohibits contracts, combinations, and conspiracies in restraint of trade, leaving the interpretation of specific prohibited activities to case law,[2] while the Cartwright Act specifically lays out prohibited activities.[3] However, the Cartwright Act is narrower than the Sherman Act in at least one respect—it is silent on single-firm monopolies and only outlaws concerted action by "two or more persons" to constrain trade.[4] By comparison, section 2 of the Sherman Act makes it unlawful to "monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States, or with foreign nations."[5] AAG Blizzard acknowledged as much during the panel discussion, noting, "I do not yet believe I have the ability to bring a criminal monopolization case[,] … [b]ut I will work on it."[6]

Both federal and California courts have recognized that the state's antitrust laws do not perfectly follow federal antitrust law and, therefore, "interpretations of federal antitrust law are at most instructive, not conclusive, when construing the Cartwright Act."[7] One notable difference between federal and California law is that the Cartwright Act makes it a crime to furnish any information in furtherance of a conspiracy, which, according to AAG Blizzard, means that even a third party may be subject to criminal punishment.[8] Additionally, some types of activities are

evaluated under a more stringent standard in California than in federal court. For example, tying arrangements brought under section 16727 are generally given per se treatment in California as long as the plaintiff can establish either that the defendant had market power over the tying product or that there was more than a substantial impact on commerce.[9] Similar cases at the federal level are frequently analyzed under the rule of reason.

AAG Blizzard also emphasized California's strong stance against employee noncompete and no-poaching agreements. The state recently passed new laws invalidating noncompete agreements, even those signed outside the state, as well as requiring employers to notify all employees that noncompete clauses in their contracts are not enforceable.

STATE ANTITRUST ENFORCEMENT IS STRONG AND GROWING

AAG Blizzard's announcement continues the increase in state antitrust enforcement over the last few years. This is partly due to recently passed federal legislation making it easier for state attorneys general to bring antitrust cases in the venue of their choosing – and keep them there. Several states have also passed legislation giving them the ability to impose increased antitrust scrutiny over certain transactions. Just last year, the federal government and the attorneys general of 31 states announced a partnership to investigate and challenge anticompetitive conduct in the food and agriculture sectors.

While California is the first state to announce its intent to pursue criminal antitrust cases, more may soon follow, considering the coordination that typically occurs at the state level. For example, Gwendolyn Cooley, Wisconsin's assistant attorney general and chair of the Multistate Antitrust Task Force for the National Association of Attorneys General (NAAG), announced last year that the NAAG had created a working group specifically to look at criminal antitrust enforcement relating to bid rigging. And just last week during an "Enforcers' Roundtable" at the American Bar Association Antitrust Spring Meeting, AAG Cooley referenced AAG Blizzard's announcement, commenting that it was "reminding everyone that [California] ha[s] criminal enforcement authority."[10] AAG Cooley added that 44 states have some form of criminal-antitrust enforcement authority, and that she expects to see more criminal investigations in the coming year.

CRIMINAL ANTITRUST PROSECUTION IS INCREASING AT THE FEDERAL LEVEL

California's decision to pursue criminal prosecution of antitrust violations mirrors the Department of Justice's recent expansion of criminal antitrust prosecutions to cover a wider array of conduct. In spring 2022, the DOJ stated its intent to begin criminally prosecuting individual executives who violate section 2 of the Sherman Act. It has since begun following through, reaching a plea deal in one criminal monopolization case and bringing 12 indictments in another. This enforcement has taken place alongside more traditional section 1 cases, which the DOJ has continued to prosecute vigorously.

The DOJ has also been actively pursuing criminal prosecution of other types of conduct, with mixed results. Just recently, the Fourth Circuit in *United States v. Brewbaker*[11] overturned a Sherman Act section 1 bid-rigging conviction, holding that per se analysis does not apply when parties are in both a horizontal and a vertical relationship. This follows several notable acquittals in no-poach and wage-fixing cases over the last few years. Despite these setbacks, the DOJ does not appear to be slowing down its enforcement efforts, barring a change in administration.

WHAT TYPES OF CRIMINAL CASES MIGHT CALIFORNIA PROSECUTE?

As AAG Blizzard acknowledged, California has not criminally prosecuted an antitrust case in roughly 25 years, and the attorney general's office has yet to give any real indication of what types of cases may be brought, or what, if any, investigations are ongoing. However, in light of the panel discussion and California's recently passed laws enhancing its scrutiny of noncompete and no-poach agreements, companies doing business in the state should exercise caution in this space. Otherwise, companies doing business in California risk both civil and criminal investigations at the state and federal level.

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[1] *See In re Cipro Cases I & II*, 61 Cal. 4th 116, 160 (2015) (the Cartwright Act is "broader in range and deeper in reach than the Sherman Act").

[2] 15 U.S.C. § 1 (2000).

[3] *See* Cal. Bus. & Prof. Code § 16720.

[4] *See id.* Note that the California Law Revision Commission has been studying potential changes to the Cartwright Act since 2022, including whether the Cartwright Act should be amended to address single-firm conduct.

[5] 15 U.S.C. § 2 (2000).

[6] Ms. Blizzard also stated during the panel discussion that the possibility of prison time is "probably the biggest deterrent" she has at her disposal. Criminal violations of the Cartwright Act can result in three years in county jail for individuals, as well as fines of up to $250,000 or double the gain or loss from the conduct, whichever is greater. For corporations, fines can reach $1,000,000 or double the gain or loss, whichever is greater. *See* Cal. Bus. & Prof. Code § 16755.

[7] *In re Capacitors Antitrust Litig.*, 106 F. Supp. 3d 1051, 1072-73 (N.D. Cal. 2015); *Aryeh v. Canon Bus. Sols.*, 55 Cal. 4th 1185, 1194-95 (2013).

[8] Paula Blizzard, Cal. Assistant Att'y Gen., Remarks at the American Bar Association National Institute of White Collar Crime (Mar. 6, 2024); *see also* Cal. Bus. & Prof. Code § 16755.

[9] *Morrison v. Viacom, Inc.*, 66 Cal. App. 4th 534, 542, 78 Cal. Rptr. 2d 133, 137 (1998).

[10] Gwendolyn Cooley, Wis. Assistant Att'y Gen., Remarks at the American Bar Association Antitrust Spring Meeting (Apr. 12, 2024).

[11] No. 22-4544 (4th Cir. 2023).

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