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Kickbacks, Rebates and Tying Arrangements In Real Estate Transactions; The Federal Real Estate Settlement Act of 1974; Antitrust and Unfair Practices

CONRAD G. TUOHEY*

Inflation has given rise to "consumerism", a cost consciousness and awareness on the part of the general public. This consumerism, in turn, is generating pressure upon administrative agencies, legislatures, and courts to reassess the laws relating to antitrust and unfair trade practices, particularly respecting the governmentally regulated industries.

No where is this reassessment more apparent than in the home buying, home financing, and related industries.

With the exception of only a handful of sophisticates who are themselves economically dependent upon some specific aspect of land sale and financing closing procedures and costs, most people (and certainly the consumer public in the form of casual buyers

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of and borrowers in real property transactions) are ignorant of cleverly concealed rebates, kickbacks, ty-ins, price fixing and compounded resulting costs which are frequently encountered.

These sophisticated insiders have been singularly successful in developing procedures which have been implemented by state and federal legislatures, sanctioned by administrative agencies, and often misconceived, and thus tolerated by courts.

As is so frequently the case, the financial incentives involved are tremendous and have served to tie significant financial institutions, professions and occupations together into artfully developed horizontal and vertical integrations, and conglomerate product extensions.

From time to time, these integrations become the subject of scrutiny. Rarely are they understood. They wield such tremendous political and financial power that, even in those rare instances when they are scrutinized or understood, they nevertheless emerge unscathed.

The composition of these integrations should patently explain why. They consist of lenders, lawyers, brokers (real estate and mortgage), insurers, abstractors and others of equal weight, who often operate through powerful trade associations and lobbies.

Singularly and collectively they have been effective in overwhelming and suppressing competition which could and should provide the consumer public with a mechanism to combat the unfair, monopolistic and inflationary practices naturally resultant from these integrations. One such mechanism is the truly independent, uncontrolled and non-captive escrow agent, whose value and utility has been most recently fortified and enhanced by the federal enactment of the Real Estate Settlement Procedures Act of 1974.[1]

The purpose of this paper is to (1) define the independent escrow agent, (2) explain its value and utility to the consumer public, (3) demonstrate the reasons why it is targeted for annihilation by the integrations and how this is being achieved, (4) discuss why remedial legislation and regulation should specifically preserve and protect the consumer and the independent escrow agent in the marketplace, and (5) determine how the Real Estate Settlement Procedures Act of 1974[2] will implement this preservation and protection.

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1. Act of Dec. 22, 1974, Pub. L. No. 93-533 § 2 *et seq.*, 88 Stat. 1724, *et seq.* (codified at 12 U.S.C. § 2601, *et seq.* (Supp. I, 1975)), effective June 20, 1975.
2. *Id.*

I. THE ESCROW AGENT FUNCTION EXPLAINED

Many states do not use the escrow in the sale of real property; however, in California this device is virtually the exclusive means by which real property is transferred or refinanced. Furthermore, California is the only state to experience relatively large scale utilization of "independent escrow agents",[3] primarily in Southern California. The essence of an escrow transaction is the deposit of money or documents by one person with an escrow agent for delivery to another person upon the occurrence of specified events.[4] In order to engage in the business of an escrow agent in California, one must be licensed as such by the State Department of Corporations,[5] except for certain conditionally exempt classes.[6]

If a deed is deposited in escrow with the intention of passing title, the buyer becomes the equitable owner and the seller holds the legal title in trust for the buyer.[7] Consideration deposited in escrow with instructions to deliver it only on the happening of certain events remains the property of the person depositing it until all the conditions of the escrow have been fulfilled.[8] The same is true where a mortgage or trust deed is deposited to encumber real property of an owner-borrower (mortgagor or trustor) in a borrowing or refinancing transaction.

In California, escrow practices differ between the northern and southern portions of the state. In Northern California, title (abstract) companies handle almost all real property escrows. However, in the south, a majority of escrows are handled by banks, title companies or by the numerous independent escrow companies who exist exclusively to handle such escrow transactions.[9]

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3. Comment, *The Independent Escrow Agent: The Law and the Licensee*, 38 S. CAL. L. REV. 289, 290 (1965).
4. CAL. CIV. CODE § 1057 (West 1954); CAL. FIN. CODE § 17003 (West 1968); *see generally* 18 CAL. JUR. 2d, *Escrows* §§ 1, *et seq.* (1969); 4 CALIFORNIA REAL ESTATE LAW AND PRACTICE 91-1 *et seq.* (Matthew Bender publ. 1974); 2 H. MILLER & M. STARR, CURRENT LAW OF CALIFORNIA REAL ESTATE § 261, *et seq.* (1969); *A General Discussion of Escrow*, TITLE INSURANCE AND TRUST MANUAL (1969).
5. CAL. FIN. CODE §§ 17000, *et seq.* (West 1968).
6. CAL. FIN. CODE §§ 17006; 17004, 17200 (West 1968).
7. Mullen v. Dyer, 20 Cal. 2d 526, 529, 127 P.2d 901, 903 (1942).
8. Hastings v. Bank of America, 79 Cal. App. 2d 627, 629, 180 P.2d 358, 359 (1947).
9. Aran, *Escrow* in REAL ESTATE SALES TRANSACTIONS 506 (Calif. Con-

Escrow transactions enjoy popularity as they are theoretically performed by parties who are ostensibly independent of the transaction and who, therefore, should objectively evaluate if and when all conditions precedent are satisfied, in order to "close" (i.e. consummate) the transaction. By the use of an independent escrow agent, an unavailable party to the transaction need not be present at closing and may presume that the escrow will not be closed unless and until all conditions agreed upon have been satisfied and the bargained-for consideration has been received into escrow. The escrow agent performs a dual agency owing fiduciary duties to all principal parties to the escrow.[10] In addition, repetitive clerical proficiency and concomitantly reduced fees (as opposed, for example, to attorney fees) render the escrow agent attractive.[11] This procedure in California differs considerably from many other states where an attorney typically is involved in the transaction solely to perform this function or in conjunction with collateral functions,[12] and the settlement costs generally reflect his participation.

The term "escrow", however, is not necessarily synonymous with a transaction conducted by an impartial and disinterested third party. In California, several of the statutorily recited exemptions permitting the conduct of escrows by individuals and firms include some who may have a conflict of interest with at least one of the parties to the escrow transaction. Depending upon circumstances, these might include the broker, the lender, title insurer, or others.[13]

The broker (whether real estate or mortgage) who conducts an escrow owes a fiduciary duty to his principal on the one hand, and a fiduciary duty as escrow holder to his principal and the other party (or parties) on the other.[14] Moreover, he may be confronted

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tinuing Education of the Bar 1967); 4 CALIFORNIA REAL ESTATE LAW AND PRACTICE § 92.06 (Matthew Bender publ. 1974).

10. Aran, *Escrow* in REAL ESTATE SALES TRANSACTIONS 506 (Calif. Continuing Education of the Bar 1967).

11. Aran, *Escrow*, in REAL ESTATE SALES TRANSACTIONS 506-08 (Calif. Continuing Education of the Bar 1967). For limitations as to permissible latitude without constituting the unauthorized practice of law, *see*, *Agreement Between the State Bar of California and Escrow Institute of California* (1966); *Agreement of State Bar of California and California Bankers Association*, ¶ 6 (1935); *Agreement Between the State Bar of California and the California Land Title Association*, ¶ 3 (1936). Comment, *The Independent Escrow Agent: The Law and the Licensee*, 38 S. CAL. L. REV. 289, 307-310 (1965).

12. Washington *Post*, Jan. 15, 1972, at A-12.

13. CAL. FIN. CODE § 1706 (West 1968). *See for example* CAL. CIVIL CODE § 1057.5 (West Supp. 1975). *See also* AMERICAN BAR ASSOCIATION: SPECIAL COMMITTEE ON RESIDENTIAL REAL ESTATE TRANSACTIONS, THE PROPER ROLE OF THE LAWYER IN RESIDENTIAL REAL ESTATE TRANSACTIONS (1974).

14. Comment, *The Independent Escrow Agent: The Law and the*

with the further complication in the stake which he holds to the extent that his brokerage commission may emanate from that source of funds and to the extent that it is his ultimate determination if and when his commission will be paid.[15] This determination is, of course, subject to judicial review.

Ironically, a broker cannot handle an escrow as to a transaction in which he is not a broker, unless he is licensed as an escrow agent under the Escrow Law in California.[16] In other words, a broker can only serve as an escrow agent in transactions where he necessarily has a conflict of interest.

According to one study conducted on the subject, the authors noted that:

> It is apprent that in . . . a typical broker conducted real estate sale situation, a listing contract between the owner and broker creates one agency relationship and if the broker handles the escrow under the exemption contained in California Financial Code Section 17006(d) a second agency relationship based upon the contract known as escrow instructions results . . . . There is a different agency obligation imposed upon the broker when he conducts the escrow than when he is fulfilling his responsibilities to the principal under the listing contract.[17]

This same article noted that, when the study was conducted, they found no evidence that this dual situation had been or is the cause of massive injury to the public. However, the study did indicate

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Licensee, 38 S. CAL. L. REV. 289, 304-307 (1965). *Cf.*, 10 CAL. ADM. CODE § 2950 setting forth limitations by the California Real Estate Commissioner upon real estate brokers handling escrows, with the equivocal admonition that the prohibitions "may be considered grounds for disciplinary action." *See also* CAL. CIVIL CODE § 1057.5 (West Supp. 1975). *See generally* L. BROMWICH, WHO PROTECTS THE BORROWERS?: A REPORT ON MORTGAGE LOAN BROKERS LAW 1955-1969 (Calif. Senate Subcommittee, etc., 2d printing, Feb. 15, 1971).

15. The seller is often unaware that the broker could include a variety of clauses in the listing agreement that are favorable to him in payment of commissions. *See* MILLER AND STARR, in REAL ESTATE SALES TRANSACTIONS, Chapt. 5 (California Continuing Education of the Bar 1967), *cf.*, CAL. INS. CODE § 12404 (West 1967).

16. 43 CAL. OP. ATT'Y GEN. 284, 284-285 (1964); 44 CAL. OP. ATT'Y GEN. 105, 105 (1964).

17. W.H. HIPPAKA, THE CONDUCT OF ESCROWS BY CALIFORNIA REAL ESTATE BROKERS, 59 (School of Business Administration, Calif. Dept. of Real Estate, California State College at Fullerton, San Diego State College, publishers, 1968).

that there was potential for breach of the legal duty of agency loyalty under the prevailing situation.[18]

Similarly, a lender who is either funding into or being paid out of an escrow transaction, while perhaps not a primary party to the escrow, may well have a conflict of interest serving as the escrow agent.

But a pattern is now clearly emerging whereby many lenders, brokers, insurers, abstractors and others are establishing their own corporate entities and licensing them as escrow companies. These escrow companies are the so-called "captive" or "controlled"[19] escrow companies, and are not independent escrow agents. Rather, the practice demonstrates the tremendous impact which escrow companies exert in most transactions which they handle. That is, they are frequently pivotal in determining who performs the title work, who writes the title insurance, and who places the loan. In effect, escrows steer the course of lucrative business monies. However, the impact of the Real Estate Settlement Procedures Act of 1974[20] in prohibiting kickbacks and unearned fees could significantly increase the competition in settlement services which would thereby insure the independent escrow company a fair share of that market.

A. *Background of the Escrow Law*[21]

Escrow business in California was governed by common law principles until 1947. The original enactment of the Civil Code in 1872[22] recognized escrow as a transactional function.

In 1947 the Escrow Law was enacted for the following stated purposes set forth in its title:

> An act to regulate the business of escrow *agencies and the employees thereof*, to provide for *their* licensing, examination and regulation by the Commissioner of Corporations to provide *exemptions* from and prescribe penalties for violations of this act. (Emphasis added.)[23]

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18. *Id.* at 59-60. *See also* CAL. BUS. & PROF. CODE § 10716(d) (West).

19. While the term "captive" in this context is a loose generic term which relates to a multitude of corporate subsidiary, joint venture, and inhouse divisional relationships, the term "controlled" is usually employed to describe the relationship between a title insurer and an underwritten title company in the issuance of title insurance through this inter-relationship, and such insurances is "controlled insurance". *See* CAL. INS. CODE § 12404.5. (West Supp. 1974).

20. Act of Dec. 22, 1974, Pub. L. No. 93-533 § 2 *et seq.*, 88 Stat. 1724, *et seq.* (codified at 12 U.S.C. § 2601, *et seq.* (Supp. I, 1975)).

21. CAL. FIN. CODE §§ 17000-17654 (West 1968).

22. CAL. CIVIL CODE § 1057 (West 1954).

23. Cal. Stats. 1947, c. 921, 2126.

In 1951 the Escrow Law became Division 6 of the California Financial Code.[24]

At the onset, it is important to delineate between "independent escrow agencies" which conduct escrows exclusively on the one hand and so-called "controlled" or "captive" escrows performed by others in conjunction with their other and usually paramount operations. The latter escrows may be conducted "in house" and are thus exempt from the operation of the Escrow Law.[25]

The Escrow Law is notable in that, on its face, it is limited to the examination, licensing and regulation of the business of only independent escrow agencies and their employees.[26]

The Escrow Law specifies its own exemptions as follows:

> This division [Division 6, the "Escrow Law"] does not apply to:
>
> (a) Any person doing business under any law of this state or the United States relating to banks, trust companies, building and loan or savings and loan associations, or insurance companies.
>
> (b) Any person licensed to practice law in California who is not actively engaged in conducting an escrow agency.
>
> (c) Any person whose principal business is that of preparing abstracts or making searches of title that are used as a basis for the issuance of a policy of title insurance by a company doing business under any law of this state relating to insurance companies.
>
> (d) Any person licensed by the Real Estate Commissioner while performing acts in the course of or incidental to his real estate business.[27]

24. Cal. Stats. 1951, c. 364, 1107. CAL. FIN. CODE §§ 17000-17654 (West 1968).

25. For an amplification of some of the operative distinctions, *see* Comment, *The Independent Escrow Agent: The Law and the Licensee*, 38 S. CAL. L. REV. 289, 303-304 (1965).

26. CAL. FIN. CODE § 17006 (West 1968).

27. CAL. FIN. CODE § 17006 (West 1968). This section was last amended by Cal. Stats. 1965, c. 287, § 2, which deleted a further exemption, the "joint control agent." (*See* CAL. FIN. CODE § 17005.1 (West 1968) and the exempted lender in the last clause thereof).

Subdivision (a) of Cal. Fin. Code § 17006 includes any person "doing business" under any law of this state or the United States relating to (1) banks, (2) trust companies, (3) building and loan or savings and loan associations, or (4) insurance companies. The term "doing business" is not defined in the California Financial Code. The term "doing business" is statutorily defined only in CAL. REV. TAX CODE § 23101 (West 1968), where it means "actively engaging in any transaction for the purpose of financial or pecuniary gain or profit."

The Escrow Law is also notable in that, as applied, it imposes elaborate and stringent requirements upon a statutorily defined class of licensed escrow agencies only, while excluding by exemption and lack of implemental legislation or administrative regulation a far greater proportion of this service industry than it includes.[28]

B. The Application of the Escrow Law: Requirements Imposed Upon the Licensed Escrow Agent

Basically there are six categories of requirements which the Escrow Law imposes solely upon a licensee, which may be an independent escrow agent or a captive or controlled escrow company. Four of these requirements must be satisfied prior to the commencement of escrow business by the licensed escrow agent. These four requirements and two more are applicable following the commencement of business and thereafter.[29]

First, it is necessary for a licensed escrow agent to be a corporation.[30] Under California Corporate law, a corporation must have not less than three directors.[31] In addition, these directors must be "especially qualified."[32]

The reason for this qualification is to make supervision easier and to create a means of control over these specific escrow companies by the California Corporations Commissioner.

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28. Based upon deed recordings in Los Angeles County between January 1, 1967 through June 30, 1968, independent escrow corporations (agencies) accounted for 34 to 36 1/2% of the real property transactions utilizing escrow. W.H. HIPPAKA, THE CONDUCT OF ESCROWS BY CALIFORNIA REAL ESTATE BROKERS, 77 (School of Business Administration, California Department of Real Estate, California State College at Fullerton, San Diego State College, publishers, (1968). Independent escrow agencies exist and are utilized much more in Southern California than in Northern California. *See* Comment, *The Independent Escrow Agent: The Law and the Licensee*, 38 S. CAL. L. REV. 289, 291, n.17 (1965). *See also*, California Department of Corporations, [Escrow Agent] *Licensee Address Listing* as of September 18, 1970, showing 325 licensees out of its Los Angeles office, and only 12 and 8 out of its San Francisco and Sacramento offices, respectively. Therefore, if independent escrow agents are utilized in only slightly more than one-third of real estate transfers in the county of their highest density (Los Angeles), it is reasonable to assume that independent escrow agents are utilized in significantly less than one-third of the total escrowed real estate transfers in the entire state.

29. Comment, *The Joint Control Industry and State Regulation*, 16 HAST. L.J. 229 (1964).

30. CAL. FIN. CODE § 17200 (West 1968).

31. CAL. CORP. CODE § 301(d) (West Supp. 1975).

32. CAL. FIN. CODE § 17209.3(b) (West 1968).

Second, the corporate capitalization must at all times consist of $10,000 liquid net worth in excess of its current liabilities.[33]

Third, two types of bonding are required. One type is a $10,000 bond for an escrow agent's license.[34] The other is a fidelity bond in an amount determined by the Commissioner of Corporations, but in no case less than $50,000.[35] Consequently, the smaller companies must absorb a relatively higher amount of protection.

Fourth, the incorporators or directors of the escrow licensee must possess "the character, experience, or general fitness to engage in such business."[36]

Moreover, the escrow licensee must establish that there is an "officer or manager posessing a minimum of five (5) years of responsible escrow experience to be stationed in the proposed business location."[37]

Fifth, the licensee must submit to rigorous auditing procedures.[38]

Sixth, the licensee is subjected to a variety of enforcement remedies. The licensee's license may either be revoked or suspended.[39]

Moreover, the Corporations Commissioner is authorized, depending upon the circumstances, to take possession of the licensee's

33. CAL. FIN. CODE § 17210 (West 1975).

34. CAL. FIN. CODE § 17202 (West Supp. 1975). A cash bond is an alternative. *See* CAL. FIN. CODE § 17202.1 (West Supp. 1975). *Cf.*, Corp. Comm. Release No. 5-L dated February 5, 1968. The Corporations Commissioner may require an additional bond of no more than $5,000. 10 CAL. ADM. CODE § 1719.

35. CAL. FIN. CODE § 17203.1 (West Supp. 1975); *cf.*, 10 CAL. ADM. CODE §§ 1720-1724. 10 CAL. ADM. CODE § 1723 sets forth a sliding scale for such bonding based upon the dollar amount of funds on deposit.

36. CAL. FIN. CODE § 17209.3(b) (West 1968). *Compare* CAL. FIN. CODE §§ 17200.8, 17209.1 (West 1968), 17209 (West Supp. 1975).

37. CAL. FIN. CODE § 17209.3(c). *Compare* 10 CAL. ADM. CODE §§ 1715, 1716; CAL. FIN. CODE §§ 17200, 17209.1 (West 1968), 17209 (West Supp. 1975).

38. CAL. FIN. CODE §§ 17404-08 (West 1968), 10 CAL. ADM. CODE §§ 1730, *et seq.* The audits referred to in CAL. FIN. CODE § 17406 (West Supp. 1975) are performed by independent certified public accountants or independent public accounts at the sole cost and expense of the licensee, annually. *Cf.* 10 CAL. ADM. CODE § 1741.51.

39. CAL. FIN. CODE §§ 17602-06 (West 1968), 17608.1 (West Supp. 1975). It is interesting to note that a revocation hearing is held pursuant to the California Administrative Procedures Act. CAL. GOV. CODE § 11500, *et seq.* (West 1966); 10 CAL. ADM. CODE § 1753.

agency,[40] apply for the imposition of a receivership upon the licensee's agency,[41] and felony offenses may be imposed for certain other violations.[42]

In 1972, the [Second] California District Court of Appeals held the Escrow Law not to be unconstitutional as an unreasonable classification.[43] The plaintiff, the Escrow Institute of California (a consortium of independent escrow agents) contended that the Escrow Law embodied an unconstitutional classification in that the parties exempted constitute a class which, in view of the purpose for which the regulatory legislation was enacted, cannot be distinguished from the class of independent escrow agents, represented by plaintiffs, which the Escrow Law solely regulated.

The court held that those who are exempt from the Escrow Law are otherwise subject to "stringent" statutes and regulations governing their conduct. Therefore, it was not unreasonable for the legislature to determine that further regulation was unnecessary for these entities. The court stated that:

> . . . a statute cannot be deemed in conflict with the constitutional provisions unless the discrimination or inequality produced by the particularly legislative classification is 'actually and palpably unreasonable and arbitrary . . . . When a legislative classification is questioned, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of existence of that state of facts, and the burden of showing arbitrary action rests upon the one who assails the classification.'[44]

The court maintained that in this case there was a:

> reasonable relation to a proper legislative objective in the inclusion of independent escrow agents within the Escrow Law and the exemption therefrom of the individuals and entities designated in section 17006 of the Financial Code.[45]

II. Conflicts of Interest, Rebates, Kickbacks and Referral Fees

Early in 1974, the California State Insurance Commissioner issued a ten-page bulletin[46] to all title insurance companies stating that unfair practices in the business would no longer be tolerated. Some

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40. Cal. Fin. Code § 17621 (West 1975).
41. Cal. Fin. Code §§ 17635-17636 (West 1968).
42. Cal. Fin. Code § 17414 (West 1975).
43. Escrow Institute of California v. Pierno, 24 Cal. App. 3d 361, 100 Cal. Rptr. 880 (1972). *But see*, Brown v. Merlo, 8 Cal. 3d 855, 861-862, 506 P.2d 212, 216-17, 106 Cal. Rptr. 388, 392-93 (1973).
44. *Id.*, at 369-70.
45. *Id.*, at 370.
46. 1974 Cal. Dept. of Ins. Bull. No. 74-2.

of the title insurance industry did not take his comments seriously and in September, 1974, a series of fines were levied. One company was fined $125,000 for depositing funds in a bank to serve as a compensating balance for a loan to a realtor to induce him to steer business to them. Another company was fined $187,000 as a result of an escrow scheme which provided escrow services to brokers at a rate cheaper than the broker charged his client. Three other companies were fined a total of $110,000 for improper rebates.[47]

The Insurance Commissioner indicated that if violations continued, he would take stronger action. He indicated that "the giving and taking of rebates is a criminal offense . . . [and the] Commissioner can take action to revoke the license of an offending company if it persists in violating the laws."[48]

Although a title company may lawfully receive a rebate or commission by referring business to a title insurer,[49] the problem occurs when real estate brokers enter into similar arrangements with title companies and title insurance companies. It was in this situation that the Insurance Commissioner issued fines.

The consolidation of real estate brokers in California has rapidly occurred and as a result an economic concentration has begun which gives rise to high volume escrow rebates being initiated by real estate brokers. The Real Estate Commissioner does have the discre-

47. Los Angeles *Daily Journal*, Sept. 11, 1974 at 20, col. 1; Los Angeles *Times*, Mar. 9, 1975, Part V, p. 1, col. 1, Averbach, "Title Insurance: Little Known Field Thurst Into Glare." *See generally* 27 CAL. JUR. 2d, *Insurance*, §§ 145, 530 (1956). (Rebates are often in disguised form, such as contest "points" the accumulation of which result in all expense paid trips; sometimes they are simply unreported cash; sometimes they consist of fictitious office rent sharing, partially paid-for employees, and infinite other cleverly concealed considerations). Cf., Paramount Gen. Hospital Co. v. National Medical Enterprises, Inc., 42 Cal. App. 3d 496, 117 Cal. Rptr. 42 (1974).

48. *Id.*

49. CAL. INS. CODE § 12412 (West 1972). Chicago Title Ins. Co. v. Great Western Financial Corp., 69 Cal. 2d 305, 444 P.2d 481, 70 Cal. Rptr. 849 (1968). The Chicago Title Ins. Co. decision is not a good example of judicial clarity with regard to complex economic and legal considerations and is accompanied by a vigorous dissent. Indeed, the decision is confusing. It is a safe observation to state that its broad dicta will give rise to numerous qualifications in the future. This is already manifesting itself. *See for example* Greenberg v. Equitable Life Assur. Society, 34 Cal. App. 3d 994, 999, 110 Cal. Rptr. 470, 474 (1973); Shernoff v. Superior Court, 44 Cal. App. 3d 406, 118 Cal. Rptr. 680 (1975).

tion to investigate, suspend or revoke a real estate license when a licensee receives certain secret or undisclosed compensation.[50]

However, the trend is bilateral in nature; that is, some title insurance companies have demonstrated a desire to organize real estate brokers, who have the unique ability to refer the escrow, on any basis. Conversely, some real estate brokers have demonstrated a desire to obtain a fee in addition to their brokerage commission for referring the escrow. As for the brokers, these referral fees, rebates or kickbacks, are relatively modest, and can only become significant when cumulated by high volume. As for the title insurers, however, the imperatives are overwhelming. The essentiality of broker or escrow referrals to the title insurer cannot be overemphasized. More often than not, the broker or escrow is the *sine qua non*, the very first link in a frequently long and lucrative chain of events, which typically leads to title work, title insurance, financing, surveying, termite inspection, fire and casualty insurance, and other ancillary endeavors, each of which independently generates money.

Moreover, a very serious question as to the actual value of the standard homebuyer's title policy is emerging and courts are either systematically construing such contracts with ultimate strictness against the insurer[51] or resorting to tort negligence theories on the title search.[52] If the title policy itself is of questionable value without costly additional endorsements (some of which are available only to lenders and not to buyers), the fierce competition between the insurers becomes more understandable. Consequently, a title insurer is amenable to *treat the escrow as a loss leader transaction*,[53] picking up the real profit through the sale of title insurance.

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50. CAL. BUS. & PROF. CODE § 10176 (West Supp. 1975). *See also* P.M. MYLNARYK, CRITICAL ANALYSIS OF EMERGING TRENDS IN FRANCHISING AND EXPANSION BY MERGER AND ACQUISITION OF REAL ESTATE FIRMS 35-36, (California State University, Fullerton, California Department of Real Estate, July, 1973).

51. *See for example* Jarchow v. Transamerica Title Ins. Co., 48 Cal. App. 3d 917, 122 Cal. Rptr. 470 (1975), Supreme Court hearing denied, Paramount Properties Co. v. Transamerica Title Ins. Co., 1 Cal. 3d 562, 83 Cal. Rptr. 394, 463 P.2d 746 (1970), Nebo, Inc. v. Transamerica Title Ins. Co., 21 Cal. App. 3d 222, 98 Cal. Rptr. 237 (1971). *See generally*, Los Angeles *Times*, March 9, 1975, at Part V, p. 1, col. 1. (Many title insurers in California use uniform policies adopted by their California Land Title Association.)

52. *See for example* Jarchow v. Transamerica Title Ins. Co., 48 Cal. App. 3d 917, 122 Cal. Rptr. 470 (1975), Supreme Court hearing denied, Contini v. Western Title Ins. Co., 40 Cal. App. 3d 536, 115 Cal. Rptr. 257 (1974); Banville v. Schmidt, 37 Cal. App. 3d 92, 112 Cal. Rptr. 126 (1974); Northwestern Title Ins. Co. v. Flack, 6 Cal. App. 3d 134, 85 Cal. Rptr. 693 (1970).

53. *Compare*: CAL. BUS. & PROF. CODE §§ 17030, 17044 (West 1964).

As a result, the independent escrow companies, who make a living solely conducting escrows, are being seriously threatened.[54]

The California Department of Insurance Bulletin observed:

> Purchaser or sellers of residential property who must pay for the almost universally required policy of title insurance seldom make a conscious selection of a title insurer on the basis of comparisons of product cost, quality or service. Rather, the selection is usually made by the agent or representative of the person required to pay for the title policy and, as a consequence, the title industry's competitive effort has been aimed at the agent or representative. While the representative has a fiduciary relationship to the purchaser or seller, cost or service features of the transaction of potential benefit to the purchaser or seller may be subordinated to other consideration found to be personally desirable or beneficial to the representative. As a result, the opportunity for enrichment of the representative may be placed in a higher order of priority than the opportunity of securing for the person required to pay for the policy of title insurance the best product in terms of cost or service.
>
> In a free and competitive consumer-oriented market, prices are generally restrained by competition. If the selection of the title service or product is made by a person whose primary interest in the transaction is a collateral benefit flowing to him from the title entity, the motivation for the selection by such person may not be in the best interest of the consumer. However, if consideration of any kind to the party making the selection of the title service or product is eliminated, it is reasonable to assume that the person making such selection will then be motivated by other considerations in channeling or directing title business, where such channeling or directing is unavoidable. It is further assumed that when there is no possibility of a material personal benefit or rebate to the representative of the seller or buyer, said representative would either make no recommendation or would recommend a listing of title companies known to be competitive in terms of price or service in order to protect his own business reputation or his own competitive position.
>
> Recognition of the potential for treating the interests of the consumer as secondary to those of the consumer's agent or representative, created by the fact that the competition that exists is not at the level of the true consumer, goes to the heart of the anti-rebate provisions in the Insurance Code. Those provisions serve as a cornerstone of the effort to maintain a fair and competitive business environment that will serve the needs as well as the best interests of the ultimate purchaser of the title product or service.[55]

The Escrow Law and all the case law are remarkable in that they are limited to the examination, licensing and regulation of the

54. *See generally*, McCarthy, *Whatever Happened to the Small Businessman? The California Unfair Practices Act*, 2 U.S.F.L. Rev. 165 (1968).
55. 1974 CAL. DEPT. OF INS. BULL. No. 74-2.

business of *only licensed escrow agencies and their employees.*[56] Financial Code Section 17006[57] exemptees regulated by California administrative agencies other than the Department of Corporations for their respective principal businesses (*e.g.*, title insurers) are either totally unregulated or virtually unregulated as to their conduct of escrows and, if regulated at all in their conduct of escrows, such regulation has been cosmetic.

Attention is here focused upon those escrow transactions to which the Escrow Law is *inapplicable.* These exemptions are set forth in the Escrow Law itself, as follows:

> This division [Division 6, the "Escrow Law"] does not apply to:
> (a) Any person doing business under any law of this state of the United States relating to banks, trust companies, building and loan or savings and loan associations, or *insurance companies.*
> (b) Any person licensed to practice law in California who is not actively engaged in conducting an escrow agency.
> (c) *Any person whose principal business is that of preparing abstracts or making searches of title that are used as a basis for the issuance of a policy of title insurance by a company doing business under any laws of this state relating to insurance companies.* (Emphasis added.)
> (d) Any person licensed by the Real Estate Commissioner while performing acts in the course of or incidental to his real estate business.[58]

In this regard, it is interesting to note that, in addition to the California Escrow Law, Regulations, and exemptions therefrom in the Financial Code, there is a specific Civil Code provision relating to escrows prohibiting rebates or kickbacks:

> Except for the normal compensation of his own employees, no person acting as an escrow agent whether required to be licensed as such or not, shall pay over to any other person any commission, fee or other consideration as handling, or servicing escrow customers or accounts. No escrow agent shall enter into any arrangement, either of his own making or of a subsidiary nature, or through any other person having a dual capacity, or through any person having a direct or indirect interest in the escrow, or other device, permitting any fee, commission, or compensation which is contingent upon the performance of any act, condition, or instruction set forth in an escrow, to be drawn or paid, either in whole or in part, or in kind or its equivalent, prior to the actual closing and completion of the escrow.[59]

Inasmuch as there is no appellate case law interpreting this section, it is not known whether these provisions apply to all who conduct escrows. On its face, it appears that it does so apply.

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56. Escrow Institute of California v. Pierno, 24 Cal. App. 3d 361, 100 Cal. Rptr. 880 (1972).
57. CAL. FIN. CODE § 17006 (West 1968).
58. *Id.*
59. CAL. CIV. CODE § 1057.5 (West 1968).

There also exists a specific code section governing escrow commissions and referral fees which the Corporations Commissioner has the authority to enforce; however, this section relates solely to its own licensees and is inapplicable to all the exemptees. It provides:

> Except for the normal compensation of his own employees, it shall be a violation of this division for any person subject to this division to pay over to any other person any commission, fee, or other consideration as compensation for referring, soliciting, handling, or servicing escrow customers or accounts.
>
> It shall also be a violation for any person to enter into any arrangement, either of his own making or of a subsidiary nature, or through any other person having a dual capacity, or through any person having a direct or indirect interest in the escrow, or other device permitting any fee, commission, or compensation which is contingent upon the performance of any act, condition, or instruction set forth in an escrow to be drawn or paid, either in whole or in part, or in kind or its equivalent, prior to the actual closing and completion of the escrow.[60]

The California Insurance Commissioner also enjoys enabling legislation by which he can regulate commissions and rebates. Under the authority of these provisions, the Commissioner issued fines and warnings mentioned above. The pertinent Insurance Code Section is 12404 which contains the following prohibitions:

> No title insurer, no controlled escrow company, and no underwritten title company shall *pay*, either directly or indirectly, any commission, or any part of its fees or charges or any other consideration as an inducement for or as compensation on any title insurance business or any escrow or other title business in connection with which a title policy is issued, to any of the following:
>
> (a) Any owner or prospective owner, lessee or prospective lessee of real property or any interest therein.
>
> (b) Any obligee or prospective obligee of an obligation secured or to be secured either in whole or part by real property or any interest therein,
>
> (c) Any person who is acting as or who is in the business of acting as *agent*, representative, attorney or employee of any of the persons described in subdivision (a) or (b).[61]

Insurance Code Sections 12404.1, 12404.5, 12405, 12405.7, 12406 and 12412 contain other restrictions and prohibitions concerning the payment or receipt of rebates and unlawful commissions.[62]

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60. CAL. FIN. CODE § 17420 (West 1968).

61. CAL. INS. CODE § 12404 (West 1968) (emphasis supplied). *cf.*, Cal. Att'y Gen. Ops. [Ops. AG 74-18] May 28, 1975.

62. CAL. INS. CODE §§ 1204.1, 12404.5, 12405, 12405.7, 12406, 12412 (West

Another code section authorizes the Insurance Commissioner to examine the books and records of any controlled escrow company or any underwritten title company.[63]

A penalty five times the amount of any commission is allowed.[64] Moreover, the Commissioner can institute a suit for injunction against any person who he believes "is violating or about to violate any provisions of this code."[65] The Commissioner can also revoke the certificate of authority of any title insurer or the license of any underwritten title company licensed pursuant to the provisions of section 12396.[66]

Unless otherwise exempted, *infra*, other pertinent statutes are section 16727 of the Business and Professions Code which prohibits "tying in contracts"[67] and section 17045 of the same code which prohibits secret rebates, refunds or discounts that result in injury to competition.[68] This latter provision is contained in the California Unfair Practices Act.[69] A tying-in contract, governed by section 16727 of the Business and Professions Code,[70] is defined as:

> an agreement by a party to sell one product but only on the condition that the buyer also purchases a different . . . product, or at least agrees that he will not purchase that product from any other supplier.[71]

1968). *See also*, CAL. INS. CODE §§ 750-766 (West 1972). *But see* CAL. INS. CODE § 12412 (West 1968) which permits fee divisions between title insurers and underwritten title companies, and CAL. INS. CODE § 12400 (West 1968) which incredibly excludes title insurers from many of the predatory prohibitions applicable to other types of insurers. *Cf.*, the last paragraph of CAL. CIV. CODE § 1057.5 (West 1968): "The provisions of this section shall not be deemed to supersede, negate, or modify any of the provisions of Section 12404 of the Insurance Code." But this latter provision expressly prohibits the payment of any rebate to anyone buying, leasing or borrowing on real property, or to such a person's agent.

63. CAL. INS. CODE § 12407 (West 1972).

64. CAL. INS. CODE § 12409 (West 1972). *But see* CAL. INS. CODE § 12404.5 (West Supp. 1975).

65. CAL. INS. CODE § 12410 (West 1972). *See also* CAL. INS. CODE § 12928.6 (West 1972).

66. CAL. INS. CODE § 12411 (West Supp. 1975).

67. CAL. BUS. & PROF. CODE §16727 (West 1964).

68. CAL. BUS. & PROF. CODE § 17045 (West 1964).

69. CAL. BUS. & PROF. CODE § 17000, *et seq.* (West 1964). *See also* CAL. BUS. & PROF. CODE §§ 17043, 17049 (West 1964). *Cf.* CAL. CIVIL CODE §§ 3369, 3370 (West Supp. 1975). *See generally* McCarthy, *Whatever Happened to The Small Businessman? The California Unfair Practices Act*, 2 U.S.F.L. REV. 165 (1968).

70. CAL. BUS. & PROF. CODE § 16727 (West 1964).

71. Chicago Title Ins. Co. v. Great Western Financial Corp., 69 Cal. 2d 305, 325, 444 P.2d 481, 493-94, 70 Cal. Rptr. 849, 861-62 (1968). *See supra* n.47. Some schemes include "free" office equipment, typewriters, photocopiers, coffeemakers, and similar items, provided directly or indirectly by some title companies and title insurers with the implicit understanding that

This provision is part of the California antitrust law which is known as the Cartwright Act.[72] Business and Professions Code Section 16727 reads as follows:

> *Lease Or Sale of Goods Under Agreement With Lessee Or Purchase Not to Use or Deal In Competitor's Goods.* It shall be unlawful for any person to lease or make a sale or contract for the sale of goods, merchandise, machinery, supplies, commodities for use within the State, or to fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, merchandise, machinery supplies, commodities, or services of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of trade or commerce in any section of the State.[73]

This statute was modeled after the federal Clayton Act.[74]

All of these code sections would seem sufficient in themselves to deter the use of rebates, commissions, and kickbacks that violate the law. However, these sections have not been properly understood or employed in their totality.

In 1974, the California Department of Insurance began to enforce administratively the provisions under its jursidiction. Earlier, in the *Chicago Title Insurance* case,[75] where plaintiffs unsuccessfully attempted to invoke most of these provisions, the court held they had not alleged facts sufficient enough to state a cause of action.[76] The court there seems to state that the Cartwright Act[77] and the Unfair Practices Act[78] are superseded and contravened by specific provisions of the Insurance Code in relation to title companies and title insurers.[79] The case did not mention specifically which Insurance Code provisions supersede the Cartwright Act. However, in

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reciprocal referrals are to be the *quid pro quo*. *See* Paramount Gen. Hospital Co. v. National Medical Enterprises, Inc., 42 Cal. App. 3d 496, 117 Cal. Rptr. 42 (1974).

72. CAL. BUS. & PROF. CODE § 16700, *et seq.* (West 1964).
73. CAL. BUS. & PROF. CODE § 16727 (West 1964).
74. Clayton Act § 3, 15 U.S.C. § 14 (1973).
75. 69 Cal. 2d 305, 444 P.2d 481, 70 Cal. Rptr. 849 (1968).
76. *But see* Sherman v. Mertz Enterprises, 42 Cal. App. 3d 769, 117 Cal. Rptr. 188 (1974).
77. CAL. BUS. & PROF. CODE § 17000 *et seq.* (West 1964).
78. CAL. BUS. & PROF. CODE § 16700 *et seq.* (West 1964).
79. 69 Cal. 2d at 305, 444 P.2d at 492, 70 Cal. Rptr. at 860 (1968).

Greenberg v. Equitable Life Assur. Society,[80] discussed *infra*, the California Court of Appeals states which Insurance Code sections it believes supersede the Cartwright Act in relation to the insurance business.

The *Chicago Title Insurance* case, combined with the new Insurance Code Section 12340.3,[81] defining the business of insurance to include title insurer, underwritten title company and controlled escrow company, would seem to imply that those entities would be regulated by the Insurance Code and not by the Cartwright Act or the Unfair Practices Act.[82] *Quaere*: Would such exclusive Insurance Code regulation of these entities apply solely to their *inter sese* dealings and all other laws cited and discussed herein, apply to dealings between any of these entities, directly or indirectly, with third parties unregulated by the Insurance Code?

III. Circumvention of the Prohibitions

With this lack of supervision and with this basic uncertainty in the law, some in the real estate and mortgage brokerage, title and title insurance industries have taken advantage of the situation and have systematically formulated schemes to increase business while ignoring the laws that restrict those devices and activities.

The following is an account of the schemes that have existed in California employed by various organizations to restrain trade, restrict competition and increase their business activity.

Case #1

This title insurance company initiated a new system of offering to licensed real estate brokers the opportunity to "delegate" some of the responsibilities for handling their escrows to the title insurance company. A real estate broker would open an escrow with the company showing the broker as the escrow holder but he would then "assign" all aspects of future processing of that escrow to the company. The real estate broker would not do any clerical work in conjunction with the processing of that escrow. The company would handle all details of the escrow and charge an escrow fee

80. 34 Cal. App. 3d 994, 999, 110 Cal. Rptr. 470, 474 (1973).

81. Cal. Ins. Code § 12340.3 (West 1974).

82. *See* Cal. Ins. Code §§ 750, *et seq.* (West 1964) for examples of such regulations. *But see*, Cal. Ins. Code § 12400, *supra* n.62, *infra* ns.87, 90. The statutory scheme clearly immunizes title insurers, underwritten title companies, and controlled escrow companies from certain prohibited insurance practices, but only *inter sese* and not with regard to others not in such classifications.

commensurate with the going rate in the area. However, a portion of this fee would be paid back to the real estate broker at the close of the escrow. Example: Assume the normal escrow fee is $180.00. The company would get $125.00, the real estate broker would receive $55.00. The broker has done nothing except to direct business to the company and has received $55.00 for doing so.

Case #2

A land title company enters into an agreement referred to as an "employment contract" to provide that the broker or a group of brokers will receive certain sums resulting from the operation of the escrow branch of the land title company. The brokers only direct business to the company and are then paid a fee for directing such business without regard to services actually rendered.

Case #3

In California, real estate brokers are presently authorized to be escrow holders in conjunction with their real estate business. The real estate broker "hires" an escrow officer to do his work under his supervision. However, the real estate broker is being paid a fee for directing business to his escrow holder. The escrow person enters into a contract with the real estate broker to do his escrows for a percentage of the fee and any amount that is paid back to the broker would be considered a fee paid for referring escrows to the escrow officer.

Also involved in this scheme is the fact that the real estate broker will "encourage" his salespeople to utilize this escrow exclusively. He can accomplish this task by either making it financially advantageous for the salesperson to take the escrow to the captive escrow holder or place all salespeople on notice that they must utilize that escrow or they will no longer work with the real estate broker. Some real estate brokers summarily print their captive escrow company designation on their printed listing agreement with their seller. Also, a combination of these devices could be employed.

Case #4

This situation is similar to Case #3. Here, a number of real estate brokers organize an escrow company and send all their business to this escrow. Recently, this procedure has come to the attention of the California Commissioner of Corporations. The Corporations Commissioner believed that these escrows appeared to be attempts to circumvent the Escrow Law. In an article written in September, 1974, the Corporations Commissioner described this operation:

> Typically, several brokers will agree to set up an escrow operation by engaging an experienced escrow officer who processes the escrows of the several brokers. The brokers assume a common "DBA", and channel all of their escrows through the escrow operation. The broker collects an escrow fee, a portion of which is disbursed to the escrow operation to cover operating expenses. This operation takes on the characteristics of an independent escrow company. Additionally, this type of operation would appear to violate Civil Code Section 1057.5.[83]
>
> Previously, the Commissioner has chosen to pursue these matters through civil channels; *i.e.*, issuing a desist and refrain order, injunctions, filing suits, etc. These cases are handled by the Attorney General.
>
> However, access to the criminal process is available to the Commissioner. In addition to violation of the statute, Section 17214 of the Escrow Law, consideration may be given to the charge of conspiracy to violate the Escrow Law in those instances where groups, cooperatives, or associations are formed for the purpose of conducting escrows without first obtaining a license from the Department of Corporations.[84]

The Commissioner then discussed his view as to the purpose and requirements of the Escrow Law in California:

> The legislative intent of the exemption to brokers was to allow those brokers in non-urban areas to provide a service to their clients, including acts ordinarily performed by an escrow person, provided these acts were 'in the course of and incidental to the real estate transaction'. This is a personal exemption available to the individual broker. This exemption would also appear to contemplate that a broker who does handle an escrow under the exemption would be competent in the field of escrow, would make all decisions relating to the processing of the escrow, and would make the determination of when the escrow was in a condition to close, thereby assuming full responsibility for the transaction.
>
> Is there the required independence in a broker held escrow? Does the notion of disclosure rectify this weakness? The Escrow Law requires that an escrow agent shall act without partiality to any of the parties to an escrow transaction. And, that if an escrow agent or a person or company related to or affiliated with the escrow agent is a principal to the transaction or is acting or has acted as broker or salesman in relation to the escrow transaction, the escrow agent shall advise in writing all parties to the escrow transaction of such relationship or affiliation before being employed as an escrow agent in connection with such transaction. This advice must be in eight point bold type or its equivalent, on the face of the escrow instructions. In the investigations that have been con-

83. Cal. Dept. of Corp., *Escrow Newsletter*, at 1 (Sept., 1974).
84. *Id.* at 4.

> ducted thus far of unlicensed escrow activity, the disclosure has been inadequate or nonexistent. The disclosure is considered inadequate when it is obscured in the general provisions of the escrow instructions.[85]

The article ended with this admonition by the Corporations Commissioner:

> The Department of Corporations is currently in the process of conducting intensive investigation in the area of unlicensed escrow activity and improper advertising. Appropriate action will be taken against those persons found in violation of this law.[86]

The astonishing aspect about these cases is that even if it were conceded, *arguendo*, that the *giving* of unearned rebates, refunds and commissions is permissible by some under the most liberal construction of the applicable statutes and regulations, it does not follow that the *receiving* of such unearned rebates, refunds and commissions by all is therefore permissible.

For example, if the California Insurance Commissioner were to condone the *giving* of unearned rebates, refunds and commissions for escrow business by its licensees to non-licensees, *e.g.*, real estate brokers licensed by the California Real Estate Commissioner, would such recipients nevertheless violate statutes outside of the Insurance Code?[87]

It seems clear that the very practice of the giving of unearned rebates, refunds and commissions is obnoxious to the law for valid reasons. In *Escrow Institute of Cal. v. Pierno*,[88] the Court observed:

85. *Id.*
86. *Id.*
87. *See* CAL. CIVIL CODE § 1057.5 (West 1974), CAL. CIVIL CODE §§ 16700, *et seq.* (West 1974); CAL. CIV. CODE §§ 17000, *et seq.* (West 1974); CAL. BUS. & PROF. CODE § 10176 (West 1964). A U.S. District Court in California has found that such *concerted action by and between insurance companies and non-insurance companies* does not constitute the "business of insurance" so as to be exempt from the federal antitrust laws. Hill v. National Auto Glass Co., Inc., 293 F. Supp. 295 (N.D. Cal. 1968); Hill v. National Auto Glass Co., Inc., 1971 Trade Cases ¶ 73, 594 (N.D. Cal. 1971). In other words, such concerted action by and between insurance companies, non-insurance companies (*e.g.*, underwritten title companies), and third parties (*e.g.*, brokers) probably is sufficient to constitute an intre-enterprise conspiracy negating the immunity of the single trader doctrine. *See generally*, 16 *Business Organizations*, Von Kalinowski, Antitrust Laws and Trade Regulations § 6.01[2]; *id.* § 47.
88. 24 Cal. App. 3d 361, 100 Cal. Rptr. 880 (1972).

> With respect to the prohibition of rebates and similar practices, it is sufficient to note that the Legislature may properly provide for safeguards against practices which tend to affect the independence of conduct of a person charged with a duty of fiduciary nature or which are otherwise generally regarded as unethical. *Unearned rebates, refunds and commissions as conpensation for referrals constitute means of extracting secret profits from a helpless public.* (See *Blumenthal v. Board of Medical Examiners*, 57 Cal.2d 228, 234 [18 Cal. Rptr. 501, 368 P.2d 101]; Ins. Code §§ 750, 752, 755, 755.5, 761.) (Emphasis added.)[89]

Obviously, there is a superabundance of statutes which empower respective Commissioners to take definitive action against their licensees for the giving or taking of unearned rebates, refunds and commissions.[90] Perhaps the question really reduces itself to whether these Commissioners truly act in the best interests of the consumer public, or whether they are the handmaidens of the licensees they ostensibly regulate.[91]

This species of questionable proximity of the licensed and regulated to the licensor and regulator takes on added significance where certain antitrust exemptions are extended to the industry ostensibly enjoying a controlled monopoly as, for example, the insurance industry.[92]

The net result is administrative inertia and judicial reluctance to interfere.[93]

But the fact remains that the giving and taking of secret rebates and kickbacks (sometimes euphemistically referred to as "commis-

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89. *Id.* at 368, 100 Cal. Rptr. at 884 (emphasis added). *But see*, generally, "Kickbacks As A Way of Life: How Widespread in U.S.," U.S. NEWS AND WORLD REPORT pp. 38-40 (Oct. 29, 1973).

90. *For example* CAL. CIVIL CODE § 1057.5 (West 1974), CAL. FIN. CODE § 17420 (West 1968) and CAL. INS. CODE § 12404 (West 1972) each clearly precludes the *payment* of any rebate for an *escrow*, and the latter provision precludes the payment of any rebate for title or title insurance business, as well, to anyone buying, leasing or borrowing on real property, or such a person's agent.

91. *See* Barron, *Business and Professional Licensing—California, A Repppresentative Example*, 18 STAN. L. REV. 640 (1966). *Compare* CAL. BUS. & PROF. CODE § 10053 (West 1974), which provides that no person shall be appointed to the California Real Estate Commission who has not been for five years a real estate broker actively engaged in business as such in California; CAL. BUS. & PROF. CODE § 6015 (West 1974) which provides that no person shall be eligible to the State Bar Board of Governors unless he is an active member of the State Bar. *See* Gibson v. Berryhill, 411 U.S. 564 (1973).

92. *See* Comment, *Insurance Regulation and Antitrust Exemptions: McCarran-Ferguson, The Boycott Exception, and The Public Interest*, 27 RUTGERS L. REV. 140 (1973).

93. *See* Escrow Owners Association, Inc. v. Taft Allen, Inc., 252 Cal. App. 2d 506, 60 Cal. Rptr. 755 (1967); Escrow Institute of Cal. v. Pierno, 24 Cal. App. 3d 361, 100 Cal. Rptr. 880 (1972). *But see* Sperry & Hutchinson v. Cal. State Bd. of Pharmacy, 241 Cal. App. 2d 229, 50 Cal. Rptr. 489 (1966).

sions"), particularly where a broker, who by definition is a fiduciary to his principal, is involved in the scheme is illegal. It would appear, on its face, that such concerted actions constitute *per se* violations under Sherman Act § 1.[94] The U.S. Supreme Court, in *Northern Pac. R. Co. v. U.S.*,[95] defined such *per se* violations quite clearly:

> However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are prescribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.[96]

The California Supreme Court has cited and followed this holding as authority in [state] Cartwright Act cases.[97]

IV. RESTRAINTS OF TRADE, ANTITRUST, UNFAIR PRACTICES

The Cartwright Act, California Business and Profession Code §§ 16700, *et seq.*, makes "trusts" unlawful, against public policy, and void and any agreement in violation of the act is void and unenforceable. The act defines a trust as any combination of capital, skill or acts by two or more persons for any of the following purposes:

(a) To create or carry out restrictions in trade or commerce
(b) To limit or reduce the production, or increase the price of merchandise or any commodity
(c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity

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94. SHERMAN ANTI-TRUST ACT § 1, 15 U.S.C. § 1 (1890).
95. 356 U.S. 1 (1958).
96. *Id.* at 5.
97. CAL. BUS. & PROF. CODE § 16700 *et seq.* (West 1974). *See e.g.*, Corwin v. Los Angeles Newspaper Service Bureau, Inc., 4 Cal. 3d 842, 853, 484 P.2d 953, 959-60, 94 Cal. Rptr. 785, 791-92 (1971); Oakland-Alameda County Builders' Exchange v. F.P. Lathrop Constr. Co., 4 Cal. 3d 354, 360-362, 482 P.2d 226, 230-31, 93 Cal. Rptr. 602, 606-607 (1971); *accord*, Sherman v. Mertz Enterprises, 42 Cal. App. 3d 769, 776, 117 Cal. Rptr. 188, 191 (1974).

(d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this state

(e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any or any combination of any of the following:

(1) Bind themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure, or fixed value.

(2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure.

(3) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity.

(4) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected.[98]

This legislation is the California counterpart to the federal Sherman Antitrust Act.[99] Arguably, the Cartwright Act[100] unless otherwise excluded can be used to attack the real estate brokers, lenders, title companies and title insurance companies which engage in kickback and rebate schemes, often pursuant to written agreements, resulting in a "trust" that prevents competition, fixes prices, and restricts trade.[101] The same argument applies to the California Unfair Practices Act.[102] Since the Cartwright Act[103] was created in the mold of the Sherman Antitrust Act[104] and the Clayton Act,[105] and all being modifications of the common law, cases can be cited interchangeably.[106]

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98. *Cf.* CAL. BUS. & PROF. CODE § 16726 (West 1964). *See* CAL. BUS. & PROF. CODE § 16720 (West 1964); *accord,* Speegle v. Bd. of Fire Underwriters, 29 Cal. 2d 34, 43, 172 P.2d 867, 872 (1946).

99. SHERMAN ANTI-TRUST ACT, 15 U.S.C. § 1 (1890).

100. CAL. BUS. & PROF. CODE § 16700 *et seq.* (West 1964).

101. CAL. BUS. & PROF. CODE § 16727 (West 1964). Corwin v. Los Angeles Newspaper Service Bureau, Inc., 4 Cal. 3d 842, 852-853, 484 P.2d 953, 959, 94 Cal. Rptr. 785, 791 (1971); Chicago Title Ins. Co. v. Great Western Fin. Corp., 69 Cal. 2d 305, 315, 444 P.2d 481, 487, 70 Cal. Rptr. 849, 855 (1968).

102. CAL. BUS. & PROF. CODE §§ 17000, *et seq.* (West 1964). Specifically, CAL. BUS. & PROF. CODE § 17024, defining "article or product", clearly applies to the activities described herein. See, generally, Barron, *California Antitrust-Legislative Schizophrenia* 35 S. CAL. L. REV. 393 (1962).

103. CAL. BUS. & PROF. CODE § 16700 *et seq.* (West 1964).

104. SHERMAN ANTI-TRUST ACT 15 U.S.C. § 1 (1890).

105. CLAYTON ACT 15 U.S.C. §§ 12-27 (1914).

106. Chicago Title Ins. Co. v. Great Western Fin. Corp., 69 Cal. 2d 305,

Although the Cartwright Act is couched in terms of prohibited conduct with criminal sanctions and the Attorney General is charged with its enforcement, private enforcement is also authorized, deemed in the public interest, and encouraged.[107] A private party injured because of an antitrust violation may recover treble damages and attorney fees as well as costs.[108]

The Cartwright Act and the Sherman Act both forbid all restraints on trade;[109] however, the acts have been interpreted to permit by implication only restraints that are unreasonable.[110] There exist certain practices which because of their very nature are *per se* violations of both the Sherman Act and the Clayton Act. By their effect on competition these violations "are presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."

> Among the practices which the Courts have heretofore deemed to be unlawful in and of themselves are price fixing . . . ; division of markets . . . ; group boycotts . . . ; buying arrangements . . . .[111]

It clearly can be argued that the practices engaged in by the real estate industry, if not *per se* illegal, are an unreasonable restraint on trade.

A. *Sherman Antitrust Act*[112]

Section 1 of the Sherman Act makes illegal every contract, combination in the form of trust or otherwise, or conspiracy in restraint

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315, 444 P.2d 481, 487, 70 Cal. Rptr. 849, 855 (1968). *See also* Von Kalinowski and Hanson, *California Antitrust Laws: A Comparison with the Federal Antitrust Laws*, 6 U.C.L.A. L. REV. 533 (1959).

107. *See* CAL. BUS. & PROF. CODE § 16750 (West 1975); CAL. CIVIL CODE § 3369 (5) (West 1975).

108. *Id. See generally*, Continuing Education of the Bar (Cal.), *Legal Aspects of Competitive Business Practices*, Chapter 9, "Treble Damages and Attorneys' Fees in Antitrust Cases" (Dixon, W.C.) (1961). *Cf.*, for federal discussion, Continuing Education of the Bar (Cal.), *Private Federal Antitrust Actions*, Chapter 3, "Damages and Other Relief" (Mitchell, M.P.) (1970).

109. SHERMAN ANTI-TRUST ACT 15 U.S.C. §§ 1-3 (1890). CARTWRIGHT ACT, BUS. & PROF. CODE §§ 16722, 16726-27.

110. Corwin v. Los Angeles Newspaper Service Bureau, Inc., 4 Cal. 3d 842, 853, 484 P.2d 953, 959, 94 Cal. Rptr. 784, 791 (1971).

111. *Id.* at 583, 484 P.2d at 959-60, 94 Cal. Rptr. at 791-92.

112. SHERMAN ANTI-TRUST ACT 15 U.S.C. §§ 1-7 (1890).

of trade or commerce among the several states, or with foreign nations. Therefore, three elements are required and must exist simultaneously.

First, there must be a contract, combination, or conspiracy. Second, the contract, combination or conspiracy must be in restraint of trade. Third, the trade or commerce must be interstate or foreign.

Section two of the Sherman Act names three separate and distinct offenses:

1. actual monopolization;
2. attempts to monopolize; and
3. combinations or conspiracies to monopolize.

Under the Sherman Act, two prerequisites for jurisdiction exist: (1) "trade or commerce" and (2) "interstate."

Within the "trade or commerce" category, underwritten title companies may qualify as insurance companies[113] or as providers of personal and commercial services.[114] Also, real estate brokers and mortgage brokers qualify under this requirement, as do title lawyers.[115]

Under the "interstate" requirement, the Sherman Act extends not only to transactions in the *flow* of interstate commerce but also to intrastate transactions which substantially *affect* interstate commerce.[116] It would appear that the concerted and reciprocal activities of lenders, brokers, title insurers, and title companies herein described do affect interstate commerce and, therefore, the Sherman Act would apply to all of those entities. However, the problem of applying the Sherman Act in these situations is that it may be argued that its application may be limited by the McCarran-Ferguson Act.[117]

B. *McCarran-Ferguson Insurance Regulation Act*[118]

This federal act provides that federal antitrust laws "shall be ap-

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113. U.S. v. South-Eastern Underwriter's Ass'n., 322 U.S. 533, 546 (1944). *But see* 54 Cal. Atty. Gen. Ops. 13, 18-19 [Ops. AG 70-59] (February 10, 1971).

114. U.S. v. National Ass'n. of Real Estate Boards, 339 U.S. 485, 488-92 (1950).

115. *Id.*, Goldfarb v. Virginia State Bar, — U.S. — (1975).

116. Las Vegas Merchant Plumber's Ass'n. v. U.S., 210 F.2d 732, 739-40 (9th Cir. 1954), *cert. denied*, 348 U.S. 889 (1954). *But see* DeVoto v. Pacific Fidelity Life Ins. Co., 354 F. Supp. 874, 877-878 (N.D. Cal. 1973).

117. McCarran-Ferguson Act, 15 U.S.C. 1011-15 (1970).

118. *Id.*

plicable to the business of insurance to the extent that such business is not regulated by state law." In essence, this statute provides an exemption from the antitrust laws if the conduct (1) is regulated by state law and (2) within the business of insurance. The statute only authorizes a Sherman Act suit against insurance companies for "boycott, coercion or intimidation", even though the state is regulating the particular conduct involved.[119]

In this regard, it is noted that both the federal McCarran-Ferguson Act exemption,[120] and the California Insurance Code provisions specifically enacted pursuant to the federal McCarran-Ferguson Act[121] provide that the antitrust laws should continue to apply to "any agreement to boycott, coerce or intimidate or act of boycott, coercion or intimidation." In *Greenberg v. Equitable Life Assur. Society,*[122] the court placed a liberally broad antitrust interpretation on the construction of the term "coercion" as follows:

> Insurance Code section 790.03 states in pertinent part: 'The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance . . . (c) Entering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance.' (3) Section 790.03, subdivision (c), must be construed in light of similar statute prohibiting activities in restraint of trade in business other than insurance. "Coercion" prohibited by subdivision (c) is thus coercion in the antitrust sense, conduct which constitutes the improper use of economic power to compel another to submit to the wishes of one who wields it. (Atlantic Rfg. Co. v. FTC, 381 U.S. 357, 368-369; Simpson v. Union Oil Co., 377 U.S. 13, 17; United States v. National Retail Lumber Dealers Ass'n. (D.C.Colo.) 40 F. Supp. 448, 455.)[123]

The court went on to give an equally liberal, antitrust interpretation on the construction of the term "tie-in agreement" as follows:

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119. 15 U.S.C. § 1013(b) (1970); *cf.*, CAL. INS. CODE § 790.03(c). For an excellent analysis, *see Insurance Regulation And Antitrust Exemptions: McCarran-Ferguson, The Boycott Exception, And The Public Interest,* 27 RUTGERS L. REV. 140 (1973). *See generally,* 16 F. Von Kalinowski, Antitrust Laws and Trade Regulation §47.03[2].

120. 15 U.S.C. § 1013(b) (1970).

121. CAL. INS. CODE §§ 790, *et seq.* (West 1972).

122. 34 Cal. App. 3d 994, 110 Cal. Rptr. 470 (1973).

123. *Id.* at 998-999, 110 Cal. Rptr. at 473-74. The federal and California definitions of "coercion" are not synonymous. *Cf.*, Addrisi v. The Equitable Life Assur. Society, 503 F.2d 725, 729 (9th Cir. 1974).

> Respondent's practice in dealing with its customers for home loans, as alleged in the first amended complaint, constitutes one form of the coercive use of economic power to create an unreasonable restraint of trade. The practice results in an illegal "tie-in agreement." " '[A] tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product . . . . Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. ' . . . . Tying arrangements are illegal per se '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 ' . . . and when 'a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimus, is foreclosed to competitors by the tie. . . ." (Corwin v. Los Angeles Newspaper Service Bureau, Inc., 4 Cal.3d 842, 856-857 [94 Cal. Rptr. 785, 484 P.2d 953].) " 'Even absent a showing of market dominance, the crucial economic power may be inferred from the tying products desirability to consumers or from uniqueness in its attributes.' " (Corwin v. Los Angeles Newspaper Service Bureau, Inc., supra, 4 Cal.3d at 858).[124]

observing that such "[T]ie-in agreements are inherently coercive."[125]

Thus, it can clearly be argued that title insurance procured by and through an underwritten title company arising out of or in connection with or resulting from an escrow conducted by the underwritten title company in which secret rebates, kickbacks and commissions are paid for the referral of the escrow are, *per se*, illegal tie-in agreements which are inherently coercive or coercive without reference to such tie-ins, within the meaning of the McCarran-Ferguson Act[126] and the California Insurance Code.

Some federal cases similarly suggest that the term "boycott" should properly be given a liberally broad antitrust construction.[127]

In *SEC v. National Securities Inc.*,[128] the United States Supreme Court held that if there is no state insurance law directly on point

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124. Greenberg v. Equitable Assur. Society, *supra*, Note 122 at 999, 110 Cal. Rptr. at 474.

125. *Id.* at 999 n.3, 110 Cal. Rptr. at 474.

126. McCARRAN-FERGUSON ACT 15 U.S.C. §§ 1011-15 (1970).

127. Hill v. National Auto Glass Co., 293 F. Supp. 295 (N.D. Cal. 1968); Hill v. National Auto Glass Co., Inc. 1971 Trade Cases ¶ 73,594 (N.D. Cal. 1971). *See* California League of Ind. Ins. Producers v. Aetna Cas. & Sur. Co., 179 F. Supp. 65, 66 (N.D. Cal. 1959), Prof. & Business Men's Life Ins. Co. v. Banker's Life Co., 163 F. Supp. 274, 281-283 (D. Mont. 1958); and *cf.* U.S. v. New Orleans Ins. Exch., 148 F. Supp. 915, 920 (E.D. La. 1957).

128. 393 U.S. 453 (1969). *See also*: DeVoto v. Pacific Fidelity Life Ins. Co., 354 F. Supp. 874, 876-877 (N.D. Cal. 1973); Hill v. National Auto Glass Co., 293 F. Supp. 295 (N.D. Cal. 1968); Hill v. National Auto Glass Co., Inc., 1971 Trade Cases ¶ 73, 594 (N.D. Cal. 1971); Fey v. John Hancock Mut. Life Ins. Co., 355 F.Supp. 1151 (Tx 1973).

and the activity is merely prohibited by state statutes of general application, then the conduct is subject to federal antitrust laws. Therefore, it would seem, for example that where a title company does not issue a policy of title insurance in an escrow transaction, the escrow activities will likely not be found to relate to the business of insurance. Consequently, if a title company, for example, would pay a rebate where it does not issue a title policy, the matter would appear to be subject to the federal antitrust law.[129]

These examples only outline the issue: The real question is *whether any of the activities of brokers, lenders, and escrow agents,* as well as title companies, or title insurance companies constitute the "business of insurance" within the meaning of the McCarran-Ferguson Act.[130]

This primary question should be analyzed in three parts. First, has the State of California determined that the conduct of an escrow constitutes "business of insurance"? Second, has the State of California determined that the activities of an underwritten title company (as opposed to a title *insurance* company)[131] constitutes "business of insurance"? Third, notwithstanding such determination by the State of California, do such activities constitute the "business of insurance" within the meaning of the McCarren-Ferguson Act, as a matter of federal law?[132] (Another primary question, pre-supposing that such activities herein presented constitute the "business of insurance", is whether such activities are regulated by [California] law", *infra.*)

(1) California Has Determined That The Conduct of Escrows By Title Companies and Insurers Constitute The "Business of Insurance."

129. *But cf.*, Addrisi v. The Equitable Life Assur. Society, 503 F.2d 725 (9th Cir. 1974).

130. McCARRAN-FERGUSON ACT 15 U.S.C. §§ 1011-15 (1970).

131. In Commander Leasing Co. v. Transamerica Title Ins. Co., 477 F.2d 77, 83-86 (10th Cir. 1973), it was held that title *insurance* constitutes the "business of insurance." The question of whether the conduct of an escrow ancillary to the issuance of title insurance constitutes the "business of insurance" was neither presented nor decided and apparently still remains an open federal question under the McCarran-Ferguson Act, notwithstanding CAL. INS. CODE § 12340(c). See cases cited in *supra* ns.93, 95 and case cited.

132. *See* SEC v. Variable Life Ins. Co. of America, 359 U.S. 65 (1959). *See generally*, C.A. Hills, *Antitrust Adviser*, § 2.21 (1974 Supp.).

As previously noted, the Unfair Business Practices Act[133] regulate independent escrow companies, and section 17006[134] provides exemption from those regulations for:

(a) Any person doing business under any law of this state or the United States relating to . . . *insurance companies.*

(b) . . .

(c) *Any person whose principal business is that of preparing abstracts or making searches of title that are used as a basis for the issuance of a policy of title insurance by a company doing business under any law of this state relating to insurance companies.*

Subdivision (c) relates to title companies, whereas subdivision (a) relates to insurance companies. However, the activity of licensed escrow companies would appear not to involve the "business of insurance." In *Escrow Institute of Calif. v. Pierno,*[135] the Court states as follows:

> On the other hand, turning to the exemption embodied in section 17006 of the Financial Code, the Legislature was justified in assuming that the licenses respectively possessed by attorneys at law and real estate brokers sufficiently assured that they were competent to properly *handle escrow incidental to the pursuit of the occupation for which they were licensed.* Moreover, the Legislature was warranted in determining that as to those designated in the other subdivisions of section 17006, the necessary responsible supervision of the conduct of *that portion of their business which related to escrows* was reasonably assured *by virtue of the nature of the principal business involved, as, for instance that of* banking or the operation of a savings and loan association or *an insurance company.* (Emphases added.)[136]

Therefore, *at least through 1973,* the conduct of an escrow by either an insurance company or, *a fortiori,* an underwritten title company, did not constitute the "business of insurance", as a matter of case law.[137] However, Insurance Code Section 12340.3(c), now expressly includes escrow within the meaning of "business of title insurance."[138]

(2) The California Legislature Has Determined That the Activities of An Underwritten Title Company Do Constitute The "Business of Insurance."

In light of the effect of the McCarran-Ferguson Insurance Regulation Act,[139] and its exemption from federal antitrust laws (except for boycott, coercion, or intimidation under Sherman Act § 1),[140]

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133. CAL. FIN. CODE § 17000 *et seq.* (West 1968).
134. CAL. FIN. CODE § 17006 (West 1968).
135. 24 Cal. App. 3d 361, 368, 100 Cal. Rptr. 880, 884 (1972).
136. *Id.* at 368, 100 Cal. Rptr. at 884.
137. *Id.*
138. CAL. INS. CODE § 12340.3(c) (West Supp. 1975).
139. 15 U.S.C. §§ 1011-1015 (1970).
140. 15 U.S.C. § 1 (1970); 15 U.S.C. § 1036 (1970).

it is critical to first determine *whether an underwritten title company conducting escrows in the State of California is "in the business of insurance . . . regulated by [California] law."*[141] If either of these two considerations is answered in the negative, the federal antitrust laws may fully apply; if not, then only Sherman Act § 1 may apply.

Prior to the enactment in 1973 of California Insurance Code § 12340.3(c), the California Attorney General clearly held that *an underwritten title company was not an insurance company:*

> An underwritten title company is defined for certain purposes as a "person engaged" in the business of preparing title searches, title examinations, certificates or abstracts of title upon the basis of which a title insurer regularly writes title policies . . . Ins. Code § 12402. Such entities since 1965 are required to be licensed by the Insurance Commissioner. Stats. 1965, ch. 361, p. 1467. Regulation by the Insurance Commissioner of the escrow activity of underwritten title companies has existed since 1961. Stats. 1961, ch. 2192, p. 4534. The question is whether the Escrow Law is inapplicable to such companies under either section 17006(a) or section 17006(c).
>
> Underwritten title companies are not 'insurance companies' nor are such entities 'doing business under any laws of this state . . . relating to . . . insurance companies' within the meaning of section 17006(c). While the word 'insurer' has been given many specialized meanings by statute, its general meaning as set forth in section 23 of the Insurance Code gives a valid approach to the meaning of 'insurance compan[y]' as found in section 17006(a). An insurance company is then a person who undertakes to indemnify another by contract against loss, damage, or liability arising from a contingent or unknown event. Ins. Code §§ 22, 23; Civ. Code § 2527; see *People ex rel Roddis v. California Mut. Assn.*, 68 Cal.2d 677 (1968). Underwriter's business does not fall within this classification since it issues not contracts of insurance or indemnity but merely prepares reports upon which a title insurer issues the policy of title insurance. As the court stated in *Chicago Title Ins. Co. v. Great Western Financial Corp.*, 69 Cal.2d 305, 319 (1968), 'appellants [underwritten title companies] are not title insurers . . . .'
>
> While underwritten title companies are not themselves insurance companies within the meaning of section 17006(a), it is arguable that they are 'person[s] doing business under any law of this state . . . relating to . . . insurance companies' under this section by virtue of their being licensed and regulated by the Insurance Commissioner under provisions of the Insurance Code and their obvious relationship to the title insurance business. Certainly the Legislature did not have this intention in 1947 when the provisions of

141. 15 U.S.C. § 1011, 1012 (1970). *See* CAL. INS. CODE § 12340.3(c) (West Supp. 1975).

section 17006(a) were originally enacted. At that time, underwritten title companies were not even mentioned in the Insurance Code, nor did they do business under any law relating to insurnce companies. Furthermore, the Legislature in 1947 provided specifically, in what is now subdivision (c) of section 17006, for exemption from the Escrow Law of persons whose principal business was 'underwritten title business.' Statutes, of course, are not frozen to the year of their enactment, but an interpretation of section 17006(a) to include underwritten title companies would effectively render surplusage the provisions of section 17006(c) which interpretation is to be avoided if other reasonable interpretations may be found. *Watkins v. Real Estate Commissioner*, 182 Cal. App. 2d 397, 400 (1960). Furthermore, such an interpretation logically lends to an exemption from the Escrow Law of insurance brokers bail bondsmen and sundrey others who do business under laws of this state relating to insurance companies. Such does not appear to have been the intent of the Legislature by a fair reading of section 17006. An underwritten title company, therefore, is not exempt from the Escrow Law under subsection (a) of section 17006.

It is only exempt under section 17006(c) if its *principal business* is that of an underwritten title company. 'Principal' means 'chief' or 'highest in importance.' Random House Dict. of Eng. Lang. 1144 (unabr. ed. 1966). Whether one's principal business is that of an underwritten title company as one of several businesses of relatively equal magnitude does not qualify for the exemption under section 17006(c) because it cannot be said that the company's principal business is the underwritten title business.[142]

However, a new California Insurance Code section provides that:

Business of title insurance includes:

(a) . . .

(b) . . .

(c) The performance by a title insurer, an underwritten title company or a controlled escrow company of any service in conjunction with the issuance or contemplated issuance of a title policy including but not limited to the handling of any escrow, settlement or closing in connection therewith; or the doing of or proposing to do any business, which is in substance the equivalent of any of the above.[143]

While it is true that this still presents a federal question and can be challenged,[144] such litigation would be monumental and costly.

Consequently, Insurance Code § 12340.3(c)[145] on its face appears to have satisfied the federal McCarran-Ferguson Act requirements in California. In any case, it would seem that the federal Sherman Antitrust Act and the McCarran-Ferguson Act prohibiting boy-

142. 54 Ops. Cal. Atty. Gen. 13, 18-19 [Ops. AG No. 70-59] (Feb. 10, 1971).

143. CAL. INS. CODE § 12340.3(c) (West Supp. 1975).

144. SEC v. Variable Annuity Life Ins. Co. of America, 359 U.S. 65 (1959). *But see infra* n.156.

145. CAL. INS. CODE § 12340.3(c) (West 1975).

cotts, coercion, or intimidation would be applied.[146] Furthermore, in California certain other state antitrust and unfair practice statutes, as previously discussed, may be applicable, but they have not been used to regulate brokers, lenders, title companies, and title insurers, in this context.

C. Boycott, Coercion and Intimidation

In this regard, other California code sections have recently received attention in the case of *Greenberg v. Equitable Life Assur. Society*.[147] One of these statutes is § 790.03 of the Insurance Code[148] which states in pertinent part:

> The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance . . . (c) Entering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance.

The statute sounds similar to but is more liberal than § 3 of the McCarran-Ferguson Act[149] and would be applicable to title companies, title insurers, and controlled escrow companies under Insurance Code § 12340.3.[150]

The Court in *Greenberg* stated that:

> Section 790.03 subdivision (c) must be construed similar to statutes prohibiting activities in restraint of trade in business other than insurance. 'Coercion' prohibited by subdivision (c) is thus coercion in the antitrust sense, conduct which constitutes the improper use of economic power to compel another to submit to the wishes of one who wields it.[151]

The Court further noted the application of this code section to insurance companies:

> In *Chicago Title Ins. Co. v. Great Western Financial Corp.*, 69 Cal.2d 305, our Supreme Court, in dealing with a demurrer to a complaint alleging restraint of trade by an insurance company, stated that the Cartwright Act which encompasses the general anti-

146. *See supra* n.92.
147. 34 Cal. App. 3d 994, 110 Cal. Rptr. 470 (1973); *accord*, Shernoff v. Superior Court, 44 Cal. App. 3d 406, 118 Cal. Rptr. 680 (1975).
148. CAL. INS. CODE § 790.03 (West 1972).
149. 15 U.S.C. § 1013(b) (1970).
150. CAL. INS. CODE § 12340.3 (West Supp. 1975).
151. 34 Cal. App. 3d at 998-999, 110 Cal. Rptr. at 474.

> trust law of California is 'expressly superseded and contravened by the specific provisions of the Insurance Code.' (69 Cal.2d at 322). After making that statement, the court recognized legal prohibitions against trade restraint by insurers when it analyzed the complaint in painstaking detail to determine whether the pleading alleged a cause of action in restraint of trade. While the opinion in *Chicago Title Ins.* does not cite section 790.03, subdivision (c), that provision is the only one other than the Cartwright Act imposing such a prohibition upon insurance companies.[152]

In the *Greenberg* case, plaintiff alleged that defendant insurance company offered home loans to individuals to be secured by deeds of trust, but only on condition that the borrower purchase a life insurance policy from defendant. Defendants demurrer to the first amended complaint was sustained and plaintiffs appealed. The court stated that the practice of dealing with customers for home loans, as alleged in plaintiff's complaint, constitutes one form of coercive use of economic power to create an unreasonable restraint of trade; and the practice results in an illegal "tie-in" agreement. This practice within the industry is not new and in 1972 a Los Angeles based savings and loan holding company was fined by the Department of Insurance for similar activities.[153]

The court in *Greenberg* also maintained (in opposition to respondent's argument) that "a private suit to impose civil liability irrespective of government action against the insurer for violation of the Insurance Code"[154] is contemplated by § 790.09.[155]

Finally, the *Greenberg* court stated that appellant was not required to exhaust his administrative remedies before filing a lawsuit.

This code section would appear to be highly applicable to title companies and title insurance companies who enter into agreements with brokers to steer business their way or who provide rebates or kickbacks in exchange for business. It appears that such agreements result in "boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance."[156]

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152. *Id.* at 999 n.2, 110 Cal. Rptr. at 474 n.2.

153. Los Angeles *Times*, September 19, 1972, at Part III, page 12. *Cf.*, Bromwich, Leo, *Who Protects the Borrowers?: A Report on Mortgage Loan Brokers Law, 1955-1969*, Cal. Senate Subcommittee on Human Needs and Resources [2d printing] (Feb. 15, 1971).

154. 34 Cal. App. 3d at 1001, 110 Cal. Rptr. at 475.

155. CAL. INS. CODE § 790.09 (West 1972).

156. CAL. INS. CODE § 790.03(c) (West 1972). Nor should such concerted actions by parties, one of which is an insurer, be exempted by the McCarran-Ferguson Act for such "tangential" or "cooperative" activities which are not exclusively the "business of insurance". *cf.*, Hill v. National

As a consequence, it can be concluded that if kickbacks and rebates to third parties and tie-ins with third parties arising out of escrows conducted by title insurers or underwritten title companies are not federal antitrust violations because of the McCarran-Ferguson Act[157] and Insurance Code § 790[158] (which states that its enactment is expressly pursuant to the McCarran-Ferguson Act), and Insurance Code § 12340.3(c)[159] (which states that such escrows are the "business of insurance"), then such kickbacks and rebates to third parties and tie-ins with third parties are in violation of California Insurance Code § 790.03(c).

This follows from any of the several grounds stated in California Insurance Code § 790.03(c).[160] In any event, there remains the independent and distinguishable question of the *receipt* of such rebates and kickbacks by these third parties.

D. Lenders

Generally, lenders take the form of banks and savings and loans. These, in turn, may be state or federally chartered. To the extent that they are federally chartered, they are governed by the Federal Home Loan Bank Board Regulations,[161] as well as other rules and regulations promulgated by other possible applicable governmental and quasi-governmental corporations, e.g., the Federal National Mortgage Association (FNMA, "Fannie Mae"), the Federal Home Loan Mortgage Corporation, and the Government National Mortgage Association (GNMA, "Ginnie Mae").

To the extent that these lenders are state chartered, they are under the administrative regulatory jurisdiction of either the California Superintendent of Banks or the Savings and Loan Commissioner. Neither of these latter agencies has promulgated any regulation whatsoever specifically governing the conduct of escrows. Consequently, predatory trade practices regulation of these lender

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Auto Glass Co., Inc., 293 F. Supp. 295 (N.D. Cal. 1968); Hill v. National Auto Glass Co., Inc. 1971 Trade Cases ¶73,594 (N.D. Cal. 1971). *See supra* n.69.

157. 15 U.S.C. § 1013 (1970).

158. CAL. INS. CODE § 790 (West 1972).

159. CAL. INS. CODE § 12340.3(c) (West Supp. 1975).

160. *See supra* n.148.

161. 12 C.F.R. 500 *et seq.* (1974). *Cf.*, 18 U.S.C. § 1014 for other possible criminal sanctions.

conducted escrows is nonexistent, unless reference is made to other general provisions of California Law.[162]

To the extent that federal jurisdiction applies, regulatons exist which do govern certain loan transactions. Specifically, 12 CFR § 563 is applicable, and it states, in pertinent part (italicized material denotes proposed additions and interlineations denote proposed deletions now pending):

> § 563.35 *Certain conditions prohibited*
>
> (a) No insured institution or director, officer or employee thereof may grant any loan or extend any other service of the institution on the prior condition, agreement, or understanding that the borrower contract for any of the following with any specific *company*, firm, agency, or person:
>
> (1) Insurance (except insurance or a guaranty provided by a government agency);
>
> (2) Building materials *or construction services*;
>
> (3) Legal services, including title examination, and escrow and abstract services; and
>
> (4) Services of a real estate agent or broker; *and*
>
> (5) *Sales or services related to mobile homes.*
>
> *(b) Nothing in this section shall be construed to prohibit an insured institution from refusing to grant any loan if the borrower wishes, in connection with such loan, to select a particular company, firm, agency or person to perform the services set forth in paragraphs (a)(1) and (a)(3) of this section if such institution on reasonable grounds believes that such services afford it insufficient protection.*
>
> *(c) In connection with a loan on a home (as defined in § 541.10-2 of this chapter) by an insured institution, such institution shall advise the borrower in writing reasonably in advance of the closing of such loan (but not later than the time of the commitment to make such loan) of his right to freely select the company, firm, agency or person rendering the services set forth in paragraphs (a)(1) and (a)(3) of this section if any such services are to be performed.*
>
> *(d) In connection with a loan on a home (as defined in § 541.10-2 of this chapter) by an insured institution, such institution shall not require the borrower to pay any part of the cost of the services set forth in paragraph (a)(3) of this section unless such services are performed by a firm or person freely selected by such borrower. However, if such institution desires to receive legal services, as set forth in paragraph (a)(3) of this section, in connection with the processing or closing of such a loan in addition to those performed by the firm or person so selected by the borrower, then such institution shall not require the borrower to pay for such additional legal services. (Italicized material denote proposed additional language and interlineations denote proposed deletions presently pending).*

162. *See e.g.*, CAL. CIVIL CODE § 1057.5 (West Supp. 1975). *But see*, Escrow Institute of California v. Pierno, 24 Cal. App. 3d 361, 369, 100 Cal. Rptr. 880, 885 (1972).

Also, there is presently proposed a new 12 CFR § 563.40:

§ 563.40 Payment of Fees to Affiliated Persons

(a) Loan procurement fees. No affiliated person of an insured institution may receive, directly or indirectly, from such institution or from any other source any fee or other compensation of any kind in connection with the procurement of any loan from or by such insured institution or service corporation affiliate thereof.

(b) Discounts, rebates and commissions. No affiliated person of an insured institution may receive, directly or indirectly, any discount, rebate or commission on any initial loan charge which is paid by a borrower (or any other person) in connection with a loan made by such institution or service corporation affiliate thereof. No insured institution or service corporation affiliate thereof may receive, directly or indirectly, any such discount, rebate or commission unless such discount, rebate or commission represents compensation for services actually performed.

Finally, 12 CFR § 571.7, is also applicable:

§ 571.7. *Conflicts of interest.*

(a) The Board has a paramount interest in the prevention and elimination of practices and conditions which adversely affect: the interests of members in insured institutions; the soundness of such institutions; the provision of economical home financing for the nation; and the accomplishment of the other purposes of Title IV of the National Housing Act, as amended.

(b) Among the practices and conditions which have such adverse effects are conflicts between the accomplishment of the purposes of Title IV set forth in paragraph (a) and the personal financial interests of directors, officers, and other affiliated persons of insured institutions. Conflicts of this type which have demonstrably resulted in such adverse effects are considered by the Board to be inherently unsafe and unsound practices and conditions. The Board accordingly holds that each director, officer, or other affiliated person of an insured institution has a fundamental duty to avoid placing himself in a position which creates, or which leads to or could lead to, a conflict of interest or appearance of a conflict of interest having such adverse effects.

(c) The Board recognizes that it is impossible to define every practice or condition which falls within the broad concept of objectionable conflict of interest. The Board has nevertheless issued various regulations to limit or prohibit certain conflicts of interest to reflect its conclusion that the conflicts so limited or prohibited are especially inimical to the accomplishment of the purposes of Title IV. However, the omission by the Board to specifically limit or prohibit other conflicts of interest should not be interpreted as tacit approval thereof. The Board or its Supervisory Agents will continue to examine those conflict-of-interest situations which are not specifically limited or prohibited under the regulations and will, when circumstances so warrant, take appropriate action to prevent, circumscribe or eliminate such situations.[163]

163. *See generally*, 48 Stat. 1256, 1257, 1260 §§ 402, 403, 407; 3 CFR 1071

However patently clear these regulations appear, one would have to live in a vacuum not to appreciate the infinite creativity of lenders in competing with one another and the euphemism of "compensating balances."[164] To those with less economic leverage in the marketplace, the results are predictable.[165]

V. FEDERAL LEGISLATIVE REFORM: THE REAL ESTATE SETTLEMENT PROCEDURES ACT OF 1974

> A problem that has received great public attention is the payment of kickbacks or referral fees made in order to obtain settlement business. While such payments do not exist in most areas of the country, the problem is sufficiently imporant to be deserving of Federal remedial legislation. Since such payments do not benefit the home buyer, ALTA (American Land Title Association) has long been opposed to kickbacks or referral fees. For example, our 1964 Model Title Insurance Code contained a strong anti-kickback provision of Section 136, and similar language has been included in the revised Model Code that was approved by our membership this past April. ALTA has for many years recommended that legislators and regulators in all states that have not already done so act to prohibit such payments in the title insurance business.[166]

In March, 1974, Senator Brock of Tennessee introduced legislation to remedy the nationwide problems associated with the real estate settlement business. This bill, S. 3164,[167] entitled "The Real Estate Settlement Procedures Act of 1974," (hereinafter referred to as the Act) was referred to the U.S. Senate Committee on Banking, Housing and Urban Affairs. Senator William Proxmire of Wisconsin, the present chairman of that Committee, was extremely critical of the Brock bill, and in the previous session of Congress had introduced his own version, S. 2288,[168] on July 30, 1973. During the 93D Congress, Representative Stephans introduced the counterpart to the Brock bill, H.R. 9989.[169]

(1943-48 Comp.); 39 F.R. 42382, *et seq.*, (Dec. 5, 1974). As for banks participating with or regulated by the Federal Deposit Insurance Corporation, whether state or federally chartered, see the rather innocuous 12 C.F.R. 336.7350.10, *et seq.* (1974). For an interesting collision between a home builder-seller insurance program, the buyer, the lender, and the U.S. Department of Housing and Urban Development and Veterans Administration regulations, see *ESP Fidelity Corp. v. Department of HUD*, 515 F.2d 887 (9th Cir. 1975).

164. *See e.g.*, Cohen, *The Antitrust Laws Applied to Bank Mergers, Reciprocity and Tie-in Arrangements*, 26 THE BUSINESS LAWYER 1 (Sept., 1970).

165. *See* McCarthy, *Whatever Happened to The Small Businessman? The California Unfair Practices Act*, 2 U.S.F.L. REV. 165 (1968).

166. "ALTA Presents Testimony at Senate Hearings" *Title News*, Sept. 1973, at 4.

167. S. 3164, 93d Cong., 2d Sess. (1974).

168. S. 2288, 93d Cong., 1st Sess. (1974).

169. H.R. 9989, 93d Cong., 2d Sess. (1974).

Both of these latter bills eventually passed their respective Houses of Congress; however, due to conflicting amendments, a committee of conference was required. This committee accepted the House amendments to the bill; consequently, the final bill[170] was passed by both Houses as synthesized and signed by President Ford on December 22, 1974.

The Real Estate Settlement Procedures Act of 1974 states the following as its findings and purpose:

> SEC. 2 (a) The Congress finds that significant reforms in the real estate settlement process are needed to insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country. The Congress also finds that it has been over two years since the Secretary of Housing and Urban Development and the Administrator of Veterans' Affairs submitted their joint report to the Congress on "Mortgage Settlement Costs" and that the time has come for the recommendations for Federal legislative action made in that report to be implemented.
>
> (b) It is the purpose of this Act to effect certain changes in the settlement process for residential real estate that will result—
>
> (1) in more effective advance disclosure to home buyers and sellers of settlement costs;
>
> (2) in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services;
>
> (3) in a reduction in the amounts home buyers are required to place in escrow accounts established to insure the payment of real estate taxes and insurance; and
>
> (4) in significant reform and modernization of local recordkeeping of land title information.[171]

The legislation regulates closing costs and settlement procedures in all "federally related mortgage loans" throughout the nation. The Act accomplishes this widespread coverage by defining federally related mortgage loans to include transactions concerning residential realty designed for the occupation of from one to four families, plus all other loans that are federally connected.[172] Over ninety-five percent of all residental sales are thus within the purview and operation of the Act.

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170. Act of Dec. 22, 1974, Pub. L. No. 93-533 § 2 *et seq.*, 88 Stat. 1724, *et seq.* (codified at 12 U.S.C. § 2601, *et seq.* (Supp. I, 1975)).
171. 12 U.S.C. § 2601 *et seq.* (West Pamphlet No. 1, Feb. 1975).
172. 12 U.S.C. § 2602(1)(A) (West Pamphlet No. 1, Feb. 1975).

The Act also authorizes the Secretary of Housing and Urban Development (HUD) to report back to Congress within two years from the effective date of the legislation as to whether there is any "necessity for further legislation in this area." If the Secretary so concludes, he is to present to Congress his recommendations for changes and additions to the law.

A uniform settlement statement is authorized by the Act to be used in all transactions which involve federally related mortgage loans. Furthermore, the lender is required to furnish to the prospective borrower, twelve days prior to settlement, an itemized disclosure of each charge arising in connection with such settlement.[173] Civil liability is authorized if the lender fails to provide the disclosure unless the violation was not intentional and resulted from a bona fide error.

The real essence of the Act as it affects the consumer and the independent escrow companies are the provisions concerning kickbacks and unearned fees.

> SEC. 8 (a) No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service.
>
> (b) No person shall give and no person shall accept any portion, split or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan, other than for services actually performed.
>
> (c) Nothing in this section shall be construed as prohibiting (1) the payment of a fee (i) to attorneys at law for services actually rendered or (ii) by a title company to its duly appointed agent for services actually performed in the making of a loan, or (2) the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed.
>
> (c) (1) Any person or persons who violate the provisions of this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.
>
> (2) In addition to the penalties provided by paragraph (1) of this subsection, any person or persons who violate the provisions of subsection(a) shall be jointly and severally liable to the person or persons whose business value or amount of the fee or thing of value, and any person or persons who violate the provisions of subsection (b) shall be jointly and severally liable to the person or persons charged for the settlement services involved in an amount equal to three times the amount of the portion, split, or percentage.[174]

173. 40 Fed. Reg. 22448-22464 (May 22, 1975).
174. 12 U.S.C.A. § 2607 (West Pamphlet No. 1, Feb. 1975).

Also, it must be noted that the Act prohibits a lender from requiring a borrower or prospective borrower from depositing in any escrow account, for the purpose of assuming payment of taxes or insurance premiums, a sum in excess of a certain amount determined by formulas as outlined by the Act.[175]

Finally, Section 9 of the Act prohibits the seller of real property, that will be purchased with the assistance of a federally related mortgage loan, from directly or indirectly requiring that title insurance covering the property be purchased by a particular company.[176]

VI. POTENTIAL IMPACT OF THE REAL ESTATE SETTLEMENT PROCEDURES ACT OF 1974

The impact of this new federal Act must be placed in the proper perspective; that is, in relation to analogous state and federal legislation heretofore that has attempted unsuccessfully to regulate similar activities. California laws and regulations are primarily directed to the independent escrow companies and those companies under jurisdiction of the Insurance Commissioner. As noted previously, it is only recently that the California Insurance Commission has taken action against title insurance companies who illegally dealt with real estate brokers. However, there does not appear to be adequate regulation and enforcement of real estate brokers themselves nor of the activity that real estate brokers may engage in with businesses that are not title companies, title insurance companies or controlled escrow companies. Prior federal legislation exists in Section 701 of the Emergency Home Finance Act of 1970.[177] This Act prescribes the Secretary of HUD and the Administrator of Veterans Affairs to set standards governing the amounts of settlement costs allowable in regard to financing FHA and VA mortgages. However, the Act is not currently being used and Senator Proxmire argued successfully to maintain that section intact. The Committee of Conference agreed that the continuation of Section 701 is "desirable for its deterrent effect and can, in fact, facilitate the achievement of the purposes of the Act" and nothing in the

175. *Id* at 2609.
176. *Id.* at 2608.
177. 12 U.S.C. §§ 1451, *et seq.* (West Supp. 1975).

Act is intended to preclude the use of Section 701.[178] The Act, therefore, is born in an atmosphere void of any effectiveness. Such a condition justifiably leads one to maintain a pessimistic if not cynical attitude toward this particular attempt at regulating illegal kickbacks and rebates in the real estate settlement business.

However, certain provisions of the Act do provide a hope that consumers will be protected from unnecessarily high settlement charges. Section 8 of the Act, prohibiting kickbacks and unearned fees, appears to be broad enough to cover referral fees, commissions or payments made by nearly everyone associated with a real estate settlement including real estate agents and brokers, unless given for services actually performed.[179]

Section 8(a) and 8(b) may become the most significant provisions of the Act. Federal regulation and judicial interpretations will be necessary, however, to give these sections their required impact. Without such rulings, those businesses who are potentially affected by the Act will not be properly informed of their possible violations. Therefore, the only manner in which the Act will accomplish its intended purpose is for it to be enforced vigorously by HUD and the judiciary.

If the legislation is properly enforced, the impact of the Act will be widespread. It can be argued that this Act has as much potential as the federal antitrust and civil rights legislation, albeit on a smaller scale. First, the Act fills a needed vacuum wherein prior regulatory attempts have been minimal and ineffective. Second, the coverage of the Act is nearly total, affecting virtually all residential transactions in the United States. Third, the Act supplants all other State laws to the extent that those statutes are inconsistent with the new legislation. Exemption is given to those state laws that provide greater protection to the consumer.[180] Fourth, the Act provides for civil liability in two areas,[181] most importantly in the area of kickbacks and unearned fees. Many similar regulatory schemes provide only for criminal penalties upon violation; consequently, those laws are difficult to enforce. However, this Act will give the consumer an opportunity to enforce the legislation and to recoup his losses.

On its face, the new Act is a meaningful attempt by the federal government to provide reform in the cost to consumers for real

178. H.R. REP. No. 9301526, 93d Cong., 2d Sess. (Dec. 9, 1974).
179. Real Estate Settlement Procedures Act of 1974, Section 8c.
180. 12 U.S.C.A. § 2607 (West Pamphlet No. 1, Feb. 1975).
181. *Id.* at § 2616(a).

estate settlement services. Moreover, an unintended effect of the Act may be twofold: First to provide the independent escrow agent in California with a more equitable share of the market; second, to help eliminate tie-in agreements, kickbacks and rebates, thereby creating greater competition and providing for a freer market for real estate settlement services.

VII. CONCLUSION

In President Ford's message before Congress on October 8, 1974, he stated that:

> To increase productivity and contain prices, we must end restrictive practices, whether instituted by government, industry, labor or others.
>
> My Administration will zero in on more effective enforcement of laws against price-fixing and bid-rigging. For instance, noncompetitive professional fee schedules and *real estate settlement fees* must be eliminated. Such violations will be prosecuted by the Department of Justice to the fullest extent of the law.
>
> I ask Congress for prompt authority to increase maximum penalties for antitrust violations from $50,000 to $1 million for corporations and from $50,000 to $100,000 for individual violators.[182] (Emphasis added.)

The President went on to say:

> I ask the Congress to establish National Commissions on Regulatory Reform to undertake a long-overdue total re-examination of the independent regulatory agencies. It will be a joint effort by the Congress, the executive branch and the private sector to identify and eliminate existing federal rules and regulatons that increase costs to the consumer, without good reason, in today's economic climate.[183]

The day before the President's message, the Federal Trade Commission Chairman stated that the Federal government's regulatory machinery should be overhauled because it amounts to little more than "government sanctioned price fixing" that is costing consumers millions of dollars a year.[184]

A further insight into the present position of the federal government toward the practices herein reviewed can be found in the articles and speeches of Thomas E. Kauper, Assistant Attorney General, Antitrust Division, U.S. Department of Justice:

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182. *Id.* at §§ 2605, 2607.
183. President Ford's Speech, October 8, 1974, 120 Cong. Record 10120-10123.
184. Los Angeles *Times*, October 8, 1974, at Part III, at 9, Col. 3.

A people's desire for freedom and their fitness for it can be measured by their willingness to conform within the limits set by general rules of conduct, recognized as necessary for the general welfare. A special application of this principle is that the fitness of a business community to live under a system of free enterprise is to be judged by its willingness to submit to the rigors of competition . . . .

If the businessmen of this country want a system of free enterprise, not only must they proclaim its merits in the abstract, but they must refrain from restrictive policies which are aimed at destroying competition; and they must, as a group, give their support to those efforts which are directed to the preservation of competition.[185]

More recently, on September 14, 1973, in an address before the Southwestern Legal Foundation, entitled "Current Antitrust Enforcement Policy of the Department of Justice," Assistant Attorney General Kauper stated:

The American economy is increasingly service oriented. For that reason, our activities in eliminating fee fixing and other anticompetitive conduct in the delivery of services to the consumer become all the more important. We will continue to channel a significant amount of the resources into real estate services, brokerage services, engineering and architectural activities, and the like, even though many such cases may appear to be localized. It is of course our hope that these cases will have nationwide impact as a deterrent to other would-be violators. So far, I must confess that such a pattern has not developed. More often, it appears that state regulation has been sought as a shelter from antitrust prosecution.[186]

It seems clear, therefore, that there will be considerable hyperactivity in scrutinizing the area of land sale and financing practices, both from the federal and state perspectives,[187] and that the conduct of escrows in California will be significantly affected, along with the predatory practices of some lenders, borrowers, brokers, abstractors, insurers and attorneys. Perhaps the consumer homebuyer and homeborrower can finally avoid the economic burden of ultimately paying for secret rebates, kickbacks and referral fees so prevalent in these transactions.

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185. Kauper, "The Challenge of Competition," 28 *The Business Lawyer* 169, 175-176 (Special Issue Mar. 1973).

186. Address by Assistant Attorney General Kauper, Southwestern Legal Foundation, September 14, 1973.

187. To date, the Justice Department has entered into twelve (12) consent decrees. These decrees challenged fee-fixing arrangements and other anticompetitive practices by local realty boards. *U.S. Department of Just. Release* November 19, 1974.