Chapter 4

Unfair Trade Practices

Overview

In General

Empowered by our Trade and commerce laws (15 USC), the Federal Trade Commission (FTC) is concerned primarily with purely private businesses and the entire gamut of their economic activities. If a citizen is upset with unfair trade practices it finds relief with the FTC – not with the federal courts; the Congress gave remedial relief only to the FTC.

Constitutionality

The Commerce Clause gave Congress the power to regulate unfair competition in commerce. People who quarrel with the vague words "*unfair methods of competition*" have no grounds:

- Words are of common use and meaning.
- They are analogous to similar words in common statutes.

An elaborate federal statutory definition is not needed.

Due Process

Due process is not violated where FTC fact-finding is presented with evidence.

Delegation of Power

Is not a proper delegation of power for the judicial/legislative branches to confer on the Executive Department the power to:

- Find facts
- Declare the activity to be illegal
- Issue cease and desist orders?

The answer was yes by multiple court decisions.

Purpose of the Act

Unfair competition is prohibited among:

- Persons
- Partnerships
- Corporations

in the course of commerce.

This is the miscreant activity:

- Destruction of competition or
- Restriction thereof in a substantial degree.

A 1938 amendment to 15 USC§ 45 dealt with the following:

- Unfair practices
- Deceptive practices = unfair competition
- Unfair competition.

A violation of the Sherman or Clayton Act is automatically a violation of the unfair competition laws.

The law expects the FTC to combat at the earliest possible moment any trade practices that exhibit strong potential for stifling competition. The particular activity under scrutiny is any unfair trade practice which has the potential for violating the antitrust laws.

The purpose of the law:

1. Yes – protect the public.
   No – punish the miscreant.
2. Yes – stop unfair competition at its incipiency.
   No – establish that there was a monopoly in a restraint of trade.
3. Yes – look for the smoke.
   No – wait for the fire.

It was a major legislative accomplishment to:

- Extend unfair competition so as to
- Include unfair or deceptive acts.

This broadening was significant.

Sherman and Clayton Acts

If the activity violates the Sherman or the Clayton Acts, the FTC, at its option, can suppress it as an unfair competition matters. That is, FTC may suppress it as an unfair competition matter even through it is also an antitrust infraction. While an antitrust violation is also automatically a violation of the unfair competition law the reverse may or may not be the case.

The purpose of the unfair competition act was to *nip* antitrust activities in the bud.

The FTC is particularly alert to unfair competition acts which conflict with the basic principles of the Sherman and Clayton Acts.

1. FTC declares an activity to be unfair competition
2. No proof is shown that it will lessen competition or tend toward monopolizations
3. Even so, FTC may enjoin the practice with a cease and desist order.

The rules applicable to price discrimination under the Clayton Act (applicable only to commodities) are also applicable to price discrimination under the unfair competition rules. A count can find a charge to be:

- Not an infraction of a Clayton Act violation.
- An infraction of the unfair competition rules.

Relation to Other Laws

While of minor interest to this discussion, these other laws are referred to as follows:

1. Emblems, signs, insignias, etc.
2. McCarran Ferguson Act FDA name-similarity issues
3. FDA false labeling
4. Tariff Act and designation of where sale made
5. Tax preparation rules of IRS
6. Interstate Land Sales Full Disclusive Act
7. Common Carrier Laws
8. Agricultural Coops (Volstead Act)
9. Fair Credit Reporting Act.

Other Provisions

The Court of Appeals has the exclusive jurisdiction to enforce FTC orders. The FTC retains the right, however, for requiring that such orders are followed.

Rx-related matters, not specifically regulated by the FDA may be regulated by the FTC.

The broadening of "*unfair competition*" to include "*unfair and deceptive acts*" did not change any statutory exceptions.

The courts will use the principles set forth in the Sherman and Clayton Acts to determine an unfair competition infraction. In dealing with unfair competition issues, the court is not obligated to follows antitrust standards as strictly or courts must under the Sherman and Clayton Acts.

State Laws

To the extent that state laws interfere or *blunt* the federal law, such state law is preempted. In providing its review, the FTC will not refer to any state laws. That state law that permits such competition does not become a factor in the court's review process.

Where there is diversity or where the cause involves pendant jurisdiction, the federal court is free to look to state law rules. State law applies where such is not in conflict with federal law.

Where the activity des not involve interstate commerce states are free to apply their state rules. What must not occur is for the state law to conflict with, control, thwart, supersede or serve as an obstacle to the full purposes and objectives of the federal laws.

Unfair Competition

Overview

In General

Fundamental questions are:

- Are activities unfair?
- Do they do substantial injury to the public by restricting competition?

What needs to be shown is that the activity worked against public policy stated in the law. Activity may be either overt and aggressive or subdued and persuasive. Some of the things to look for are:

- Is there unfair trade with interstate commerce?
- By deception, did the activity result in the buying/paying for something not provided or delivered?

Consider two acts:

1. Act one – without any agreement or combination.
2. Act two – with an agreement or combination.

Act one maybe legal; act two may not be legal.

In essence, what is unfair is to be determined by the courts but:

1. Based upon principles of commercial law,
2. Subject to judicial review.

Meaning of Fair

The factors enter into the decision of the FTC as to unfairness are as follows:

- Exigencies of the particular situation
- Relevant trade practices
- Practical requirements of the business in questions.

The exercise is essentially one involving analysis of:

- Facts and circumstances
- Impact of such on competition and monopoly.

The FTC is expected to rely on the myriad of decided cases in making its decision relative to what is unfair competition.

The following factors are determinate of unfair competition:

- Violation of Sherman, Clayton or Robinson-Patman Acts

- A *per se* violation of antitrust policy
- A violation of the spirit of these acts as defined by relevant Supreme Court decisions.

While it is a factor in determining whether or not the activity is unfair competition, it is not necessary that a rigorous measure of economic impact be made. There will not be any excessively strict burdens placed on the demonstration.

In determining unfairness, the court will not apply a *best deal* test; rather the court also will not restrict the FTC in what tests it uses. This is particularly true where there are such factors involved as the following.

- Deception
- Coercion
- Withholding of material information.

For the activity to be an unfair trade practice (Wheeler-Lea Amendment) some or all of these elements must be present.

- Fraud
- Misrepresentation
- Deception
- Unethical conduct.

Unfairness is not constrained by practices forbidden by common in criminal law. Acts which are not (a) antitrust or (b) deceptive include these:

- Offends public policy
- Are immoral/unethical/oppressive/unscrupulous
- Causes substantial to consumers or competitors.

The analysis should be economically broad; permit a wide focus.

Meaning of Unfair Methods of Competitions

Congress intended that the meaning the "*unfair methods of competition*" would be arrived at by one gradual process of judicial inclusion and exclusion. Certainly, the term is not limited to fraud. Some of the more typical questions to be followed in the determination thereof include:

- What is the specific and substantial public interest?
- What are the particular competitive conditions?

A solitary infraction may constitute a method of unfair competition and as a consequence constitute an infraction.

Unfair methods of competition are practices contrary to good morals because they are characterized by:

- Deception
- Fraud
- Oppression.

To constitute an act of unfair competition, there does not have to have any antitrust issues; there does have to have some nexus with competition, however.

Without the specific facts and circumstances, there can not be a determination.

Meaning of *Unfair*

Some of the considerations in determining whether or not it is an unfair act or an unfair method of competition are as follows:

- Facts and circumstances of case
- Impact on competition and/or monopolization
- Practical business and economic considerations
- Business and trade practices
- Prior court decisions
- *Per se* violation of antitrust policy
- Possible violation of Sherman, Clayton or Robinson-Patman Acts
- Elements of fraud, deception; coercion; misrepresentation; or practices which are immoral, unscrupulous or unethical.
- Offensive to public policy
- Extent of harm to consumers
- Impact on competition.

Requirement of Anticompetitive Effect

The words "*unfair methods of competition*" must be taken in their total context because the phrase:

- Affects the existence of present or potential competitors
- Implies that such unfair methods may hurt the competitors.

It is sufficient to show that the activity had the effect of threatening competition to a significant extent.

It must always be paramount that the task of the FTC is to prevent potential injury by stopping unfair competition at is incipiency.

For the FTC to issue a cease and desist order, it is not necessary that there be:

- Evidence or testimony of specific losses
- Expert evidence to prove tendency to injury.

It is sufficient that there be a reasonable probability that competition may be adversely affected.

The FTC is to combat at their incipiency trade practices that exhibit a strong tendency for stifling competition.

- Need not show – that competition was eliminated.
- Need to show – unfairly burdened competition which involved a significant volume of commerce.

The two dominant factors of unfair competition are these:

- Element of competition (actual or potential) must be present.
- Effect of such activity on such activity must be specific and substantial.

If it is obvious that competitors are likely to be injured by the activity, that is sufficient for the FTC to issue desist and cease order. It is not necessary to prove or show cause that such activity actually lessoned the degree of competition. That is, actual damages need not be shown to gain the cease and desist order.

Public Policy

The FTC has the right to issue a cease and desist order merely because of the dangerous tendency of the activity to unduly hinder competition or create a monopoly. That is, the FTC is empowered to declare an activity to be unfair merely because it is contrary to public policy.

Common-Law Concept of Unfair Competition

The FTC concept of unfair competition is broader than the common-law concept. Common-law includes that found in the Sherman Act.

Unfair or Deceptive Acts or Practices

These words were added in 1938 by the Wheeler-Lea Amendment. The key tests are these:

- It is not necessary that actual deception occurred.
- It is necessary to show that the activity had, as a natural and probable result, the likelihood of deception:
- Having the capacity to deceive is sufficient; aggrieved customers and their testimony is not necessary.

Target of the FTC is for the public (consumers) and not for the competitors. The beneficiaries of the Act are not the experts but rather those who are:

- Ignorant
- Unthinking
- Credulous

and who are swayed by appearances and impressions.

The FTC wants to stifle the activities at their incipiency; actual deception of the purchasers is not needed. It is capacity or tendency to deceive and not the actual or proven inception that is of interest to the FTC.

Deceptive Advertising

The likely effect of advertising (natural and probable result) is a matter left to the discretion of the FTC. It must, however, be shown to be present by substantial evidence.

To establish such deception, it is not necessary to have consumer testimony; the vantage point in making the judgment is that of an unsophicated observer. Also, the FTC can make its own determination based upon its own appraisal.

Statements susceptible of both misleading and truthful interpretation will be construed against the advertiser. The guide will be to assess what the effect would be on the minds of the consuming public.

It is not necessary that the FTC do research, opinion polls, etc., to establish whether advertising is or is not deceptive.

Anticompetitive Effect is Not Necessary

The purpose of the Whealer-Lea Amendments, adding the words “unfair or deceptive acts or practices” make it clear that the intent of Congress was to protect the consumers as well as the competitors. Thus, such acts may be illegal even through not anti-competitive.

Lack of Intent to Defraud or Deceive

A practice may be unfair but not fraudulent; unfairness may describe an act that is (a) an innocent misrepresentation and yet involve the retention of benefits by the miscreant. It was unfair for a miscreant to have adopted the trade name of another firm with no fraudulent intent. For this purpose, fraud and deliberate efforts deceive are the same. Good faith misrepresentations constitute unfair competition.

So long as the advertising is prejudicial to the public’s interest, it is unfair competition.

Expression of Opinion

The FTC must make its rulings as follows:

- Yes – statements of fact
- No – expressions of opinion.

An honest difference of opinion, however, does not constitute unfair competition; this is true even if statements are controversial.

A book consisting primarily of opinions may be

- Acceptable as a First Amendment matter
- Unacceptable as a matter opinion for unfair practices issues.

It is the task of the FTC to sort out the differences.

Absence of Injury

Retail store offered product A for $10 plus a free chance to punch a board which offered the possibility of an upgrade to product B worth $15. The idea was to induce the buyer to purchase A instead of a competitors product. Even though (a) the customer could not lose, (b) the board was sent *gratis* and (c) the customer could pass on the offer. The FTC held the arrangement to be 2 of tying arrangement.

It was unfair competition for the seller to misrepresent even though:

- Buyer did not lose any actual value
- Buyer benefited by the deception.

Even though the prospective purchaser neither gains or losses by a gambling device which is used in merchandising, it does not negate the illegality of the practice; innocent deception is non-the-less deception; *no damage done* is no defense. That the person who was the victim either gained or suffered any loss was not an issue; proof of injury to the buyer is not needed to establish price misrepresentation.

Use of Practice by Others in Trade

It is no defense to unfair competition to assert that "*the other competitors are doing it*;" two wrongs do not make a right. That the FTC is not putting a cease and desist order on the competitors that are doing the same activity is not a defense; the argument by the FTC that is has limited resources is pervasive so that the FTC can pick one miscreant employer and use it as an example.

Obviousness of Deception to Others in Trade

Just because no one takes labeling seriously is not a defense from such being a method of unfair competition. So long as innocent consumers (middle-men aside) have the potential for being deceived, there is an infraction.

Even though the trained and experienced person is able to spot the deception, it is unfair trade so long as the untrained and inexperience are unable to spot the deceptions.

Obviousness of Deception to Consumers, Puffing

Practice of *puffing* (e.g., jumping on a mattress) is time-honored and so long as slight, it is not deemed to be unfair.

It was patently unfair to call *sili*ca by the name *vitreas marble* (which it was not) even though the buyer was aware of the falsity.

It was more than mere *puffing* when a cure for bunions was advertised with these assertions:

- Is approved by leading physicians.
- Bunions were dissolved.
- Pain was instantly stopped.
- Permanent relief followed.
- Normal foot function restored.

Literal or Technical Truth

Over-blown videos are unfair.

Exceptions under Unfair Competition

Power to regulate meat advertising is with the FDA and not the FTC.

Other exceptions include the following

- Packers and canners (FDA)
- Airlines (CAA or FAA)

Price Fixing

Overview

Price-fixing is an unfair trade act under these circumstances:

- Results are anti-competitive in result.
- Test of such act is *substance* and not *form.*
- Agreement to price-fix may be express or implied.
- Acid test is this: is the price level unrelated to supply and demand.
- Such act is illegal *per se* under the antitrust act.
- An unlawful conspiracy to fix prices is an infraction even without any discernible agreement.

Price-Fixing – Horizontal

Absent collusion, conspiracy or conflicted interest, the practice of *price-followship* or *price-leadership* is not dispositve to an unfair trade act.

To establish an unfair act of price-fixing, the FTC must show that prices were actually affected. The mere showing of parallel activity is not sufficient.

In establishing horizontal price-fixing the various functional levels of competition must be defined.

It is usually needful to show that collusion or conspiracy was involved to make a successful case for illegal price-fixing.

Where each entity in the horizontal pricing scheme has the free choice to modify its own price, there is no price fixing in the unfair trade meaning.

If a competitor adopts on to an illegal pricing activity, it also may be found guilty of an unfair trade act.

Agreements may be informed and implied and not necessarily formal and express. Being a clearinghouse for pricing data may easily constitute price-fixing.

Price-Fixing-Vertical

Agreements to fix prices are illegal; agreements to select customers are legal.

Manufacturer's coercion, reprisal etc. against retailers for not honoring suggested retail prices are treated as follows:

- FTC will issue a cease and desist order to stop such coercion.
- Refusal to supply or even criticizing them or even publicizing their names is illegal.
- Tying in an expensive maintenance contract is legal *only* if there is a patent on the process.
- Threatening to reprise may be acceptable but actual reprised is definitely not acceptable.

The act of the retailer to sell at a lower price will not jeopardize such retailer in any way.

The arbiter is these price-fixing disputes will be the FTC.

Unfair and Deceptive Practices

Statutory Background

The United States Code (15 USC §45(a)(1)) declares as illegal the following:

1. Unfair methods of competition…
2. Unfair or deceptive acts or practices…
3. Which affect commerce.

The *litmus test* of whether an act is an unfair method of competition is three-fold:

1. Is commerce affected?
2. Is competition substantially lessoned?

3. Is there a tendency for a monopoly to be created?

This is ultimately a judicial and not an administrative decision.

The *litmus test* of whether an act or practice is unfair or deceptive is as follows:

1. Is commerce affected?
2. **General Questions**
   a. Is public policy offended?
   b. Is the act characterized by any of the following, e.g.:
      - Immoral
      - Libelous
      - Unethical
      - Illegal
      - Oppressive
      - High pressure
      - Unscrupulous
      - Fraudulent
      - Injurious to the general public.
   c. Without regard to any acts, are there any unfair provisions in any contracts of adhesion?
3. **Specific Questions**
   a. Are services of A passed off as services of B?
   b. Does the act cause the likelihood of confusion or misunderstanding as to the source, sponsorship, approval or certification of services?
   c. Does the act cause the likelihood of confusion or misunderstanding as to affiliation, connection or association with, or certification by, another?
   d. Does the act use deceptive representations or designations of origin in connection with the services?
   e. Does the act represent that the services have sponsorship approval, characteristics, ingredients, uses, benefits or qualities that they do not have or that an entity has a sponsorship, approval, status, affiliations or connection that it does not have?
   f. Does the act represent that the services are of a particular standard, quality or grade, if, in fact, they are of another?
   g. Does the act create the likelihood of confusion or misunderstanding?

Traditional and Common-Law Meanings

Unfair Competition

This is a widely-used term that has gained a place in common-law.

General Use

Any dishonest or fraudulent act in trade or commercial rivalry.

Particular Use (Example)

The practice of substituting one's own goods or services for those of another by capitalizing on such other firm's reputation, name, etc. that is, infringement of trade-name or similar.

Unfair competition is a tort involving the misappropriation for commercial advantage of a benefit or right belonging to another. It is the simulation by Firm A of certain product or service characteristics of its competitor, Firm B, such as trade names, materials, services, etc. Thereby falsely inducing the purchase of goods or services. This act has the common-law name of *passing off*. In brief it is the selling of another firm's services or products as one's own.

Unfair competition includes the following:

- Deceitful advertising
- Bribery of employees
- Secret rebates and/or concessions.

The true test of unfair competition is, when comparing the two products or services, that:

- Perfect simulation need not be achieved.
- Similarity is all that is needed to make the act unfair.

Unfair Methods of Competition

This term is unique with the FTC Act (15 USC§45) and is more broad than the term unfair competition. The term, by design, is not defined but its meaning is to be a function of the following:

- Particular instance…
- Particular competitive condition…
- Specific and substantial public interest…

All supported by evidence provided.

The concept of unfair methods of competition was not to restrict fair and free competition among honorable opponents, nor was it to give license to acts heretofore deemed immoral, unethical or against public policy.

Description of Potential Infractions

Several examples of activities which would likely be deemed unfair trade practices characterized by both bundling and conflicted interest are these:

Instance Number One

The TPA is combined with an MCO which also provides its own UR services. A covered person with a serous health problem, capped by an outlier provision, presents a serious financial problem to the network hospital. The solution is to get the person's consent and by air ambulance ship such patient to a non-network hospital. The stop-loss carrier will doubtless be apoplectic but it will necessarily have to pay the higher charges.

Instance Number Two

The TPA and the stop-loss carrier are combined and stop-loss benefits are easily manipulated by simple claims gaming. The employer likely is not aware of such activity.

Instance Number Three

The MCO, TPA, and stop-loss carrier are combined and aggressively slash the hospitals submitted charges. The hospital must acquiesce but recovers much of the cost direct by means of the Medicare Outlier and charity recovery relief.

Instance Number Four

Hospital billing practice of making undisclosed and chaotic or discriminatory variations from its chargemaster with the Medicare Outlier conflicted interest.