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ARTICLES

The Arbitration of Consumer Unfair Trade Practices Claims

By Peter J. Boyer and Mariah N. Samost – October 17, 2011

Congress and most state legislatures have enacted broad consumer protection (CP) and unfair trade practice (UTP) laws designed to protect consumers from fraudulent or deceptive practices in the marketing and sale of products and services. Many of these statutes provide for private rights of action. Some provide for treble damages and attorney fees. *See, e.g.*, N.J.S.A. § 56:8–19 (New Jersey Consumer Fraud Act); Cal. Bus. & Prof. Code § 17082 (Unfair Competition Act); Cal. Civ. Code § 1794 (Consumer Warranty Act).

In many consumer transactions, the contract at issue has been drafted by the manufacturer or seller, providing little or no opportunity for the consumer to negotiate terms. Recognizing this, most of these statutes have antiwaiver provisions that render void or unenforceable a contractual clause purporting to provide for a waiver of statutory rights. Consumers asserting claims under these provisions may feel that litigation in court, with traditional rights to discovery and a trial by jury, will give them the best opportunity to secure a favorable outcome.

When the contract at issue has an arbitration clause, the strong policy favoring a private right of action in court clashes head on with an equally strong federal policy in favor of agreements to arbitrate disputes, a policy expressed in the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1, *et seq.* Reconciling these divergent policies is largely dependent upon the language of the underlying contract, which is almost always prepared by the manufacturer or seller and accepted by consumers who may not know what they are agreeing to and, as a practical matter, have no ability to negotiate the terms.

Congress enacted the FAA in 1925 in response to long-standing judicial hostility toward arbitration agreements. The goals of the FAA are the enforcement of private agreements and the encouragement of efficient and speedy dispute resolution. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985). The FAA’s operative clause provides that any

written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

The U.S. Supreme Court has observed that this section reflects a “liberal federal policy favoring arbitration” and the “fundamental principal that arbitration is a matter of contract.” *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) (citations omitted). The Court has

further remarked, in accordance with the goals of the Act, that private arbitration agreements are to be enforced according to their terms and that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24–25 (1983).

Is There an Enforceable Agreement to Arbitrate?

The FAA does not prescribe a general presumption in favor of the arbitration of all statutory claims. The presumption applies only where the parties have agreed to arbitrate. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 615 (1985); *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 469 (1989) (“Arbitration under the Act in a matter of consent, not coercion”). Historically, the issue of whether parties agreed to arbitrate arose in the context of a written agreement, signed by the consumer (typically with a host of terms and conditions set forth in a printed form).

In the electronic age, an agreement to arbitrate can be confirmed in a variety of ways apart from signing a written contract, including a single mouse click ordering the item in question. The click evidences a consumer’s agreement to terms and conditions that can only be viewed by scrolling down a web page or clicking on a separate document. *Siebert v. Amateur Athletic Union*, 422 F.Supp.2d 1033, 1039–40 (D.Minn. 2006). An agreement to arbitrate can also be confirmed through the language on a web page. The text indicates that, by placing an order, the customer agrees to the terms and conditions set forth elsewhere on the page or on another page. *Hubbert v. Dell Corp.*, 359 Ill. App. 3d 976, 983–84 (Ill. App. Ct. 2005). An agreement to arbitrate can also be confirmed through the receipt of a written statement of terms and conditions with the purchased product (termed a shrink-wrap agreement). The agreement includes an assertion that if the consumer does not return the product, he or she is deemed to have accepted all of the agreement’s terms, including an agreement to arbitrate. *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997).

If the parties do not agree on the existence of an agreement to arbitrate the dispute, that issue can be brought before a court for determination in the first instance. If a court finds the parties agreed to arbitrate, the arbitrator (not the court) assesses the validity of purportedly void or voidable clauses in the contract and decides whether “grounds . . . exist at law or in equity” to invalidate an arbitration agreement. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404 (1967) (holding that attacks on the validity of an entire contract, as distinct from attacks aimed at the arbitration clause, are within the arbitrator’s ken); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447-48 (2006) (extending the holding of *Prima Paint* to apply in state court).

Federal Statutory Remedies and the FAA

Because the FAA expresses a statutory policy created by Congress, the legislature has the power to preclude arbitration and provide for a statutory right to a judicial remedy or a trial by jury if it expresses a clear intention to do so with respect to a particular statute or remedy. Thus, the FAA will give way to a federal CP or UTP statute if it can be shown specifically that “Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.” *Shearson/Am.*



Exp., Inc. v. McMahon, 482 U.S. 220, 227 (1987). However, given the FAA's expressed policy in favor of arbitration, the burden for demonstrating clear congressional intent to do so rests on the party resisting arbitration. *Id.* at 226-227. In *McMahon*, the Supreme Court recognized three disjunctive factors a court may use to discern congressional intent, including the statute's text, the statute's legislative history, or the inherent conflict between arbitration and the underlying purposes of the act granting statutory rights. However, even in this context, the FAA's policy favoring arbitration holds a commanding lead in decisions applying this standard.

In the past 25 years, the Supreme Court has found that the FAA mandates enforcement of agreements to arbitrate claims arising under federal statutes, providing private rights of action for violations of the Sherman Antitrust Act (*Mitsubishi Motors Corp.*, 473 U.S. 614 [1985]), the Securities Exchange Act of 1934 (*McMahon*), the Racketeer Influenced and Corrupt Organizations Act (*McMahon*), the Securities Act of 1933 (*Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477 [1989]), and the Age Discrimination in Employment Act of 1967. (*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 [1991]). Indirectly, the Court has also rejected an attempt to avoid arbitration under the Truth in Lending Act. (*Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79 [2000]). Most of these cases turned on a claim of an inherent conflict between arbitration and the underlying purposes of the statute at issue—the third factor of the *McMahon* inquiry. In making its assessment, the Court gave great weight to the federal policy in favor of arbitration.

In its current 2011-2012 term, the Court will be hearing an appeal from the decision of the U.S. Court of Appeals for the Ninth Circuit in *Greenwood v. Compucredit Corp.*, 615 F.3d 1204 (9th Cir. 2010), *cert. granted* 2011 WL 220683 (2011). This will address the issue of whether language in the federal Credit Reporting Organization Act that states the consumer has a right to “sue” means the consumer's right to sue in court cannot be avoided by contractual language providing for the arbitration of disputes.

It should be noted that, having created the FAA, Congress has the power to change it. In the past few sessions of Congress, legislation has been introduced that would modify the FAA to provide more stringent requirements for enforcement of arbitration agreements in consumer transactions. Although this legislation has not passed, similar proposed legislation is pending before Congress as of the publication of this article.

State Remedies

When the FAA's policy in favor of arbitration clashes with a state court policy favoring a judicial forum over arbitration, the Supremacy Clause dictates that the federal policy in favor of arbitration must take precedence. The Supreme Court reiterated in *Perry v. Thomas* that “[i]n enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.” *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)).

The preemptive effects of the FAA must be applied to all “contracts evidencing transactions involving commerce,” unless such contract is revocable “upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. Though the FAA is not applicable to every consumer transaction, the reach of the FAA is quite broad. *See, e.g., Perry*, 482 U.S. at 490. (The FAA is “a statute that embodies Congress’ intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause.”)

As a result, a state law that interferes with or seeks to avoid the federal policy favoring agreements to arbitrate, whether of legislative or judicial origin, is preempted by the FAA. *Preston*, 552 U.S. 357–58. The judicial inquiry becomes more complex when a state law defense concerning the validity, revocability, or enforceability of contracts is alleged to infringe upon the parties’ agreement to arbitrate.

In *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), a Montana statute mandated that, as a requisite for enforcement, all arbitration clauses must be printed on the first page of a contract in underlined capital letters. The U.S. Supreme Court found that the FAA preempted the statute because the statute had the effect of conditioning the enforceability of an arbitration agreement on compliance with a special notice requirement that was not applicable to contracts generally. The Court also held that while courts may invalidate arbitration agreements under generally applicable contract defenses, such as fraud, duress, or unconscionability, courts may not invalidate arbitration agreements under state laws focused on the arbitration clause and not applicable to contracts generally.

In its most recent statement on the issue, the U.S. Supreme Court, in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), overturned a California Supreme Court decision holding that an arbitration agreement in a consumer cellular telephone contract that specifically waived arbitration of class-action claims was unconscionable if: the agreement was in a non-negotiated adhesion contract; disputes between the parties were likely to involve small amounts of damages; and the party with inferior bargaining power alleged a deliberate scheme to defraud. The Court noted that the California rule classified most collective-arbitration waivers in consumer contracts as unconscionable, effectively requiring the availability of class-wide arbitration or suit. *AT&T*, 131 S. Ct. at 1746. The Court then explained that the FAA preempted California’s judicial rule because it interfered with fundamental attributes of arbitration and because it stood as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the FAA, which included ensuring the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. *Id.* at 1753. Ironically, while the Supreme Court’s decision seems to be denying arbitration to a category of cases—in this case collective or class actions—in reality, the Court is saying that a state cannot condition the enforceability of an agreement to arbitrate on the condition that such agreement allows arbitration of collective as well as individual actions.

Although the Supreme Court’s recent pronouncements have made it increasingly difficult for consumers to overcome the statutory presumption in favor of arbitration, practitioners are well



advised to bear in mind that in a given case, there is still room for creative advocacy on this issue. Many state courts are still receptive to arguments that provide a consumer plaintiff with an opportunity to litigate in court. For example, in a recent unpublished decision, the Appellate Division of the Superior Court of New Jersey held a written agreement to arbitrate not to cover certain statutory claims because the language of the arbitration agreement did not specifically refer to those claims. As a result, the Court found that the buyer was given “insufficient notice of her waiver of the statutory right to a jury trial on her [Law Against Discrimination] and [Consumer Fraud Act] claims.” *Wilson v. Woodfields at Princeton Highlands*, 2011 WL 2409369, *3 (NJ App. Div. 2011)(not approved for publication). Whether this decision would pass muster under recent U.S. Supreme Court precedents is a fair question. For now, at least, this case will be heard in court.

Conclusion

Whether a consumer unfair trade practices claim—or any case, for that matter—is litigated or arbitrated can have a significant impact on the manner in which it is investigated and tried. It is vital at the outset to identify, recognize, and develop a strategy for dealing with issues regarding the arbitrability of claims. A right to arbitrate may be waived if a party begins the process of litigating in court. Similarly, a delay in seeking to stay arbitration on the ground that the dispute at issue does not fall within the scope of an agreement to arbitrate may itself be waived if not asserted in a timely manner.

Careful consideration and proactive handling of the important question of whether the consumer unfair trade practices case will be arbitrated or litigated will ensure that both counsel and client are making informed decisions calculated to ensure the best possible result for the client.

Practice Pointers

Review and Consider Whether the Claim Is Arbitrable

While there is a strong presumption in favor of agreements to arbitrate, if there is a disagreement over whether a particular dispute falls within the scope of an agreement to arbitrate, a court may be called upon to determine whether there is an agreement to arbitrate the dispute in question. The issue is most often raised in court through a motion or petition to stay or compel arbitration. Some agreements will carve out of the arbitration clause limited categories of claims, such as requests for injunctive relief. The availability of a judicial forum for some aspects of a claim may provide an opportunity to secure discovery or other judicial remedies, notwithstanding an agreement to arbitrate the monetary portion of the claim.

Consider Whether Arbitration May Be to Your Benefit

Arbitration has many potential advantages, and not all of them favor defendants. Compared with the more drawn out and expensive process of litigation in court, a consumer claimant may well benefit from the streamlined process and reduced expense of arbitration. Likewise, a defendant should consider whether, notwithstanding an agreement to arbitrate, he would prefer to litigate a particular claim in court. If no one asserts the right to have the claim arbitrated, the existence of



an arbitration clause will not deprive the court of jurisdiction to hear a case. Conversely, parties can always agree to arbitrate, even if there is no pre-dispute contractual agreement to do so.

Be Alert to Waiver Issues

While agreements to arbitrate are construed in favor of a right to arbitrate, the right to arbitrate the claim may be waived. Many jurisdictions hold that a party that avails itself of the benefits of a judicial proceeding—by pursuing discovery, for example—cannot thereafter switch horses midstream by asserting that the matter should be moved to arbitration, even if the agreement to arbitrate clearly covers the claim.

Actively Participate in the Selection of the Arbitrator(s)

Most successful trial lawyers agree that jury selection is a critical step in securing a successful jury verdict. Recognize that in arbitration, you have the right to participate in the selection of the arbitrator or arbitrators (or sometimes in the decision of whether one arbitrator or more than one will decide the matter). Make sure your input into the selection process is meaningful by taking full advantage of this opportunity and using the resources at your disposal to find out as much as you can about the potential arbitrators.

Understand the Rules and Use Them to Your Advantage

Many arbitration clauses are relatively nonspecific about which rules should be applied in the arbitration process itself. Do not assume, for example, that arbitration means you cannot get discovery. Arbitration rules may provide for limited discovery upon request and as allowed by the arbitrator(s). If the rules are not explained or are unclear, don't be afraid to ask. If the arbitration clause does not specify the particular type of arbitration to be used, a proactive approach at the outset may enable you to select an arbitration forum or process that better fits your client's case. As with any case, understanding the rules and practices of the forum in which you find yourself is essential to securing the best possible result for your client.

When an Award Is Entered, Move Promptly to Confirm or Set Aside

The entry of an arbitration award is not the end of the process. Absent a prompt satisfaction of the award by the losing party, it is essential to have the award confirmed in court. Then it has the effect of a judgment that can be enforced through the normal judgment execution process. While appellate rights are usually limited, if there is a basis for overturning the award under the law of the jurisdiction at issue, a motion to set aside the award must be promptly filed. Most states have relatively short deadlines for moving to confirm or to set aside the award that can be jurisdictional, so those deadlines should be treated with the same attention and respect as a deadline for filing post-trial motions or a notice of appeal after a trial in court.

Keywords: litigation, business torts, arbitration, unfair trade practice



Peter J. Boyer is a partner with Hyland Levin, LLP, in Marlton, New Jersey. Mariah N. Samost is a student at Vanderbilt Law School in Nashville, Tennessee.

Civil Relief for Foreign Corrupt Practices Injuries

By Jeremy P. Evans and Andrew R. Booth – October 17, 2011

In recent years, the U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC) have become increasingly aggressive in their enforcement of the Foreign Corrupt Practices Act (FCPA). The FCPA prohibits U.S. companies and citizens, as well as foreign companies listed on a U.S. stock exchange, from bribing foreign officials to secure improper advantages or to influence certain actions. The monetary fines and penalties imposed by the government on companies found to have violated the FCPA have escalated, resulting in multimillion-dollar corporate fines and sanctions that may include the termination of export licenses and debarment from government contracting programs. The government also has shown an increasing appetite for prosecuting individuals, both U.S. citizens and foreign nationals, for directing and authorizing payments to foreign officials.

Interestingly, the recent increase in corporate settlements for FCPA violations has not been accompanied by the wave of civil litigation that often follows word of government investigations in other areas. For example, it is a well-established practice for the civil antitrust plaintiffs' bar to launch class-action lawsuits as soon as a company admits to being under investigation by DOJ Antitrust for potential cartel violations. The dearth of civil litigation may stem in part from the difficulty of a potential civil plaintiff in finding a nexus to the United States and also because the "victims" in an FCPA case are difficult to identify. By its definition, the FCPA applies to acts of "foreign" bribery committed overseas, such as instances where a company pays officials to gain a contract issued by a foreign government. And because the act of bribery often results in immediate, individualized gain to the company, a specific victim can be difficult to identify.

Corrupt practices can, however, have a negative impact on a commercial competitor of the bribing company. If two companies are competing for a foreign government contract and through bribery one of those companies obtains a contract it would not otherwise have won, then its competitor has suffered a loss—assuming that, but for the bribery, it would have obtained the contract. But the competitor may find it difficult to establish a link between the act of bribery and a legal framework that permits civil recovery. Because the FCPA includes no private right of action for a nongovernmental actor, the competitor cannot sue relying on the FCPA.

In an attempt to obtain damages for injury caused by conduct implicating the FCPA, litigants have invoked the federal Racketeering Influenced and Corrupt Organizations Act (RICO), as well as antitrust, fraud, common-law tort, and consumer-protection laws, but these efforts generally have failed. There has indeed always been a strong level of resistance to private actions for foreign bribery. As the U.S. Court of Appeals for the Sixth Circuit noted in the landmark no-

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private-right-of-action case, *Lamb v. Phillip Morris, Inc.*, “Recognition of the plaintiffs’ proposed private right of action . . . would directly contravene the carefully tailored FCPA scheme presently in place.” 915 F.2d 1024, 1029 (6th Cir. 1990).

Nevertheless, private litigants undoubtedly will continue to seek redress for perceived injuries. Recently, there have been whispers in the legal community about another potential avenue for relief: Section 337 of the Tariff Act of 1930. It appears that, in certain narrow circumstances, section 337 could conceivably offer a company an opportunity to obtain relief in regard to conduct that resulted in an FCPA violation. Section 337 is designed to protect U.S. industries from injury caused by the importation of goods connected to unfair acts. The statute makes unlawful

[u]nfair methods of competition and unfair acts in the importation of articles . . . into the United States, or in the sale of articles by the owner, importer, or consignee, the threat or effect of which is—(1) to destroy or substantially injure an industry in the United States; (2) to prevent the establishment of such an industry; or (3) to restrain or monopolize trade and commerce in the United States.

19 U.S.C. § 1337(a).

Thus, section 337 actions include four elements:

- First, the complainant must prove that an unfair act has occurred.
- Second, there must have been an importation of goods into the United States.
- Third, the complainant must establish the presence of a domestic industry.
- Fourth, the complainant must prove that the importation of goods has the effect of substantially injuring the domestic industry.

Of critical importance is that a complaining company must be able to establish a nexus between the unfair acts and the importation of goods into the United States. Essentially, the foreign bribery must facilitate the importation.

Administration of section 337 rests with the International Trade Commission (ITC), a quasi-judicial federal agency. Two features in particular have made the ITC a preferred option for many companies in recent years, resulting in an explosion of the agency’s docket. First, section 337 investigations are conducted pursuant to an abbreviated timeline. Most cases are to be completed within one year of filing and provide for only seven months for investigation and trial. Thus, ITC actions can proceed much more expeditiously and not get bogged down in discovery delays that can affect a federal court action.

Despite this limited time period, parties are still permitted the full range of discovery including interrogatories, requests for document production, and depositions, which can yield invaluable information. ITC actions also are favored because of the powerful remedies available to a prevailing company. Although the ITC cannot impose monetary sanctions, it has the power to

direct that offending goods be excluded from entry into the United States, which effectively constitutes an injunction barring a company from selling its products in the U.S. market.

Section 337 actions typically involve disputes over intellectual property rights (e.g., patents, copyrights, and trademarks), but the statute is not limited by its terms to the intellectual property context. It has been invoked in cases involving a range of unfair acts and unfair methods of competition, including price fixing and deceptive advertising. The ITC has broad discretion in determining what constitutes an unfair act, and there is case law and commentary that lend support to the notion that section 337 is potentially expansive enough to encompass bribery as an unfair act.

Indeed, the U.S. Court of Customs and Patent Appeals (USCCPA) has held that the provision in section 337 relating to “unfair acts” is broad enough to prevent “every type and form of unfair practice . . .” and that “unfair acts” could “consist of deceitful advertising which injures a competitor, bribery of employees, secret rebates and concessions, and other devices of unfair trade.” *In re Northern Pigment Co., et. al.*, 71 F.2d 447, 22 C.C.P.A. 166, 173–174 (1934) (emphasis added). Furthermore, the U.S. Customs and International Trade Guide states that “commercial bribery” constitutes a “[p]ossible Section 337 violation.” *See U.S. Customs and International Trade Guide*, § 21.02[3]. It must be recognized that using the unfair act of bribery as a basis for a section 337 claim has been raised thus far only in a passing, non-analytical manner. The USCCPA’s statement that the “bribery of employees” could potentially constitute an unfair act was made in dicta in a case some decades old, and the Trade Guide, a nonbinding treatise, listed “commercial bribery” as a potential unfair act without further analysis or explanation.

Still, under a narrow set of circumstances, an aggrieved company might be able to construct an argument that a competitor’s FCPA plea provides the basis for a section 337 action. Imagine the situation in which a company headquartered in Taiwan but traded on the New York Stock Exchange has a manufacturing site for electronic goods in Taiwan. The company ships these goods to the United States for sale. In constructing the manufacturing site, the company bribes government officials with cash payments in exchange for the officials turning a blind eye to the company’s noncompliance with various government regulations. This arrangement permits the company to construct a low-cost factory, which enables it to reduce its manufacturing costs and reduces the cost it can charge the end-use U.S. customer for its products. Because the customers elect to purchase the qualitatively comparable yet less expensive product of its competitor, a competing company that does not engage in such conduct loses its U.S. market share.

The bribing company’s actions subsequently are discovered and it admits to FCPA violations. The DOJ and SEC mete out fines and penalties. Yet, although the foreign bribery stops, the manufacturing site remains and continues to churn out products sold into the U.S. market. In initiating a section 337 action, the complainant would argue that the critical nexus continues to exist between the unfair acts and the importation of goods into the United States because the four elements of a section 337 action are satisfied: the bribing company engaged in unfair acts in



connection with the importation of electronic goods into the United States, and the competing company, which is a domestic industry, suffered substantial injury by losing U.S. market share.

Without doubt, the respondent would strongly challenge the first element by claiming that commercial bribery is too attenuated to constitute an “unfair act” sufficient to establish the first element of section 337. The respondent might also challenge the attempt to link the act of bribery with the importation of goods as too attenuated and difficult for the claimant to establish. Furthermore, the ITC might be receptive to procedural and substantive arguments that prevent it from further burdening its docket. Indeed, in 2010, the ITC experienced an 81 percent increase in investigations from the prior year, and commentators are suggesting that the ITC may be approaching a saturation point.

But assuming, arguendo, that the ITC would be willing to engage such an investigation, and then further assuming the complainant could convince the ITC that each element has been satisfied, the potential remedy of excluding the offending goods from entry into the United States could be highly valuable. Though the competing company would not be entitled to monetary damages, the injunctive relief could assist in regaining its U.S. market share, a remedy potentially worth any measure of monetary damages. Equally significant, however, is that subjection to a section 337 investigation and potential subsequent injunctive restraint could be highly burdensome and problematic for the respondents.

A company seeing that its competitor has admitted to FCPA violations for unlawful bribery of foreign officials may view section 337 actions as a potential arrow in its quiver in seeking redress from injuries it claims to have suffered as a result of the competitor’s actions. In reality, to fit the parameters of section 337, the circumstances would have to align in a very specific manner. The whispers that section 337 could apply to instances of foreign bribery are probably unlikely to materialize—the application is a bit tenuous—but discussion on this matter is nonetheless warranted, especially considering the increase in the frequency and intensity of FCPA investigation. With private litigants always looking for paths to obtain civil redress, it is more critical than ever for companies to establish and maintain robust anticorruption compliance programs.

Keywords: litigation, business torts, Foreign Corrupt Practices Act, International Trade Commission

Jeremy P. Evans is of counsel in the litigation department of Paul Hastings, LLP, in Washington, D.C. Andrew R. Booth is an associate in the litigation department of the firm’s Washington, D.C., office.

The Rise of Unfair and Deceptive Trade Practice Act Claims

By Michael C. Gilleran – October 17, 2011

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Twenty-three states now have statutes that are modeled on or are similar to the Federal Trade Commission Act (FTC Act). These statutes provide for enhanced remedies and also permit rights of action by business plaintiffs. Because of their enhanced remedies and their often low standards of proof, these statutes—known as unfair and deceptive trade practice acts (UDTPAs)—have become the main battleground of business litigation in states that have them. In short, they are the 800-pound gorilla of business litigation.

Massachusetts was the first state to enact a UDTPA in 1967, where it was known as chapter 93A of the Massachusetts General Laws. Like the FTC Act, chapter 93A prohibited “unfair methods of competition and unfair or deceptive acts or practices.” It also provided that a prevailing plaintiff was not only to be awarded its actual damages, but also its attorney fees. It further provided that if the plaintiff could show that the defendant’s violation of chapter 93A was willful or knowing, then the plaintiff was to receive a mandatory award of at least double and up to treble the amount of actual damages. As initially enacted, chapter 93A only permitted rights of action by consumers and the state attorney general.

Reasons for the Enactment of UDTPAs

In the 1960s, a strong consumer movement helped raise awareness of the weakness of the remedies available to consumers who brought claims against businesses. Moreover, the FTC Act itself did not permit private rights of action. The FTC Act, which was quickly recognized as expanding common-law liability, had no provision for private rights of action by consumers. Common-law fraud and misrepresentation claims often had high standards of proof, such as requiring intent to deceive and proof of reliance. Furthermore, common-law claims were often limited to fraud, misrepresentation, and express breach of contract without reaching the broader category of unfair conduct that was not necessarily deceptive. In addition, at common law, there was no right to attorney fees.

Under the American Rule, a successful consumer plaintiff generally had no right to an award of his or her attorney fees. Thus, even successful plaintiffs had to pay their own attorney fees, which reduced their net recovery to an amount that was less than their actual damages. Finally, at common law in those states with punitive damages, such awards were utterly discretionary and standards governing such awards were vague. Thus, whether an award would be granted and, if so, in what amount was largely unpredictable. In those states without common-law punitive damages, the threat of such an award was not available to encourage settlement or to deter fraudulent conduct.

Rise of Rights of Actions for Businesses

In 1972, the Massachusetts legislature added a new section to its existing UDTPA providing a private right of action to “any person who engages in the conduct of any trade or commerce” Although the section’s legislative history is limited, it appears to have been designed to deter fraud, deception, and overreaching in the commercial marketplace as well as to redress perceived imbalances in bargaining power between small and large businesses. Thus, a

business plaintiff suing under the Massachusetts UDTPA was entitled to the same lower standard of liability and enhanced remedies as a consumer plaintiff suing under the same statute.

Texas amended its UDTPA in 1975 to permit businesses to bring suit. Instead of adding a new section granting a cause of action to anyone engaged in trade or commerce, Texas redefined the word “consumer” in its statute to include “an individual, partnership, corporation, or governmental entity” Thus, a corporation could bring suit under the statute, although Texas law limited corporations who could sue to those with no more than \$25 million in assets.

After Massachusetts and Texas permitted business plaintiffs under their UDTPAs in the 1970s, other states began to follow suit and also added business claims to their UDTPAs. Twenty-three states now permit business claims under their UDTPAs.

Most states that permit business claims under their UDTPAs do so by providing that suit can be brought by “any person,” and then defining the word “person” to include corporations. Even though the rationale for permitting business claims under UDTPAs would seem to fit more closely with smaller corporations that have limited bargaining power, corporations of any size can bring suit under UDTPAs. In addition, the claims that can be brought by corporations and businesses under UDTPAs are usually not limited in amount.

Lower Standards and Enhanced Remedies under UDTPAs

UDTPAs have lower standards of proof, and they eliminate the intent to deceive requirement. *See Hangman Ridge Training Stables v. Safeco Title Ins.*, 105 Wash.2d 778 (1986). They also do not necessarily require proof of reliance. Moreover, the representation does not have to be literally false; all that has to be shown is that the representation was likely to deceive, or even that it just has the capacity or tendency to deceive. *Id.*

Second, UDTPAs expand the breadth of potential liability. For example, UDTPAs expand liability to include unfair conduct. This expansion of the scope of liability in UDTPAs marks a sharp break with the past and often causes courts to characterize UDTPAs as “statute[s] of broad impact which create[] new substantive rights” and as “making conduct unlawful which was not unlawful under the common law or any prior statute.” *See, e.g., St. Paul Fire and Marine Ins. v. Ellis & Ellis*, 262 F. 3d 53 (1st Cir. 2001).

Third, UDTPAs provide for awards of attorney fees. UDTPAs usually provide for a mandatory or discretionary award of attorney fees to a prevailing plaintiff. As a result, the net recovery of a successful plaintiff under a UDTPA would at least be equal to its actual damages. In some states the amount of attorney fees awarded is determined by the jury rather than the judge. *See Thorsen v. Durkin Development, LLC*, 129 Conn.App. 68 (2011). Some states also require that attorney fees be awarded to a party who has successfully sought injunctive relief for a violation of a UDTPA. *See Airflo A/C & Heating v. Pagan*, 929 So. 2d 739 (Fla.App. 2006).

Finally, UDTPAs provide for awards of multiple or punitive damages. They provide for an award of either a multiple of actual damages, or unlimited punitive damages, to a prevailing plaintiff. An award of multiple damages is usually predicated upon a showing that the defendant's unfair or deceptive conduct was willful or knowing. Such awards of multiple or punitive damages are for the purpose of prompting settlement in particular cases, encouraging injured parties to file suit, and deterring business fraud. *See Kenai Chrysler Center v. Denison*, 167 P. 3d 1240, 1260 (Alaska 2007).

Examples of Powerful Business Claims under UDTPAs

As shown by the examples below, claims by businesses under UDTPAs make for an entirely new and more powerful claim in general business litigation than was previously available to businesses.

In Massachusetts, a landowner who had entered into a real estate development contract with a developer had a right under the contract to be satisfied with the landscaping for the development. The landowner then engaged in pretexts to deny various needed approvals for the landscaping as part of an attempt to coerce the developer into paying more to the landowner than had been contractually agreed upon. As a result, the construction project failed. At trial, the developer was awarded actual damages of \$42 million against the landowner, but its claim under the Massachusetts UDTPA, enacted as Massachusetts General Law Chapter 93A, was denied. On appeal, the court found as a matter of law that the landowner had willfully violated Chapter 93A, and remanded the case where damages under Chapter 93A were then trebled to \$126 million. *Anthony's Pier Four, Inc. v. HBC Associates*, 411 Mass. 451 (1991).

In North Carolina, key executive employees of a specialized construction rental equipment company, upon learning that the rental company was about to be sold, formulated a plan based on the rental company's pricing, customer, personnel, and salary information and then restarted essentially the same business at another company. The new company was at first a weak competitor of the rental company. The key executives left the rental company and moved to the competitor where they brought with them many other employees of the rental company. They quickly established a market presence in many cities in which the competitor at that time had no business. Under the North Carolina Unfair and Deceptive Practices Act, N.C. Gen. Stat. § 75-16, the rental company was awarded actual damages of \$5 million, which were trebled to \$15 million, as well as attorney fees of \$1.2 million. *See Sunbelt Rentals, Inc. v. Head & Engquist Equipment, LLC*, 174 N.C. App. 49, 50-51 (2005).

In Connecticut, a company that developed membership programs for access to discounted products, including health care, entered into a contract with a national distributor to sell the discounter's health and dental insurance plans. After the distributor designed a national sales program for the health and dental plans, the discounter began to block performance of the contract by the distributor. The discounter, among other things, refused to communicate vital information to the distributor about physician networks that would participate in the program. An arbitration panel ruled in favor of the distributor but awarded no compensatory damages, holding

that the distributor had failed to establish such damages with reasonable certainty. Nonetheless, the arbitration panel awarded the distributor \$5 million in punitive damages under the Connecticut Unfair Trade Practices Act, Conn. General Statutes § 42-110g(a). *See Medvalusa Health Programs, Inc. v. Memberworks, Inc.*, 273 Conn. 634, 637-638 (2005).

In Massachusetts, a hospital had a valid patent application but was induced by a later inventor of an expanded invention to abandon that application in exchange for a promise of fair compensation. The later inventor then filed its own successful patent application but did not pay the hospital fair compensation. In addition to receiving an award of actual damages of \$68 million, the hospital was awarded attorney fees of \$14 million under Mass. Gen. Law Chapter 93A. *Massachusetts Eye and Ear Infirmary v. QLT, Inc.*, 495 F. Supp. 2d 188, 217-218 (D. Mass. 2007).

Development of the UDTPA Deception Standard

At first, UDTPAs generally incorporated common-law standards of fraudulent and intentional misrepresentation for its deception standard. Before long, however, many states decided to go much further. First, some states adopted the “tendency to deceive” standard taken from FTC Act litigation. *See, e.g., York v. Sullivan*, 369 Mass. 157 (1975). This standard was meant to apply to a business’s misleading statements made to numerous consumers, where the business had not dealt directly with the consumers and proof of actual deception of the entire class of consumers would have been impossible. But the application of this “tendency to deceive” standard often did not make much sense in a business versus business context where businesses had dealt directly with each other and proof of actual deception would have been far less difficult.

Second, UDTPA violations for deception were extended to mere negligent misrepresentation. *See, e.g., Acushnet Federal Credit Union v. Broderick*, 26 Mass. App. Ct. 604 (1988). This occurred even though many states held at the same time that mere contract breaches were not UDTPA violations.

Third, many states, by statutory enactment or case law, have extended their UDTPAs to false advertising and have permitted business competitors to bring such claims. *See, e.g., Cal. Bus. & Prof. Code § 17200*. By extending their UDTPAs to false advertising, these states provide essentially the same cause of action already available under Section 43(a) of the Lanham Act, but with the much more powerful remedies available under the UDTPAs.

There has also been an effort under some states’ UDTPAs to permit a nondisclosure claim in a business versus business context, but this effort has met with mixed success. *See Industrial General Corp. v. Sequoia Pacific Systems*, 44 F. 3d 40 (1st Cir. 1995) (no general duty to disclose); *Lily Transp. v. Royal Institutional Services*, 64 Mass. App. Ct. 179 (2005) (limited duty to disclose).

Development of UDTPA Unfairness Standard

In *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972), the Supreme Court held that under



one part of the test employed by the FTC in interpreting the FTC Act, an unfair act is defined by “whether it is immoral, unethical, oppressive or unscrupulous.” As a result, some states have come to interpret the standard for unfairness liability under their UDTPAs as moralistic in nature and as requiring “rascality.” *Acas Acquisitions v. Hobert*, 155 N.H. 381 (2007).

Other states have more recently rejected moralistic standards, focusing instead on another prong for unfairness recognized by the Supreme Court in *Sperry & Hutchinson*. Under that prong, the challenged conduct must be “within at least the penumbra of some common law, statutory or other established concept of unfairness.” This test does not include any subjective or personal judgment about the morality of the challenged conduct. *See Lambert v. Fleet National Bank*, 449 Mass. 119 (2007).

Subject Matter of UDTPA Claims

Generally, UDTPA claims do not extend to a mere breach of contract. However, a breach of contract, coupled with use of that breach to coerce further advantages to which the breaching party is not otherwise entitled, may be a UDTPA violation. *See Atkinson v. Rosenthal*, 33 Mass. App. Ct. 219 (1992). Misrepresentation of ability to perform a contract may also be a UDTPA violation. *See Balay v. Gamble*, 2011 WL 2435929 (Tex. App. 2011).

Most business torts can be brought under UDTPAs, including commercial defamation and interference with contract. *See, e.g., Barker v. Southeastern Hospital Supply*, 99 N.C. App. 30, 41 (1990). Other business torts to which UDTPAs have been held to apply include conversion, unfair competition, malicious prosecution, and abuse of process.

UDTPA claims can be brought against virtually any party in the chain of distribution of a product. Manufacturers can be held liable for anticompetitive business practices against distributors, as well as for violations of product warranties. Franchisors too are subject to claims for bad faith termination of franchisees. *See Zapatha v. Dairy Mart*, 381 Mass. 284 (1980). Licensors also are subject to claims from licensees.

States vary on whether they permit claims under their UDTPAs against business/service professionals. Business plaintiffs can, under most UDTPAs, sue attorneys and accountants. However, these claims must be for more than mere negligence. *See Kimleco Petroleum v. Morrison & Shelton*, 91 S.W. 3d 921, 924 (Tex. App. 2002). Some UDTPAs do not extend to claims against attorneys. *See, e.g., Office of the Attorney General v. Shapiro & Fishman, LLP*, 59 So.2d 353 (Fla. App. 2011).

UDTPAs vary in whether they apply to regulated industries. In some states, UDTPAs do not apply to the conduct of banks, *Bankers Trust Co. v. Basciano*, 960 So. 2d 773 (Fla. App. 2007), while in others they do. In 12 states, an unfair insurance claim settlement practice is also a violation of the UDTPA, and a business plaintiff has standing to bring such a claim. *See, e.g., St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wash.2d 122 (2008). Most UDTPAs do not



apply to business-to-business securities transactions, but some do. *See Marram v. Kobrick Offshore Fund*, 442 Mass. 43 (2004).

UDTPA claims may be brought in conjunction with intellectual property claims, and they may be added to misappropriation of trade secret claims. Claims for trademark infringement often can be brought under UDTPAs, and such claims are not preempted by the Federal Lanham Act. *See JCW Investments v. Novelty*, 509 F.3d 339 (7th Cir. 2007). UDTPAs generally provide for superior remedies over the Lanham Act. It may also be the case that patent infringement claims can be brought under UDTPAs, which would, in many cases, permit recovery of attorney fees, while the Patent Act would not. *See M. Gilleran, "Enhanced Remedies for Federal IP Claims Under State Law," Intellectual Property Today* (Oct. 2007).

Exemptions and Limitations

UDTPA claims may be barred by contractual disclaimers. Contractual disclaimers of UDTPA liability in a business context are generally enforceable. *See Canal Electric v. Westinghouse Electric*, 406 Mass. 369, 377 (1990). In a business context, contractual disclaimers of warranties or limitations of remedies may also limit UDTPA claims. Contractual disclaimers do not bar UDTPA claims where the underlying claim is for fraud or misrepresentation.

UDTPA claims may be barred by a choice of law clause. Choice of law clauses in an agreement may bar application of the UDTPA of another state to the contract itself, but the UDTPA claim may have arisen outside the contract and thus not be barred by the choice of law clause. *See Jacobson v. Mailboxes, Etc.*, 419 Mass. 572 (1995). Also, the UDPTA claim may be for fraud in the inducement, and again the choice of law clause may not bar a UDTPA brought under the law of another state.

UDTPA claims may be preempted by federal law, such as the National Bank Act, *Brown Nationscredit Financial Services Corp.*, 32 So.2d 661 (Fla. App. 2010), or the Copyright Act, *Berklee College of Music, Inc. v. Music Industry Educators, Inc.*, 2010 WL 3070150 (D. Mass. 2010). However, where a UDTPA claim contains an "extra element" beyond wrongful copying, it may be maintained. *Id.* Other Federal statutes held to preempt UDTPA claims include the Petroleum Marketing Practices Act, the Telecommunications Act of 1996, and the Employee Retirement Income Security Act.

UDTPAs may not apply to strictly interstate conduct. Under the Interstate Commerce Clause, a state's UDTPA may not regulate conduct that takes place wholly outside its borders even if the conduct has some effects within that state. *See Alaska Rent-a-Car v. Cendant Corp.*, 2007 U.S. Dist. Lexis 554774 (D. Alaska 2007).

Business claims may be limited to business competitors and may not apply to contract breaches or business torts. Some states with UDTPAs only permit business claims to be brought by business competitors, prohibiting claims by parties to a contract. *See Cal. Bus. & Prof. Code § 17200; Garrand v. Gateway Financial Services*, 207 P.3d 1227 (Utah 2009). Louisiana law is



divided on whether it limits UDTPA claims to business competitors only or permits broader claims. *See AEP River Operations LLC v. The Cargoes of Coal*, 2009 WL 2013750 (E.D.La. 2009).

A few states require that claims under their UDTPA must show an impact on the public interest, meaning that the conduct must be capable of repetition. *See Global Protection v. Halbersberg*, 332 S.C. 149 (S.C. App. 1998). Others hold that a private contractual dispute is not within their UDTPA. *See Saulsberry v. Morinda, Inc.*, 2008 U.S. Dist. Lexis 10512 (N.D.Ga. 2008).

Defensive Strategies

Practitioners representing defendants in UDTPA claims should consider some of the following defensive strategies:

Defendants should argue that a higher standard of liability under UDTPAs—meaning a showing of greater wrongdoing—does or should apply in cases where the plaintiff is a business as opposed to a consumer. *See Madan v. Royal Indem. Ins.*, 26 Mass. App. Ct. 756 (1989). This makes sense because a whole series of policy choices, such as freedom of contract, stand behind the law in the business versus business context but do not apply in the consumer versus business context.

Likewise, the more sophisticated the business plaintiff, the more that a plaintiff should have to meet a higher standard of liability; that is, there should be a showing of greater wrongdoing by the defendant. Commercially sophisticated plaintiffs may have to show higher “rascality” to prevail. *See Anthony’s Pier Four, Inc. v. HBC Associates*, 411 Mass. 451 (1991).

The standard for liability is or should be objective; thus, the judge or jury should not be permitted to engage in any moralistic judgment about the defendant’s conduct. *See Massachusetts Employers Ins. v. Exchange Propac-Mass.*, 420 Mass. 39 (1995). The standard should be whether the defendant violated an objective and established concept of unfairness. If the standard involves a moralistic judgment, then liability becomes subjective, standardless, and unfair.

A mere breach of contract should not be a violation of the UDTPA. *See Crawford v. Ace Sign*, 917 S.W. 2d 12 (Tex. 1996). Even an intentional breach of contract is still nothing more than a breach of contract. *See Eclipse Systems, Inc. v. Harrell*, 2011 WL 2480405 (Conn. Super. 2011). There must be aggravating circumstances accompanying the breach of contract, such as fraudulent misrepresentations, fraudulent concealment, false claims, or multiple breaches of contract. *Id.* There may even have to be a showing that the breaching party used its own breach to coerce or leverage the non-breaching party into some concession contrary to existing contract terms.

Interpretation of UDTPAs should rely on more recent restrictive interpretations of the FTC Act. UDTPAs generally state that they are to be interpreted in line with related interpretations of the



FTC Act. *See KC Leisure v. Haber*, 972 So. 2d 1069, 1072 (Fla. App. 2008). In recent years, many interpretations of the FTC Act have been more restrictive than in the past. *See, e.g., F.T.C. v. Publishing Clearing House*, 104 F. 3d 1168 (9th Cir. 1997).

The general benefit of the conduct challenged under a UDTPA may outweigh its overall harms. *See Juarez v. Jani-King of California, Inc.*, 273 F.R.D. 571 (N.D.Cal. 2011). Moreover, the FTC Act was itself amended in 1994 to prohibit a declaration that challenged conduct violated the FTC Act “unless the act or practice causes or is likely to cause substantial injury to consumers which is . . . not outweighed by countervailing benefits to consumers or to competition.” 45 U.S.C. § 45(n).

Conventional business ethical standards are or should be the standard governing business-versus-business claims under UDTPAs. UDTPAs do not contemplate an overly precise standard of ethical or moral conduct in the business versus business context; the standard is that of the commercial marketplace. *See Arthur D. Little v. Dooyang Corp.*, 147 F. 3d 47 (1st Cir. 1998). A defendant should introduce commercial norms and customs and seek to prevent a judgment of its conduct that does not take into account such norms and customs.

Punitive damages under UDTPAs are or should be limited to a multiple of actual damages. States with UDTPAs permitting unlimited punitive damages are increasingly limiting punitive damages to a multiple of two to three times compensatory damages. *See, e.g., Indymac Bank v. Reyad*, 2007 WL 1191254 (D. Conn. 2007). Authority to grant punitive damages that are out of proportion to actual damages is standardless and unfair.

Conclusion

Business claims under UDTPAs offer great opportunities, but they also present tremendous risks. In the many states that permit them, they have lower standards of liability and much more powerful remedies than standard business tort or breach of contract claims, but they also have many complex exemptions and limitations and require extremely sophisticated defensive strategies. Precisely because they pose great opportunities, as well as tremendous risks, where they are permitted, business claims under UDTPAs have become widely used and even dominant in business litigation today.

Keywords: litigation, business torts, unfair and deceptive trade practice acts, Federal Trade Commission Act, breach of contract

Michael C. Gilleran is counsel at the Boston office of Adler Pollock & Sheehan, P.C.

Use of the FCPA in State-Law Unfair Competition Cases

By Edward W. Little Jr. – October 17, 2011

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A brief review of the recent financial press reveals that the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd–1, *et seq.* (the FCPA), is making a comeback of sorts. Enacted in 1977 and designed primarily to combat bribery of foreign officials by U.S. companies, the FCPA has been at the center of federal government prosecutions and investigations into corporate wrongdoing abroad. This includes reports that the Department of Justice or the Securities and Exchange Commission (SEC) may soon begin FCPA investigations into allegations that Rupert Murdoch’s News Corp. bribed British government officials to obtain nonpublic information for use in news reporting. Whether or not one agrees that the United States should police how corporations do business in foreign countries, the FCPA provides a powerful weapon in the prosecutor’s arsenal—and the current administration is not reluctant to use it.

But what of those innocent private parties who are harmed by a wrongdoer’s foreign bribery? For example, what of the lawful competitor whose bid to provide goods or services to a foreign government, though lower than a rival’s, loses out to the rival because of improper payments made to government officials? What of those who are precluded entirely from selling in foreign markets because of a well-placed payment to a foreign government official by a competitor? For those injured by foreign corrupt practices by a competitor, there is no private right of action directly under the FCPA. *See Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1024 (6th Cir. 1990); *Wisdom v. First Midwest Bank*, 167 F.3d 402, 407 (8th Cir. 1999). There are, however, state and federal civil statutes under which a would-be plaintiff may use a competitor’s violation of the FCPA as a predicate act for liability. These include powerful state unfair competition laws, which may, in some cases, allow for multiple damages and the recovery of attorney fees.

The Foreign Corrupt Practices Act of 1977

Investigations by the SEC in the mid-1970s revealed that many U.S. publicly traded companies were making millions of dollars in illegal payments (bribes) to foreign government officials or political parties, mostly for the purpose of obtaining favorable treatment. These bribes ranged from outright cash payments to individuals, or payment of false invoices from foreign government agencies or parties, to high-priced travel and gifts disguised as legitimate corporate expenses. The favorable treatment sought and obtained by the payer could be anything from an award of exclusive government procurement contracts to lower foreign tax rates.

As a reaction to bribery itself and as a demonstration to the world that the United States is above public corruption even when it occurs abroad, Congress enacted the FCPA, which President Carter signed in December 1977. The act, as amended, provides for increased transparency in the accounting procedures of public companies and, more famously, prohibits foreign bribery. The FCPA applies to U.S. publicly traded companies (“issuers”), so-called domestic concerns, natural persons, and other corporate entities (including partnerships, associations, and business trusts)—and it specifically makes it unlawful to use the mail or other means of interstate commerce “corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value” to any foreign official or foreign political party for the purpose of influencing any act

or omission of such foreign official or party “in order to assist [the wrongdoer] in obtaining or retaining business for or with, or directing business to, any person.” 15 U.S.C. § 78dd-1(a)(1)-(3). The act applies not only to the issuers themselves, but also to any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer.

With respect to domestic concerns—which by definition include not only nonpublic corporate entities but also any individual who is a citizen, national, or resident of the United States—the Department of Justice is empowered to seek injunctive relief, subpoena testimony, and other information, and to pursue contempt charges against those who resist. *Id.* § 78dd-2(d). Possible penalties may include fines of up to \$2 million for corporate entities, and fines up to \$100,000 and/or imprisonment for up to five years for individuals. *Id.* § 78dd-2(g). The 1998 amendments to the FCPA expand the reach of the Act to U.S. entities facilitating bribes outside the United States (even where no federal interstate means are used) and to foreign entities who commit an act in the United States in furtherance of a foreign bribe.

The FCPA provides exceptions for payments to obtain “routine governmental action”—so called grease payments such as payments to expedite an official action of a foreign official—and it allows affirmative defenses including any payment that was “lawful under the written laws and regulations” of the foreign government. *Id.* § 78dd-1(b) & (c). The Attorney General may also issue guidelines for covered entities and provide opinions in response to questions from covered entities as to the propriety of any action the entities may be considering in foreign countries. *Id.* §§ 78dd-1(d) and (e).

FCPA Prosecutions and Recent Government Enforcement

Government enforcement of the anti-bribery provisions of the FCPA is clearly on the upswing. In May 2011, a federal jury in Los Angeles convicted Lindsey Manufacturing Company and two senior officers of paying bribes to an official of a state-owned utility in Mexico in exchange for the award of a purchase contract for Lindsey. *See [California Company, Its Two Executives and Intermediary Convicted by Federal Jury in Los Angeles on All Counts for Their Involvement in Scheme to Bribe Officials at State-Owned Electrical Utility in Mexico](#)*, U.S. Department of Justice (May 10, 2011). Lindsey, a private company based in California, manufactures emergency restoration systems used by electric utilities. Though the bribes were paid by an independent Mexican sales representative firm hired by Lindsey, Lindsey knew of the payments and reimbursed the sales agent for the bribes by paying inflated invoices to the agent. This scheme allowed Lindsey to receive \$19 million in business over seven years. The case highlights the fact that using an intermediary for the illegal bribes does not provide a shield against prosecution. (The Lindsey conviction may be in jeopardy, due to admissions by the U.S. Attorneys Office following the trial that they had inadvertently violated a court order by failing to provide the defense with certain grand jury testimony of an FBI agent. *See [Are the Lindsey Convictions Hanging by a Thread?](#)*, Corporate Compliance Insights (July 7, 2011).

Whether a state-controlled company abroad is an “instrumentality” of that foreign government—a requirement for the FCPA to apply—has been challenged recently, and one district court has

held that this is a question of fact for trial. *See* Criminal Minutes, *U.S. v. Carson*, Cr. No. 09-00077-JVS (C.D. Cal. May 18, 2011).

More recently, there is speculation that the government has begun (or will soon begin) investigating Rupert Murdoch's News Corp. in connection with allegations in the United Kingdom that the news company paid police and other government officials to obtain nonpublic information for use in news stories. It has also been reported that Palo Alto-based Hewlett-Packard is cooperating with the U.S. Department of Justice, the SEC, and German authorities regarding allegations that three company executives and several accomplices violated the FCPA and other laws by using bribes to win a contract to sell computer equipment to an agency of the Russian government. No one is sure where these investigations will go, but these events again highlight the attention that the current administration is giving to allegations of FCPA violations and the zeal with which prosecutors are using their powers under the FCPA—including providing incentives for cooperation by companies. For example, to increase self-reporting by companies of possible FCPA violations abroad, the SEC has entered into its first deferred prosecution agreement (DPA) under which Tenaris, S.A., received leniency in exchange for its uncovering and prompt reporting of bribery by its employees of the state-owned oil and gas company in Uzbekistan.

Other recent FCPA prosecutions have included the 2008 guilty pleas of Siemens, A.G., and three of its subsidiaries. As part of the plea, Siemens and its subsidiaries paid a \$450 million fine—at the time the largest ever collected by the government under the FCPA—to resolve allegations that Siemens paid approximately \$1.36 billion between 2001 and 2007 in bribes to foreign officials. In one instance, Siemens and certain subsidiaries paid \$1.7 million in kickbacks to Iraqi officials in exchange for 42 contracts valued at more than \$80 million. *See [Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \\$450 Million in Combined Criminal Fines](#)*, Department of Justice, (Dec. 15, 2008). In 2008, the government charged former U.S. Representative William J. Jefferson (D-La.) with several counts, including violations of the FCPA, relating to bribery of African government officials. Although acquitted of the FCPA charges, Rep. Jefferson was convicted on 11 of 16 counts of bribery, racketeering, and money laundering. *See* “Ex-Rep. Jefferson Convicted in Bribery Scheme,” *N.Y. Times* (Aug. 5, 2009).

FCPA Violations as “Triggers” to Civil Liability

In a press release following the recent conviction of Lindsey Manufacturing on FCPA charges, Los Angeles U.S. Attorney André Birotte Jr. stated, “Bribery is not a victimless crime.” So what remedies are available to those victims when no private right of action is available under the FCPA statute itself? Where does a losing bidder on a foreign government procurement contract turn for redress when it learns that its competitor won the contract because of illegal bribes? What, if any, remedies do consumers have when foreign bribery is involved?

Although these plaintiffs may not bring claims directly under the FCPA, those injured by the wrongdoing may use the FCPA violations as a “trigger,” or predicate act, the proof of which could entitle them to civil relief under other state or federal laws.

A prime example of using the FCPA as a “trigger” in a private civil suit is where shareholders of a company accused or convicted of FCPA violations derivatively sue the officers and directors on behalf of the company for breaching their state law fiduciary duties. Essentially, the shareholders are standing in the shoes of the company and alleging that the directors harmed the company either by engaging themselves in the FCPA violations or failing to take steps to prevent such violations by subordinates. *See, e.g., Kassamali v. Parker*, Civ. Action No. 10-34655 (Harris County Dist. Ct., Tex.) (verified shareholder derivative petition filed June 3, 2010). Another example is the indirect use of the FCPA to bring a civil suit under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961, *et seq.*, where a private right of action with severe penalties is allowed by the racketeering statute. In this scenario, a plaintiff must allege and prove (among other elements) that the defendant engaged in two or more predicate acts of racketeering. Though the FCPA is not itself an enumerated predicate act under RICO, a violation of the federal Travel Act, 18 U.S.C. § 1952, which prohibits travel with the intent to promote “unlawful activity,” provides the basis for a RICO predicate act. Proof of an intent to travel to commit a violation of the FCPA is a violation of the Travel Act, which may provide for civil liability under RICO. *See, e.g., Dooley v. United Technologies Corp.*, 803 F. Supp. 428 (D.D.C. 1992).

The federal antitrust laws may also provide a basis for civil liability against those who violate the FCPA, especially when it is proved that the foreign bribery had an anticompetitive effect within the United States—for example, where two subsidiaries of Phillip Morris bribe officials in several South American countries to obtain price controls on tobacco, elimination of controls on retail cigarette prices, tax deductions for the bribes, and assurances that taxes would not increase. *See Lamb v. Phillip Morris*, 915 F.2d 1024 (6th Cir. 1990). State antitrust laws may also provide a basis to pursue defendants for violations of the FCPA. *See Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. 1983) (claims brought under California’s Cartwright Act as well as the California Business & Professions Code).

State Unfair Competition Laws and the FCPA

State unfair competition or unfair trade laws—some of which are based on the Revised Uniform Deceptive Trade Practices Act—provide severe penalties for violations of federal and state law when committed in trade or commerce, including multiple damages and recovery of attorney fees. Issues concerning private state law suits based on foreign conduct, such as alleged bribery in violation of the FCPA, include questions of preemption (Is the state law preempted by the fact that the conduct at issue is also precluded by federal law?) as well as jurisdiction (Did any of the illegal conduct occur in the state, or did an injury because of the conduct occur in the state?).

A current example of the use of the FCPA as a predicate act under a state unfair competition statute is occurring in Virginia. Using federal antitrust and state unfair competition laws,

Newmarket Corporation, a producer and seller of chemical fuel additives, is suing its competitor Innospec, Inc., following Innospec's guilty plea to criminal violations of the FCPA in connection with bribes it made to Iraqi officials. *See Newmarket Corp. v. Innospec, Inc.*, Civ. Action No. 10-503-HEH (E.D. Va.). In addition to federal claims under the Sherman Act and the Robinson-Patman Act, Newmarket is claiming that Innospec's FCPA crimes also constitute violations of Virginia's Business Conspiracy Act, which makes combinations of two or more persons for the purpose of "willfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever" both a misdemeanor and a privately actionable civil law violation. These civil law violations entitle a plaintiff to recover up to threefold in damages (including lost profits) and the cost of suit, including attorneys fees. *See Va. Code Ann. §§ 18.2-499 & 2.500.* Recently, the federal court in Richmond determined that jurisdiction was proper because, although the bribery occurred in Iraq, Innospec "engaged in a series of substantial business transactions with Plaintiffs in Virginia." *See Memorandum Opinion on Defendant's Motion to Dismiss, Newmarket Corp. v. Innospec, Inc.*, Civ. Action No. 10-503-HEH (E.D. Va. May 20, 2011). The Court did not question the validity of using the FCPA violations as the basis for violations of state unfair competition laws.

One of the more expansive unfair business laws is California's Unfair Competition Law (UCL), Cal. Bus. of Prof. Code § 17200, *et seq.* The UCL defines unfair competition as, among other things, "includ[ing] any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." The statute borrows violations from other laws by making them independently actionable as unfair competitive practices—that is, as "triggers" for a violation of the UCL. In 2003, the California Supreme Court in *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134 (2003) upheld a lower court's decision that a violation of the UCL may be predicated upon a violation of the FCPA. (Technically, the California Supreme Court upheld this lower court ruling because the parties did not challenge it. What the appellants did challenge, and what the Supreme Court reversed, was the lower court's ruling that disgorgement of profits was a proper remedy for a UCL violation. *Korea Supply*, 29 Cal. 4th at 1145.)

In *Korea Supply*, plaintiff Korea Supply was representing an American defense contractor bidding to provide radar systems to the Republic of Korea. Though its bid was lower and its equipment superior, Korea Supply and its principal lost to defendant Lockheed Martin because of alleged bribes and sexual favors offered by Lockheed to key Korean officials. Korea Supply was ultimately unsuccessful on its UCL claim, not because of its "borrowing" of FCPA violations as a predicate for the UCL violation (which was unchallenged on appeal), but because the remedy of disgorgement sought was not permitted by the statute. The UCL's borrowing of violations of federal statutes is not in question. *See Sullivan v. Oracle Corp.*, No. S170577, 2011 Cal. LEXIS 6537 at *32 (Cal. June 30, 2011) (citing *Korea Supply* favorably, though finding the particular federal statutes at issue inapplicable due to jurisdictional issues).



Most states have statutes that protect consumers and businesses from broadly defined “unfair and deceptive” business, competition, or trade practices. Several of these statutes generally declare that “unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are . . . unlawful.” *See, e.g.*, M.G.L. c. 93A § 2(a) [Massachusetts]; N.Y. Gen. Bus. Law § 349(a) [New York]. Some states leave it to the state’s attorney general to define by regulation specifically what will constitute the prohibited practices. Some look to federal law and particularly to the Federal Trade Commission (FTC) and how the FTC and federal courts interpret such practices under the Federal Trade Commission Act. *See* 15 U.S.C. 45(a)(1). In describing its investigative and enforcement authority, the FTC itself states that unfair and deceptive practices under section 5(a) of the FTC Act “include[es] such acts or practices involving foreign commerce that cause or are likely to cause reasonably foreseeably injury within the United States or involve material conduct occurring within the United States.” *See* [A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority](#), FTC Office of General Counsel, at II.A (rev. July 2008). Under these powerful and general state laws designed to prohibit unfair business competition and practices, the argument can be made by injured competitors that, so long as jurisdiction over the defendant is proper, a defendant’s violations of the FCPA abroad constitute violations of state law.

Conclusion

Prosecutions for FCPA violations by the U.S. Department of Justice and/or the SEC are likely to continue their upswing, especially given the new regulations issued by the SEC under Dodd-Frank that provide monetary incentives for whistleblowers. *See* 17 C.F.R. § 240.21F-1 through 21F-17. Given that a private right of action has not been found directly under the FCPA as the number of government FCPA prosecutions increases, those arguably injured by wrongdoing, whether they are shareholders, competitors, or consumers, will likely turn to state-law remedies.

Although this article is not intended to be a 50-state survey of state unfair competition laws, it is clear that state statutes protecting consumers and businesses provide a potential and powerful tool for those harmed by the wrongdoing abroad of those persons and entities covered by the FCPA. Especially in cases where the wrongdoer pleads guilty or admits to SEC claims that the FCPA was violated, plaintiffs have a strong incentive to argue that the bribery of foreign officials has harmed them domestically and constitutes the type of unfair competition that the broad state statutes were enacted to prevent.

Keywords: litigation, business torts, Foreign Corrupt Practices Act, unfair competition, state law

Edward W. Little Jr. is a partner in the Boston, Massachusetts, office of McCarter & English, LLP.

When Business Torts Give Rise to Antitrust Liability

By Kevin McCann and Alyse L. Katz – October 17, 2011

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In the appropriate circumstances, the conduct underlying unfair trade practices and other business torts can also give rise to an antitrust claim. Especially in markets characterized by vigorous competition, attorneys who counsel and litigate on behalf of bitter rivals must be able to not only recognize potentially tortious competitive conduct, but also understand when conduct may be considered anticompetitive, raising the risk of liability under antitrust laws. Although the legal consequences of committing an unfair or deceptive trade practice may be severe, the consequences of violating antitrust laws can be devastating. In addition to injunctive relief, a successful antitrust plaintiff will be entitled to recover three times its damages plus the attorney fees incurred in pursuing the action.

The law encourages vigorous competition; indeed, it recognizes competition as privileged conduct in defense of many alleged business torts. But the law also severely sanctions conduct that crosses the line from vigorous, or even unfair, competition to become unlawful exclusionary conduct that harms competition itself and thereby injures rivals and deprives consumers of the lowest prices and greatest number of choices in the marketplace.

When Is a Business Tort an Antitrust Violation?

A business tort can arise from any act that wrongfully harms a rival, either directly or through improperly winning a customer. However, the circumstances in which a business tort may also be considered an antitrust violation are more rare. In general, before the unilateral tortious conduct of a market rival may be considered anticompetitive, the conduct must violate Section 2 of the Sherman Act. Section 2 provides, in pertinent part, that “Every person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.” 15 U.S.C. § 2. This terse statute has been interpreted to require that before any conduct, including a business tort, may rise to the level of an antitrust violation, three fundamental elements must be present: The defendant must have engaged in predatory or exclusionary conduct; the defendant must be a monopolist or have a dangerous probability of achieving monopoly power; and there must be harm to the market, not just to one competitor. *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

Predatory or Exclusionary Conduct

In determining whether a defendant has engaged in improper predatory or exclusionary conduct, preliminary issues that are common to many tort cases may arise. For example, to evaluate the propriety of an alleged misrepresentation that is alleged to have distorted the competitive balance in the market, the court may still have to examine the distinction between fact and opinion, the knowledge or due care of the speaker, the reliance of those allegedly deceived, and the reasonableness of any such reliance. The application of tort standards of wrongfulness alone, however, will not be sufficient to ascertain whether improper conduct should be considered exclusionary under the Sherman Act.

Both lawful and unlawful acts may have the effect of forcing rivals out of a market, but only “anticompetitive” conduct will be considered improperly exclusionary and thus violative of the

antitrust laws. As the Supreme Court has recognized, “[I]t is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects.” *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767–68 (1984). Indeed, courts have found it difficult to establish a general standard for determining whether conduct may be considered “anticompetitive.” The oft-quoted dichotomy set forth in *United States v. Grinnell Corp.* provides some cryptic guidance, defining anticompetitive conduct as “the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” 384 U.S. 563, 570–71 (1966). But it is clear that for conduct to be deemed “anticompetitive,” it must harm the competitive process itself and thereby ultimately harm consumers. Harm to business rivals alone is not sufficient for conduct to be considered exclusionary or “anticompetitive.”

Monopoly Power

The second requirement that must be satisfied before a business tort may give rise to antitrust liability is that the improper conduct must have been undertaken by an actor through its accused conduct. Conduct that would not be considered anticompetitive when perpetrated by one who does not possess monopoly power might be deemed exclusionary and anticompetitive when perpetrated by one who does possess such power.

Monopoly power is most frequently defined as “the power to control prices or exclude competition.” *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 391 (1956). Before it can be determined whether an actor possesses such power, it is necessary to define the relevant market in which the power is said to be wielded. “Without a definition of that market, there is no way to measure [a rival’s] ability to lessen or destroy competition.” *Walker Process Equip. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965). Thus, the definition of the relevant market is critical in assessing or proving any claim under Section 2.

The relevant market is defined in two dimensions: a relevant product market and a relevant geographic market. The relevant product market is determined by assessing the reasonable interchangeability of use of potential alternatives. Products that can reasonably be used interchangeably are generally considered to compete with each other, and thus are in the same product market. The relevant geographic market is the region within which customers can reasonably seek alternative sources of the product. A rival who can control prices or exclude competition in a properly defined relevant market will be deemed to possess monopoly power within the meaning of Section 2 of the Sherman Act. Regardless of the nature of its conduct, a rival who cannot be said to possess such power, or who possesses insufficient market power to pose a dangerous probability of achieving monopoly power through its accused conduct, cannot be found to violate Section 2 of the Sherman Act.

Harm to the Market as a Whole

The third requirement for an antitrust claim is proof of harm to competition in the relevant market. Proof of harm to a specific competitor, which is all that tort law requires, will not sustain an antitrust claim. “Isolated business torts, such as falsely disparaging another’s product, do not



typically rise to the level of a section 2 violation unless there is a harm to competition itself.” See *Amer. Council of Certified Podiatric Physicians & Surgeons v. Amer. Bd. of Podiatric Surgery*, 323 F.3d 366, 371–72 (6th Cir. 2003).

The conduct of a monopolist who bribes a rival’s employees to work secretly for the monopolist and to obtain trade secret information is an example of a business tort that may give rise to an antitrust claim. See *Associated Radio Serv. Co. v. Page Airways, Inc.*, 624 F.2d 1342 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981). Another example might arise from a market leader’s sales representatives attempting to persuade retailers to carry the leader’s products and discontinue those of its rivals by continuously removing and discarding its rivals’ product racks and point-of-sale advertising from stores, while also providing misleading information to retailers regarding the relative desirability of competing brands. See *Conwood Co., L.P. v. United States Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002), *cert. denied*, 537 U.S. 1198 (2003).

Even where the effects of such acts in isolation might be de minimis, the cumulative impact of several such practices might be sufficient to raise competitive concerns. Where the impact on rivals is significant and lasting, and the competitive opportunities of rivals in the relevant market are impeded, tortious misconduct in the marketplace can constitute exclusionary behavior that harms competition in general.

Incentives for Casting Business Torts as Antitrust Claims

The standards for proving antitrust claims are rightly rigorous; they are strict in order to reduce the risk that enforcement of the antitrust laws may chill the very sort of vigorous, competitive conduct they are intended to encourage. “The Sherman Act is not a panacea for all evils that may infect business life.” *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 287–88 (2d Cir. 1979), *cert. denied*, 44 U.S. 1093 (1980). At the same time, the antitrust laws incentivize plaintiffs to bring antitrust actions to redress anticompetitive business behavior in appropriate cases. Typical tort remedies are not intended to promote the public interest in encouraging robust competition while failing to deter conduct that undermines the competitive process. In contrast, the antitrust laws contain provisions to incentivize plaintiffs to look beyond the individualized harm they may have suffered as a result of the tortious conduct of business rivals, and to consider prosecuting broader antitrust claims as “private attorneys general” to redress competitive harm to the market as a whole.

The most significant of the incentives for plaintiffs is set forth in Section 4 of the Clayton Act, which provides that a plaintiff “shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.” 15 U.S.C. § 15. Thus, in an appropriate situation in which a colorable claim of harm to competition caused by wrongful business conduct can be sustained, a plaintiff who has suffered individual harm is strongly incentivized to attempt to vindicate the public’s interest in maintaining competition in the marketplace, while also seeking to redress the injury he or she has suffered at the hands of a rival.



Conclusion

As the U.S. Court of Appeals for the Sixth Circuit has explained, “Isolated tortious activity alone does not constitute exclusionary conduct for purposes of a § 2 violation, absent a significant and more than a temporary effect on competition, and not merely on a competitor or customer. . . . Business torts will be violative of § 2 only in ‘rare gross cases.’” *Conwood Co., L.P. v. United States Tobacco Co.*, 290 F.3d 768, 783–84 (6th Cir. 2002) (citing 3A Areeda & Turner, *Antitrust Law*, ¶ 782(a), at 272 (2002)). But, as the appellate court went on to recognize, “[T]his is not to say that tortious conduct may never violate the antitrust laws.” *Id.* at 784. Where the tortious business conduct of a powerful rival causes harm as the result of a significant and nontransitory disruption of the competitive process, antitrust laws will impose severe sanctions. Such sanctions are intended both to incentivize injured parties to police competition in the marketplace, and to deter businesses from engaging in such anticompetitive behavior.

Keywords: litigation, business torts, antitrust liability, unfair trade practices

Kevin McCann is of counsel and Alyse L. Katz is an associate in the San Francisco, California, office of Paul Hastings, LLP.

NEWS & DEVELOPMENTS

First Circuit: Noncompetition Period Begins with Merger

So far in 2011, the business community has witnessed a flurry of mergers and acquisitions—arguably the most in more than a decade. One issue related to this activity is what an acquiring company must do to ensure that the noncompetition agreements the employees of the acquired company entered into can be enforced by the acquiring company when those employees’ services are terminated. The First Circuit recently faced this issue in *OfficeMax, Inc. v. Levesque*, No. 10-2423, 2011 WL 4015654 (1st Cir. 2011), and reached a decision that some may find surprising.

The First Circuit vacated a preliminary injunction granted in favor of OfficeMax to enforce noncompetition agreements involving sales employees who OfficeMax acquired as a result of a corporate merger. The appellants were sales employees of Loring, Short, and Harmon (LS&H), and they all signed noncompetition agreements when they were employed there. The noncompetition agreements stated that a one-year, noncompetition period would commence on the termination of employment with LS&H. Further, in the preamble of the noncompetition agreements, the parties acknowledged the impending sale of LS&H to Boise Cascade Office Products Corporation (BCOP). BCOP subsequently merged with OfficeMax, and the salesmen began selling products for OfficeMax. Due to reorganization, the salesmen left their employment at OfficeMax and began working for a direct competitor. As a result, OfficeMax moved for a preliminary injunction to enforce the terms of the noncompetition agreements that the salesmen

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signed when they were employed with LS&H, the predecessor in interest. The district court granted OfficeMax's request for a preliminary injunction.

On appeal, the key issue was whether the salesmen's termination of employment at OfficeMax in 2009 and 2010 triggered the running of the one-year, noncompetition period or whether the period was triggered earlier in 1996 when BCOP purchased LS&H. On appeal, OfficeMax argued that the triggering event for the one-year, noncompetition agreement was when the salesmen left their positions at OfficeMax because BCOP assigned the agreements to OfficeMax pursuant to the corporate merger. In contrast, the salesmen argued that the running of the one year, noncompetition period began when the salesmen's employment at LS&H was terminated when BCOP's purchased LS&H. The First Circuit rejected OfficeMax's argument, instead siding with the salesmen by stating that "the language of the agreements, read as a whole, unambiguously compels the appellants' interpretation."

This is an interesting decision because the First Circuit held that the noncompete period began to run simply by virtue of an acquisition that occurred at the corporate level, rather than when the employee actually left the successor company to go work for a competitor. Further, the successor company, here OfficeMax, did not get the benefit of the noncompete agreements, even though, under the facts in this case, both BCOP and OfficeMax intended to transfer that benefit to OfficeMax.

Thus, the court focused on a strict, literal reading of the covenant rather than on the obvious intent of the parties. Even though the preamble clearly mentioned the imminence of the share sale to BCOP, the First Circuit held that BCOP's purchase of LS&H was the triggering event for the running of the noncompetition agreements. This result could have been avoided if the language of the agreement referred instead to termination of employment with the company or any of its successors or assigns as the triggering event for the running of the noncompetition period.

Keywords: litigation, business torts, First Circuit, noncompetition agreements

—[Amy M. Stewart](#), *Cox Smith Matthews, Inc., Dallas, Texas.*

With Expired Period of Restraint, Relief Is Inappropriate

In [EMC Corp. v. Arturi](#) [PDF], docket number 11-001 (Aug. 26, 2011 Souter, J.), the First Circuit affirmed the decision of the district court to decline granting EMC a preliminary injunction preventing a former employee from competing with EMC or soliciting its customers and remaining employees on the ground that the contractual restrictions on these activities limited the employee's efforts for one year only. This period had passed before any injunction could be issued. The court indicated that EMC could have contracted for tolling the term of the



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restriction during litigation or for a period of restriction to commence upon preliminary finding of breach, but it did not.

Keywords: litigation, business torts, First Circuit, preliminary injunctions

—*Dawn M. Curry, Nutter, McClennen & Fish, LLP, Boston, Massachusetts*

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