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Unfair Competition Under Federal Law

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NOTES

UNFAIR COMPETITION UNDER FEDERAL LAW.*

"Unfair Competition," like "Fraud," or "Police Powers," is an indefineable abstract idea that is easier to point out in a specific case than to generalize and thereby include all of its multitudinous and partly unknown varia-

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tions. Unfair competition, like modern civilization has had a slow and steady growth, which as a whole has been greatly, if not absolutely, affected by the growth of civilization itself.

In England and the United States, before our declaration of independence from Great Britain, unfair or unscrupulous competition, like the commercial and community life of the individual, was confined, generally speaking, within the narrow bounds of a local borough or town. There were no large factories or commercial corporations, competition existed only between small local concerns, any exercise of unscrupulous business methods affected only those nearby merchants and was not a matter of much public import. However, it is true that from the time of Queen Elizabeth, 1558, to the American Revolution various acts of Parliament were passed in a legislative attempt to regulate the business affairs of corporations, but the courts of England, believing that competition was the life of free commerce, refused to fully administer those enactments. Naturally this attitude of the courts led to a great deal of confusion in regard to the regulation or suppression of unfair competition, which confusion was also prevalent in the American Colonies.

At that early period the doctrine of "caveat emptor"—let the purchaser beware—prevailed, and true to that doctrine many trade practices which, even though considered slightly dishonorable, were as yet not unlawful and could be performed with impunity. Even after the Declaration of Independence there was little change in the law, although the increasing commercial activity of the people was rapidly bringing about newer methods of fraudulent and unfair dealing. Nevertheless, the doctrine of caveat emptor still controlled as the rule of law and naturally resulted in stamping as lawful acts that were decidedly unethical. An individual was absolutely unprotected from false advertisements, trade talk, and other methods of unscrupulous merchandising of goods. Only the grossest fraud or deceit had a remedy at common law.[1]

During the period following the Declaration of Independence, just previous to the actual writing of the United States Constitution, the industrial life of each State, as a whole, was taking on State-wide and inter-state aspects to such an extent that a great deal of State legislation was enacted in an attempt to prefer local business to that of other States. This industrial rivalry led to many unjust laws and restraints upon free trade. This condition of affairs was responsible for paragraph three, section eight, of Article I of the Constitution of the United States, giving Congress the power "To regulate commerce with foreign nations, and among the several States, and with the Indian Tribes." Hand in hand with that paragraph is paragraph eight of the same section and article, giving Congress the power "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." It is extremely doubtful whether the authors of those sections fully realized the scope and extent of the powers therein granted, yet fortunately the language used is sufficiently broad to allow ample protection through modern legislation.

Immediately following the organization of the Federal Government, under the present political system, and up to the time of the financial and business depression of 1873, the industrial activity of the country was slowly supplanting the agricultural life of the people. After the depression of 1873 industry was carried on upon a larger and more concentrated scale than ever before. Corporate organization took the place of individual enterprise. The factory system

1. Drew v. Barantine, 13 Hen. IV, pl. 4; Anon. Y. B. 11 Edw. VI, pl. 6, 1548; Gordon v. Parmelee, 2 Allen 212 (Mass.), 1861; Sherwood v. Salmon, 2 Day 128 (Conn.), 1805; Coolidge v. Goddard, 77 Maine 578, 1885; Price v. Read, 2 H. & S. 291 (Ky.), 1846.

became thoroughly established and by the use of the large resources at their command corporations began to stifle competition. Smaller concerns, through ruinous price cutting and other unscrupulous yet "lawful" methods, were gradually being driven from the field and monopolies were being created that would eventually give the larger corporations the control of the entire trade, and thereby force their customers to meet their demands, regardless of their reasonableness.

The transportation systems of the country were keeping in step with the rapid growth of the industrial systems, so that during the same period large and powerful railroad corporations had come into being. Uncontrolled by any legislation the railroads were able to grant discriminatory rates, preferences, and rebates to the larger commercial corporations, due to the volume of business given to the railroads by the latter, and this in turn merely made those business corporations more secure in their monopoly upon the market. Such practices led to what is known as the Interstate Commerce Commission Act of 1887,[2] which act is regulatory of the railroads and prohibits such unjust practices and discriminations as they had carried on before that date.

Various attempts were made by the courts to control the influence and unfair tactics of these large commercial corporations, some of which were successful and others complete failures. Generally speaking, the common law was found to be thoroughly inadequate to cope with the situation. Under the common law, in its early development, as has been previously stated, only an action for actual deceit or fraud was maintainable. Aside from that there was practically no such a thing as a misdemeanor or tort of unfair competition and only a professional swindler could be prosecuted. The essence of the crime was a fraudulent misrepresentation, with intent to deceive the person complaining, followed by actual loss or damages to that said person. There was no action for arrest

2. 24 Stat. 379 and 25 Stat. 855.

or an injunction for an attempt to defraud or deceive at common law.[3]

Before the passing of the various acts by Congress that are regulatory of monopolies and unfair competition methods many attempts were made to prevent these unethical practices, but in every case the courts held that the complainant must show special damages before he would be entitled to relief. In the case of *Canal Co. v. Clark*,[4] the Court said, "It is invariably held that the essence of the wrong (considering unfair competition) consists in the sale of the goods of one manufacturer or vendor as those of another."[5] This same principle was more clearly stated in the case of the *American Washboard Co. v. Saginaw Mfg. Co.*,[6] where the Court says, "It is doubtless morally wrong and improper to impose upon the public by a sale of spurious goods, but this does not give rise to a private right of action unless the property rights of the plaintiff are thereby invaded. There are many wrongs which can only be righted through public prosecution, and for which the legislature, and not the courts must provide a remedy."

This last case was decided ten years after the passage of the Sherman Act (against monopolies, etc.) and it was not until four years later in the case of *Cole v. American Cement & Oil Co.*,[7] that the courts held "The doctrine of unfair competition is possibly lodged upon the theory of the protection of the public whose rights are infringed or jeopardized by the confusion of goods produced by unfair methods of trade, as well as upon the right of the complainant to enjoy the good will of a trade built up by his efforts and sought to be

3. 26 C. J. 6; Smith Elem. L. 278.

4. 13 Wall. 322.

5. See also McLean v. Fleming, 96 U. S. 251; Goodyear, etc., Mfg. Co. v. Goodyear Rubber Co., 128 U. S. 694; Leather Cloth Co. v. American Leather Cloth Co., 11 H. L. Cases 523.

6. 103 Fed. 281.

7. 130 Fed. 703, 1904.

taken from him by unfair methods."[8] But even then there was no right to prosecute in behalf of the public, there must still be the damage to the individual complainant.

Most of the early cases in the United States turn upon the point of unfair competition when concerning the infringement of some trademark or patent. As stated in *Pierce v. Guittard*,[9] "Where a person has established a business in the manufacture and sale of goods, and carries it on under a given name or with a particular mark, whether the words and devices adopted by him constitute a trademark or not, another person cannot assume the same name or mark, or the same with slight alteration, in such a way as to induce others to deal with him in the belief that they are dealing with the person who has given a reputation to the name or mark."[10] Such has consistently been held to be the law throughout this country. But when it came to applying the common law rules and principles to large monopolies and corporations using unfair competitive methods to increase their business at the expense of others, or the public, the courts found themselves powerless to cope with the situation in its entirety. By unethical and unscrupulous practices large corporations began to menace the commercial life of the country and to lay restraints upon the free flow of trade and competitive commerce to such an extent as to raise a great protest from the public, as a whole, which resulted in what are called the "anti-trust" and "unfair competition" acts of Congress.

During the period between 1880 and 1890 agitation for trust regulation became a dominant issue. There were some who believed in the concentration of resources by large corporations as a benefit to the public, while others considered such to create a monopoly and to act in restraint of free trade

8. See also Howe Scale Co. v. Wychoff, 198 U. S. 118.

9. 68 Cal. 71, 1885.

10. See also Koehler v. Sanders, 122 N. Y. 74; Von Numm v. Frash, 56 Fed. 830.

and as a detriment to the public interests. The opponents of monopolies won out, with the result that in 1890 Congress passed an act that has since been known as the Sherman Anti-Trust Law.[11]

This act was passed with the firm belief that large corporations and monopolies were evils within themselves and should be abolished by law. With this thought in mind the celebrated Sherman Anti-Trust Act, entitled "An act to protect commerce against unlawful restraints and monopolies," was passed. The main provisions of this act are found in sections one, two, and three, which provide in substance as follows; that every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce . . . . is hereby declared to be illegal; that every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, with foreign nations, shall be deemed guilty of a misdemeanor, etc.; and that every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce . . . . is hereby declared illegal.

This act while in effect it is a regulation of unfair competition and monopolies, in its actual result it served only to compensate the individual for his losses. As said in *Fed. Trade Com. v. Gratz*,[12] "In 1890 Congress did not realize that prevention of unfair competition was as necessary as compensation for."

By a series of decisions, all of which placed a new construction on the act under different circumstances, the courts of the nation decided that the Sherman Anti-Trust Act does not and can not apply to manufacturing;[13] makes void railroad combinations that affect trade competition;[14] illegalizes

11. 26 Stat. 209, July 2, 1890.
12. 253 U. S. 421, 1919.
13. U. S. v. Knight Sugar Refining Co., 156 U. S. 1, 17.
14. U. S. v. Trans-Missouri Freight Ass'n., 166 U. S. 296.

exclusive combinations of local dealers handling some article of commerce shipped in from another State;[15] illegalizes an agreement between various producing, trading companies not to compete on city contracts.[16] At first it was held that a "holding company," formed to own and control the stock of several competing companies, is absolutely illegal;[17] but later the courts began to apply the "rule of reason" and to allow large combinations to exist if their organization is merely an honest and legitimate attempt to introduce economies, uniform systems and methods and the benefits of large scale management, and only involves such restraints of trade as are natural and reasonable.[18] The Sherman Act is also applicable to combinations of labor as well as of capital formed for the purpose of restraining trade between the States;[19] even the circulation of "black lists" or "white lists" is held to be an illegal restraint of trade, although there is no express agreement to boycott the firms concerned;[20] the widespread purchase of an article for the purpose of withdrawing it from trade in order artificially to increase its price is contra to the Sherman Act.[21] After a change of opinion the courts finally decided that an owner of a patent could not use his patent so as to control the sale of other goods used in conjunction with it;[22] and in two other cases price fixing was declared illegal whether the article,

15. U. S. v. Anderson, 171 U. S. 604; Board of Trade of Chicago v. Christie Grain & Stock Co., 198 U. S. 236.

16. Montague & Co. v. Lowry, 193 U. S. 38.

17. Northern Securities Co. v. U. S., 193 U. S. 197.

18. Standard Oil Co. v. U. S., 221 U. S. 1; U. S. v. American Tobacco Co., 221 U. S. 106; and U. S. v. Terminal R. R. Ass'n of St. Louis, 224 U. S. 383.

19. Loewe v. Lawlor, 208 U. S. 274; Bucks Stove & Range Co. v. Gompers, 221 U. S. 418.

20. Eastern States Retail Lumber Dealers' Ass'n v. U. S., 234 U. S. 600.

21. U. S. v. Patten, 226 U. S. 525.

22. Henry v. Dick, 224 U. S. 1; Baur & Co. v. O'Donnell, 229 U. S. 1.

whose price an attempt was made to fix, was patented or not.[23]

By the above review of cases can be seen what was actually accomplished by the Sherman Act. Its influence was sound and tended to discourage destructive, and immoral practices, and business piracy by large and powerful corporations and monopolies. However, the act, because of its wording, was blindly applied to large corporations merely because of their size, which not only caused the breaking up of unscrupulous corporations, but also of corporations founded upon the soundest economic principles, such as the introduction of uniform processes, reduction of waste, use of scientific methods, etc. It should never have been made applicable to corporations merely because of their size but purely because of their effect upon business, and because of the unfairness of their dealings.

About 1900 public opinion suffered a slight change and people began to fear more the overcapitalization of corporations rather than their size and unfair business methods. Accordingly, in 1903, the Department of Commerce and Labor was created, the chief feature of which was the Bureau of Corporations. This bureau was created with the idea in mind of giving publicity to the business affairs of corporations and thereby prevent many frauds upon the public. The corporations, as a whole, welcomed this publicity with the result that the bureau was able to carry out effectively its work of protecting the public from unscrupulous business management of corporate affairs. The information obtained by this bureau clearly proved the ineffectivenes of the Anti-Trust laws.

Congress by 1914 realized the inefficiency of the Sherman Act, in its remedial methods of fines and imprisonment, so it enacted what is known as the Federal Trade Commission

23. Straus & Straus v. Amer. Publishing Ass'n and Miles Co. v. Park Drug Co., 220 U. S. 373.

Act,[24] which act is preventive rather than remedial. The most important part of the entire act is embodied in section five and in this simple sentence, "That unfair methods of competition in commerce are hereby declared unlawful." Provision is made for the enforcement of the act by the five commissioners, who also have all of the necessary powers of investigation, subpoenaing, etc.

There is a great difference in the effect of the Federal Trade Commission Act and the Sherman Anti-Trust Act. The Federal Trade Commission Act does not require the enforcement of competition where combination is feasible and beneficial; combinations are destroyed, or reorganized, when they use unfair competitive methods and not because of their size only; and lastly this act hastens the settlement of disputes by letting the control and regulation of interstate commercial companies, except the common carriers, be conducted by a national trade commission instead of by the national legislature and by the courts. The commission, after its decision has been rendered, can have the courts enforce it, subject to the usual right of an appeal by the defendant. The Bureau of Corporations was taken over by the Federal Trade Commission, as provided in the law creating that commission, with the result that the commission has the power of requiring various reports and of publishing them annually, or oftener. It is expressly provided that a judgment under the Federal Trade Commission Act does not absolve one from liability under the Sherman Anti-Trust Act.

Congress by not stating definitely what unfair competition consists of, but by merely declaring unfair methods of competition illegal, created a lasting and effective law. As new businesses come into being so do new methods of unscrupulous dealing, so that it can be realized that a present statement of what constitutes unfair competition would fail utterly to cover future abuses. The Federal Trade Com-

24. 38 Stat. 717, Sept. 26, 1914.

mission declares a certain unscrupulous business method to be unfair competition and subjects the corporation doing the same to some punishment, or to desist therefrom, or to reorganization, or otherwise prevents the continuance of the act.

A brief review of some of the leading cases decided under this law will show what construction has been placed thereon by the courts. The Federal Trade Commission Act is not void for indefiniteness.[25] This act does not apply to a refusal by a corporation to trade with a particular individual, except under certain purchasing agreements.[26] Use of false labels is prohibited by the act.[27] Commission can not prevent the sale of a staple, like sugar, below cost, but it can prevent misleading representations concerning the said sale.[28] A manufacturer may sell to any jobber he pleases on condition that the jobber resell at a special price, but he can not thereby bind a retailer, who buys from the jobber, to sell at a special price.[29] A magazine publisher can build up an extensive and trained sales-agency and insist that it sell only certain other magazines.[30] Distributors of gasoline can lease tanks to be used only for their own gasoline as long as the lessee can sell a competitor's brand otherwise.[31] A combination of jobbers or manufacturers to prevent others from selling their goods to whom they please, as to a competitor, is unfair.[32]

A few days after the passage of the Federal Trade Commission Act Congress passed another act for the regulation of trade and unfair competition. This act is popularly known

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25. Sears, Roebuck & Co. v. Fed. Trade Com., 258 Fed. 307.
26. Fed. Trade Com. v. Gratz, 250 U. S. 657.
27. Fed. Trade Com. v. Winstead Hosiery Co., 258 U. S. 483; Royal Baking Powder Co. v. Fed. Trade Com., 281 Fed. 744.
28. Sears, Roebuck & Co. v. Fed. Trade Com., 258 Fed. 307.
29. Fed. Trade Com. Beechnut Packing Co., 257 U. S. 441.
30. Pictorial Review v. Curtis Pub. Co., 255 Fed. 206.
31. Standard Oil Co. of N. Y. v. Fed. Trade Com., 273 Fed. 478; Sinclair Refining Co. v. Fed. Trade Com., 276 Fed. 686.
32. Wholesale Grocers' Ass'n of El Paso v. Fed. Trade Com., 277 Fed. 657.

as the Clayton Act.[33] This important measure had three objects: First: To give the injured party under the anti-trust laws a better legal position and to make it easier for him to prosecute his suit. Second: To define more clearly certain trade abuses and restraints, and to forbid these, or empower the Trade Commission to suppress them. Third: To legalize boycotts. This last provision was the result of activity in favor thereof by the labor unions, caused by the decisions under the Sherman Act.[34]

The provisions of the Clayton Act that are of primary importance prohibit unreasonable differences in prices; prohibit leases, sales, etc., binding purchaser not to use goods of competitors; exclude labor organizations from the effect of the act; prohibit one corporation from acquiring stock in another corporation so as to lessen competition (investments permitted); prohibit interlocking directorates; and prohibit a common carrier from dealing with a corporation if one of its officers is interested therein.

It is hardly necessary to review the decisions under this act, as the prohibitions and definitions are self-explanatory, yet a brief reference to a few of the cases will help to clarify the above mentioned sections. A manufacturer may sell for less to a wholesaler than to a retailer, as they are not actual competitors.[35] Clayton Act only reaches acts which probably and actually tend to create a monopoly.[36] Manufacturers can not force buyers to deal in their articles only, or prevent them from selling competitors' goods.[37] Labor organizations are still liable when they engage in an actual combination or conspiracy in restraint of trade.[38] Effect of one corporation

33. 38 Stat. 730, Oct. 15, 1914.

34. Loewe v. Lawlor, 208 U. S. 274; Bucks Stove & Range Co. v. Gompers, 221 U. S. 418.

35. Baran v. Goodyear Tire & Rubber Co., 256 Fed. 571.

36. Standard Oil Co. v. Fed. Trade Com., 282 Fed. 81.

37. Standard Fashion Co. v. Margrane Houston Co., 259 Fed. 559.

38. Duplex Prtg. Co. v. Deering, 254 U. S. 443.

acquiring stock in another corporation, not the motive, makes the act illegal.[39] Section referring to interlocking directorates does not apply to State banks joining the Federal Reserve System.[40]

After analyzing all of the cases cited in the forepart of this article, and after reading many other cases, it is quite natural for one to ask and almost expect a concise definition of the term "unfair competition." Such is and always will be impossible. Congress very wisely, in section five of the Federal Trade Commission Act, merely declared "unfair methods of competition are . . . unlawful," but it did not attempt to define, limit, or state what unfair competition consists of in every case. It is true that the Clayton Act names various methods of business dealing as being unfair and unlawful, but in so doing it only attempts to clarify, and not define, the law, when applied to certain situations.

"It is not conceived that Congress; which laid down no definition whatever, intended to either limit or extend the matters which constitute unfair methods of competition prior to the passage of the Clayton Act,[41] but that its object was the creation of a board of commissioners who, as stated in the Sears-Roebuck case,[42] 'are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or tendency to injure competitors directly or through deception of purchasers quite irrespective of whether the specific practices in question have yet been denounced in common law cases.' "[43]

"The legislative history of the Federal Trade Commission Act shows that it was the intention of Congress to make all unfair methods of competition unlawful, and to regulate

39. Aluminum Co. of America v. Fed. Trade Com., 284 Fed. 401.
40. Comp. Stat. 9792, 31 Op. Atty. Gen. 153.
41. Curtis Pub. Co. v. Fed. Trade Com., 270 Fed. 881, 908.
42. 258 Fed. 307, 311.
43. Kinney-Rome Co. v. Fed. Trade Com., 275 Fed. 665.

competition rather than solely prevent monopoly. The purpose to prevent unfair practices in trade enlarges the natural interpretation of 'unfair methods of competition' to include whatever might be against the public interest as obstructing the channels of fair competition, on the preservation of which the policy of Congress is firmly based."[44]

"Competition is not an unmixed good. It is a battle for something that only one can get, one competitor must necessarily lose. The weapons in competition are various. Superior energy, more extensive advertising, better articles, better terms as to time of delivery, place of delivery, time of credit, interest or no interest, freights, methods of packing, lower prices, more attractive and more convenient packages, superior service, and many others, are and always have been considered proper weapons."[45]

"A method of competition fair among equals may be unfair if applied where there is an inequality of resources."[46] "Unfair competition means competition which is unfair in the circumstances."[47]

"Unfair methods of competition" admits no concrete definition, the meaning can only be ascertained when all things pertinent to each specific case have been considered. The statement made by the court in *Federal Trade Commission v. Gratz*,[48] clearly shows the futileness of any attempted definition; "The words 'unfair methods of competition' are not defined by (the) statute and their exact meaning is in dispute. It is for the courts, not the (Federal Trade) commission, ultimately to determine as a matter of law what they include."

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44. Fed. Trade Com. v. Winstead Hosiery Co., 258 U. S. 483
45. Sinclair Refining Co. v. Fed. Trade Com., 276 Fed. 686.
46. Fed. Trade Com. v. Gratz, 253 U. S. 421.
47. Australian Industries Preservation Act, 1908-1910.
48. 253 U. S. 421.