New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 256—NO. 3
WEDNESDAY, JULY 6, 2016

Outside Counsel

What Role for Abuse of Superior Bargaining Position Laws?

By **Yee Wah Chin**

Abuse of superior bargaining position laws prohibit a party to a business arrangement, holding what is considered to be a superior bargaining position relative to another party to the arrangement, from engaging in activities that are deemed to be unfair trade practices. Several jurisdictions in Europe and Asia have such laws, including France, Germany, Japan and South Korea. China is considering adding such a prohibition to its Anti-Unfair Competition Law, defining a superior bargaining position as "an advantageous position in a specific transaction held by an undertaking in terms of capital, technology, market access, distribution channel and material procurement, etc. and its trading counterparty is reliant on such undertaking and is difficult to switch to other undertakings."[1]

The United States has no law at the federal level regarding "unfair trade practices" generally. At the federal level, the closest may be the Lanham Act §43, 15 U.S.C. §1125, and the Federal Trade Commission Act §5, 15 U.S.C. §45. Neither covers unfair trade practices generally.

Lanham Act §43 essentially establishes a cause of action for anyone who suffers lost sales or damage to business reputation as a direct result of another's false or misleading statements. The most common type of such statements is false advertising. The U.S. Supreme Court has noted that, as set forth in §45,[2] the Lanham Act, including §43, protects against unfair competition, based upon the common law tort of unfair competition which is "concerned with injuries to business reputation and present and future sales."[3]

The United States has no law at the federal level regarding "unfair trade practices" generally.

FTC Act §5 prohibits unfair methods of competition and unfair or deceptive acts or practices in commerce. There has been much discussion over what §5 covers that is outside the Sherman and Clayton Acts.

The FTC's 2015 Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act states that §5 covers acts "that contravene the spirit of the antitrust laws and those [acts] that, if allowed to mature or [be] complete[d], could violate the Sherman or Clayton Act."[4] The FTC set forth three principles that it will follow in determining whether an act or practice is an unfair method of competition under §5 that may be outside the scope of the Sherman or Clayton Acts—

- the public policy underlying the antitrust laws, that of promoting consumer welfare;
- whether the conduct has caused or is likely to cause harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications; and
- the FTC is less likely to challenge conduct as an unfair method of competition on a standalone basis if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm from the act or practice.[5]

As for the other prong of §5 of the FTC Act, the FTC may conclude that conduct constitutes "unfair acts or practices" only if "the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by

YEE WAH CHIN *is counsel at Ingram Yuzek Gainen Carroll & Bertolotti.*

countervailing benefits to consumers or to competition."[6]

Therefore, at the federal level, there are no laws that cover unfair trade practices generally.

United States

With respect to abuse of superior bargaining position in particular, the United States has no law that addresses that concept generally. The Robinson-Patman Act, 15 U.S.C. §13, might be considered a type of abuse of comparative advantage position law. The Robinson-Patman Act prohibits price discrimination among similarly situated customers that might injure competition, the discriminatory provision of or payment for services, and inducing or knowingly receiving discriminatory prices. It was enacted during the Great Depression to address concerns about the comparative advantage position of downstream players, specifically large supermarket chains such as A&P.[7]

However, the United States is a federal system, and U.S. states may and do enact laws that overlap with or fill in gaps in federal laws, and/or are inconsistent with federal laws. Many states have enacted laws that address unfair competition that are similar to §43 of the Lanham Act.[8] Many have also diverged from federal law in continuing to apply the per se rule to resale price maintenance.[9] Thirty-five states have enacted Illinois Brick repealer statutes,[10] to make it clear that those states' antitrust laws allow indirect purchasers to recover damages for overcharges resulting from antitrust violations, contrary to the rule under federal law established by the Supreme Court in *Illinois Brick Co. v. Illinois*.[11] Beyond those general laws, many states also have specific laws that reflect concerns with superior bargaining positions.

Many states have laws regarding automobile dealerships and franchise relationships that reflect concerns similar to those that drive comparative advantage position laws. Franchises and automobile dealerships may be the two most common areas of sectoral regulation by U.S. states protecting the distributor relative to the manufacturer. California's Franchise Investment Law[12] and Vehicle Code,[13] and New York's Franchise Act[14] and Franchised Motor Vehicle Dealer Act[15] may be good examples of the genre.

Both California's and New York's franchise laws require registration with the state authority that includes detailed financial statements by franchisors who seek to appoint franchisees in the state and set forth detailed disclosures that the franchisor must provide to potential franchisees. The required disclosures include information regarding the franchisor, fees, franchise terms, renewal, termination, transfer, dispute resolution and earnings claims. The laws set forth fraudulent, prohibited and unfair practices. They also require a minimum time for proposed franchisees to review any contracts.

The California Department of Business Oversight has published Guidelines for Franchise Registration,[16] which provides detailed guidance to franchisors regarding their disclosure and registration obligations. The New York Attorney General has issued detailed Franchise Regulations[17] and published a Franchise Registration Information Sheet[18] providing guidance to franchisors regarding registration requirements, franchise renewals and amendments, advertisements and brokers.

The California Vehicle Code contains detailed requirements as to notices and disclosures that automobile manufacturers must give to their dealers, the process of terminating or not renewing a dealer, the conditions for any modification of dealership agreements, and the relocation or addition of dealerships in a geographic area. The Vehicle Code also places conditions on an automobile maker's ownership or operation of dealerships in competition with independent dealers. California's New Motor Vehicle Board has published an Informational Guide for Manufacturers and Distributors,[19] which explains the requirements of the Vehicle Code for automobile manufacturers and distributors.

New York's Franchised Motor Vehicle Dealer Act prohibits various activities by franchisors as unfair business practices and limits manufacturer interests in dealerships.[20] It also identifies restrictions on dealerships as unreasonable[21] and sets forth limitations and requirements on dealership terminations, cancellations or non-renewals.[22] The New York law also provides for dispute resolution processes between manufacturers and dealers.[23]

Therefore, while there is no general law in the United States regarding abuse of superior bargaining position, the concern exists and is addressed in many states for specific industries in which there is a conclusion that a superior bargaining position is common.

Comparative Advantage

A focus on comparative advantage, which is distinct from dominant market position and based on relative bargaining power rather than on market power, may interject antitrust

enforcers into commercial negotiations, which government is poorly suited for, and into normal market operations, which may impede normal market functioning. This would ultimately be detrimental to consumers and to the economy, as such a prohibition would likely affect most directly the most efficient and competitive firms.

The current consensus in the United States is that the purpose of competition law in general is to promote consumer welfare through the competitive process.[24] A buyer that is able to use its position to extract more favorable terms from suppliers may in turn pass on the resulting savings for the benefit of consumers. But a law that penalizes the unilateral actions of such a buyer, or other entities, that otherwise lacks market power, cannot only lead to inappropriate government intervention into routine business decisions and agreements, but also increase the risk of chilling pro-competitive conduct.

Such a prohibition on undertakings with a comparative, but not market-dominant, advantage vis-à-vis their trading counterparties, may deter companies from doing business with small- or medium-sized counterparties, distributors or suppliers that the law ostensibly seeks to protect, thereby hurting economic efficiency and consumer welfare, as well as the small businesses that such a prohibition may be intended to protect. There is also a danger that counterparties will mischaracterize benign actions to attack their rivals or competitors who are trading partners and seek government intervention to enhance their bargaining position.

If an abuse of superior bargaining position law is nonetheless adopted or retained, the same economic principles and analytical framework that support abuse-of-dominant-position provisions could be applied to abuse-of-superior-bargaining position provisions. Under this framework, when the conduct challenged as an abuse of superior bargaining position does not have an anticompetitive effect and instead results in enhanced efficiency and increased consumer welfare, it should not be deemed abuse of superior bargaining position.

Another approach may be to focus on the industries and businesses where concerns seem to be concentrated and adopt laws such as franchise regulatory laws for those industries, establishing ex ante what is legal, rather than trying to determine ex post whether a superior bargaining position existed and was abused. This way, the remedy can be focused on where the problem appears to be, instead of being a universal medicine that is generally unnecessary except possibly in a few problem areas.

> While there is no general law in the United States regarding abuse of superior bargaining position, the concern exists and is addressed in many states for specific industries in which there is a conclusion that a superior bargaining position is common.

1. Anti-Unfair Competition Law (Revised Draft Submitted for Review), Article 6 http://mp.weixin.qq.com/s?__biz=MzA3NTI0NzYxNw==&mid=403245988&idx=1&sn=d944fe7acdc3229e5b26d1f0d0c67970&scene=5&srcid=0225Vx58BM3jzi3du8SUuQBd#rd

2. 15 U.S.C. §1127 ("The intent of this chapter is to…protect persons engaged in such commerce against unfair competition…").

3. *Lexmark International v. Static Control Components*, 572 U.S. ___ (2014).

4. https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf

5. Id.

6. 15 U.S.C. §45(n).

7. See, e.g., Earl W. Kintner & Joseph P. Bauer, "The Robinson-Patman Act: A Look Backwards, a View Forward," 31 Antitrust Bulletin 571-609 (1986).

8. See, e.g., New York General Business Law §349 http://public.leginfo.state.ny.us/lawssrch.cgi?NVLWO.

9. See, e.g., Michael A. Lindsay, Overview of State RPM, the Antitrust Source, October 2014 http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/lindsay_chart.authcheckdam.pdf.

10. See, e.g., ABA Section of Antitrust Law, Indirect Purchaser Litigation Handbook 2d Ed (ABA Publishing 2016).

11. 431 U.S. 720 (1977).

12. http://leginfo.legislature.ca.gov/faces/codes_displayexpandedbranch.xhtml?tocCode=CORP&division=5.&title=4.&part=&chapter=&article=

13. http://leginfo.legislature.ca.gov/faces/codes_displayexpandedbranch.xhtml?tocCode=VEH&division=2.&title=&part=&chapter=6.&article=

14. New York General Business Law §§680-95.

15. New York Vehicle & Traffic Law §§460-73.

16. http://www.dbo.ca.gov/Licensees/franchise_investment_law/pdf/310111UFDD.pdf

17. 13 NYCRR Part 200 https://www.ag.ny.gov/sites/default/files/pdfs/bureaus/investor_protection/franchise/part200.pdf

18. http://www.ag.ny.gov/sites/default/files/pdfs/bureaus/investor_protection/Franchise%20Registration%20Information%20Sheet.pdf

19. http://www.nmvb.ca.gov/publications/manuf_guide.pdf

20. New York Vehicle & Traffic Law §463.

21. New York Vehicle & Traffic Law §466.

22. New York Vehicle & Traffic Law §§463, 467.

23. New York Vehicle & Traffic Law §471-a.

24. See, e.g., FTC 2015 Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act.

Reprinted with permission from the July 6, 2016 edition of the NEW YORK LAW JOURNAL © 2016 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 or reprints@alm.com. # 070-07-16-11