COMMERCE

A statute of limitations begins to run when the cause of action accrues. When a complaint alleges that a defendant's anticompetitive actions forced the plaintiff out of business the cause of actions accrues when the plaintiff went out of business. AHPW, Inc. v. FSM, 9 FSM R. 301, 304 (Pon. 2000).

Whether Pohnpei's power to regulate trochus means that any action which has an arguably regulatory effect on trochus cannot constitute an anticompetitive practice is an issue for trial, and a motion to dismiss in this respect must be denied. AHPW, Inc. v. FSM, 9 FSM R. 301, 304 (Pon. 2000).

Title 32, sections 301 *et seq.* date from the Trust Territory period but continue in effect pursuant to the FSM Constitution's Transition Clause. AHPW, Inc. v. FSM, 9 FSM R. 301, 305 (Pon. 2000).

The State of Pohnpei is deemed a person within the meaning of section 306 of the Anticompetitive Practices statute and may be a defendant as well as a plaintiff in suits brought under the statute. AHPW, Inc. v. FSM, 9 FSM R. 301, 305 (Pon. 2000).

A party to a commercial transaction, not one primarily for personal, family, or household purposes, may not bring a cause of action under Title 34 of the FSM Code since Title 34 only provides for consumer protection. FSM Dev. Bank v. Mudong, 10 FSM R. 67, 77 (Pon. 2001).

32 F.S.M.C. 306(2) creates a civil cause of action under national law for violations of the prohibitions against anti-competitive practices. Foods Pacific, Ltd. v. H.J. Heinz Co. Australia, 10 FSM R. 200, 203 (Pon. 2001).

A case that asserts five causes of action under 32 F.S.M.C. 301 *et seq.*, is one that "arises under national law" within the meaning of Article XI, section 6(b). Foods Pacific, Ltd. v. H.J. Heinz Co. Australia, 10 FSM R. 200, 203 (Pon. 2001).

The venue provision of 32 F.S.M.C. 306(2) must be read in conjunction with the service provisions of the FSM "long-arm statute," 4 F.S.M.C. 204, and with the FSM Code's venue provisions. Foods Pacific, Ltd. v. H.J. Heinz Co. Australia, 10 FSM R. 200, 204 (Pon. 2001).

A foreign corporation served pursuant to 4 F.S.M.C. 204 may be sued within the FSM for violations of 32 F.S.M.C. 302 or 303, regardless of where the service occurs, so long as that foreign corporation has done specific acts within the FSM to bring it within the jurisdiction of the FSM Supreme Court. Foods Pacific, Ltd. v. H.J. Heinz Co. Australia, 10 FSM R. 200, 204-05 (Pon. 2001).

Any person who is injured by another's violation of 32 F.S.M.C. 302 or 303 may sue therefor where the defendant resides or where service may be obtained, and may recover three times the damages sustained by him together with a reasonable attorney's fee and the costs of suit. Foods Pacific, Ltd. v. H.J. Heinz Co. Australia, 10 FSM R. 409, 413 (Pon. 2001).

There is no common law tort of unfair competition in the FSM because that field of law has been preempted by the Consumer Protection Act of 1970. Foods Pacific, Ltd. v. H.J. Heinz Co. Australia, 10 FSM R. 409, 414 (Pon. 2001).

Because the national government has the exclusive power to regulate foreign and interstate commerce, the Consumer Protection Act is the law of the FSM insofar as any advertising, sale, offer or distribution involves commerce between the states of the FSM or with any foreign entity. The Consumer Protection Act also is the law of the states of the FSM, insofar as it involves commerce which is intrastate and has not been repealed by the state legislatures. Foods Pacific, Ltd. v. H.J. Heinz Co. Australia, 10 FSM R. 409, 415 (Pon. 2001).

The Consumer Protection Act of 1970 exclusively provides the means by which unfair competition between businesses should be dealt with under both national and applicable state law. Foods Pacific, Ltd. v. H.J. Heinz Co. Australia, 10 FSM R. 409, 415 (Pon. 2001).

The Consumer Protection Act vests consumers with a civil cause of action against anyone engaged in activity which is deceptive or misleading, and authorizes the Attorney General to seek injunctive relief against such activity, to prosecute criminal violations of the Act, and to seek civil and criminal penalties against those who violate the Act. The Act does not provide a means for recourse by businesses against other competing businesses. Foods Pacific, Ltd. v. H.J. Heinz Co. Australia, 10 FSM R. 409, 415-16 Pon. 2001).

The Consumer Protection Act abolishes any common law action for unfair competition. Businesses do not have standing to sue competitors for violations of 34 F.S.M.C. 103, including passing off goods or services as those of another. Because Congress has legislated comprehensively in this field, it should be Congress that decides whether to provide businesses with a private cause of action against competitors for engaging in unfair competition. Foods Pacific, Ltd. v. H.J. Heinz Co. Australia, 10 FSM R. 409, 416 (Pon. 2001).

Attempts to threaten or induce merchants not to sell competing products violate 32 F.S.M.C. 303. Foods Pacific, Ltd. v. H.J. Heinz Co. Australia, 10 FSM R. 409, 417 (Pon. 2001).

When it is not clear whether the plaintiff can demonstrate the type of illegal "combination" contemplated by 32 F.S.M.C. 302, and there is no relevant case law found in the FSM which interprets the anti-competitive practices law and when the court does not have before it any evidence of the parties' relative market shares, it is difficult to evaluate the likelihood of success of plaintiff's claims under 32 F.S.M.C. 301 *et seq*. Foods Pacific, Ltd. v. H.J. Heinz Co. Australia, 10 FSM R. 409, 417 (Pon. 2001).

The Attorney General has the authority to prosecute violations of the Consumer Protection Act, but private business entities do not. The Act recognizes that unfair or deceptive trade practices are criminal, and also confers standing on consumers who are injured by the practices to recover their actual damages or $100, whichever is greater. Foods Pacific, Ltd. v. H.J. Heinz Co. Australia, 10 FSM R. 409, 418 (Pon. 2001).

In commercial credit transactions, no person may directly or indirectly receive or charge interest which exceeds an annual percentage rate of twenty-four percent. Jayko Int'l, Inc. v. VCS Constr. & Supplies, 10 FSM R. 475, 477 (Pon. 2001).

The term "counterfeit" has a specific legal meaning: to forge; to copy or imitate, without authority or right, and with a view to deceive or defraud, by passing the copy or thing forged for that which is original or genuine. Yang v. Western Sales Trading Co., 11 FSM R. 607, 616 (Pon. 2003).

Goods received through unauthorized distribution networks often are referred to as "gray market" goods, or parallel products. Gray market goods are genuine products possessing a brand name protected by trademark or copyright, which are typically manufactured abroad and then purchased and imported by third parties, bypassing authorized distribution channels. Yang v. Western Sales Trading Co., 11 FSM R. 607, 617 (Pon. 2003).

Summary judgment will be granted when, viewing the facts in the light most favorable to the plaintiff, the defendant national government's $40,000 appropriation did not, as a matter of law, violate any of the plaintiff's constitutional rights since the allotment was not a subsidy or other payment to pepper farmers that arguably reduced or otherwise affected its competitive advantage in a way that violated its constitutional rights and when the court does not construe this allotment as some form of financing of Pohnpei's allegedly unlawful activities. Any connection between the FSM allotment and the destruction of AHPW's pepper business is too remote since there is no showing that the allotment caused, or even contributed to the cause of, the destruction of its pepper operation. AHPW, Inc. v. FSM, 12 FSM R. 114, 118 (Pon. 2003).

Since it is not competition, but anticompetitive practices that is proscribed and since nothing in the record suggests that at the time of its 1995 allotment to Pohnpei, the FSM had any knowledge that Pohnpei intended to engage in unfair competitive practices, the FSM's allotment did not constitute, as a matter of law, an anticompetitive practice. AHPW, Inc. v. FSM, 12 FSM R. 114, 119 (Pon. 2003).

Pohnpei is a "person" for purposes of the anticompetition statutes. AHPW, Inc. v. FSM, 12 FSM R. 114, 123 (Pon. 2003).

Competition is not what 32 F.S.M.C. 301 *et seq.* proscribes, but rather anticompetitive practices. AHPW, Inc. v. FSM, 12 FSM R. 114, 123 (Pon. 2003).

Title 32, chapter 3 of the FSM Code prohibits anticompetitive conduct, not competition. AHPW, Inc. v. FSM, 12 FSM R. 164, 168 (Pon. 2003).

The regulation of businesses is an exercise of the police power, recognized as necessary to protect the public health, morals and welfare. Regulation of intoxicating liquors pursuant to the police power is recognized in virtually every jurisdiction. Ceasar v. Uman Municipality, 12 FSM R. 354, 357 (Chk. S. Ct. Tr. 2004).

Since the police power is an incident of state sovereignty, municipal exercise of the police power may only occur when delegated by the state, and since municipalities ordinarily have no original police power, they have only such authority with respect to intoxicating liquors as is conferred upon them by the state, either in express terms or by implication. Thus, if a municipality is to have the legal right to regulate the possession and sale of alcoholic beverages, that right must have been delegated to it by the state legislature. Ceasar v. Uman Municipality, 12 FSM R. 354, 357-58 (Chk. S. Ct. Tr. 2004).

Chuuk municipalities once had the delegated right to regulate alcoholic beverage sales, but in 2001 the state legislature made major revisions to the law pertaining to intoxicating liquors and placed exclusive jurisdiction over the regulation of alcoholic beverages in the state. The Chuuk Legislature's enactment removed any prior municipal authority to regulate the

possession and sale of alcoholic beverages – a municipality may not by imposition of licensing fees or taxes regulate the possession or sale of such substances. Ceasar v. Uman Municipality, 12 FSM R. 354, 358 (Chk. S. Ct. Tr. 2004).

Under 32 F.S.M.C. 302(3), it is illegal for one or more persons to create or use an existing combination of capital, skill, or acts the effect of which is to prevent competition in the manufacture, making, transportation, sale, or purchase of any merchandise, produce, or commodity. The State of Pohnpei is a "person" for purposes of this statute. AHPW, Inc. v. FSM, 12 FSM R. 544, 551 (Pon. 2004).

"Competition" means the effort of two or more parties, acting independently, to secure the business of a third party by the offer of the most favorable terms. "Merchandise" and "commodity" are similar enough in meaning to be interchangeable: "merchandise" is defined as each commodity bought and sold by merchants, while "commodity" is defined as any movable or tangible thing used in commerce as the subject of trade or barter. "Produce" as a noun means articles produced or grown from or on the soil. AHPW, Inc. v. FSM, 12 FSM R. 544, 551 (Pon. 2004).

When Pohnpei arbitrarily set the $1 a pound price for the purchase of pepper from the pepper farmers, a price that bore no relation to the world market price, it created a market condition with which Island Traders could not compete and was not able to purchase the raw pepper it required for its operations. Pohnpei thus prevented competition in the purchase of produce, and by preventing Island Traders from acquiring raw pepper for processing, Pohnpei also prevented competition in the manufacture of merchandise; the merchandise being the finished, processed pepper. Viewed in either light, Pohnpei violated 32 F.S.M.C. 302(3). AHPW, Inc. v. FSM, 12 FSM R. 544, 551-52 (Pon. 2004).

It is unlawful for a person to fix the price of a commodity. This prohibition against fixing the price charged for goods, merchandise, machinery, supplies, or commodities is directed toward sale, and not the purchase, of goods and does not apply when the facts do not involve selling of raw pepper, but conduct in purchasing raw pepper at an anticompetitive price. AHPW, Inc. v. FSM, 12 FSM R. 544, 552 (Pon. 2004).

Under 32 F.S.M.C. 302(2), it is illegal for one or more persons to create or use an existing combination of capital, skill, or acts the effect of which is to limit or reduce the production, or increase the price of, merchandise or any commodity. "Production" means that which is made; i.e. goods, or the fruit of labor, as the productions of the earth, comprehending all vegetables and fruits. AHPW, Inc. v. FSM, 12 FSM R. 544, 552 (Pon. 2004).

When Pohnpei's refusal to hold a trochus harvest allegedly stemmed from environmental concerns, but all of the reports addressing this issue recommended that a trochus harvest be held and the concern was not that there would be too little trochus, but that there would be too much, nothing stood in the way of reasonable limitations on the harvest that could have harmonized both Pohnpei's legitimate environmental concerns and the national law requirement that it not limit the production of any commodity. Failure to do so violated 32 F.S.M.C. 302(2). AHPW, Inc. v. FSM, 12 FSM R. 544, 552 (Pon. 2004).

Anticompetitive conduct is tortious in nature. AHPW, Inc. v. FSM, 12 FSM R. 544, 553 (Pon. 2004).

Loss of future profits is a well-established basis for determining the measure of economic injury resulting from an anticompetitive act which forces the victim out of business. AHPW, Inc. v. FSM, 12 FSM R. 544, 554, 555 (Pon. 2004).

In unfair trade practices cases, courts draw a distinction between the amount of proof necessary to show that some damages resulted from the wrong, and the amount of proof necessary to calculate the exact amount of the damages. A lower burden of proof applies because the most elementary conception of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. AHPW, Inc. v. FSM, 12 FSM R. 544, 554 (Pon. 2004).

In anticompetitive practices cases where causation is established, the burden of proving damages is much less severe. This rule of leniency with regard to proof of damages is necessary because any other rule would enable the wrong-doer to profit by his wrongdoing at his victim's expense. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Once the fact of damage is established with reasonable certainty, the amount of damages need only be shown with as much certainty as the tort's nature and the case's circumstances permit. In such cases, if it is uncertain and speculative and whether damages have been incurred, then damages will be denied; however, if it is only the amount of the damages that presents the uncertainty, then the court will allow recovery so long as there is proof of a reasonable basis from which the amount can be approximated or inferred. AHPW, Inc. v. FSM, 12 FSM R. 544, 554 (Pon. 2004).

When there is no doubt about the violation of 32 F.S.M.C. 302(2), but when there is nothing of record to establish that even if a trochus harvest had been held after 1994, the plaintiff would have been successful in purchasing enough trochus so that it would have had an adequate source of supply for its button operation, the plaintiff has failed to establish that it was damaged by the defendant's conduct as proscribed 32 F.S.M.C. 302(2). Since that conduct was tortious in nature, the plaintiff is entitled only to nominal damages. AHPW, Inc. v. FSM, 12 FSM R. 544, 555 (Pon. 2004).

Damages under 32 F.S.M.C. 306(2) are subject to trebling. AHPW, Inc. v. FSM, 12 FSM R. 544, 555, 556 (Pon. 2004).

Averaging three years of normal operations when the pepper supply was continuous when the manufacturing process was uninterrupted to arrive at an annual profit, is a projection that provides a reasonable basis from which a plaintiff's lost profits can be approximated or inferred under the lower burden of proof applicable for damages in anticompetitive practices cases. AHPW, Inc. v. FSM, 12 FSM R. 544, 555 (Pon. 2004).

When the conduct's nature was discrete and specific, and would have been amenable to injunctive relief had the plaintiff sought it, once that relief had been awarded there could have been no prospective damages since the conduct giving rise to those damages would necessarily have ceased. There should be no recovery for further diminution of a business's value, predicated on the defendant's continuing wrongdoing, after the defendant has been enjoined. The court will thus not award prospective damages from the time of the lawsuit's filing onward because injunctive relief, to which the claim would have been amenable, would have terminated the conduct complained of. But since under the continuing tort doctrine, a plaintiff is

entitled to recover all of the damages that result from on-going tortious conduct, even though the inception of the conduct lies outside the limitations period, the court will award damages from the start of the anticompetitive pepper processing operation in mid-1995 until the plaintiff filed suit. AHPW, Inc. v. FSM, 12 FSM R. 544, 555-56 (Pon. 2004).

When claims of damages for sums the plaintiff owed to third parties on the theory that since its business operations were destroyed by the defendant's conduct, it cannot pay back those amounts, would have depended for their repayment on profits that the operation would have made but for the defendant's conduct. Since future profits are the measure of the business's damages, to allow a separate recovery for these sums would be to permit a double recovery. AHPW, Inc. v. FSM, 12 FSM R. 544, 556 (Pon. 2004).

When the lack of details provided in an attorney's fee affidavit is problematic, but Congress felt that the policy concerns underlying 32 F.S.M.C. 301 *et seq.* were strong, because a successful plaintiff may recover both reasonable attorney's fees and treble damages and the plaintiff has successfully vindicated an interest protected by this statute and when the case presented complex, novel issues and the relief sought was ultimately achieved, in lieu of denying a fee request altogether, the court may reduce the amount of the fee claimed. AHPW, Inc. v. FSM, 13 FSM R. 36, 41 (Pon. 2004).

The usual cause of action when a governmental entity has exercised its regulatory powers improperly is a constitutional due process claim. Pohnpei v. AHPW, Inc., 14 FSM R. 1, 15 (App. 2006).

A state must abide by the same rules as anyone else engaging in business or in the market. Pohnpei v. AHPW, Inc., 14 FSM R. 1, 17 (App. 2006).

Even under national law, sovereigns, any sovereign, have sovereign immunity. But sovereigns are generally considered to have waived that immunity when the sovereign has acted as a participant in commerce instead of as a sovereign. It would seem unfair if a state, as a competitor in a commercial enterprise, could not be held liable and assessed the same damages that another commercial competitor, who committed the same acts, would be assessed. Pohnpei v. AHPW, Inc., 14 FSM R. 1, 20 n.5 (App. 2006).

Commercial activity includes any type of business or activity which is carried on for a profit, and a non-commercial activity is one that is not carried on for a profit. Meninzor v. M/V Caroline Voyager, 15 FSM R. 540a, 540c (Pon. 2008).

The Constitution expressly grants the national government, not the state governments, the power to regulate foreign and interstate commerce, and taxation is a form of regulation. Continental Micronesia, Inc. v. Chuuk, 17 FSM R. 526, 531 (Chk. 2011).

The court cannot accept an interpretation that operating a business within Pohnpei is, in and of itself, sufficient to establish the applicability of Pohnpei state tax law due to minimum contact analysis because to accept it would be to accept that a business whose task it is to act as an intermediary or broker between two clients – a producer and a consumer – who are both based outside the FSM would be assessed the Pohnpei first commercial sales tax, even if the tangible personal property never entered Pohnpei since this is the very heart and soul of international commerce. Genesis Pharmacy v. Department of Treasury & Admin., 18 FSM R. 27, 32 (Pon. 2011).

Goods cannot properly be deemed to have been sold until both parties to the sale have performed. Performance by the buyer requires payment in full or execution of some sort of instrument of credit which the seller is willing to accept in lieu of payment in full. Performance by the seller requires delivery. Genesis Pharmacy v. Department of Treasury & Admin., 18 FSM R. 27, 34 (Pon. 2011).

Whatever commercial banking business standards might apply to a bank cannot be the same as those for a retail/wholesale store. Iriarte v. Individual Assurance Co., 18 FSM R. 340, 359 (App. 2012).

For a retail/wholesale store to cash checks with a corporate payee, particularly a large, off-island corporate payee with an off-island address printed on the check's face, with only an individual's personal endorsement and without written authorization from the corporate payee cannot possibly be considered a good faith commercial business standard. Iriarte v. Individual Assurance Co., 18 FSM R. 340, 359 (App. 2012).

As a matter of law, no individual can ever have the apparent authority to cash a check that has a corporation as the payee, and, as a matter of law, any business that cashes such a check with a corporate payee is not engaged in a commercially reasonable business practice. Iriarte v. Individual Assurance Co., 18 FSM R. 340, 359-60 (App. 2012).