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Michigan Trade Regulation

Vol. 25 No. 1
April, 1998

Antitrust, Franchising and Trade Regulation Section
State Bar of Michigan

INSIDE

MESSAGE FROM THE CHAIR

Greetings from the Council for the Antitrust, Franchising and Trade Regulation Section of the State Bar of Michigan. This year, we are continuing our emphasis on trade regulation developments of local origin which emanate from the Legislature and the Courts of this state. This edition of the section newsletter evidences that emphasis with featured articles on Michigan's franchise law, an update on the status of the pending Uniform Trade Secrets Act in the Legislature, and reports on two Trial Court class certification rulings in price-fixing cases.

This year, you can also look forward to receiving the tri-annual update of the previously published Antitrust Digest. Thanks to the efforts of Editor Irwin Alterman, the update is nearing completion and will soon be on its way to the publisher. The Council is currently exploring options for printing the update either as a supplement to the present loose-leaf volume or as part of a new compilation of the volume itself. The Section will continue to provide this publication to members at no additional charge.

To keep you apprised of Section activities and other pertinent information, the Section continues to sponsor its home page at http://www.michbar.org/sbm/sections/antitrus.htm. We are continuing to explore ways to make the home page relevant and useful to our members.

As always, we welcome any suggestions or comments you may have relative to proposed Section activities, and we actively solicit your assistance in apprising us of significant local rulings or legal developments. Please feel free to author and submit an article for publication in the Section newsletter, or to otherwise provide us with information you would like to share.

-Joanne Geha Swanson

FEATURE ARTICLE

DOES MICHIGAN'S FRANCHISE RELATIONSHIP LAW CREATE SUBSTANTIVE RIGHTS FOR FRANCHISEES?

By John A. Forrest

The Michigan Franchise Investment Law, MCLA 445.1501 et seq. (the "Act"), includes provisions regulating the franchise relationship. Those provisions are found in Section 27 of the Act, which addresses franchise relationship issues such as rights of association among franchisees, termination of the franchise, renewal of the franchise, venue for dispute resolution, transfer by the franchisee and transfer by the franchisor.

Section 27 begins by stating that: "Each of the following provisions is void and unenforceable if contained in any documents relating to a franchise:"

Section 27 then has nine paragraphs dealing with the various relationship issues noted above. As an example, subparagraph (e) states: "A provision that permits the franchisor to refuse to renew a franchise on terms generally available to other franchisees of the same class or type under similar circumstances. This section does not require a renewal provision."

As worded, Section 27(e) provides that a provision in a franchise agreement that permits the franchisor to refuse to renew a franchise on terms generally available to other franchisees is void and unenforceable. If such a provision is voided, do you then look to general contract law to de-

termine the rights of the parties. Under general contract law, there generally is no requirement to offer to renew a contract after the expiration of the stated term. Or, in the alternative, does Section 27(e) create a substantive right for a franchisee. In other words, is the franchisor required by Section 27(e) to offer renewal to a franchisee if the franchisor is offering renewal to other similarly situated franchisees? The plain language of Section 27 does not seem to support the latter interpretation.

This issue had only been addressed by the federal courts until a Michigan Court of Appeals decision in early 1997. The federal courts had found that Section 27 does create substantive rights and that a private right of action existed to enforce those rights. General Aviation, Inc. v Cessna Aircraft Co., 915 F.2d 1038 (6th Cir. 1990)(Cessna I); General Aviation, Inc. v Cessna Aircraft Co., 13 F.3d 178 (6th Cir. 1993) (Cessna II). However, the 6th Circuit later questioned its decision in the Cessna cases. In Geib v Amoco Oil Co., 29 F.3d 1050 (6th Cir. 1994)(Geib I), the 6th Circuit asked the Michigan Supreme Court to answer the question of whether Section 27 created a private right of action for franchisees. The Michigan Supreme Court declined to answer this question. As a result, the 6th Circuit ruled consistently with the Cessna I case, finding a substantive right in Section 27 which was enforceable by a private right of action. Geib v Amoco Oil Co., CCH Business Franchise Guide Par. 10,628 (6th Cir. 1995) (Geib II). Finally, in Franchise Management Unlimited, Inc. et al. v America's Favorite Chicken, 221 Mich App 239 (1997), the Michigan Court of Appeals addressed the issue. The Court of Appeals indicated that it did not agree with the federal court's interpretation of Section 27 of the Act.

The Cessna case arose from the nonrenewal of a Cessna distributorship agreement between General Aviation, Inc. and the Cessna Aircraft Company at the end of 1984 after a series of one year distributorship agreements beginning in 1977. In Cessna I, the 6th Circuit reversed the district court's holding that the Act did not apply. The Cessna I court was also faced with a question as to the retroactivity of the 1984 amendments to the Act, because the last contract between Cessna and General Aviation was entered into in 1983. The 6th Circuit remanded for further consideration by the district court, holding that the 1984 amendments to the Act would apply to this case. More importantly, in a brief description of the 1984 amendments, the 6th Circuit stated that the 1984 amendments to Section 27 of the Act made "any franchise contract provisions in violation thereof 'void and unenforceable', 445.1527, thereby creating private rights of action for their violation." (Emphasis supplied). With this simple statement, supported by no analysis or discussion, the 6th Circuit declared that Section 27 created substantive rights enforceable by private right of action.

In Cessna II, the Court assumed that Section 27 created substantive rights. The Court framed the issue as whether Section 27(e) of the Act required Cessna to have a legitimate reason for refusing to renew General Aviation's distributorship agreement while renewing contracts with other, similarly situated franchisees, or whether Cessna could lawfully refuse to renew its franchise agreements at will as long as it offered similar terms to those franchisees it did renew. There is no indication that the parties disputed the Court's assumption regarding Section 27(e). Apparently the parties believed the issue had been decided in Cessna I.

The Geib case arose out of Amoco Oil Company's refusal to renew Geib's motor fuel sales and automotive service franchises. In Geib I, Geib claimed that Section 27(d) of the Act required Amoco to repurchase his equipment. Section 27(d) provides, in part, that the following provision is void and unenforceable: "A provision that permits a franchisor to refuse to renew a franchise without fairly compensating the franchisee by repurchase or other means for the fair market value at the time of expiration of the franchisee's inventory, supplies, equipment, fixtures, and furnishings."

The District Court summarily dismissed this claim, concluding that the Petroleum Marketing Practices Act, 15 USC 2801 et seq., preempted the Michigan Franchise Investment Law. The District Court also ruled that, in the alternative, the Act did not provide a private right of action for violations of Section 27.

The District Court relied in part on Section 34 of the Act which instructs courts not to imply private rights of action. Section 34 states as follows: "Except as explicitly provided in this Act, civil liability in favor of any private party shall not arise against a person by implication from or as a result of the violation of a provision of this act or a rule or order hereunder. Nothing in this act shall limit a liability which may exist by virtue of any other statute or under common law if this act were not in effect."

The Geib I Court noted that the District Court's interpretation of Section 27 was at odds with the Cessna I holding. The 6th Circuit also noted that no Michigan courts had addressed this issue since Cessna I was decided. Under these circumstances, the Geib I Court certified the question, as to whether Section 27 created a private right of action, to the Supreme Court of Michigan and retained jurisdiction pending a response from the Supreme Court of Michigan. Unfortunately the Michigan Supreme Court did not accept certification of the question. Consequently, in the Geib II opinion, the 6th Circuit found it had no alternative but to apply the precedent of the Cessna I decision. The case was reversed and remanded to the District Court for further consideration of Geib's rights under Section 27(d) of the Act.

A Michigan appeals court finally addressed this issue in the America's Favorite Chicken case. This case arose from a dispute over the franchisor's insistence that the franchisee release claims against the franchisor before the franchisor would approve a transfer of the franchise. Although this case involved issues relating to Section 27 of the Act, the issue relevant to this discussion involved Section 5 of the Act. Section 5 prohibits a person, in connection with the filing, offer, sale or purchase of any franchise, from employing fraudulent practices, making untrue statements or omitting to state material facts. The franchisee claimed that the franchisor's demand for a release was an unfair practice under Section 5 of the Act. The Circuit Court had summarily dismissed this claim, holding that it was not an unfair practice to enforce an express contractual provision.

The Court of Appeals upheld the Circuit Court's ruling, but on different grounds. The Court of Appeals noted that Section 31 of the Act, which provides franchisees with a private right of action for certain violations of the Act, only imposes liability on a person who sells a franchise in violation of Section 5 of the Act. In this case, since a transfer between franchisees was taking place, the franchisor was not selling a franchise at the time of the alleged unfair conduct. Consequently, Section 31 of the Act did not provide a private right of action for the franchisee. Although the franchisee argued for a more expansive reading of Section 31, the Court declined to imply a private right of action beyond any rights clearly provided in Section 31. In support of its position, the Court cited Section 34 of the Act which is quoted above.

The Court of Appeals ended its opinion with a footnote (Footnote 2) addressing the apparent contradiction between the Court's ruling and the ruling in the Cessna I case. Footnote 2 reads as follows: "We note that our holding arguably

contradicts the 6th Circuit's holding in [Cessna I], that a franchisee had a private right of action under Section 27 of the [Act]. We note, however, that the 6th Circuit later questioned the correctness of this holding in [Geib I]. Recognizing that the Legislature's contrary intent was expressed in Section 34, the 6th Circuit certified the question of whether Section 27 of the [Act] authorizes private actions to the Michigan Supreme Court, but the Michigan Supreme Court declined to answer the question. See In Re: Certified Question, 447 Mich 1216 (1994). Thereafter, the 6th Circuit followed its prior holding on the issue. [Geib II]. The 6th Circuit's interpretation of the [Act] is not binding on this court. See State Board of Education v Houghton Lake Comm Schools, 430 Mich 658, 675; 425 NW 2d 80 (1988). Given the Legislature's clear intent expressed in Section 34 of the [Act], we decline to imply a cause of action for nonpurchasers of a franchise for violations of Section 5."

Section 31 of the Act, which provides for private rights of action, does not provide a private right of action for violations of Section 27. Therefore, based on the America's Favorite Chicken case, it appears that the Michigan courts will not find that Section 27 creates substantive rights for franchisees enforceable by private right of action. However, until the Michigan Supreme Court rules on this issue, it appears that federal courts in the 6th Circuit will continue to follow the precedent of the Cessna I case.

Oakland County Circuit Court Denies Class Certification in Pharmaceutical Price-Fixing Case

By David Ettinger

In Wood v Abbott Laboratories, Inc., et al, (Case No. 96-512561-CZ), Oakland County Circuit Court Judge Steven N. Andrews denied certification of a class action alleging price-fixing in the sale of brand name pharmaceuticals by 23 national pharmaceutical manufacturers. The decision, rendered after an evidentiary hearing, focused on the significance of the "indirect purchaser" nature of the lawsuit, which was brought by a consumer. Plaintiff claimed that she was injured by price-fixing by manufacturers. Yet Defendants established that any price-fixing that led to higher prices would have to be passed on to particular consumers by the individual retailers with which they dealt in order for them to be injured, and that the question of passing on raised individual questions that would vary from retailer to retailer and drug to drug. The Court found as a result that common issues would not predominate.

Ingham County Circuit Court Denies Class Certification In Price-Fixing Case

By Joanne Geha Swanson

Another decision denying class certification in a price-fixing case has been rendered by a Michigan Court. In Wilcox v Archer-Daniels-Midland Co, (Case No. 96-82473-CP), Ingham County Circuit Court Judge William Collette denied a request to certify a class of consumers in an action alleging a conspiracy to fix prices for high fructose corn syrup and citric acid. The ingredients are used in various food products, particularly soft drinks and breakfast cereals.

Plaintiff asserted that the Defendants conspired to fix the price offered to companies that used the items in their goods and, as a result, the prices charged to consumers were proportionately higher than they might otherwise have been. Because use of the ingredients is widespread in several "common products," the Court noted that the requested class would essentially consist of everyone residing in the state during the relevant time period (January 1, 1992 through December 31, 1994).

In analyzing the request for certification under the class action rule requirements, the Court noted that the numerosity requirement had obviously been met. Additionally, the Court observed that there were "numerous common questions of law and fact that would be most expeditiously handled by a class action," the most obvious being whether a conspiracy to fix prices existed. The Court further found that the claims of the representative parties were typical of the claims of the class and that the attorneys representing the class had tremendous experience in civil litigation. Additionally, the Court could ascertain no "apparent conflict between the position taken by the named Plaintiff and the members of the class at large."

However, the Court found that Plaintiff's claim that everyone in the state was a victim and should be permitted to recover damages created "a vast problem of proof that ... tolls the death knell for the request to certify a class in this case." The problem, the Court said, was that the proposed class was "not a fixed entity" that could "be readily ascertained with any degree of certainty" but was a "fluid group that is ever-changing in its makeup."

The Court considered Plaintiff's claim that it would be a simple matter for individual claimants to provide the number of months and years they lived in the state during the applicable time period but found that, in view of the state's population of approximately eight million people, the paperwork required to handle this portion of the claim would be staggering. The Court also noted the inability to ascertain the amount of damages suffered by any one claimant. Many of the products were consumed without knowledge as to whether they contained the ingredients involved in the alleged conspiracy. Nor would consumers likely have maintained records of the amount of products they consumed during the time in question.

The Court rejected the suggestion that the amount of damages could be generalized based upon an assumption that everyone ate or drank the same amount of the products during the relevant time period. While noting that the people of the State deserved protection from illegal price fixing, the Court said there were other mechanisms available to punish the alleged illegal actions.

Uniform Trade Secrets Act Pending

By Howard B. Iwrey

House Bill No. 5312, the Uniform Trade Secrets Act, has been reported favorably out of the Michigan House Commerce Committee and is now on its way to the "floor" of the House for consideration.

The Act codifies the definition of a "trade secret" and provides a private cause of action for misappropriation of trade secrets. The remedies provided for in the Act include injunctive relief to "eliminate any commercial advantage to the person who misappropriated the trade secret"

and actual damages or a "reasonable royalty." These provisions are similar to current Michigan common law. Additionally, the Act provides for double damages and attorney's fees in certain cases.

The Act requires that courts implement procedures (such as protective orders, in camera hearings, etc.) to protect trade secrets from exposure during the course of litigation. Many companies have been reluctant to pursue trade secrets litigation because of the fear that the mere institution of the lawsuit would open the trade secrets to the public.

The Antitrust, Franchising and Trade Regulation Section has endorsed enactment of this Act, which has been adopted by 33 other states.

Supreme Court Denies Case Designation Request

The Section has been advised by the State Court Administrative Office that the Section's request to amend Michigan Court Rule 8.117 to include an additional case-type code for antitrust and trade regulation cases has been denied because it was not persuaded that sufficient cause existed to amend the rule. The Section requested the designation to make it easier to identify, track and report on antitrust and trade cases pending in the circuit courts.

Seminars Of Interest

April 13-14, 1998—New York City, NY;
May 14-15, 1998—San Francisco, CA
Technology Licensing & Litigation.
Sponsored by Practising Law Institute.

April 23-24, 1998—New York City, NY;
June 11-12, 1998—San Francisco, CA
Handling Mergers & Acquisitions in High-Tech & Emerging Growth Environments.
Sponsored by Practising Law Institute.

April 30-May 1, 1998—New York City, NY
Advanced Criminal Antitrust Workshop.
Sponsored by the American Bar Association Section of Antitrust Law

April 30-May 1, 1998—Atlanta, GA;
May 28-29, 1998—New York City, NY;
June 25-26, 1998—Chicago, IL;
July 23-24, 1998—San Francisco, CA
39th Annual Antitrust Law Institute.
Sponsored by Practising Law Institute.

May 11-12, 1998—New York City, NY
19th Annual Seminar on Distribution & Dealer Termination.
Sponsored by New York Law Journal.

May 14-15, 1998—Nashville, TN
Nuts and Bolts of Securities Law.
Sponsored by Practising Law Institute. Co-Sponsored by Vanderbilt University Law School's Corporate and Securities Law Institute.

June 11-12, 1998—New York City, NY;
July 27-28, 1998—San Francisco, CA
CORPORATE COMPLIANCE: Caremark and the Globalization of Good Corporate Conduct.
Sponsored by Practising Law Institute.

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