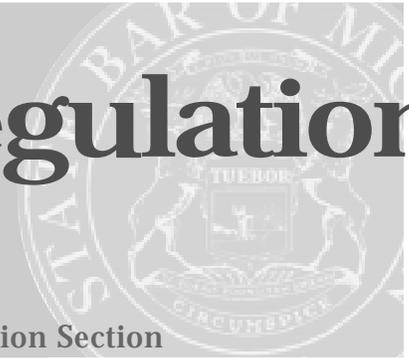


# Michigan Trade Regulation

Volume 27, No.1 August 1999

State Bar of Michigan Antitrust, Franchising, and Trade Regulation Section



## Franchisor Not Liable for Alleged Discriminatory Acts of Franchisee's Employee

By Howard B. Iwrey

The United States District Court for the Eastern District of Michigan recently ruled that a franchisor could not be held liable for civil rights violations allegedly committed by an employee of a franchisee.

The franchise agreement at issue stated that the franchisees had "complete control" over hiring and supervision of its employees. The plaintiffs nonetheless argued that the franchisor should be held liable for its franchisees' alleged discriminatory actions, because the franchise agreement, among other things, established an agency relationship through its regulation of such things as advertising, franchise fees, inventory, bookkeeping and store layout.

The court held that these types of regulations were insufficient to establish an agency relationship because they did not "establish control over the day-to-day activities of the . . . store in question" and there was no evidence that the franchisor controlled employee matters.

The plaintiffs also argued that the franchisor should be held liable under the doctrine of "apparent authority." Under this doctrine, an agency relationship may be established where the person dealing with the franchisee had a reasonable belief that the franchisor, through some affirmative act or negligence, authorized the franchisee's actions. Plaintiffs claimed that the franchisor's advertising of the convenience and friendliness of its stores (in both English and Spanish) was sufficient to establish apparent authority. Plaintiffs, how-

ever, failed to come forward with any affirmative evidence about particular advertising or representations they relied upon or how such advertising led plaintiffs to believe that they were dealing with the franchisor and not the franchisee. Accordingly, the court rejected the apparent authority claim.

*Nieves et al. v. Southland Corp., et al.* (U.S. Dist. Ct., E.D. Mich, Case No. 97-CV-10398—C) (Cleveland, I).

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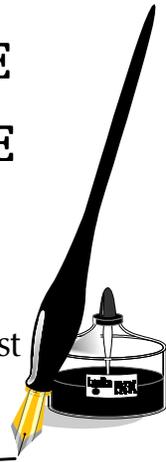
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**MESSAGE  
FROM THE  
CHAIR**

By John A. Forrest



Greetings from the 1998-1999 Antitrust, Franchising and Trade Regulation Section Council. I want to thank our immediate past Chairperson, Joanne Swanson for her excellent service to the Section as Chairperson and publications editor. Under Joanne's tutelage, the Section participated in a very successful joint program with the Business Law Section at the State Bar's Annual Meeting and published an updated and completely restated Antitrust Digest.

**MEMBERSHIP PARTICIPATION**

As in the past, the Section Council will conduct seminars, publish this newsletter and the Antitrust Digest, and advise the State Bar on issues involving antitrust, franchising and trade regulation matters. The Section Council encourages and welcomes your comments on the quality and value of the Section activities, your ideas for improving those activities or for other activities you believe the Section should undertake. You should contact the Council if you have ideas for educational activities or if you wish to participate in those activities. Also, we are always looking for articles from members of the Section for the Newsletter. The Council holds monthly meetings that are open to all Section members. The meetings are usually held on the first or second Wednesday of each month. If you are interested in attending any meetings, feel free to call any Council member for details.

**LEGISLATIVE ACTIVITIES**

On the legislative front, the Council, specifically Howard Iwrey, was instrumental in Michigan's recent adoption of the Uniform Trade Secrets Act. See Howard's article on that

*Continued on page 5*

## Physician Termination Case Dismissed for Failure to Alleged Properly Defined Relevant Market

By Howard B. Iwrey

The United States District Court for the Western District of Michigan recently dismissed, pursuant to Fed.R.Civ.P. 12(b)(6), an obstetrician's antitrust, civil rights and tort claims stemming from the termination of his obstetrical privileges at a Kalamazoo hospital and the obstetrical department of a nearby community hospital (which was leased by the Kalamazoo hospital). The plaintiff alleged that the Kalamazoo hospital and the community hospital conspired to eliminate competition in the obstetrics market.

The court also held that the plaintiff failed to properly define the relevant geographic market. The plaintiff defined the market to include only the service area of the community hospital. The court held:

The relevant geographical area cannot, as a matter of law, be defined narrowly by reference to [the community hospital's] facilities. As essentially admitted [by plaintiff], the geographic area in which consumers can seek obstetric services includes at least the areas surrounding Kalamazoo, Michigan, if not an even greater area.

The court also found that the lease itself was not sufficient to constitute a conspiracy with respect to the two hospitals' decisions on the plaintiff's obstetrical privileges. Also relevant was the fact that the Kalamazoo hospital and community hospital made different decisions on the plaintiff's obstetrical privileges.

*Beyer v. LakeView Community Hospital, et al.* (U.S. Dist. Ct., W.D. Mich., Case No. 1:97-CV-750) (Enslin, J.)

## Antitrust Challenge To Department of Public Health Action Dismissed Under Governmental Exception to MARA

By James E. DeLine

The Michigan Court of Appeals in *Bio-Magnetic Resonance, Inc. v Department of Public Health*, 234 Mich App 225 (1999), dismissed an antitrust challenge to action taken by the Michigan Department of Public Health under the governmental exception to the Michigan Antitrust Reform Act (MARA). Bio-Magnetic provides medical diagnostic services using magnetic resonance imaging (MRI) units.

When Bio-Magnetic wanted to acquire a second MRI unit, it filed a petition with the Michigan Department of Public Health for a certificate of need. The Department issued a proposed decision recommending the denial of Bio-Magnetic's application. Bio-Magnetic then filed suit against the Department in the Michigan Court of Claims, alleging that the standard of review used by the Department created

a monopoly in violation of the Michigan Antitrust Reform Act.

The court of claims granted summary disposition in favor of the Department, concluding that the Department's actions were authorized by the public health code and that the Department was exempt from state antitrust laws under MCL §445.774. Bio-Magnetic appealed.

*“any unit of government”  
is excepted from the provisions of MARA...”*

The Michigan Court of Appeals affirmed. The court of appeals held that the statutory language of the governmental

*Continued on page 7*

State Bar of Michigan's  
**Antitrust, Franchising and Trade Regulation Section**  
**Annual Meeting**

**September 16, 1999**

**9:30 a.m.**

**Business Meeting & Elections**

*Amway Grand Plaza*  
*Pearl Room, Conference Level*  
*Grand Rapids*

# Michigan Adopts Uniform Trade Secrets Act

By Howard B. Iwrey

Through the efforts of the Antitrust, Franchising and Trade Regulations Section, on December 31, 1998, Governor Engler signed into law Public Act 448 of 1998, adopting the Uniform Trade Secrets Act.

The Act provides for injunctive and monetary relief for misappropriation of trade secrets. The Act defines trade secrets to include "a formula, pattern, compilation, program, device, method, technique, or process" which: (a) has independent economic value to the person possessing it because of the fact that it is not generally known or readily ascertainable to another, and (b) the person possessing it has made "reasonable efforts to maintain its secrecy."

Misappropriation is defined as acquiring a trade secret with reason to know that the trade secret was acquired by improper means or disclosing a trade secret with the knowledge that it was improperly acquired or that it had been acquired by accident or mistake.

The Act provides for both injunctive relief and damages. The damages relief could include damages representing the actual loss, and, in addition, a reasonable royalty. Furthermore, courts award double damages if the misappropriation "was willful or malicious." Attorneys fees may be awarded where, among other things, a claim of misappropriation is made in bad faith by a plaintiff or where a defendant willfully and maliciously misappropriated trade secrets.

The Act also instructs courts to preserve the secrecy of alleged trade secrets by reasonable means, including protective orders, in-camera hearings, sealing of the record and orders of involved persons not to disclose alleged trade secrets. Thus, parties victimized by misappropriation should be less concerned about disclosing trade secrets merely by filing a lawsuit. Finally, the Act establishes a three year statute of limitation.

The Section wishes to thank State Representative Andrew Richner (Grosse Pointe) for his primary role in sponsoring the Act.

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## Message from the Chair

*Continued from page 2*

subject in this Newsletter. Also, the Council has been monitoring proposed legislation of possible interest to the Section by reviewing proposed legislation at the website for the Michigan legislature ([www.michiganlegislature.org](http://www.michiganlegislature.org)). This website is an valuable tool for monitoring legislation. Please visit the website and contact us if you believe the Section should take action with respect to any pending legislation.

## CHANGES IN THE AG'S OFFICE

As you are probably aware, Robert Ward is no longer the Assistant Attorney General for the State of Michigan responsible for franchising and consumer protection matters. The Council wishes to thank Robert for his many years

of quality service in these areas. He will be missed. The Assistant Attorney General now responsible for this area is Paul Novak. We look forward to working with Paul in the future.

## FUTURE ACTIVITIES

The Franchising, Distribution and Dealer Law Committee is planning an afternoon seminar which will be an update on franchise issues. Details will be provided in the near future. The Section is also considering a program at the State Bar annual meeting, possibly jointly with the Business Law Section. If you have any comments or if you wish to participate in any of these activities, please contact a Council member. ■

# Welcome to Our Home



**www.michbar.org**

**Be Sure to Visit our Internet site for the latest Section news and project updates!**

## Antitrust Challenge to...

Continued from page 3

exception is plain and unambiguous. The exception states that "any unit of government" is excepted from the provisions of MARA "when the unit of government is acting in a subject matter area in which it is authorized by law to act." MCL §445.774(3). Accordingly, the court of appeals concluded that the Department's conduct with regard to Bio-Magnetic's application was statutorily exempt from attack on antitrust grounds. ■

## Seminars of Interest

### September 30-October 1, 1999—New York, NY

*Advanced Distribution Workshop: Antitrust and Advertising Issues*

Sponsored by American Bar Association Section of Antitrust Law

### November 11-12, 1999—Sedona, AZ

*The Sedona Conference—Antitrust: Old and New*

Sponsored by Minnesota Institute of Legal Education

### November 11-12, 1999—Washington, D.C.

*The New Joint Venture Guidelines Program*

Sponsored by American Bar Association Section of Antitrust Law

### February 24-25, 2000—Scottsdale, AZ

*Discovery in Antitrust Litigation*

Sponsored by American Bar Association Section of Antitrust Law

### April 5-7, 2000—Washington, D.C.

*48th Annual Antitrust Law Spring Meeting*

Sponsored by American Bar Association Section of Antitrust Law

### June 1-2, 2000—San Francisco, CA

*Issues in Intellectual Property Antitrust*

Sponsored by American Bar Association Section of Antitrust Law

### July 10-12, 2000—New York, NY

*ABA Annual Meeting Antitrust Law Calendar*

Sponsored by American Bar Association

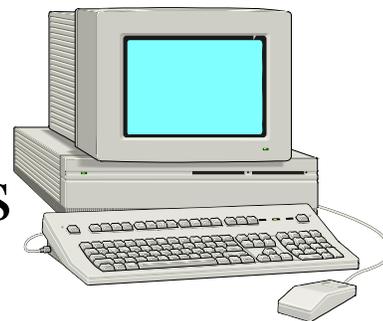
### July 16-19, 2000—London, England

*ABA Meeting in London*

Sponsored by American Bar Association



## Antitrust Web Sites



### State Bar of Michigan Antitrust, Franchising and Trade Regulation Section

<http://www.michbar.org/sections>

### ABA's Section of Antitrust Law

<http://www.abanet.org/antitrust>

### Antitrust Case Summary Browser

<http://www.stolaf.edu/people/becker/antitrust>

### Antitrust Law and Economics Review

<http://www.ljx.com/practice/antitrust>

### Antitrust Policy On-line Resource

<http://www.ljx.com/practice/antitrust>

### Antitrust Resources

<http://www.law.cornell.edu/topics/antitrust.html>

### Department of Justice Antitrust Division

<http://www.usdoj.gov/atr>

### Federal Trade Commission

<http://www.ftc.gov>

### FTC - Pre-merger/Hart-Scott-Rodino

<http://www.ftc.gov/bc/hsr>



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