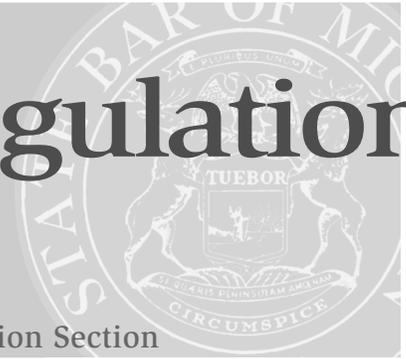


Michigan Trade Regulation

Volume 29, No.2 Summer 2001

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



Baby Food Battle Update

By David G. Chardavoine

An adverse ruling by the U.S. Court of Appeals for the District of Columbia Circuit has caused the H.J. Heinz Company to drop its plans to acquire Milnot Holding Corporation, makers of “Beech-Nut” baby food. In a previous newsletter, we reported on action taken by the FTC to contest the proposed merger between the two companies which are the smallest competitors in the three-firm market for the sale of jars of baby food in the United States. The Gerber Company of Fremont, Michigan is the third, and by far the largest, competitor in that market.

On October 18, 2000, the U.S. District Court for the District of Columbia denied the FTC’s request to enjoin the merger even though the court found that the merger would increase the market’s Herfindahl-Hirschman Index substantially and that entry into the market by a new competitor would be “difficult and improbable.” The FTC appealed that ruling and, on November 8, 2000, the U.S. Court of Appeals for the District of Columbia Circuit enjoined the merger pending appeal.

After hearing from the parties in February, the Court of Appeals entered an order, on April 27, 2001, holding that the district court should have granted the FTC’s motion for a preliminary injunction under § 13(b) of the Federal Trade Commission Act. In an opinion written by Judge Karen LeCraft Henderson, the court of appeals held that the district court should have presumed that the merger would substantially lessen competition based on the market-share figures, the high barriers to entry, and the existence of vigorous price competition between the merger partners, both

at the wholesale level nationwide and at the retail level in some metropolitan areas.

The court of appeals was not convinced by Heinz’s attempts to rebut the presumption that the merger would decrease competition. In particular, the court chided the district court for failing to explain why Heinz could not achieve efficiencies in distribution and innovation without a merger.

A few days after the decision of the court of appeals, Heinz announced that it was abandoning the acquisition of Milnot Holdings. Thus, Gerber remains the market’s giant with a market share that is more than three and a half times larger than that of its nearest rival.

IN THIS ISSUE

- Message from the Chair 3
- Legislative News 4
- Websites for the Antitrust Practitioner.. 6
- Annual Meeting Information 7

**Antitrust, Franchising and
Trade Regulation Section**

**2000-2001 Officers
and
Council Members**

Chairperson

Mark T. Boonstra

Vice-Chairperson

Daniel R. Gravelyn

Secretary

James E. DeLine

Treasurer

Rick Kalisher

Council Members

Elizabeth Joliffe Basten

Stanford P. Berenbaum

David G. Chardavoyne

Camile Cleveland

Craig M. Halseth

K. Scott Hamilton

Rick Kalisher

Brian J. Masternak

Lizbeth S. O'Shaughnessy

Steven M. Raymond

Gregory D. Wittrock

FTC Commissioner Leary Speaks at Section Luncheon

FTC Commissioner Thomas Leary addressed the gathering of Section members, practitioners and others whom attended the roundtable luncheon sponsored by the Antitrust, Franchising & Trade Regulation Section on March 23 at the Detroit Club. Commissioner Leary offered his perspective on the inner workings of the FTC, including his predictions on how the FTC will function under the Bush administration. He also provided valuable insight about the FTC's agenda for the upcoming year. According to Commissioner Leary, most of the FTC's resources have been devoted to merger activity, and he did not expect much change in the immediate future.

Upcoming Seminars of Interest

**Mergers & Acquisitions:
Getting Your Deal Through In the
New Antitrust Climate**
(ABA Section of Antitrust Law)

October 10-12, 2001
New York City Bar, NY

**The Advanced Forum on Antitrust Litigation:
What You Need to Know to Win Your Case in
Today's Changing Landscape**
(American Conference Institute)

October 15-16, 2001
Washington, D.C.

**MESSAGE
FROM
THE CHAIR**

By Mark T. Boonstra



Greetings from the Council of the
Antitrust, Franchising, and Trade Regulation Section.

We were pleased to have the opportunity to gather with you at the Detroit Club on March 23, 2001 for our Roundtable Luncheon with Federal Trade Commissioner Thomas B. Leary. It was our good fortune that Commissioner Leary's schedule enabled him to spend some time with us on that day, and it was our pleasure to have been able to invite him back to Michigan and to our Section. The attendance was splendid; the food was first-rate; and the discussion was lively and informative. Thank you to all who were able to make it.

Please mark your calendars for the September 12-14, 2001 State Bar Annual Meeting, to be held at the Lansing Center & Radisson Hotel in Lansing. The Antitrust, Franchising, and Trade Regulation Section is scheduled to meet on the morning of the 12th. We are exploring opportunities for a program to be held in conjunction with our section meeting. If you are interested in particular topics or programs, please let us know.

Please also visit our website at www.michbar.org/sections/antitrust/. It's not quite there yet, but it's beginning to take shape. If you have ideas or suggestions for what you'd like to see there, let us know that too.

As Spring turns into Summer, watch your mailbox for the latest edition of the Michigan Antitrust Digest. Our thanks to Irwin Alterman for his continued assistance in updating this valuable research tool for antitrust practitioners in Michigan.

As always, if you have comments, questions, or suggestions for the Council, please feel free to contact me or any of our officers or council members.

Legislative News

By David G. Chardavoine

Two recent statutes enacted by the Michigan legislature may be of interest to members of the Section:

Amendment of the Michigan Dealer Act, [2000] Mich. Pub. Act 239, codified at M.C.L. §445.1561-.1583.

Motor vehicle manufacturers, distributors, and importers (i.e., those who wholesale motor vehicles) and their licensed dealers are engaged in a perpetual, if usually polite, struggle for dominance. In 1981, the Michigan legislature gave a boost to the dealers in that struggle by enacting the Michigan Dealer Act which prohibits motor vehicle wholesalers from using certain practices, with regard to dealers, that the Act deems to be unfair. For example, the Act regulates the manner in which new motor vehicles are allocated among, and delivered to, dealers.

Vehicle wholesalers are not fans of the Act. In particular, they have long objected to one provision of the Act which prohibits them from establishing a new dealership that would “unfairly compete” with an existing dealer. On the other hand, dealers believe there are new threats to their business not covered by the Act. Dealers are especially concerned that wholesalers will try to increase their profit margins, and make dealers obsolete, by selling vehicles and repair services directly to consumers, both over the Internet and through wholesaler-owned dealerships.

In response to those concerns on both sides, the legislature has recently passed a compromise amendment of the Act that became effective on June 28, 2000. Wholesalers are now prohibited from selling vehicles to anyone but a dealer and are limited in their ability to own or control a dealership. On the other hand, the “unfair competition” restriction on the location of new dealerships has been deleted.

The legislation amends §14(g) of the Act by adding two new subsections. One of those new subsections prohibits any attempt by a wholesaler to:

Sell any new motor vehicle directly to a retail customer other than through its franchised dealers, unless the customer is a nonprofit organization or a federal, state, or local government or agency.

The other new subsection provides that a wholesaler may not:

Directly or indirectly own, operate or control a new motor vehicle dealer, including, but not limited to, a new motor vehicle dealer engaged primarily in performing warranty repair services on motor vehicles pursuant to the manufacturers’ warranty.

However, the amendment does provide three exceptions to that prohibition on wholesalers owning dealerships. Wholesalers are allowed to own or control a dealership during its sale or some other transfer of ownership, and some wholesaler-owned dealerships existing on May 1, 1999, have been exempted from the ban. On the other hand, wholesalers seem to have lost the ability to take over a dealership when no change of ownership is contemplated.

The Music Royalty Practices Act, [2000] Mich. Pub. Act. 430, codified at M.C.L. § 445.2101-.2108.

In this Act, the Michigan legislature has established rules for the conduct of agents for performing rights societies (such as ASCAP or BMI) in their dealings with owners of stores, bars, or other businesses where music is performed, broadcast, or transmitted “for the enjoyment of members of the public assembled in that place.” The Act does not (and clearly could not) affect copyright holders’ rights to be paid

royalties for playing their music. Instead, the Act attempts to regulate the manner in which performing rights societies go about obtaining royalties for their artists from businesses (other than radio or television stations) that either have live, non-dramatic musical performances or play music electronically for their customers or employees. Specifically, the Act requires that a performing rights society must:

- ☒ Maintain, and make available to the public, both (1) an electronic data base listing the music in the society’s repertoire and the names of the artists and publishers that the society represents; and (2) a toll-free telephone number for answering questions about specific works; and
- ☒ Provide businesses, in writing and at least 72 hours before signing any contract to pay royalties, information regarding rates and terms of royalties,

the electronic database, and the fact that there are exemptions that may exclude the business from having to pay royalties.

The Act requires that all contracts to pay royalties must be in a writing signed by all parties and must contain certain specific information. In addition, agents for performing rights societies are prohibited from using unfair or deceptive practices in obtaining or enforcing a contract. In particular, agents must advise businesses of ways that they can avoid copyright liability other than entering into such a contract (such as not using copyrighted music or obtaining a license directly from the artist or publisher).

Any person injured by a violation of the Act may sue to obtain actual damages and reasonable attorney fees, an injunction, or “any other relief available in law or equity.”

Welcome to Our Home www.michbar.org

Be sure to visit our Internet site for the latest Section news and project updates!



Websites for the Antitrust Practitioner

By Brian Masternak

While many of us use the Internet to provide a break from their work day, taking a few moments for a quick check of the market, news or sports scores, we should be aware that the Internet can also provide a useful tool in our antitrust and unfair competition practices. The web is filled with antitrust and unfair competition resources that provide a valuable starting place for practitioners faced with such issues. Here are four of the best such resources on the Internet:

ANTITRUST POLICY HOMEPAGE:

www.antitrust.org

Perhaps the most comprehensive resource on the Internet is the Antitrust Policy Homepage, found at. The site, which was founded by a Vanderbilt University economics professor, features sections addressing mergers, vertical restraints and price fixing. Within each of those sections, the site includes scholarly articles, key case summaries (but not full-text cases), and recent news. The site also includes a discussion board where practitioners can ask (or answer) questions and discuss current topics in antitrust and unfair competition.

Probably the most interesting feature of the Antitrust Policy site is the merger simulation section. There, the site authors have provided a number of interactive, computer models that are designed to predict the outcome of different merger scenarios based on information input by the user. There are different simulations, including ones that allow the user to compute potential damages or to predict FTC response to a proposed merger.

FEDERAL TRADE COMMISSION HOMEPAGE:

www.ftc.gov

This FTC website includes a number of features that are useful to antitrust practitioners, including recent news releases and public reports, meeting and seminar announcements, summaries of recent cases involving the FTC, advisory opin-

ions and some articles. The site also contains some “plain English” guides to the antitrust laws, designed primarily for consumers and businesses, that may be of some use for lawyers seeking a quick, simplified overview of this area of the law.

ANTITRUST CASE BROWSER:

www.antitrustcases.com

This site is sponsored by St. Olaf College in Minnesota. It includes summaries (but not full text) of antitrust cases, grouped either alphabetically, chronologically, by legal area (e.g., boycotts, exchange of information among competitors, exclusive dealing), or product. This site provides a good starting place for finding cases dealing with a particular product or aspect of the antitrust laws.

DEPARTMENT OF JUSTICE ANTITRUST DIVISION:

www.usdoj.gov/atr/

This DOJ Antitrust Division website provides an overview of the Antitrust Division’s structure and mission, a database of press releases going back to 1994, a database of selected pleadings filed by the DOJ in antitrust cases, and an employee locator. The site also includes a Freedom of Information Act “Reading Room” that compiles information that is frequently requested by the public, including the useful Antitrust Division Staff Manual.

State Bar of Michigan



Annual Meeting

Mark Your Calendar!

September 12-14, 2001

Lansing Center
Lansing, Michigan

3 DAYS OF PRACTICAL SEMINARS & PROGRAMS

Wednesday
CORPORATE/BUSINESS

Thursday
ACCESS TO JUSTICE

Friday
LITIGATION/PROBATE

ANTITRUST FRANCHISING & TRADE REGULATION SECTION

WEDNESDAY, SEPTEMBER 12, 2001, 9:30 a.m.

Business Meeting and Election.

Room 102, 1st Floor (LC)

STATE OF THE LAW
FREE TO ALL ATTENDEES



Supporting access to justice for all.



Antitrust Franchising & Trade Regulation Section

State Bar of Michigan
Michael Franck Building
306 Townsend Street
Lansing, MI 48933-2083

First Class
U.S. PostagePaid
Lansing, MI 48933
Permit No. 191