# Michigan Trade Regulation

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


## Hart-Scott-Rodino Reform Legislation Raises Reporting Threshold—and Filing Fees

By Howard B. Iwrey

On December 21, 2000, President Clinton signed into law the most significant amendments to the Hart-Scott-Rodino Antitrust Improvements Act ("HSR"), 15 U.S.C. 18a, since the law was originally enacted in 1976. These amendments went into effect on February 1, 2001. This legislation, among other things, eliminates all HSR requirements for transactions valued at less than $50 million and raises the filing fees for transactions valued at $100 million or more.

HSR requires the acquiring and acquired persons in certain transactions to file a premerger notification with the Antitrust Division of the Department of Justice and the Federal Trade Commission ("FTC") and observe a 30-day waiting period (which can be increased or decreased by the FTC or the Antitrust Division) prior to consummation. HSR allows the Antitrust Division and the FTC to take appropriate enforcement actions to prevent consummation of transactions they determine to be anticompetitive.

*"These amendments went into effect on February 1, 2001."*

The most significant changes to HSR were the increase in the "size of transaction" test from $15 million to $50 million and the elimination of the reporting requirement based on the percentage of assets or voting securities held as a result of the transaction. As a result, parties to **all** transactions valued at less $50 million (i.e., where the acquiring person holds $50 million or more in assets or voting securities of the acquired person as a result of the transaction) need not observe the above HSR requirements. Parties to transactions valued between $50 million and $200 million must satisfy the HSR requirements if the "size of person" test is met. This "size of person" test generally is satisfied if one party to the transaction (including its ultimate parent entity and all entities controlled by its ultimate parent entity) has annual net sales or assets of $100 million or more **and** the other party to the transaction (including its ultimate parent entity and all entities controlled by its ultimate parent entity) has annual net sales or assets of $10 million or more.

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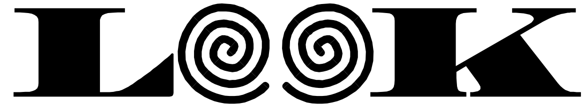


for details of the
Antitrust, Franchising and Trade
Regulation Section's

**A Roundtable Luncheon with Commissioner Thomas B. Leary, Federal Trade Commission**

Friday, March 23, 2001
12:00 noon
The Detroit Club
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## Welcome to Our Home
## www.michbar.org

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

# Message from the Chair

By Mark T. Boonstra

I am honored to serve as the Chairperson of the Antitrust, Franchising, and Trade Regulation Section of the State Bar of Michigan for the year 2000-2001. With the dawning of the new millennium, antitrust law remains alive and well.

The *Microsoft* trial is now complete, but the appeals continue, and new investigations have now commenced. The Northwest Airlines/Continental Airlines case that was until recently pending in Detroit federal court has settled.

Merger-mania continues, and in our ever-shrinking world economy, it does so with increasing scrutiny both from the United States Department of Justice and Federal Trade Commission and from foreign governments as well. The FTC recently threatened a challenge to the merger of America Online and Time Warner, for example, requiring the parties to address competitive issues in connection with that now-approved merger.

Michigan's Attorney General, Jennifer Granholm, is proving to be a watchdog on antitrust and consumer protection issues in Michigan. One of her first acts was to open a High Tech Crime Unit, which, among its early acts, instituted litigation over the undisclosed implantation of "cookies" on home computers.

It is the objective of the Antitrust, Franchising, and Trade Regulation Section to keep its members up to date on developments in all areas in which they practice. We'll be watching the developments in Washington, including the actions of new Antitrust Division chief-designate Charles James, as the new administration's policies take shape.

Changes to the Hart-Scott-Rodino requirements were just adopted. You'll see them described in Howard Iwrey's informative article in this newsletter. We're also monitoring the proposed new FTC franchise rule, and will keep you advised on developments there. We'll be following legislative activity in Michigan too, as well as any Michigan court decisions of note.

We plan to continue offering seminars on timely topics of interest to our members. We're fortunate to have the opportunity to hear from FTC Commissioner Thomas B. Leary (a former Assistant General Counsel at General Motors Corp. and a former chair of this State Bar Section) on March 23, 2001. Please mark your calendars and plan to attend that Roundtable Luncheon at the Detroit Club. Bring your questions and your appetites. See the flyer within this newsletter or look for a separate mailing. We look forward to seeing you there.

We're also hoping to present a seminar later in the year on e-commerce issues. More information about that event will be forthcoming.

Our publications editor, Irwin Alterman, has graciously agreed to again assist the Section in the publication of another update of the Michigan Antitrust Digest. Our thanks to Irwin. That effort should be completed in the coming year.

We're also actively updating our State Bar web page, *www.michbar.org/sections/antitrust/*, to reflect current and past newsletters, council minutes, and other information of interest. Please visit it.

If there are particular issues that interest you, particular services that you would like the Section to provide, or if you are interested in becoming involved in the Section, in authoring a newsletter article, or in just offering your comments, please feel free to call me or any of our Section officers.

# Federal Court Invalidates Provision of Michigan Franchise Investment Law

BY HOWARD B. IWREY

The United States District Court for the Eastern District of Michigan recently held in *Flint Warm Air Supply Co. v. York International Corp.,* 115 F. Supp.2d 820 (E.D. Mich. 2000) (Rosen, J.), t hat Section 27 of the Michigan Franchise Investment Law ("MFIL"), MCL §445.1527, which voids provisions in franchise agreements providing for arbitration or litigation out of Michigan, was preempted by the Federal Arbitration Act, 9 U.S.C. §2 ("FAA").

The case arose in connection with York's termination of a franchisee located in Flint. The franchisee filed an arbitration claim contesting the termination with the American Arbitration Association office in Southfield. York requested a transfer of the arbitration to York, Pennsylvania, relying on a provision in the Franchise Agreement which stated, among other things, that "the site of the arbitration or court action shall be York, Pennsylvania, unless another state is mutually agreed between the parties and that the franchise Agreement was governed by Pennsylvania law."

The franchisee disputed the transfer, contending that the arbitration site clause was unlawful under Section 27 of the MFIL. Section 27 provides:

> Each of the following provisions is void and unenforceable if contained in any document relating to a franchise:
>
> * * *
>
> (f) A provision requiring that arbitration or litigation be conducted outside [Michigan]. This shall not preclude the franchisee from entering into an agreement, at the time of arbitration, to conduct arbitration at a location outside of [Michigan].

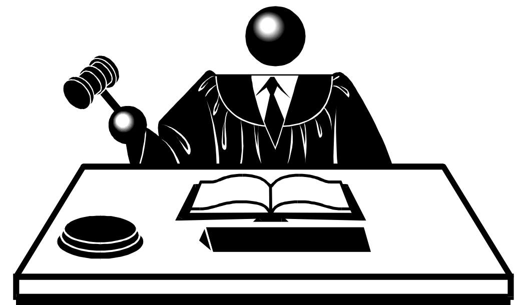
MCL §445.1527(f).

The franchisee filed a Complaint for Declaratory Relief in Genesee County Circuit Court, seeking to declare the Pennsylvania arbitration site clause and the Pennsylvania choice-of-law unlawful. The case was subsequently removed to the United States District Court.

The court held that the FAA preempted MCL §445.1527. The FAA provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The court reviewed the extensive body of United States Supreme Court and Sixth Circuit decisions, which uniformly noted that "any doubts concerning the scope of arbitration should be resolved in favor of arbitration" and that the FAA declared a "national policy favoring arbitration [which] withdrew the power of states to require a judicial forum for the resolution of claims which the contracting parties had agreed to resolve by arbitration." 115 F. Supp.2d at 825 (quotations omitted).



For example, in *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984), the Supreme Court held that the FAA indicates that state law cannot foist additional limitations on validly executed arbitration agreements and that any state legislative attempts to foreclose the enforceability of arbitration agreements were void, even if such legislation was enacted to provide special protection to a group of persons, such as franchisees.

The court then concluded:

> that arbitration agreements are to be enforced "according to their terms" and that the Michigan Franchise Investment Law's prohibition against extra-territorial agreements, "impose[s] limitations on the method and manner of arbitration," which cannot be permitted under the Federal Arbitration Act and the Supremacy Clause. Accordingly, the Court finds that Section 27(f) of the MFIL is preempted under the FAA.

115 F. Supp.2d at 827-28 (quotations omitted). The court also held that the MFIL was preempted by the FAA to the extent that it purports to preclude parties from agreeing to arbitrate under Pennsylvania law. Id. at n.3.

# A Battle Over Baby Food

By David G. Chardavoyne

The business of selling jars of baby food in the United States has only three players. The Gerber Company of Fremont, Michigan, has 65% of that market, the H.J. Heinz Company has 17.4%, and Milnot Holding Corporation ("Beech-Nut") has 15.4%. Thus, Gerber's share of the market is as large as its two rivals' shares combined.

On July 14, 2000, the Federal Trade Commission filed suit in the U.S. District for the District of Columbia asking for an injunction to halt Heinz from acquiring Milnot. On October 18, 2000, after a five-day evidentiary hearing, the Court denied the F.T.C.'s request, giving an unusual reason: because Milnot and Heinz do not compete against each other now, a merger would not decrease competition.

"...the merger would increase the market's Herfindahl-Hirschman Index by a whopping 510 points to 5285."

The District Court agreed with the F.T.C. that the proposed merger would substantially increase concentration in the market for U.S. sales of baby food in jars. In fact, the Court noted, the merger would increase the market's Herfindahl-Hirschman Index by a whopping 510 points to 5285. The Court also found that entry barriers are high, making entry by a new competitor "difficult and improbable."

Hearing those findings, the F.T.C. attorneys must have felt, justifiably, that victory was theirs. However, it was not to be. The Court also found that this market has a peculiarity that justified denying the injunction.

The evidence established that 90% of all supermarkets across the country only stock two brands of baby food and that Gerber is always one of the two. The Court concluded that Heinz and Beech-Nut do not compete at the consumer level now and that, therefore, a merger of those brands would not decrease competition for consumer sales in the future. To the contrary, a merged company might be better able to compete with Gerber, resulting in lower consumer prices and new products.

The F.T.C. argued fruitlessly that the merger would decrease competition at the *distribution* level—i.e., competition to see which of them got into which stores to compete with Gerber. There was, indeed, evidence that Heinz and Beech-Nut competed strongly for shelf space by offering promotions and allowances to retailers. However, the Court held that such a loss of that competition would not be significant.

The Court gave one other reason for ruling in favor of Heinz. Acknowledging that this was a close case which ought to be considered by the Court of Appeals, the Court opined that Heinz would not appeal an adverse ruling but would, instead, abandon the merger. The Could stated that F.T.C., on the other hand, would certainly appeal if the injunction were denied.

The Court was correct on that last point at least. On October 23, 2000, the agency did appeal and, at the same time, moved for an injunction pending appeal and an expedited hearing. On November 8, 2000, the U.S. Court of Appeals for the District of Columbia Circuit granted the F.T.C.'s motion and enjoined the merger pending appeal. The Court of Appeals focused on the retail sales market but did not address whether the companies currently compete in that market. The Court found that the F.T.C. had demonstrated a substantial probability of success on the merits based principally on the proposed merger's affect on the industry's already high Herfindahl-Hirschman Index.

The Court noted that the anticipated H.H.I. increase from 4775 to 5285 created a strong presumption of decreased competition and that the usual rebuttals to a prima facie case (ease of new entry and failing enterprise) did not apply. The companies argued that any anticompetitive effects of the merger would be offset by increased efficiency. Although the Court did not reject that argument outright, it did express considerable doubt over the viability of such a defense.

Argument on the appeal was held in February 2001. Along with the parties (and Gerber), we await with interest the rulings of the Court of Appeals in this unusual case.

## Hart-Scott-Rodino Reform Legislation Raises Reporting Threshold—and Filing Fees

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Parties to transactions valued at $200 million or more must satisfy the HSR requirements, regardless of the size of the parties. The HSR rules also provide exemptions for certain transactions that satisfy the above thresholds.

The HSR amendments also changed the filing fee structure. Previously, all transactions within the HSR thresholds were subject to a $45,000 filing fee, payable by the acquiring person. The amendments implemented a tiered filing fee structure, ranging from $45,000 to $280,000. Transactions valued at less than $100 million are now subject to a $45,000 filing fee, transactions valued at $100 million to less than $500 million are now subject to a $125,000 filing fee and transactions valued at $500 million and more are now subject to a $280,000 filing fee.

All of the above thresholds will also be indexed each year, beginning in fiscal year 2005, to reflect changes in the Gross Domestic Product during the previous year.

The amendments also increased the length of the waiting period following “substantial compliance” with a “second request” (i.e., a request by the Antitrust Division or FTC for additional information from parties to transactions viewed as potentially anticompetitive, which is made within the initial 30 day waiting period) from 20 days to 30 days. This waiting period, however, remains 10 days for cash tender offers and transactions in bankruptcy. The FTC or Antitrust Division may seek to enjoin transactions within this waiting period. Parties receiving second requests may consummate a transaction at the conclusion of this waiting period, unless enjoined.

In conjunction with this legislation, the FTC also issued interim and proposed rules that reflected the increased thresholds, made ministerial changes and clarification and, most significantly, updated the premerger notification form. The comment period for the proposed rules ends on March 19, 2001.

*“The business community has generally welcomed the HSR amendments.”*

The FTC also amended its internal Rules of Practice to incorporate procedures for review of second requests. Second requests are essentially expansive interrogatories and document requests (which may take several months to respond to and may cause the parties to incur well over $1 million in fees and costs). In the past, parties often informally negotiated modifications with the FTC or Antitrust Division. These rules set up formal procedures for parties to confer with FTC staff to request modification or clarification of second requests. Additionally, parties can also petition the General Counsel of the FTC for modification or elimination of portions of second requests.

The business community has generally welcomed the HSR amendments. However, some high tech companies expressed disappointment about the elimination of the size of person test for transactions valued at $200 million or more. These amendments may actually result in more HSR reporting in this industry, in which transactions (at least in the past) involved high purchase prices for companies with minimal assets and sales.

HSR practitioners also expressed relief that the FTC did not amend “Item 4(c)” of the premerger notification form. Item 4(c) requires parties to file “all studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) . . . for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets . . . .” The FTC had in the past expressed interest in expanding Item 4(c) to include virtually all transaction-related documents. The interim and proposed HSR rules, however, did not expand Item 4(c).

**The Antitrust Section of the American Bar Association will hold its Annual Spring Meeting on March 28-30 in Washington, D.C.**

Reminder Reminder Reminder

Don't Forget Don't Forget Don't Forget

State Bar of Michigan

Antitrust, Franchising and Trade Regulation Section

# A Roundtable Luncheon

*with*

# Commissioner Thomas B. Leary
# Federal Trade Commission

Your questions for Commissioner Leary will be welcome.

## Friday, March 23, 2001, 12:00 noon

The Detroit Club
712 Cass Avenue
(corner of Cass Avenue and Fort Street)
Detroit, MI 48226
(313) 963-8600

Cost: $15
(includes lunch)

If you have any questions, please contact:
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*boonstra@millercanfield.com*

### Thomas B. Leary

Thomas B. Leary was sworn in as a Commissioner at the Federal Trade Commission on November 17, 1999. His term on the five-member Commission expires in 2005.

Before his service on the Federal Trade Commission, Mr. Leary was a partner at Hogan & Hartson, in Washington, D.C., since 1983. His practice was principally in the area of antitrust and trade regulation.

Before becoming a partner at Hogan & Hartson, Mr. Leary was the Assistant General Counsel of General Motors, with overall responsibility for antitrust, consumer protection and commercial law matters.

Before joining General Motors, he was a partner at White & Case in New York. Mr. Leary received his undergraduate degree in economics from Princeton University and a law degree from Harvard Law School, where he was an editor and an officer of the Harvard Law Review.

He served as an Air Intelligence Officer on active duty in the United States Navy from 1952-1955.

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YES, I plan to attend the Antitrust, Franchising and Trade Regulation Section Roundtable Luncheon with FTC Commissioner Thomas Leary on March 23, 2001. Please find enclosed my check for $15 (made payable to the "State Bar of Michigan").

Name______________________________ P#____________

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