STATE BAR OF MICHIGAN

ANTITRUST, FRANCHISING, AND TRADE REGULATION SECTION

E-NEWSLETTER

MARCH, 2009

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MESSAGE FROM THE CHAIR

Welcome to the State Bar of Michigan, Antitrust, Franchising, and Trade Regulation Section's new and improved e-Newsletter, which will be available in electronic format and distributed in hard copy format to section members. The newsletter is our way of conveying Section information, current events, and articles addressing current issues to the Section's members. We hope that you'll find it both informative and helpful. Please note that the electronic copy of this document is hyperlinked, so that readers can click through to view the primary sources on which we rely, and to further investigate topics of interest.

Thank you for taking an interest in our newsletter. We welcome comments, suggestions, and feedback through our e-Newsletter editor or myself.

Best regards,

Rick Juckniess
Section Chair

SECTION NEWS

Section Get-Together at the Detroit Institute of the Arts

The Antitrust, Franchising, and Trade Regulation Section is planning to host a Section get-together and the Detroit Institute of the Arts this spring. Details for the event will be announced when they are finalized, so watch your email for Section e-blasts. In addition, the Section is planning to host an informal bar night on Thursday, March 19, so save that evening on your calendar if you would like to attend. The event will take place in Detroit, with final location and time details to be announced shortly.

Missed the Last E-Newsletter?

If you missed the December e-Newsletter, be sure to check out the archives at the State Bar of Michigan Website, accessible here.

MICHIGAN NEWS

Dow Resolves FTC Problems With its Acquisition of Rohm & Haas

Midland company Dow Chemical has resolved competitive problems with its $18.8B purchase of Rohm & Haas in a consent order entered into with the FTC on January 23 of this year. The Commission alleged problems with the acquisition due to the elimination of competition in the acrylic monomer, acrylic latex polymer, and hollow sphere particle markets. Dow competes directly with Rohm & Haas in these product markets, together with BASF. The agreement requires the divesture of a variety of assets related to the relevant product lines, and protects the trade secrets associated with them from disclosure to Dow.
Press Release; FTC Docket.

Warrior Sports Inc. v. NCAA

Warrior Sports brought an action against the NCAA under the Sherman Act alleging that a

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requirement regarding the type of lacrosse sticks that may be used in NCAA play was an anticompetitive agreement in violation of section one. After Warrior lost its motion for preliminary injunction, the NCAA has moved for judgment on the pleadings arguing that the contract restrains athletic competition and not economic competition, that the NCAA functions as a single entity not subject to section one, and that in any event the contract does not unreasonably restrain trade. No opinion on the motion has yet been issued.
Justia.com Docket (08-14812)

Class Action Brought for Alleged Price Fixing of Compressors

Several class action suits have been filed late February and early March, alleging a global price fixing conspiracy on compressors and compressor products in violation of section 1 of the Sherman Act. The complaints were filed in the Eastern District of Michigan and named Tecumseh Products Company, Whirlpool Corp., Bristol Compressors Int'l Inc., Danfoss A/S, Appliances Components Companies SpA, Panasonic Corp., Emerson Climate Technologies, Inc., and several related entities.
Justia.com docket nos. (09-10791); (09-10806); (09-10737); (09-10745).

NATIONAL NEWS

Opinion Released in *AT&T v. linkLine*

The Supreme Court released its opinion in *Pacific Bell Telephone Co. dba AT&T California v. linkLine Comm.*, last week. The Court held that a "price squeeze" claim can no longer be made after *Verizon v. Trinko* when the defendant has no antitrust duty to deal with the plaintiff. AT&T was alleged to have accomplished the price squeeze by selling access to its DSL infrastructure to DSL retailers at a price that was sufficiently high to prevent the retailers from being able to compete with AT&T's retail DSL arm. While respondents had abandoned their price squeeze claim in part before the Supreme Court, amici took up their sword, and the Court ruled on the merits of the question certified despite the changed position of the parties. The American Antitrust Institute, which filed a brief as amici and was granted leave to participate in oral argument, released a statement calling the opinion "a Gift to Monopolists."
Opinion; Background at SCOTUSWiki; AAI Statement; Antitrust Review Analysis.

SCOTUS Calls for the SG to Weigh In On Petition for Certiorari in American Needle

The Supreme Court invited the Solicitor General's views on the Petition for Certiorari filed by American Needle in *American Needle Inc., v. NFL*. The SG's opinion is sometimes sought at the petition stage, but more often in the merits stage of cases. The order came following the opposition brief filed by the NFL, which agreed with the Petitioners that Certiorari should be granted to resolve the question of whether the NFL is a single entity
SCOTUSBlog Coverage.

Friction in the Ticketmaster-Live Nation Deal

The Ticketmaster/Live Nation deal has encountered scrutiny pending antitrust approval from the agencies. Although the deal would appear innocuous—vertical integrations are rarely subject to close scrutiny given their built-in efficiencies—the proposed merger has come under scrutiny from not only the agencies, but the Boss himself. Live Nation is primarily a promoter, which would situate the deal as primarily a vertical merger, although

DEAL LOG:

CCC Information Services Inc. & Mitchell International Inc.

The FTC was granted an injunction against the $1.4B merger of CCC and Mitchell. The Commission alleged that the merger would impair competition in markets for collision repair estimation electronics (estimatics) market and total loss valuation systems.
FTC Press Release; FTC Docket.

Mantiwoc Co. & Enodis, PLC

The DOJ settled charges against the Mantiwoc/Enodis merger, which would combine two manufacturers of commercial ice-makers. The DOJ originally filed to enjoin in the Federal District Court in Washington, D.C. in October. The settlement required divestures of various facilities in the U.S.
DOJ Docket; Settlement.

JBS & National Beef

JBS and National Beef announced the abandonment of their merger. The DOJ brought a challenge in October of last year alleging the merger would have combined two of the nation's largest beef packers.
DOJ Press Release; DOJ Docket.

Getinge AB & Datascope Corp.

The FTC settled competitive concerns with Getinge AB's $865M acquisition of Datascope. The consent order requires divesture of Datascopes's endoscopic vessel harvesting product line. The product is used to harvest blood vessels for use in co-

other facets of their business compete directly with Ticketmaster's ticket sales and distribution business. The American Antitrust Institute has provided a tentative summary of the antitrust issues presented by the merger.
WSJ Blog Article; Bruce Springsteen in the NYT Dealbook via Antitrust Law & Comp. Blog; AAI Analysis.

Christine Varney to Head Antitrust Division; Jon Leibowitz to Head FTC

Barack Obama has chosen Hogan & Hartson partner Christine Varney to head the Antitrust Division. The Wall Street Journal notes that Ms. Varney is an experienced internet law expert, who has also served with the FTC and, more recently, the Obama transition team. As for the Commission, Jon Leibowitz was named Chairman in February. Leibowitz has served as a Commissioner since 2004.
Wall Street Journal Article; White House Release (Leibowitz); White House Release (Varney).

Settlement in *FTC v. Whole Foods*

In a brief order, the D.C. Circuit denied mandamus to Whole Foods, permitting the FTC to begin the next stage of administrative proceedings before an ALJ. The FTC did, however, issue an order permitting a five day stay of proceedings to permit settlement negotiations between the already combined companies and the Commission. The discussions finally resulted in a settlement, announced March 6, that requires Whole Foods to divest 32 stores as well as the Wild Oats intellectual property and brand.
Settlement Press Release; FTC Docket; D.C. Circuit Mandamus Opinion via Antitrust Review; FTC Order.

$175M Cosmetics Giveaway Settles California Class Action

Purchasers of women's beauty products were happy to hear that they may have been eligible for a free product from Macy's, Nordstrom, or one of 12 other retailers. The product giveaway began January 20, 2009 and settles a class action suit originally filed in California. It is unclear whether the giveaway is currently ongoing, as the website providing information (linked below) has since been taken offline.
Settlement Information;

More Details Unfold About the Google-Yahoo Deal

A January 19 Wired Magazine article entitled "The Plot to Kill Google" reports more details about the ad deal struck between Google and Yahoo that was abandoned under threat from the DOJ. The article recounts the Google attorneys' experience defending the deal before the Antitrust Division and former AAG Tom Barnett. Although Google has had relative success dealing with antitrust authorities in the past, the article illustrates how vigorously the DOJ contested the deal. Ultimately, Google abandoned the deal just hours before the DOJ was set to file suit. The article also details the opposition Google faces from the government and companies like AT&T and Microsoft generally.
Wired Article via Antitrust & Comp. Policy Blog.

Bowl Championship Series an Antitrust Violation?

The Washington Post reports that Utah Attorney General Mark Shurtleff is investigating

ronary bypass surgery.
FTC Press Release; FTC Docket.

Oldcastle Architectural, Inc.
&
Pavestone Company, LP

The FTC brought an administrative action to block Oldcastle's $540M purchase of Pavestone Company alleging it would reduce competition in the drycast concrete market. The companies abandoned the merger promptly after the suit was filed.
FTC Press Release; FTC Docket.

King Pharmaceuticals, Inc.
&
Alpharma, Inc.

The FTC intervened in King's $1.6B purchase of Alpharma, and issued a consent order requiring the divesture of a long acting opioid analgesic used to treat chronic pain. The drug competes in the larger market of similar drugs, but the Commission required divesture because a competing drug owned by King utilizes similar mechanism of action, dosage, and other characteristics.
FTC Press Release; FTC Docket.

Teva Pharmaceutical Industries
&
Barr Pharmaceuticals

The FTC challenged the merger of Teva and Barr, leading to a consent order requiring divesture of assets in 29 markets in the U.S. The FTC brought an action in Federal Court to block the merger, alleging that it would reduce competition in several drug markets.
FTC Press Release; FTC Docket.

the BCS for antitrust violations, following the Utah's undefeated season. "Shurtleff said his office is still in the initial stages of reviewing the Sherman Antitrust Act to see if a lawsuit can be filed. To succeed in a lawsuit, he would have to prove a conspiracy exists that creates a monopoly." Shurtleff and the Washington Post further explain that under the BCS system, Conferences are reimbursed for providing their football teams for bowl games, with Conferences that have automatic BCS berths receiving more money. The Wall Street Journal Law Blog, however, speculates that the claim would look more like a group boycott case under section 1, which typically requires a showing of market power.
Press Release; Washington Post via Antitrust & Comp. Policy Blog; WSJ Law Blog.

Supreme Court Denies Review in *Rambus v. FTC*

The Supreme Court denied the Commission's petition for Certiorari *Rambus Inc. v. FTC*. The Commission alleged that Rambus deceived a standard setting organization ("SSO"), and the trial court held that the deception enabled Rambus to attain monopoly power, or in the alternative, to avoid licensing fee limits imposed by the SSO. The D.C. Court reversed, finding that the second ground would not support a section 2 claim independently and thus the alternative holding could not be sustained. The court went on to question the sufficiency of the factual basis for the antitrust claim generally, and suggested that the claim might be better brought as an FTC Act section 5 action.
Denial via SCOTUSBlog; D.C. Circuit Opinion, Petition for Certiorari, FTC Press Release; Prior SCOTUSBlog Coverage.

ENFORCEMENT ACTIONS

FTC Brings Claims Against Makers of AndroGel and Potential Generic Competitors

The Commission, in conjunction with the California Attorney General's office, brought various claims against various pharmaceutical companies alleging a conspiracy to abandon patent challenges to the drug AndroGel, a testosterone replacement often used to treat men with low testosterone levels. The Commission alleges that the companies abandoned efforts to bring generic drugs to the market to compete with AndroGel in exchange for a share of monopoly profits. The complaint alleges violations of Section 1 and 2 of the Sherman Act, Section 5 of the FTC Act, together with Violations of California's Antitrust Law, the Cartwright Act.
Complaint (C.D. Cal.); FTC News Release; Cal AG's News Release.

DOJ Settles Civil Contempt Charges with AT&T for $2M

The DOJ settled civil contempt charges for $2M with AT&T in January. The charges stemmed from the consent order entered into in connection with AT&T's acquisition of Dobson Communications Corp. The consent order required AT&T to divest certain holdings and, pending divesture, to maintain confidentiality with the entity's sensitive customer and other competitive information. The complaint alleges that AT&T failed to do so, and instead obtained competitive information from the companies in violation of the order.
Press Release; DOJ Docket.

Four Executives Plead Guilty in LCD Television Price Fixing Conspiracy

Executives from LG Display Co. Ltd. and Chunghwa Picture Tubes Ltd. have agreed to plead guilty for their roles in the LCD price fixing conspiracy. The executives are Taiwanese and Korean citizens; one is a joint US and Taiwanese citizen. They will each serve under a year in prison, and be required to pay fines ranging from $20,000 to $50,000. The charges come on the heels of the November guilty pleas from LG, Sharp, and Chunghwa Picture Tubes, which resulted in a total $600M in criminal fines. Following guilty pleas from both companies and executives, the DOJ secured indictments in the LCD Television Price Fixing Investigations. Grand juries returned indictments of three former Chunghwa Picture Tubes Ltd. executives and one former LG executive in February.
Press Release; November Press Release; Indictment Press Release (1); Indictment Press Release (2).

DOJ Files Suit Against Microsemi

The DOJ files suit in December against Microsemi Corp., for Sherman and Clayton act violations stemming from the company's acquisition of Semicoa, Inc. The DOJ alleges that the purchase reduced competition in small signal transistors and certain diodes that are used by the Department of Defense. The Department seeks to undo the acquisition and filed for a TRO and preliminary injunction.
DOJ Press Release; DOJ Docket.

FTC Settles With Two Doctors Groups

In late December the FTC entered into consent orders with two doctors groups, one in Boulder, Colorado, and the other in Modesto California. The consent orders settle similar complaints against both groups that stem from the physicians acting in concert to deal with insurance companies. The groups were alleged to have threatened to refuse to work with the insurance companies, actually refused to deal, and taken other actions in concert in attempt to raise the amount paid to the doctors by the insurance companies. Both actions were brought administratively before the Commission.
Press Release; FTC Dockets: Ind. Phys. Ass. Med. Grp./Boulder Valley Ind. Prac. Ass'n.

FTC Files Suit Against Ovation Pharm., for Illegal Acquisition of a Rival Drug

The FTC filed suit in December against Ovation Pharmaceuticals, Inc. in the U.S. District Court of Minnesota for illegally acquiring the right to NeoProfen, a drug that competes with its own Indocin. The two drugs are the only two drugs available to treat a condition that afflicts premature newborns. The complaint alleges that the company's acquisition led to a 1,300% price increase in NeoProfen, and a similar price scale for Indocin when it was subsequently released. The FTC is seeking divesture of the asset, and disgorgement of profits.
Complaint; Press Release; Docket.

Have We Missed Something?

Do you know of a recent case that you don't see in the newsletter? Please email the editor with recently resolved or newly pending cases that we have missed.

THE CASE FOR DIFFERENT PRELIMINARY INJUNCTION STANDARDS IN MERGER CHALLENGES

Justin J. Hakala[†]

I. INTRODUCTION

Much is made of the different standards that the Federal Trade Commission ("FTC" or "Commission") and the Antitrust Division of the Department of Justice ("DOJ") must meet to obtain a preliminary injunctions against a merger on antitrust grounds.[1] Congress divided antitrust enforcement responsibilities between two competing agencies in order to better facilitate policy development, account for varying antitrust theories and models, and to better cover the field of violations.[2] As a result, "[d]ecentralized authority to sue means that one entity's rejection of certain theories does not bar others from relying on those theories to bring cases and attempting to persuade judges to accept them."[3] The differing standards that apply when either of the agencies challenges a merger simply reflect the different natures of the agencies, and were designed for the same reasons that the agencies were designed as concurrent enforcers.

Why, then, do the agencies divide pre-merger reviews under the Hart-Scott-Rodino Antitrust Improvements Act ("HSR") based on industry? This system subjects the merging companies to different standards because of their industry affiliations. If, as critics maintain, the standards are indeed different, industries will consistently be subjected to more or less stringent merger review based upon which agency reviews their respective industry.

Both critics and the Antitrust Modernization Commission ("AMC") have called for the harmonization of enforcement standards,[4] but that solution addresses a different problem. Harmonization attempts to make the agencies equal, and to unify merger enforcement. This article argues that the problem is not that the agencies are different and make use of different preliminary injunction standards, but instead it is that the division of merger review between the agencies by industry inappropriately splits the merger review market, and undermines the purpose of decentralizing antitrust enforcement generally between the DOJ and FTC.

II. BACKGROUND

[†] The author (justinhakala@gmail.com) is a third year law student at Wayne State University Law School, graduating in May. He currently serves as the Section's e-Newsletter editor. The opinions in this paper are the author's own; he retains sole responsibility for any errors.

[1] *See* Leon B. Greenfield, *FTC v. Whole Foods: Is Agency Draw Destiny?* GLOBAL COMPETITION POLICY, Sep. 1, 2008, http://www.globalcompetitionpolicy.org/index.php?&id=1385&action=907; *Whole Foods Fiasco*, WALL ST. J., Dec. 31, 2008, at A8, *available at* http://online.wsj.com/article/ SB123068935035244619.html; ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 24-26, at 138-42 (2007) [hereinafter AMC REPORT], *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf; *see generally* William Baer & Deborah Feinstein, *Changing Emphasis: How Whole Foods Advances the FTC's Efforts to Transform Merger Litigation*, GLOBAL COMPETITION POLICY, Sep. 1, 2008, http://www.globalcompetitionpolicy.org/index.php?&id=1377&action=907 (discussing the Commission's merger policy goals, specifically the goal of placing more emphasis on administrative proceedings).

[2] ERNEST GELLHORN, WILLIAM E. KOVACIC, & STEPHEN CALKINS, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL 37 (5th ed. 2004).

[3] *Id.* at 41.

[4] *See* Greenfield, *supra* note 1 at 10; AMC REPORT 24-26, *supra* note 1, at 138-42.

Mergers that meet the statutory size threshold require the parties to file a pre-merger notification with the agencies as part of HSR.[5] The DOJ and FTC initially determine which agency will review the merger in what is referred to as the 'clearance process.' The agencies generally follow unwritten guidelines about which industries each is responsible for and the corresponding agency undertakes the review of the merger. Occasionally delays result when disputes arise over which agency will undertake the review.[6]

There have been efforts to rework the practice of dividing up the HSR workload, but none have effected a lasting change.[7] The agencies appear to be comfortable with the system, and it allows the regulator that is most familiar with a given industry to address all of the mergers in that area.

When challenging a merger, the DOJ will typically file suit on behalf of the United States in a federal district court seeking both preliminary and permanent injunctions. The DOJ must meet the traditional four-part test for a preliminary injunction, which requires the court to balance the likelihood of the government's success on the merits, the likelihood of irreparable harm, the likelihood that the injunction would harm other interested parties, and the public interest at stake.[8] If the DOJ loses a preliminary injunction motion it typically stands aside and allow the merger to consummate.[9] Finally, because the DOJ typically seeks to consolidate the preliminary and permanent injunction actions, the court will hold evidentiary hearings on the merits of the action rather than simply determining the likelihood of success.[10]

The FTC, on the other hand, is an administrative agency and does not file suit on behalf of the United States. When the Commission seeks to enjoin a merger, it brings a suit under the Federal Trade Commission Act,[11] which provides for grants of preliminary injunctions when they would be in the public interest, considering the Commission's likelihood of success on the merits and the balance of equities.[12] The equities are set by default in favor of the Commission, as Congress considered the public's interest in effective antitrust enforcement the primary public equity consideration.[13] Congress provided for this slightly different standard in lieu of the traditional four-part test that must be met by the DOJ; consequently the Commission "need not show any irreparable harm, and the 'private equities' alone cannot override the FTC's showing of likelihood of success."[14]

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[5] 15 U.S.C.A. 18A (West, Westlaw through Dec. 23, 2008); *see also* Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (codified in scattered sections).

[6] AMC REPORT, *supra* note 1, at 132-37.

[7] *See* Dep't of Justice, Antitrust Div. & Federal Trade Comm'n, Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations (Mar. 5, 2002), *available at* http://www.ftc.gov/opa/2002/02/clearance/ftcdojagree.pdf. The agreement was in place for about two months. AMC REPORT, *supra* note 1, at 133.

[8] U.S. v. Gillette Co., 828 F.Supp. 78, 80 (D.C. Cir. 1993).

[9] AMC REPORT, *supra* note 1, at 138.

[10] *Id.*

[11] Federal Trade Commission Act § 15(b), 15 U.S.C.A. § 53(b) (West, Westlaw through Dec. 23, 2008).

[12] FTC v. H.J. Heinz Co., 246 F.3d 708, 714 (D.C. Cir. 2001).

[13] *Id.* at 726.

[14] FTC v. Whole Foods, 548 F.3d 1028, 1034-35 (D.C. Cir. 2008) (citing FTC v. Weyerhaeuser Co., 665 F.3d 1072, 1082-83 (D.C. Cir. 1981)).

In addition, as is often stressed by courts, the "district court must not require the FTC to prove the merits, because, in a section 53(b) preliminary injunction proceeding, a court 'is not authorized to determine whether the antitrust laws . . . are about to be violated.'"[15] The FTC will resolve that question before an administrative law judge, although in practice merger cases are most often abandoned before this point due to the difficulties of placing a merger on hold in order to fight an FTC administrative action.

III. ANALYSIS

The critics make a good point: if the DOJ and the Commission have agreed to split the market, with each agency reviewing mergers based on the industry of the merging parties, then the standards should be the same. There is also a colorable argument that the standards are not the same and that the difference leads to disparate outcomes. Despite the different approaches, however, the evidence does not make it entirely clear that—at least in practice—the standards are actually different.

By the agencies own reports, they have taken less than ten cases to a decision on preliminary injunction in the last five years for which reports are available.[16] In fact, between them the agencies have precious few preliminary injunctions in merger review cases.[17] The sparse record is hardly enough to support a conclusion either way on whether the standards are different, but it does illustrate just how rare the problem is. Both the DOJ and the FTC benefit from merging parties' general aversion to litigation. When proceedings are initiated, companies overwhelmingly choose to negotiate a consent order, restructure the transaction, or abandon the transaction completely in lieu of litigation.[18]

Regardless of whether the standards are actually different, the AMC has made recommendations to remedy the perceived problems of two different agencies enjoining mergers on antitrust grounds with different procedural and legal frameworks. The AMC suggests that the FTC adopt the DOJ practice of seeking both preliminary and permanent injunction and consolidating the hearings.[19] They further suggest that Congress enact legislation to prevent the FTC from using administrative actions in merger cases, and to require the FTC to meet the same preliminary injunction standard required of the DOJ.[20]

The AMC approach would harmonize enforcement, but it ignores the underlying reasons that Congress decentralized antitrust enforcement at the outset.[21] Harmonization is not the solu-

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[15] *Whole Foods*, 548 F.3d at 1035 (citing FTC v. Food Town Stores, Inc., 539 F.2d 1339, 1342 (4th Cir. 1976)).

[16] *See* 2003-2007 FTC & DOJ HART-SCOTT-RODINO ANNUAL REPORT, *available at* http://www.ftc.gov/bc/anncompreports.shtm.

[17] *See, e.g.,* United States v. UPM-Kymmene Oyj, 2003-2 Trade Cases ¶ 74,101, 2003 WL 21781902 (N.D. Ill. 2003); FTC v. Whole Foods, 548 F.3d 1048 (D.C. Cir. 2008) (remanding to the district court to balance the equities). Note that *Whole Foods* is not yet recorded in the agencies' HSR annual reports.

[18] *See supra* note 16; *see also* AMC REPORT, *supra* note 1, at 138.

[19] AMC REPORT 24-26, *supra* note 1, at 138-42.

[20] *Id.*

[21] It should be noted this refers to the AMC recommendations dealing specifically with preliminary injunctions. Other recommendations, such as those calling for a timely and organized clearance, might be helpful and may serve as a framework to allow the agencies to overlap and serve as a check on one another.

tion, just like having different preliminary injunction standards is not the problem. Instead, the problem is that the agencies divide merger enforcement across artificial lines. Because the agencies largely stick to their agreed-upon industries, there is no room for competing theories of review. Without this interplay the utility of decentralized antitrust enforcement is defeated, and antitrust concerns would be better served by one agency responsible for reviewing every merger under one standard.

To that end the AMC recommendations are a step in the right direction, but if decentralized enforcement is still a principle with which we have confidence, the AMC approach is actually a step backwards. Instead, we should be working toward a solution that permits the agencies to work independently and fosters advancement in antitrust doctrine and theory. Simply put, we should make the agencies compete.

In merger review, a change in policy would drastically alter the landscape. If each agency were more aggressive about overseeing the other's merger enforcement choices, however it was coordinated logistically, parties would not have the opportunity to lament the standard to which they were subjected. Different standards would then simply reflect the different agencies and their different natures, and would not be any different from any other enforcement action.

The agencies come from different places, but that is not the problem; in fact, it is by design. The problem is that HSR, and the division of merger review robs antitrust of the benefit of decentralized and concurrent enforcement.

IV. CONCLUSION

The irony of two antitrust enforcement agencies agreeing to divide the merger review market should not be missed. This agreement has robbed antitrust of vigorous competition and debate on the law, policy and doctrine of merger review. Academics and critics are right to question why one rulebook applies to one set of mergers, and another applies to the remaining mergers, but the problem is not that the rulebooks are different, it is that their application is predestined.

MFIL SECTION 26(f): THE ILLUSION OF PROTECTION

Howard Yale Lederman[†]

In 1974, the Michigan Legislature passed the Michigan Franchise Investment Act ("MFIL").[1] The statute's purpose is "to remedy perceived abuses by large franchisors engaged in manipulating, coercing or lying to unsophisticated investor franchisees."[2] MFIL Section 27 includes a long list of "[v]oid and unenforceable provisions."[3] Among them is Section 27(f) barring any "provision requiring that arbitration or litigation be conducted outside this state. This shall not preclude the franchisee from entering into an agreement, at the time of arbitration, to conduct arbitration at a location outside this state."[4] To most attorneys and others reading this provision, it protects franchisees (and franchisors) from the excessive and unnecessary burdens of having to arbitrate or litigate far from home. But such is not the case. Rather, the federal courts have consistently held that the Federal Arbitration Act[5] ("FAA"), preempts MFIL Section 27(f) and similar state franchise law provisions.

Flint Warm Air Supply Co. v. York International Corp,[6] illustrates how the federal courts have reinterpreted and severely restricted MFIL Section 27(f)'s protection. There, "on December 21, 1988, Central Environmental Services, a division of York International, entered into a `Distributor Sales Agreement' with Plaintiff Flint Warm Air."[7] The agreement included Article 9, a combined arbitration, forum selection, and choice of law provision. When a dispute arose over York's decision to terminate the Distributor Sales Agreement, Flint Warm Air demanded arbitration. The parties clashed over the forum selection provision. Flint Warm Air asserted that under MFIL Section 27(f), the contract provision's **forum selection part** was invalid and unenforceable. Flint Warm Air sued for a declaratory judgment in a Michigan trial court. York removed the action to federal district court on diversity grounds. Pressing for arbitration in Michigan, Flint Warm Air asked the Federal District Court to declare the forum selection and choice of law provisions unenforceable. Both parties moved for summary judgment.

After quoting MFIL Section 27(f), the Federal District Court quoted FAA Section 2: "'A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation

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[1] Mich. Comp. Laws §§ 445.1501 *et. seq.*

[2] Jerome-Duncan, Inc v. Auto-By-Tel, 989 F. Supp. 838, 842 (E.D. Mich. 1997) (citing Michigan House Legislative Analysis, H.B. 4203, August 2, 1974); *accord* Geib v. Amoco Oil Co., 29 F.3d 1050, 1056 (6th Cir. 1994).

[3] Mich. Comp. Laws § 445.1527.

[4] *Id.*

[5] 9 U.S.C. § 1 *et seq.*

[6] 115 F.Supp.2d 820 (E.D. Mich. 2000).

[7] *Id.* at 821.

of any contract.'"[8] Then, the Court reviewed federal arbitration cases, law, and policy extensively. The Court held that the FAA preempted the MFIL provision, and that the forum selection provision was valid and enforceable. Accordingly, the Court granted York International summary judgment. The Court concluded "that the Michigan Franchise Investment Law's prohibition against extra-territorial arbitration agreements" impermissibly restricted arbitration under the Federal Arbitration Act and the Federal Constitution's Supremacy Clause.

The Court cited *Alphagraphics Franchising, Inc. v. Whaler Graphics, Inc.*,[9] where the Court held that the FAA had preempted MFIL Section 27(f). There, the parties' franchise agreement included a forum selection provision requiring arbitration in Tucson, Arizona. The plaintiff franchisor demanded arbitration of the parties' dispute and filed its demand at the American Arbitration Association office in Phoenix, Arizona covering Tucson. The defendants, Michigan franchisees, did not oppose arbitration, but invoking MFIL Section 27(f), refused to arbitrate in Arizona. The plaintiff sued in federal district court and moved for an order compelling arbitration in Arizona.

In holding that the FAA preempted MFIL Section 27(f), the *Alphagraphics Franchising* Court acknowledged that "[t]he FAA does not contain any express preemption provisions and does not include a congressional intent to occupy the entire field of arbitration."[10] Next, the *Alphagraphics Franchising* Court recognized that "even when Congress had not completely displaced state regulation in an area," federal law can still preempt state law "to the extent that it actually conflicts with federal law—that is to the extent that it 'stands as an obstacle to the full accomplishment and execution of the full purposes and objectives of Congress.' Congressional passage of the FAA `was motivated first and foremost by a congressional desire to enforce agreements into which parties had entered.' . . . 'It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.

"Because the FAA's primary purpose is to ensure that arbitration agreements are enforced according to their terms and Section 27(f) of the MFIL imposes limitations on the method and manner by which the parties agreed to arbitrate their disputes, it is preempted."[11]

The *Alphagraphics Franchising* Court cited several other decisions holding that the FAA preempted state statutes limiting the arbitration manner and method. These courts reasoned that the state statutes had restricted arbitration agreements more than other contracts.[12]

The *Flint Warm Air* Court noted that Flint Warm Air did not "challenge the validity of the contract or any part thereof" or assert that York International had fraudulently induced it "to agree to the arbitration provision in the contract. Indeed, [Flint Warm Air] has never sought revocation of the contract or the arbitration provision, and in fact, has effectively *admitted* the validity of the arbitration clause by . . . initiating the arbitration. Plaintiff's sole contention is that it is entitled to arbitrate this action in Michigan."[13] For these reasons, the Court held that the FAA

[8] *Id.* at 824 (quoting 9 U.S.C. § 2).
[9] 840 F. Supp. 708 (D. Ariz. 1993).
[10] *Id.* at 710.
[11] *Id.*
[12] *Id.*
[13] *Flint Warm Air Supply Co*., 115 F. Supp.2d at 825.

preempted MFIL Section 27, and that the forum selection provision part was binding and enforceable.

Like the *Flint Warm Air* Court, the U.S. Court of Appeals for the First Circuit relied on *Alphagraphics Franchising* in concluding that the FAA preempted a Rhode Island franchise law provision similar to MFIL Section 27(f). In *KKW Enterprises, Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*,[14] Gloria Jean's, an Illinois corporation and franchisor, and KKW signed four franchise agreements. Each included a mandatory arbitration and forum selection provision providing for American Arbitration Association arbitration in Chicago, Illinois.

Notwithstanding this provision, KKW sued Gloria Jean's in Rhode Island state court for 10 claims, including fraudulent inducement (intentional misrepresentation), breach of fiduciary duty, Rhode Island Franchise Investment Act violations, etc. Gloria Jean's removed the action to the U.S. District Court for the District of Rhode Island. After demanding arbitration with AAA's Chicago office, Gloria Jean's moved to stay proceedings pending arbitration. In response, KKW moved to stay the arbitration proceedings. Regarding KKW's nonstatutory claims, the district court enforced the forum selection provision and granted Gloria Jean's motion. But regarding KKW's Rhode Island Franchise Investment Act claims, the district court refused to enforce the forum selection provision, granted KKW's motion, and denied Gloria Jean's motion based on a Rhode Island Franchise Investment Act provision, Section 19-28.1-14, similar to MFIL Section 27(f). The district court reasoned that the FAA "does not preempt provisions in an agreement to arbitrate that deal with . . . the mechanics of arbitration . . . where the arbitration is to take place, and the like."[15]

Reversing in relevant part, the Court held that the FAA preempted Section 19-28.1-14. First, the Court cited "the FAA's strong policy in favor of rigorously enforcing arbitration agreements."[16] The Court recognized that the FAA did not contain any express preemption provision. Nor did the Act "`reflect a congressional intent to occupy the entire field of arbitration.'" *KKW Enterprises*.[17] Nevertheless, the Court explained that the Rhode Island provision was "an obstacle" to the FAA's purpose of promoting court enforcement of arbitration agreements, "`like other contracts, in accordance with their terms.'"[18] The arbitration venue was an arbitration agreement term. Since the Rhode Island franchise law section blocked enforcement of the agreed-on forum selection provision, the FAA preempted the state franchise law section. In support, the Court cited *Alphagraphics Franchising*.

In *Prude v. McBride Research Laboratories, Inc.*,[19] the Court held that the FAA preempted MFIL Section 27 based on *Flint Warm Air.* There, beginning in 1998, Plaintiff Prude "entered into a series of yearly Distributor Agreements with McBride, a Georgia manufacturer of professional hair care products, to sell and distribute McBride's health and beauty products to

[14] 184 F.3d 42 (1st Cir. 1999).
[15] *Id.* at 49 (district court citation omitted).
[16] *Id.* (citing *Perry v. Thomas,* 482 U.S. 483, 490 (1987) and *Dean Witter Reynolds v. Byrd,* 470 U.S. 213, 221 (1985)).
[17] *Id.* (quoting *Volt,* 489 U.S. 468, 477).
[18] *Id.* (quoting *Volt,* 489 U.S. 468, 478).
[19] 2008 U.S. Dist. Lexis 9440 (E.D. Mich. Feb. 8, 2008).

beauty salons in a designated territory.” [20] The 2006 distributor agreement contained a provision mandating arbitration in Atlanta, Georgia under American Arbitration rules with an exception for injunctive relief to preserve the status quo. On April 19, 2007, Defendant informed Plaintiff that it would not renew Plaintiff’s distributorship due to failure to meet sales quotas. Plaintiff claimed that Defendant “ha[d] authorized another individual to distribute McBride products to customers in his territory, causing confusion, lost sales, and impeding Plaintiff’s ability to collect accounts receivable.”[21]

On July 7, 2007, Plaintiff sued Defendant in a Michigan state court based on improper termination of his distributorship for damages. On August 17, 2007, based on diversity, Defendant removed the action to the U.S. District Court for the Eastern District of Michigan. Defendant moved for summary judgment based on no genuine issues of material fact. Defendant claimed that the FAA preempted MFIL Section 27(f). The Court assumed without deciding that the April 19, 2006 Distributorship Agreement was a MFIL franchise agreement. Relying on *Flint Warm Air’s* conclusion and reasoning, the Court held that the FAA preempted MCL 445.1527(f).

Therefore, franchisees counting on MFIL Section 27(f) or similar state franchise law provisions for protection against arbitrating far from home are relying on an illusion. The federal courts have practically nullified such provisions’ protections. For franchisees, this situation makes retaining counsel to negotiate more favorable forum selection provisions imperative. Even without challenging the franchise agreements’ arbitration or governing law provisions, franchisees’ counsel may be able to negotiate forum selection provisions providing for arbitration closer to home.

[20] *Id.* at *2.
[21] *Id.* at *6.