

Founded in 1852
by Sidney Davy Miller



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January 7, 2025

City of Mackinac Island
c/o Erin K. Evashevski, Esq.
City Attorney
Evashevski Law Office
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erinevashevskilaw@gmail.com

Re: Mackinac Island Ferry Antitrust Issues

Dear Ms. Evashevski:

You have asked us to review the antitrust issues relating to the acquisition by Hoffmann Marine of the ferry companies serving Mackinac Island.

Executive Summary

Hoffmann Marine's acquisition and combined operation of both ferry companies serving Mackinac Island is a monopoly and, unless an exemption applies, could be challenged under the federal or state antitrust laws. Active regulation of the ferry companies by the City of Mackinac Island pursuant to its charter likely serves to exempt the ferry companies from the antitrust laws under the "state action" doctrine and the Local Government Antitrust Act of 1984.

Background

We understand the following based on our discussion with you. We did not independently review these facts and are relying on the information you provided.

Historically, three ferry companies provided service to Mackinac Island: Arnold Transit Company, Shepler's Mackinac Island Ferry ("Shepler's"), and Star Line. In 2016, Star Line purchased the assets of Arnold Transit Company, including its boats, docks and name, and began rebranding the combined business "Mackinac Island Ferry Company" ("MIFC"). In 2022, Hoffmann Marine, part of the Hoffmann Family of Companies, a privately-owned group of companies headquartered in Florida, purchased Shepler's. In 2024, Hoffmann Marine purchased Star Line/MIFC, bringing the two remaining ferry companies under common ownership. Hoffmann has since rebranded MIFC "Arnold Transit Company" ("Arnold").

Hoffmann Marine has maintained Shepler's and Arnold as separate corporations with separate management teams and separate assets, including docks and boats. Both companies, however, report to Jenny Gezella, Hoffmann Marine's President, who appears to be the ultimate decision-maker for both companies. Shepler's CEO Chris Shepler has spoken on behalf of both companies in dealing with City officials. In Summer 2024, when most of Arnold's boats were out of service, Shepler's used its boats to transport passengers for both companies.

The Charter of the City of Mackinac Island, approved by the Michigan Legislature in 1899, gives the City power to "license and regulate ferries to and from the city, . . . and to regulate and prescribe from time to time the charges and prices for the transportation of persons and property thereon." *Arnold Transit Co. v. City of Mackinac Island*, 99 Mich App 266, 269-272 (1980), quoting 1899 LA 437, Chapter IX. Relying on its charter, the City has historically granted franchises to the ferry companies.

In late 2024, Shepler's and Arnold asked the City to approve identical \$2 increases in certain ticket prices for 2025, citing their investments in equipment upgrades. Ms. Gezella and others appeared at the City Council meeting on behalf of Hoffmann Marine, representing both companies. Hoffmann Marine representatives denied the ferry companies are a "monopoly," apparently because they are allegedly managed separately, have separate assets and somewhat different rates. The City Council declined to approve the fare increases pending further study by a consultant.

Analysis

The Hoffmann Companies' acquisition and operation of all ferry companies serving Mackinac Island creates a monopoly and, unless an exemption applies, could be challenged under multiple antitrust laws. Specifically, Section 7 of the Clayton Act, 15 USC 18, prohibits mergers that may substantially lessen competition or create a monopoly; Section 1 of the Sherman Act, 15 USC 1, prohibits contracts, combinations or conspiracies in restraint of trade; Section 2 of the Sherman Act, 15 USC 2, prohibits monopolization or attempted monopolization. Sections 2 and 3 of the Michigan Antitrust Reform Act, MCL 445.772, .773 ("MARA") are similar to Sections 1 and 2 of the Sherman Act and are construed in accord with the federal antitrust laws. See MCL 445.784(2).

There is little doubt that ferry service to Mackinac Island could be found to be a relevant product and geographic market capable of being monopolized. Compare *Spirit Airlines v Northwest Airlines*, 431 F3d 917, 933-35 (6th Cir 2005) (city pairs served by airlines were relevant markets for antitrust purposes).

The antitrust laws can be enforced by the Department of Justice ("DOJ"), the Federal Trade Commission ("FTC"), or the state Attorney General. See 15 USC 4; 15 USC 45; MCL 445.777, MCL 445.778(2). Private persons or entities injured in their business or property by an antitrust violation can bring lawsuits in state or federal court, including class actions, to recover treble damages, attorney fees and costs, and the State can bring a lawsuit seeking damages on behalf of its citizens as *parens patriae*. See 15 USC 15; MCL 445.778.

The argument that Shepler's and Arnold are "not a monopoly" is not supported by antitrust law. A parent corporation and its wholly-owned subsidiaries are, except in very rare circumstances, treated as a single entity under the antitrust laws. See *Copperweld Corp. v. Independence Tube Corp.*, 467 US 752, 771 (1984). As a single entity, Shepler's and Arnold have market power and would be considered a monopoly in the relevant market. If Shepler's and Arnold were actually independent companies (or were seriously held out as such), they could be found liable for fixing prices and dividing markets, which are per se antitrust violations of the Sherman Act and MARA. See *id.* at 763-64.

Hoffmann Marine has also suggested that the acquisitions are immune from challenge under the antitrust laws because they were not required to file a notice with the DOJ and FTC under the Hart-Scott-Rodino Act, 15 USC 18a ("HSR Act"), for the purchase of either ferry company. The City assumes Hoffmann relied on the size of the transactions as an exemption from the HSR Act. Regardless of the exemption, the HSR Act is clear that action or inaction by the agencies does not provide a defense to a future challenge to the acquisition or to post-acquisition conduct. 15 USC 18a(i)(1). All that can be said is that the DOJ and FTC have not yet challenged the acquisitions.

To date, no private suit has been filed challenging the acquisitions or any post-acquisition conduct. The four-year statute of limitations on a private lawsuit against either acquisition has not yet run, see 15 USC 15b, MCL 445.781. Any alleged violation is arguably continuing, tolling the statute of limitations.

The most viable defense to an antitrust challenge to the consolidation of the ferry companies is the "state action" doctrine, which exempts certain conduct of government units and regulated entities from the antitrust laws. See *Parker v. Brown*, 317 US 341 (1943). The Michigan Legislature's express delegation of the power to regulate ferry rates exempts the actions of the City of Mackinac Island itself from the antitrust laws. While municipalities and other subordinate state units like the City of Mackinac Island are not automatically covered by "state action," *City of Lafayette v. Louisiana Power & Light Co.*, 435 US 389, 413 (1978), municipalities need only show their anticompetitive activities were "authorized by the State 'pursuant to a state policy to displace competition with regulation or monopoly public service.'" *Community Communications Co. v. City of Boulder*, 455 US 40, 52 (1982). A municipality need not show either state compulsion or active state supervision. See *Town of Hallie v. City of Eau Claire*, 471 US 34, 38 (1985).

Private entities like Arnold and Shepler's are covered by the "state action" doctrine if their conduct is "actively supervised" by the state itself pursuant to a "clearly articulated and affirmatively expressed . . . state policy" to displace competition with regulation. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 US 97, 105 (1980). Passive acceptance of a tariff, however, is not enough to trigger the exemption. *Cantor v. Detroit Edison Co.*, 428 US 579 (1976).

In 2024, Michigan Attorney General's antitrust unit conducted an informal investigation of the acquisitions, but took no enforcement action, relying on the understanding that the City would actively regulate the combined ferry companies. While the United States Supreme Court has never decided the issue, a number of lower courts have concluded that active municipal supervision in

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accord with state law confers antitrust immunity on the regulated entity. See *GF Gaming Corp v. City of Black Hawk*, 405 F3d 876, 886-87 (10th Cir 2005); *Trinity Ambulance Service, Inc v G&L Ambulance Service, Inc*, 625 F Supp 142 (D Conn 1985), aff'd, 787 F2d 86 (2d Cir 1986); *Vartan v Harrison Development Corp*, 655 F Supp 430 (ND Pa 1987). Also see *Crosby v Hospital Auth. of Valdosta and Lowndes County*, 93 F3d 1515, 1531-32 (11th Cir 1996). But see *Riverview Investments, Inc v Ottawa Community Improvement Corp*, 774 F2d 162 (6th Cir 1985) (assuming active supervision must be by the state, not a city); *City Communications, Inc. v. City of Detroit*, 660 F Supp 932, 935 (ED Mich 1987).

Reacting to the large number of antitrust suits against municipalities after *Lafayette* and *Boulder*, Congress in 1984 adopted the Local Government Antitrust Act, 15 USC 34-36 ("LGAA"). The LGAA prohibits an award of damages, interest or attorney fees under the federal antitrust laws against local governments or their employees "acting in an official capacity," or any other "person based on any official action directed by a local government, or official or employee acting in an official capacity."

The LGAA's limited immunity from damages under the federal antitrust laws thus potentially extends to private entities regulated by the municipality, like Shepler's and Arnold. The Eastern District of Michigan in *City Communications*, however, found a question of fact existed as to whether the city was the "effective decision maker" or merely rubber-stamped the decisions of the private defendants. 660 F Supp at 935.

The Michigan legislature has not adopted a counterpart to the LGAA. While MARA is to be applied consistently with federal antitrust law, MCL 445.784(2), we are aware of no Michigan state court decision considering the application of the state action doctrine to municipal regulation.

We appreciate the opportunity to advise the City on the issues presented and would be pleased to address any further questions.

Very truly yours,

Miller, Canfield, Paddock and Stone, P.L.C.

By:



cc: Michael E. Cavanaugh, Esq. (mcavanaugh@fraserlawfirm.com)

City Clerk

From: erinevashevskilaw@gmail.com
Sent: Tuesday, January 7, 2025 5:19 PM
To: City Clerk; mdoud@lighthouse.net; Mayor's Assistant; Richard Chambers; Tom Corrigan; Steve Moskwa; Anneke Myers; Jason St. Onge; Alan Sehoyan
Cc: Mike Cavanaugh
Subject: FW: Antitrust Letter City of Mackinac Island (final PDF format)(43173348.1) [MCPS-ACTIVE.FID3308602]
Attachments: Antitrust Letter City of Mackinac Island (final PDF format)(43173348.1).pdf

All,

Please see attached the opinion from Larry Saylor regarding the monopoly status of the ferry boat franchises.

Sincerely,

Erin

Erin K. Evashevski

EVASHEVSKI LAW OFFICE

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From: Saylor, Larry J. <Saylor@MillerCanfield.com>
Sent: Tuesday, January 7, 2025 2:01 PM
To: Erin Evashevski <erinevashevskilaw@gmail.com>
Cc: Mike Cavanaugh <mcavanaugh@fraserlawfirm.com>
Subject: Antitrust Letter City of Mackinac Island (final PDF format)(43173348.1) [MCPS-ACTIVE.FID3308602]

Erin and Mike,

The signed letter is attached. We appreciate the opportunity to advise the City on the issues and would be happy to discuss further.

Best regards,
Larry

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