# The GPMemorandum

**TO:** **OUR FRANCHISE AND DISTRIBUTION CLIENTS AND FRIENDS**

**FROM:** **GRAY PLANT MOOTY'S FRANCHISE AND DISTRIBUTION PRACTICE GROUP**

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This issue of *The GPMemorandum* focuses on topics primarily of interest to companies that use distributors and dealers rather than manage a business format franchise system. The distribution-related topics this quarter include antitrust, application of state statutes, and contract issues, as well as a description of new government contractor affirmative action requirements for protected veterans and individuals with disabilities.

## ANTITRUST

### TYING AND OTHER CLAIMS BY SERVICE COMPETITOR REJECTED

A federal court in Arizona has rejected various antitrust claims brought by a servicer of aircraft power units against a manufacturer of those units. *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 2014 U.S. Dist. LEXIS 38651 (D. Ariz. Mar. 17, 2014). The court granted summary judgment in favor of Honeywell International, a company that manufactures aircraft power units that provide on-board electrical power in commercial aircraft. Honeywell is the largest servicer of its power units. Aerotec International is an independent service provider that performs maintenance, repair, and overhaul work on Honeywell power units. Aerotec brought suit alleging that Honeywell engaged in illegal tying in violation of section 1 of the Sherman Act by using its dominant position in the market to coerce aircraft owners who need Honeywell parts to purchase maintenance services directly from Honeywell. Some of those aircraft owners went on to sign exclusive dealing agreements with Honeywell, so Aerotec further alleged that those agreements were anticompetitive in violation of section 1. Aerotec also claimed that Honeywell engaged in monopolization and attempted monopolization in violation of section 2 of the Sherman Act, among other claims.

In reviewing the section 1 claims, the court noted that Aerotec had not alleged any customers were prevented from doing business with Aerotec because of limited access to Honeywell parts. Since Aerotec was not foreclosed from competition by Honeywell's bundling of its parts and services at a discount, no illegal tying had occurred. The court also observed that Aerotec failed to show how any exclusive agreement between Honeywell and particular customers had precluded competition, since there were at least forty-nine other service providers for Honeywell's power units. Although Honeywell controlled roughly half of the market for repair, its power was insufficient to influence service prices where other providers actively competed for customers. The fact that Aerotec's own fractional share of the market had decreased was not enough to demonstrate the injury to overall competition required under section 2.

**DISTRIBUTOR'S ANTITRUST CLAIMS DISMISSED ON SUMMARY JUDGMENT**

The United States District Court for the District of Colorado granted summary judgment dismissing seven claims of federal and state antitrust violations brought by a distributor of DuPont's automobile paint coatings. *JTS Choice Enters., Inc. v. E.I. DuPont De Nemours & Co.*, 2014 U.S. Dist. LEXIS 24332 (D. Colo. Feb. 26, 2014). DuPont provided various forms of assistance to its distributors and, in exchange, each distributor agreed not to solicit existing business from other distributors. Between 2008 and 2009, DuPont gave significant financial assistance and other support to Metro Paint, a distributor that competed with plaintiff JTS Choice, by enabling Metro Paint to acquire an existing DuPont distributor in Colorado. Following the acquisition, Metro Paint began aggressively soliciting JTS Choice's customers without interference from DuPont.

The court granted DuPont's motion on the grounds that JTS Choice failed to prove antitrust injury. While JTS Choice may have lost customers to Metro Paint, the court found it was not due to predatory pricing or any other anticompetitive practice; rather, the evidence showed a robust market in the Denver area in automotive coatings both before and after Metro Paint's entry. The court grounded its decision on the long-standing principle that the "[a]ntitrust laws were not intended to protect a particular distributor; they protect the public and overall inter-brand competition."

## TERMINATIONS

**COURT DENIES PRELIMINARY INJUNCTION FOR TERMINATION OF ORAL DEALER AGREEMENT AND ALLEGED DISCRIMINATION**

A federal court in Ohio recently denied a dealer's motion for a preliminary injunction that would have required a tire manufacturer to continue supplying the dealer with products pending adjudication of the dealer's claims for wrongful termination and violation of 42 U.S.C. § 1981. In *B & S Tires, Inc. v. Bridgestone Americas Tire Operations,* *LLC,* 2014 U.S. Dist. LEXIS 26119 (N.D. Ohio Feb. 27, 2014), the plaintiff dealer was a thirty-plus year distributor of Bridgestone and Firestone tires and a minority-owned business that frequently fulfilled supply contracts for the U.S. government. The parties conceded that their relationship was not governed by a comprehensive written contract. The dealer alleged that the parties' oral understandings and course of performance resulted in a contract that required Bridgestone to show "good cause" for termination. In 2011, Bridgestone provided certain requested product pricing information to the dealer and, using the information, the dealer was able to bid on and win six government contracts. Bridgestone included language warning that its provision of pricing information was not a guarantee to supply products. In February 2013, Bridgestone provided the dealer with written notice that it would terminate its authorization to sell Bridgestone products at year-end. In October 2013, the U.S. government exercised an option under its supply contracts with the dealer requiring that the dealer continue to supply tires for dates beyond January 2014. The dealer also alleged that Bridgestone provided pricing to a nonminority firm, enabling that firm to underbid and win contracts over the dealer. The dealer brought suit alleging the termination violated the parties' oral agreement, was discriminatory under § 1981, and was barred by promissory estoppel. The dealer sought a preliminary injunction requiring Bridgestone to continue to supply products pending resolution of the dispute.

With regard to the discrimination claim, Bridgestone asserted that its reason for termination was that the dealer did not have the warehouse capacity and tire service capabilities that most dealers possess, and that the dealer was "difficult and unpleasant." Bridgestone also asserted that the pricing afforded to the dealer's competitor was available to all dealers meeting applicable size requirements. The court found that the dealer did not provide sufficient evidence to dispute these assertions and did not, therefore, show a likelihood of success on its § 1981 claim for discrimination on the basis of race. With respect to the claim Bridgestone wrongfully terminated without good cause, the court noted that under general contract principles, an oral agreement that is silent on grounds for termination is terminable at will. Finally, the dealer's claim for promissory estoppel was not likely to succeed because Bridgestone gave the dealer express warnings in all pricing communications that the pricing information was not a guarantee to supply. The court then addressed whether denying the dealer's motion would result in irreparable harm, finding that the dealer's inability to continue purchasing Bridgestone products would significantly harm its business and reputation, and that continuing to supply the dealer for a few more months would not significantly harm Bridgestone. Nonetheless, the dealer had been given almost ten months' notice of termination, during which time it could have mitigated its damages. Finally, the court determined that granting injunctive relief in this case, where the dealer had waited ten months to assert its claims, would encourage undesirable behavior from future claimants. The court denied the dealer's motion for injunctive relief.

## ENCROACHMENT

### DEALER'S ENCROACHMENT CLAIMS DISMISSED

In *Aston Martin Lagonda of North America, Inc. v. Lotus Motorsports, Inc.*, 2014 U.S. Dist. LEXIS 35909 (D. Mass. Mar. 18, 2014), a Massachusetts federal court partially granted Aston Martin's motion to dismiss the defendant-dealer's counterclaims. Aston Martin had sought a declaratory judgment that the parties' dealer agreement did not prohibit it from locating a new dealer within 8.7 miles of Lotus's existing dealership, but outside of its territory. Lotus, which had served as the sole Aston Martin dealership in New England (except for one dealership) since 1996, claimed the supplier had agreed not to open another dealership in the region. It filed numerous counterclaims alleging violations of the Automobile Dealers Day in Court Act, state unfair competition statutes, and common law. Lotus claimed that, based on Aston Martin's alleged representations and encouragement, it moved its dealership to a new location, investing more than $700,000 in the new facility. Locating a competing dealer nearby would harm Lotus.

Regarding the alleged violation of the Automobile Dealers Day in Court Act, the court held that Lotus could not show that Aston Martin had threatened coercion or intimidated it. According to the court, conclusory statements that the supplier demanded consent to the appointment of a new dealer did not meet the requirements of the statute. As to the alleged unfair competition, the law applies only if the competing dealership is within the dealer's relevant market (defined as a radius of eight miles from any boundary of the existing dealership). Here, the new dealership was 8.7 miles from Lotus's dealership; thus, the statute did not apply. The court did hold that Lotus had adduced enough facts to overcome the motion to dismiss on other claims.

## CONTRACTS

### COURT DECLINES INVITATION TO STRAY FROM LANGUAGE OF AGREEMENT

In a decision from the Western District of New York, a magistrate judge relied on the plain language of a distribution agreement to determine its scope. *Precimed Inc. v. ECA Medical Instruments*, 2014 U.S. Dist. LEXIS 10349 (W.D.N.Y. Jan. 28, 2014). ECA, a manufacturer of both standard and custom surgical instruments, entered into a distribution agreement for Precimed to market and sell ECA's "Products." After a disagreement as to the scope of the term "Products," the parties filed opposing claims regarding whether the distribution agreement gave Precimed exclusive rights to distribute ECA's custom products in addition to its standard products.

Applying Delaware law and citing the plain language of the parties' agreements, the judge recommended denying Precimed's motion for a declaratory judgment. In reaching this conclusion, the court noted that the language defining "Products" did not include custom products. Further, the court rejected Precimed's argument that inclusion of custom products in the definition of "Products" should be inferred. The court observed that terms are inferred only when doing so is necessary to give effect to parties' intentions. In this case, the agreement remained effective without custom products. The court also rejected Precimed's argument that custom products should be included in the definition of "Products" based on the parties' course of performance. Applying the UCC, the court found no evidence of such a course of performance, and, in any event, the agreement required a signed writing to modify its terms.

## STATE FRANCHISE LAWS

### OHIO COURT DISMISSES TAKINGS CLAIM AGAINST SUCCESSOR MANUFACTURER

A federal district court in Ohio dismissed claims brought by two beverage distributors alleging that a successor manufacturer's termination of their distribution agreements constituted an unlawful taking under the Ohio and U.S. Constitutions. In *Tri County Wholesale Distributors, Inc. v. Labatt USA Operating Co., LLC*, 2014 U.S. Dist. LEXIS 903 (S.D. Ohio Jan. 6, 2014), the distributors entered into written distribution agreements with Labatt that granted them exclusive rights to distribute specified brands of alcoholic beverages in designated territories. Later, a new entity that acquired Labatt terminated the distributors' agreements in accordance with the Ohio Alcoholic Beverages Franchise Act ("ABFA"), which permits successor entities to terminate without just cause within ninety days of a merger or acquisition. The distributors filed suit, claiming that forfeiture and transfer of their contracts under ABFA amounted to an unconstitutional taking.

Granting the manufacturer's motion, the court held that principles underlying the takings doctrine were not implicated. While the termination of the distributors' agreements did result in losses, the court determined that those losses did not stem from a governmental appropriation and, therefore, were not entitled to protection. The court also noted that the ABFA was not created to nullify the distributors' rights, as it was already in effect when they entered into their contracts with Labatt. The court further reasoned that the ABFA did not unlawfully target distributors because it merely permits successor manufacturers to terminate contracts—a common law right.

### FRANCHISE RELATIONSHIP FOUND UNDER NEW JERSEY STATUTE

In *McPeak v. S-L Distribution Co.*, 2014 U.S. Dist. LEXIS 10794 (D.N.J. Jan. 29, 2014), a federal district court held that held that a distributor had pled sufficient facts to be considered a franchisee under the New Jersey Franchise Practices Act ("NJFPA"), even though the distribution agreement specifically disclaimed that the parties were in a franchise relationship. McPeak was a distributor for a large snack food manufacturer, and the agreement specifically prohibited McPeak from using S-L's trademarks and trade name without its prior written permission. In addition, the agreement classified the distributor as an independent contractor and contained McPeak's explicit acknowledgment that it was "not a franchise agreement." However, S-L provided McPeak with business cards bearing its logo and slogan; mandated the use of invoices with its name, address, phone number, and web address; gave McPeak a telephone number and voice mailbox; required McPeak's employees to wear apparel bearing S-L's trademarks and logos; and allowed McPeak to display its trademarks on his delivery vehicle. Moreover, the distribution agreement prohibited McPeak from selling snack foods made by other manufacturers.

The district court agreed that McPeak was entitled to protection under the NJFPA, noting that the Act had been amended in 2010 to apply not only to "retail businesses, but also wholesale distribution franchisees that, through their efforts, enhance the reputation and goodwill of franchisors" in New Jersey. The court further explained that a trademark license is sufficient under the Act when a licensee is permitted to use a trademark in a manner that creates an impression that the parties are related and that the licensor is vouching for the activities of the licensee. The distributor met the minimum pleading requirements by alleging that the manufacturer had either required or allowed the extensive use of the manufacturer's trademarks by the distributor. The court further found the parties to the distribution agreement were in a "community of interest," under the NJFPA because the distribution agreement prohibited the distributor from selling snack products made by other manufacturers, rendering the distributor "economically dependent" on the manufacturer. Finally, the court held that the distributor fulfilled the requirement that he have a place of business in New Jersey by pleading that he rented warehouse space from the manufacturer.

## "WARRANTY COST RECOVERY CHARGE" VIOLATES ILLINOIS ACT

The Illinois Court of Appeals recently held that the "Warranty Supplemental Cost Recovery" charge that Nissan imposed on its Illinois Infiniti dealers violated the Illinois Motor Vehicle Franchise Act. *Nissan N. Am., Inc. v. Motor Vehicle Review Bd.*, 2014 Ill. App. LEXIS 93 (Ill. App. Ct. Feb. 20, 2014). Two dealers sued after Nissan sought to recover a portion of the warranty payments made to dealers by imposing a "Warranty Supplemental Cost Recovery" surcharge on each Infinity vehicle sold to each dealer.

Section 6 of the Act describes the process by which dealers may be reimbursed for providing warranty services on behalf of the auto manufacturers. The Act also provides a mechanism by which a motor vehicle franchisor may lower the warranty reimbursement, if a majority of Illinois dealers contractually agree to the lower rate. There was no such agreement with the dealers. Nissan argued that the Act does not prohibit a "warranty supplemental cost recovery" charge. Nissan further argued that, because section 6(g)(4) of the Act provides that if a franchisor and its franchisees do not reach such an agreement then "subsection (g) shall have no effect whatsoever," Nissan was not bound by the other procedures regarding warranty reimbursement. The court disagreed with Nissan's interpretation, and found that a franchisor may only reduce its warranty reimbursement obligations to dealers through negotiated contract.

## LEGISLATION AND RULEMAKING

### NEW GOVERNMENT CONTRACTOR AFFIRMATIVE ACTION REQUIREMENTS TOOK EFFECT LAST MONTH

The Office of Federal Contract Compliance Programs recently announced final rules changing federal contractors' affirmative action requirements for individuals with disabilities under section 503 of the Rehabilitation Act and protected veterans under the Vietnam Era Veterans' Readjustment Assistance Act. The final rules became effective March 24, 2014. These new rules mandate various changes to the content and implementation of contractors' affirmative action plans for these protected classes. Compliance with some changes was required by March 24, while other changes can be implemented by the time of the next annual update of the contractors' Affirmative Action Plan ("AAP"). Notices, contract language, and advertisements, among other things, need to be revised to comply with the new regulations.

The new federal affirmative action rules for protected veterans apply to most contractors and covered subcontractors with contracts of at least $100,000 in value. There are additional requirements for those with fifty or more employees. The new rules for individuals with disabilities apply to federal contractors and covered subcontractors that have contracts of at least $10,000 in value, with additional requirements for contractors with fifty or more employees and a contract of at least $50,000 in value.

By the start of the contractors' next plan year, additional requirements will take effect, including a requirement to extend offers to applicants and employees to self-identify as members of these protected classes, revisions to internal and external notices, and revisions to policies. Contractors must update the language in their next AAP to complys. The regulations also establish new hiring goals for individuals with disabilities and for protected veterans. Contractors will need to make changes in their efforts to recruit individuals with disabilities and protected veterans, measure their effectiveness, and compile reports documenting efforts and remedial measures where appropriate.

Gray Plant Mooty has developed a packet and implementation plan to bring contractors' affirmative action programs into compliance with the new regulations. Contractors are invited to contact Kathryn Nash (612.632.3273, kathryn.nash@gpmlaw.com) or Pamela Kovacs (612.632.3406, pamela.kovacs@gpmlaw.com) for more details.

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