

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 termination, antitrust, application of state statutes, and more.

ANTITRUST

NINTH CIRCUIT AFFIRMS SUMMARY JUDGMENT AGAINST PLAINTIFF'S ROBINSON-PATMAN ACT AND SHERMAN ACT ALLEGATIONS

The Ninth Circuit recently affirmed summary judgment in an antitrust suit involving the sale of aftermarket automotive parts. In *Gorlick Distribution Centers v. Car Sound Exhaust*, 2013 U.S. App. LEXIS 14635 (9th Cir. July 19, 2013), the appeals court agreed that Gorlick had failed to raise a genuine issue of fact regarding its claim that its competitor, Allied Exhaust Systems, knowingly received discriminatory pricing in violation of the Robinson-Patman Act. Although it was clear that Allied did in fact know it was receiving favorable pricing from its supplier, Car Sound Exhaust System, the court found that Gorlick had not met its burden of proving that Allied knew its favored prices did not qualify for a defense under the Act. The evidence demonstrated that Allied could have reasonably believed that the favorable prices did not result from anything other than significant differences in the way the competitors did business. The court also rejected Gorlick's theory that Allied's "trade experience" should have alerted it to the fact its prices violated the federal statute, or that Allied had a duty to inquire into the prices offered to its competitors.

A divided panel also affirmed the district court's summary judgment on Gorlick's claim under Section 1 of the Sherman Act, although for reasons not identified by the district court. The Ninth Circuit concluded that even if Allied and Car Sound had reached an agreement to restrain trade, Gorlick's claim still failed under a rule of reason analysis because there was no evidence of actual injury to interbrand competition—as opposed to injury to Gorlick as a mere competitor for Car Sound parts. Because the relevant market was the larger aftermarket automotive exhaust products market, and not merely products sold by Car Sound, Gorlick was required to demonstrate that any purported agreement between Allied and Car Sound would have wider competitive effects. Although a dissenting judge would have remanded the case for more discovery on possible anticompetitive effects, the panel majority concluded that the issue had been sufficiently addressed and affirmed the district court's summary judgment ruling.

CONTRACTS

EIGHTH CIRCUIT AFFIRMS SUMMARY JUDGMENT FOR PLAINTIFF FINDING NO BREACH OF CONTRACT

The United States Court of Appeals for the Eighth Circuit affirmed a district court award of summary judgment in favor of a Minnesota supplier, finding that the supplier did not breach its contract with the appellant distributor. *Watkins Inc. v. Chilkoot Distrib., Inc.*, 2013 U.S. App. LEXIS 13716 (8th Cir. July 8, 2013). The parties had entered into a series of two agreements through which Chilkoot became a Watkins sales associate in Canada. Chilkoot then recruited a new sales associate, the Lambert Group, which became a profitable part of Chilkoot's downline sales network. Watkins subsequently changed the classification of the Lambert Group to "manufacturing representative" and as a result, Chilkoot was no longer eligible to receive commissions by the Lambert Group. Watkins, the supplier, sought a declaratory judgment that it did not breach its contract with Chilkoot by reclassifying the Lambert Group. Chilkoot counterclaimed for breach of contract and equitable remedies.

To prove breach of contract under Minnesota law, which governed the case, the breaching party must show (1) formation of a contract, (2) performance by the plaintiff of any conditions precedent to its right to demand performance by the defendant, and (3) breach of the contract by the defendant. The court held that Chilkoot did not have a cause of action for breach of contract because neither contract by its terms prohibited Watkins from reclassifying a sales associate as a manufacturing representative. Chilkoot presented no case law from Minnesota—or any other authority—that found a breach of contract when the agreements were silent on reclassification. The court also found that the action by Watkins did not breach the implied covenant of good faith and fair dealing. Although the covenant of good faith and fair dealing generally is read into Minnesota contracts, it serves only to enforce existing contractual duties, not to create new ones.

COURT RULES INTEGRATION CLAUSE BARS BOTH PARTIES' CLAIMS INVOLVING PREAGREEMENT REPRESENTATIONS

The United States District Court for the Southern District of Indiana recently ruled that an integration clause barred certain claims by a dealer that were premised on an alleged preagreement misrepresentation by the supplier/distributor. *Volvo Trucks N. Am. v. Andy Mohr Truck Ctr.*, 2013 U.S. Dist. LEXIS 83881 (S.D. Ind. June 14, 2013). Mohr Truck alleged that it entered into a dealer agreement with Volvo in reliance on a preagreement oral representation by Volvo that Volvo would also grant Mohr Truck a separate Mack Truck dealership, which Volvo never awarded. Citing the alleged misrepresentation, Mohr Truck asserted claims for breach of an oral contract, promissory estoppel, and violation of Indiana's Franchise Disclosure, Unfair Practices, and Crime Victims' Acts.

Upon Volvo's motion for judgment on the pleadings, the court found that the dealer agreement's integration clause barred those claims that required a showing of reasonable reliance on the alleged misrepresentation, while claims that did not require reasonable reliance survived. Specifically, the court rejected Mohr Truck's oral contract and promissory estoppel claims, concluding that the promise underlying the misrepresentation, as pleaded, would merely have been consideration for the Volvo dealer agreement and not an independent promise. Because that term was not included in the dealer agreement, the agreement's integration clause precluded the dealer from reasonably relying on it. The court also found that the integration clause barred Mohr Truck's Indiana Franchise Disclosure Act claim because, as interpreted by previous cases, the portion of the IFDA cited by the dealer requires reasonable reliance on a misrepresentation made by the franchisor. (For reasons not addressed in the decision, Volvo did not argue that the relationship with Mohr Truck was not a "franchise" under the Indiana statute.) Mohr Truck's claims under the Indiana Unfair Practices Act and Indiana Crime Victims' Act, on the other hand, did not require reasonable reliance. As a result, the court declined to dismiss those claims.

In a separate opinion in the same case, the court also dismissed Volvo's claims for breach of contract and violation of the IFDA. *Volvo Trucks N. Am. v. Andy Mohr Truck Ctr.*, 2013 U.S. Dist. LEXIS 83835 (S.D. Ind. June 14, 2013). Volvo claimed that Andy Mohr had not satisfied several promises and representations relating to sales performance that it made in its application for the franchise and alleged that its failure to fulfill those promises constituted a breach of the agreement between the parties. Volvo further alleged that Andy Mohr had engaged in fraud in connection with the purchase of the franchise in violation of the IFDA, and sought a declaratory judgment to enforce the termination of the dealership agreement and to confirm that Andy Mohr was not entitled to a Mack Truck dealership. As with Andy Mohr's claims, the court dismissed Volvo's breach of contract claim and IFDA fraud claim because the integration clause rendered Volvo's alleged reliance on Andy Mohr's promises in its application

unreasonable as a matter of law. The court also concluded that there was no need to separately assess Volvo's request for a declaratory judgment as to the Mack Truck dealership because its claim would be resolved as part of the counterclaims filed by Andy Mohr. The court left in place Volvo's request for a declaration that it had good cause to terminate the dealership agreement, reasoning that in its motion for judgment on the pleadings, Volvo was entitled to have its allegation that Andy Mohr misrepresented a material fact in its application taken as true.

STATE FRANCHISE LAWS

MASSACHUSETTS FEDERAL COURT DEFINES "COMMUNITY OF INTEREST" AS IT RELATES TO MASSACHUSETTS FRANCHISE LAW

The United States District Court for the District of Massachusetts recently explained the meaning of "community of interest" as it relates to Massachusetts franchise law. *C.N. Wood Co. v. Labrie Envtl. Grp.*, 2013 U.S. Dist. LEXIS 78977 (D. Mass. June 5, 2013). C.N. Wood Company entered into an exclusive distributorship agreement with Labrie Environmental Group, under which Wood served as Labrie's exclusive distributor in Massachusetts and Rhode Island. The agreement had an initial term of one year, which automatically renewed unless a party gave notice of its intent to terminate. Labrie sent Wood a notice of nonrenewal under the agreement, and while Labrie secured a new distributor, Wood continued to sell the Labrie brand past the termination date. Three months after the termination date, Labrie sent Wood a notice of termination. Wood sued and alleged that the agreement, which Wood characterized as a franchise contract, was wrongfully terminated by Labrie. Labrie moved to dismiss on the basis of the agreement's choice of law and forum selection provisions that designated Quebec and Massachusetts law as governing, and Quebec courts as the exclusive jurisdiction for any disputes that arose from the agreement. The Massachusetts federal court's decision as to whether the agreement was a de facto franchise agreement focused on the agreement's choice of law and choice of forum provisions. That dispute centered on what the term "community of interest" meant under the Massachusetts definition of franchise agreement.

The court joined other jurisdictions that have interpreted similar state franchise laws in focusing on the power dynamics between the franchisor and franchisee. The court explained the meaning of "community of interest" as reflecting the "potentially oppressive power" that a franchisor has over a franchisee "because of the substantial franchise-specific investment of the franchisee that is of minimal utility outside of the franchise." This "potentially oppressive power," the court explained, gives "the franchisor explicit or implicit control over the relationship such that he has the franchisee 'over a barrel.'" The court then determined that Labrie and Wood did not share a community of interest, because among other things and most compellingly, Wood not only carried multiple product lines, but also sold and serviced products that

directly competed with Labrie. Rather, the court explained Wood and Labrie had both benefitted from the vendor/vendee relationship while it endured. Accordingly, the agreement's choice of law and choice of forum provisions were controlling, and the court granted Labrie's motion to dismiss.

JURISDICTION AND PROCEDURE

COURT HOLDS NEW ISSUES ARISE WHEN MANUFACTURER TERMINATES DEALERSHIP FRANCHISE AFTER PREVIOUS LITIGATION

When a dealership franchise was terminated following litigation between the manufacturer and dealers, the Minnesota Court of Appeals found that the termination created new issues and new litigation was not barred. *North Star Int'l Trucks, Inc. v. Navistar, Inc.*, 2013 Minn. App. Unpub. LEXIS 447 (Minn. App. May 20, 2013). The dealership franchisee, North Star International Trucks, had previously brought suit against Navistar in 2009, alleging eight claims, including that Navistar threatened termination of its franchise in bad faith. Though the jury made advisory findings that Navistar acted in good faith, the district court ultimately determined that the claim was not ripe, because Navistar had not terminated the franchise. One month after the district court's order, Navistar terminated North Star's franchise. North Star again brought suit, alleging, among other things, that Navistar acted in bad faith and without good cause in terminating its franchise. Navistar moved to dismiss all counts as barred by res judicata and collateral estoppel. North Star in turn moved for summary judgment as to the claim of bad faith. The trial court granted Navistar's motion to dismiss and denied North Star's motion for summary judgment as moot. The court of appeals reasoned that North Star's claim was not barred under res judicata or collateral estoppel because at the time the jury made its findings, North Star had not yet been terminated or subjected to the conduct alleged in the second action. Therefore, the issues North Star asserted in the second action could not be identical to those in the prior action. For the same reasons, the court concluded that it was improper to dismiss North Star's summary judgment motion as moot. Accordingly, the court reversed and remanded for consideration of North Star's summary judgment motion on the merits.

TERMINATIONS

MISSOURI FEDERAL COURT DISMISSES PORTIONS OF DEALER'S FRANCHISE ACT CLAIMS BASED ON NOTICE, BUT ALLOWS OTHER CLAIMS TO PROCEED

The Eastern District of Missouri recently ruled on a number of issues in a dealer's claims for wrongful termination. In the first decision, the court granted the manufacturer's motion for summary judgment on a claim that it violated Missouri's Franchise Act by failing to provide 90 days' notice of its intent to terminate the dealership, but the court denied the supplier's motion as to the claim that it violated the Missouri Power

Equipment Act by terminating the agreement without “good cause.” *Lift Truck Lease & Serv., Inc., v. Nissan Forklift Corp.*, 2013 U.S. Dist. LEXIS 82313 (E.D. Mo. June 12, 2013). Pursuant to three agreements, Lift Truck was the exclusive Nissan forklift dealer in parts of Missouri and Illinois. One of the agreements had a February 1, 2012, termination date, and the other agreements had indefinite terms. On January 10, 2012, Nissan gave notice of its intent to terminate the relationship on April 15, 2012, because Lift Truck failed to meet its performance obligations.

The court held that a party satisfies the notice requirements of the Missouri Franchise Act and the Missouri Power Equipment Act if it maintains a relationship for 90 days after providing the notice, even if the parties’ agreement expires by its own terms less than 90 days after the notice. In this case, even though notice was provided less than a month before the agreement was set to expire, the franchisor continued to allow the franchisee to advertise and accept orders for the franchisor’s products for another 180 days after the notice. Accordingly, the court held that Nissan provided sufficient notice of the termination.

The Missouri Power Equipment Act, however, also provides that a manufacturer of industrial construction equipment cannot terminate a contract with a retailer without “good cause.” Good cause includes the retailer’s failure to substantially comply with the “essential and reasonable requirements imposed upon the retailer by the contract.” The court held that whether the requirements on the franchisee were “essential and reasonable” presented genuine issues of material fact. Accordingly, the court denied the franchisor’s motion for summary judgment on the franchisee’s second claim.

In another decision the following week, the same court applied Missouri law to find that the dealer could not contract away certain rights to a larger manufacturer, distributor, or wholesaler under Missouri law. *Lift Truck Lease & Serv., Inc. v. Nissan Forklift Corp.*, 2013 U.S. Dist. LEXIS 85183 (E.D. Mo. June 18, 2013). In this decision, the court reviewed whether, under the Missouri Franchise Act, parties can contract to limit a party’s future liability. Chapter 407 of the Missouri Franchise Act provides a cause of action when a wholesaler, distributor, or manufacturer terminates a retailer without “good cause.”

Previously, the United States Court of Appeals for the Eighth Circuit, in which the Missouri federal courts sit, interpreted Chapter 407 to “regulate the marketplace to the advantage of those traditionally thought to have unequal bargaining power,” and others “who may fall victim to unfair business practices.” The appellate court had described the statute as “paternalistic” and said that the Missouri legislature would not want those parties Chapter 407 was designed to protect to be able to waive them. Applying the Eighth Circuit’s logic, the Eastern District of Missouri found Nissan was a party in an unmatched position of strength over ADL, a small power equipment retailer,



and it would be against public policy and intent of Chapter 407 to enforce the limitation of liability provision.

With the case headed for trial on at least some claims, the admissibility of an industry expert's testimony was the central focus of a third decision by the same court in *Lift Truck Lease & Serv., Inc. v. Nissan Forklift Corp.*, 2013 U.S. Dist. LEXIS 87391 (E.D. Mo. June 21, 2013). Nissan had filed a motion to exclude the testimony of Lift Truck's expert witness, who had 38 years of experience in the material handling business. In his report, the expert stated that (1) Lift Truck substantially achieved the sales goals set forth in the parties' dealership agreement, (2) Nissan treated Lift Truck differently than similarly situated dealers, and (3) Nissan's termination of Lift Truck did not conform to forklift industry custom and practice.

In deciding whether to admit the proffered expert testimony, the court applied the Eighth Circuit's requirements of evidence "based on scientific, technical, or other specialized knowledge [which] must be useful to the finder of fact in deciding the ultimate issue of fact"; that the proposed witness is qualified; and that the proposed evidence must be reliable or trustworthy. The trial court allowed the expert's first two opinions because he had specialized knowledge and experience in those areas, he relied on trustworthy reports from Nissan itself, and his opinion would help the jury understand the meaning of key statutory terms not defined elsewhere. The court excluded the third opinion, however, because the expert lacked experience with new dealers and did not have sufficient facts or knowledge that would assist the jury in understanding the evidence.

Along with the attorneys indicated on the next page, summer associates Ashley Bailey, Nick De La Cruz, Hallie Goodman, Wade Hauser, Megan Kelner, and Leah Leyendecker contributed to this issue.



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