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

CONTRACTS

TEXAS COURT OF APPEALS FINDS MANUFACTURER FAILED TO USE BEST EFFORTS TO SETTLE DISPUTE

In *DaimlerChrysler Motors Company, LLC v. Manuel, et al.*, 2012 Tex. App. LEXIS 1489 (Tex. Ct. App. Feb. 24, 2012), a Texas appellate court affirmed the trial court's finding that DaimlerChrysler (Chrysler) breached the best efforts provision of its contract with its dealer. In this case, Chrysler entered into an agreement with the dealer for a new Chrysler-Jeep dealership in South Arlington, Texas. The agreement stated that Chrysler granted the dealership subject to the possibility that it could be protested by another dealer, which would delay its establishment. The contract stated that in the event of a protest, Chrysler would use its "best efforts" to litigate or settle the dispute. Before the appellees began constructing the new dealership, another dealer filed a protest. Chrysler engaged in multiple attempts to resolve the dispute, including discussions with the protestor, going before the Texas Motor Vehicle Commission, and filing suit in court. Eight months after the protest was filed,

Chrysler began settlement negotiations and ultimately settled the case. Because the economy and market for new cars had dropped significantly in the meantime, the dealership still sued. The trial court found that Chrysler failed to use its best efforts to resolve the protest and awarded the dealership $370,668. Chrysler appealed.

In affirming, the court of appeals noted that the best efforts provision had a measurable goal of resolving any protest within a reasonable time. It also found that even absent a date certain by which Chrysler was obligated to litigate or settle the protest, Chrysler's eventual settlement did not meet the goal. After observing that Chrysler had a $30 million budget to resolve protests and that it could have offered the protesting dealerships at least two locations, the court found that Chrysler's failure to attempt to settle until eight months after the protest was enough to support the finding of breach.

ARBITRATION

SAVINGS CLAUSE UNDERMINES MOTION TO COMPEL ARBITRATION

A recent decision from the Maine federal district court underscores the need to review provisions in franchise agreements to ensure that they do not have unintended consequences. In *Oliver Stores v. JCB, Inc.*, 2011 U.S. Dist. LEXIS 149718 (D. Maine Dec. 29, 2011), the magistrate judge granted a motion to compel arbitration of two of the three counts of the complaint, but held that the remaining count survived because of the agreement's savings clause. The savings clause provided that "[i]f any provision herein contravenes the laws or regulations of any state or other jurisdiction wherein the Agreement is to be performed, or denies access to the procedures, forums or remedies provided for by such laws or regulations, such provisions shall be deemed to be modified to conform to such laws or regulations . . . ." The court concluded that the arbitration clause denied the plaintiff "access to the procedures or forums" provided by the Maine franchise statute and noted that a court had only limited authority to review arbitration decisions. Therefore, the court determined that the savings clause precluded that count from being arbitrated.

ENCROACHMENT

COURT UPHOLDS DISTRIBUTOR'S RIGHT TO AUTHORIZE MULTIPLE DEALERSHIPS

In *Kia Motors America, Inc. v. Glassman Oldsmobile Saab Hyundai, Inc.*, 2012 U.S. Dist. LEXIS 7346 (E.D. Mich. Jan. 23, 2012), a federal district court held that Kia's decision to add a new dealership to the defendant's assigned geographic area did not implicate the "anti-encroachment" provision of the Michigan Motor Vehicle Dealers Act. Under the statute, a distributor that seeks to place a new dealer within the "relevant market area"

of an existing dealer must satisfy certain procedures. In 1998, at the time the parties executed their agreement, the statute defined the "relevant market area" as being within six miles of an existing dealer. The legislature amended the statute in 2010 to enlarge this radius to nine miles. Later that year, when Kia sought to establish a new dealership seven miles away from the defendant's business, it objected on the grounds that the proposed location fell within its relevant market area as defined by the current version of the statute. The dealer maintained that Kia had failed to comply with the statute's requirements before moving ahead with its decision. Kia sought a declaratory judgment to determine the applicability of the statute in light of the 2010 amendment, and the parties both ultimately filed motions to dismiss each other's claims.

In opposing Kia's motion, the defendant argued that the parties' agreement limited Kia's right to add new locations to an existing dealer's designated area to the extent that such action was "prohibited by applicable law." According to the defendant, this language showed an intent that the contract incorporate future changes in the law, such as the 2010 amendment. The dealer further asserted that the court could not apply the pre-2010 version of the statute because it "ceased to exist" upon passage of the amendment. The court rejected these arguments, citing Sixth Circuit case law for the proposition that subsequent changes in the law cannot amend the terms of a contract unless its language expresses a clear intention to the contrary. The court found that in bargaining over the contract's terms, the parties in this case only meant to incorporate the law in existence at the time of their negotiations. The court also noted that amendments retroactively nullify past versions of a statute only when they are remedial in nature. Here, the 2010 amendment qualified as a substantive change because it imposed a new duty on distributors. For those reasons, the court held that the six-mile radius prescribed by the 1998 version applied and granted Kia's motion to dismiss.

TORTIOUS INTERFERENCE

COURT DENIES DISMISSAL OF CLAIMS FOR BREACH AND INTERFERENCE

In *Getty Petroleum Marketing, Inc. v. 2211 Realty, LLC*, 2012 U.S. Dist. LEXIS 19346 (D. Mass. Feb. 16, 2012), a Massachusetts federal court considered a dispute arising out of the termination of a dealership agreement. Pursuant to the agreement, which Getty assigned to Green Valley Oil, defendant 2211 Realty operated a Lukoil station in Rhode Island. The plaintiffs terminated the agreement based on 2211 Realty's alleged failure to pay for fuel deliveries, and initiated a lawsuit to enforce termination. 2211 Realty brought counterclaims alleging, among other things, breach of the implied covenant of good faith and fair dealing and tortious interference with business relations. The counterclaim for breach of the implied covenant alleged that Green Valley had no interest in maintaining the contractual relationship and sought to pressure 2211 Realty

into entering a less favorable contract. It also alleged that Green Valley sent representatives to its store to break into its office, steal documents, and make it appear as though it breached the agreement. 2211 Realty's claim for tortious interference alleged that Green Valley intentionally reduced and then terminated fuel deliveries in order to interfere with 2211 Realty's relationship with its customers.

Applying Rhode Island law, the court denied the plaintiffs' motion to dismiss both counterclaims. With respect to the claim for breach of the implied covenant, the court decided that the conduct alleged, if proved, "would almost certainly be unreasonable and inconsistent with the purposes of the contract." Therefore, the court found 2211 Realty's allegations sufficient to state a claim. With respect to the claim for tortious interference, the court held that it was sufficient for 2211 Realty to allege that Green Valley knew of 2211 Realty's relationship with its customers, and that Green Valley's actions in reducing and eventually terminating gasoline delivery to 2211 Realty prevented the customers from continuing their business relationships with 2211 Realty.

ANTITRUST

ARKANSAS COURT DISMISSES ONLINE RETAILER'S SHERMAN ACT CLAIMS

Last month, the United States District Court for the Western District of Arkansas dismissed state and federal antitrust claims brought by Coffee.org against Green Mountain Coffee relating to the distribution of the "K-cup" single-serve coffee capsule, which is used with a patented coffee machine owned by Green Mountain. *Coffee.org, Inc. v. Green Mountain Coffee Roasters, Inc. et al.*, 2012-1 Trade Cases ¶ 77,790 (W.D. Ark. Feb. 15, 2012). Coffee.org, an online retailer of coffee and coffee-related products, alleged that Green Mountain acquired essentially all distributors of K-cups and terminated its business relationship with Coffee.org, thereby ending Coffee.org's existing supply source for K-cups in violation of state and federal antitrust laws.

In granting the defendant's motion for judgment on the pleadings, the district court rejected Coffee.org's overly narrow, one-brand relevant product market—the market for the K-cup product. The court noted that in some instances one brand of a product can constitute a specific market but, as set forth in the Supreme Court's 1962 *Brown Shoe* decision, in all instances, a relevant market can only be determined after considering all reasonably interchangeable products. The court found that many products are reasonably interchangeable with the K-cup. Accordingly, Coffee.org's market definition was too narrow and its claims were dismissed.

GRAY PLANT MOOTY

SALES LOST TO COMPETITOR ADEQUATE TO STATE CLAIM OF PRICE DISCRIMINATION

A federal district court in New York has denied a plaintiff's motion to dismiss antitrust counterclaims for discriminatory pricing by a seller to competing buyers. In *Dayton Superior Corp. v. Spa Steel Products, Inc.*, 2012 U.S. Dist. LEXIS 4283 (N.D. N.Y. Jan. 13, 2012), the plaintiff originally sued the defendant for breach of contract to recover $1.2 million that the defendant allegedly owed the plaintiff for goods sold and delivered. The defendant brought counterclaims with its amended answer, including a counterclaim under the Robinson-Patman Act based on the allegation that the plaintiff was offering its goods to the defendant's competitors at a lower price than the plaintiff offered to the defendant. The defendant claimed secondary-line price discrimination, which occurs where the allegedly injured party is in competition with a favored customer of the seller. To state a valid claim for this type of price discrimination, the plaintiff must show that the seller discriminated in price between the two purchasers and that the price discrimination had an unlawful effect on competition.

The defendant supported its claim that the plaintiff was offering its product (a component of the defendant's product) to the defendant's competitors at substantially lower prices by alleging that the defendant's potential customers purchased from these competitors, rather than from the defendant, because the defendant's prices were 10% to 15% higher. The court determined that an issue of fact existed as to the cause of the pricing difference, and thus denied the plaintiff's motion to dismiss. Moreover, the defendant adequately pled each element of price discrimination in its counterclaim by submitting an affidavit from one customer stating that it purchased product from defendant's competitor rather than from defendant because the defendant's prices were significantly higher.

TERMINATIONS

MARKET FORCES ALONE NOT SUFFICIENT BASIS FOR COERCION UNDER ALABAMA MOTOR VEHICLE FRANCHISE ACT

In *Long-Lewis Sterling Western Star Of Bessemer v. Sterling Truck Corporation,* 2012 U.S. App. LEXIS 3130 (Feb. 17 2012), an auto dealer sued a distributor and manufacturer under the Alabama Motor Vehicle Franchise Act, claiming that the dealer had been coerced to participate in a program that conditioned the purchase of 2008 model year vehicles upon the purchase of the 2007 model. In affirming the lower court's grant of summary judgment in favor of the manufacturer, the Eleventh Circuit panel first found that a 2010 amendment to the Act modifying the definition of "coerce" did not apply to the case because the amendment post-dated the program at issue. Using instead what it termed the "ordinary" definition of coercion, and referencing Black's Law

Dictionary, the court found that the distributor's "buy-one-to-get-one" program was not coercive. The dealer presented no evidence that it was compelled by force or threat to purchase vehicles under the program and it admitted that it had voluntarily participated. Market forces allegedly compelling the dealer to participate did not constitute coercion for purposes of the Act.

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