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 issues related to international distribution, good faith and fair dealing, and antitrust.

DAMAGES

SEVENTH CIRCUIT AFFIRMS LOST PROFIT AWARD BECAUSE CONTRACTUAL DAMAGES LIMITATION PROVISION WAS UNCONSCIONABLE

The Seventh Circuit Court of Appeals has affirmed an award of lost profits against a dairy silo manufacturer that breached a promise of exclusivity made to its distributor, even though language in the contract barred such damages. Sanchelima Int'l, Inc. v. Walker Stainless Equip. Co., 920 F.3d 1141 (7th Cir. 2019). Defendant Walker entered into a distribution agreement that gave Sanchelima exclusive rights to distribute Walker’s silos in 13 Latin American countries, and Walker agreed it would not make its own direct sales of silos to customers in those countries. The distribution agreement also contained limited remedy and damages disclaimer provisions, which barred Sanchelima from making any claim for lost profits and capped Walker’s liability at amounts paid by Sanchelima in performance of the agreement. After Walker made several direct sales in violation of the agreement, Sanchelima filed suit. Walker moved for summary judgment, arguing that Sanchelima had no recoverable damages because of the limited remedy provisions. The district court denied the motion and ruled after a bench trial that the limited remedy provisions in the contract were unenforceable for failure of their essential
purpose, rendering Walker liable for nearly $800,000 in commissions that Sanchelima lost because of Walker’s direct sales.

On appeal, Walker argued that the district court’s invalidation of the limited remedy provisions was a misapplication of the Uniform Commercial Code. In evaluating these provisions, the district court applied a “dependent approach,” which was adopted by the Wisconsin Supreme Court in Murray v. Holiday Rambler, Inc., 265 N.W.2d 513 (Wis. 1978). Under this approach, if a litigant proves that a limited remedy fails its essential purpose, any accompanying consequential damages disclaimer is per se unconscionable. Walker argued, however, that the district court should have followed the “independent approach,” under which the conscionability of a consequential damages disclaimer is evaluated independently of a limited remedy provision. The Seventh Circuit held it was powerless to overturn Murray, and could not certify the issue to the Wisconsin Supreme Court because, under Seventh Circuit rules and Wisconsin law, issues can be certified only if there is “no controlling precedent.” Because Murray was controlling precedent, the Wisconsin Supreme Court would lack jurisdiction. Finally, Walker argued that the district court should not have invalidated the limited remedy provisions in their entirety, but instead, should have reduced the award. But the Seventh Circuit found that Walker waived this argument by failing to include it in its summary judgment brief.

DUTY OF GOOD FAITH AND FAIR DEALING

SIXTH CIRCUIT AFFIRMS DISMISSAL OF INTERNATIONAL DISTRIBUTOR’S GOOD FAITH AND FAIR DEALING CLAIMS AGAINST AUTOMOBILE MANUFACTURER

The Sixth Circuit Court of Appeals has affirmed dismissal of claims against FCA International Operations regarding the termination of a Chrysler distributor in Angola. Union Commercial Servs. Ltd. v. FCA Int’l Operations, LLC, 2019 WL 4011895 (6th Cir. Aug. 26, 2019). FCA as the successor in interest of Chrysler International Corporation, was the grantor of a 2006 nonexclusive distributor agreement with Union Commercial Services, an Angolan private business. In 2009, Chrysler began working with Union’s Angolan competitor, Auto-Star, a company controlled by high-ranking Angolan government and military leaders. By 2011, Auto-Star directly competed with Union selling Chrysler products within Union’s territory. Around that time, Auto-Star offered to purchase an ownership interest in Union, which Union declined. In 2014, Chrysler terminated the distributor agreement with Union. Believing it was terminated because FCA wanted to exploit the sales market with the government officials associated with Auto-Star, Union sued FCA in Michigan federal court. After a multi-count complaint was dismissed, Union appealed focusing on two legal theories: (1) that Chrysler breached the implied covenant of good faith and fair dealing by working with Auto-Star, a company that would bribe Angolan state officials and attempted to purchase part of Union; and (2) that Chrysler tortiously interfered with the business relations of Union by encouraging Auto-Star to
purchase part of Union, by enabling Auto-Star to take sales from Union, and by ending the relationship after Union would not participate in a scheme to bribe Angolan state officials.

In a split decision, the Sixth Circuit affirmed the dismissal of both claims. In its claim for breach of the implied covenant of good faith and fair dealing, Union relied upon Article 13.6 of the distributor agreement, which required that Union cooperate with Chrysler’s efforts to comply with the Foreign Corrupt Practices Act. Union argued that the provision implied that Chrysler would in fact make efforts to comply with the act. The court held that nothing contained within the language of the provision imposed any obligation on Chrysler to take steps to comply with the act, but rather, the provision imposed duties upon Union to cooperate if Chrysler were to take steps to comply with the act. Although the choice to comply with its statutory obligations was within Chrysler’s discretion, the obligations in Article 13.6 flowed only to Union and therefore could not create an implied duty on Chrysler. On the tortious interference claim, the court concluded that malice on the part of Chrysler could not be reasonably inferred from Union’s bribery allegation. The court held that the general allegation that Chrysler violated the Foreign Corrupt Practices Act was not a specific, affirmative act that demonstrated Chrysler’s improper motive.

EMPLOYMENT

NEW YORK COURT RULES DELIVERY DRIVERS INDEPENDENT CONTRACTORS, NOT EMPLOYEES, FOR PURPOSES OF FLSA AND NEW YORK LABOR LAW

A federal court in New York has granted a distributor’s motion for summary judgment after concluding that the plaintiffs were independent contractors and therefore not entitled to the protections and rights of federal and state labor laws. *Franze v. Bimbo Food Bakeries Distrib., LLC*, 2019 WL 2866168 (S.D.N.Y. July 2, 2019). Nicholas Franze and George Schrufer signed distribution agreements with Bimbo Food Bakeries to deliver baked goods along designated routes. Franze and Schrufer both filed suit against Bimbo on the premise that Bimbo was their employer and had violated various obligations under the Fair Labor Standards Act (“FLSA”) and the New York Labor Law (“NYLL”). Bimbo moved for summary judgment arguing that Franze and Schrufer were independent contractors, not employees, of Bimbo and therefore not entitled to the rights and protections provided by the FLSA and NYLL.

Applying the factors derived from *United States v. Silk*, 331 U.S. 704 (1947), the court agreed that Franze and Schrufer were independent contractors for purposes of the FLSA because they had a high degree of control over their business operations; had a limited non-compete clause; could sell their distribution rights at any time; “enjoyed independent opportunities for profit and loss” based on their own business skill; possessed independent skills, such as professional
driving and business management skills, necessary for their work; and because their role in delivering goods was an important yet small part of Bimbo’s overall business operations. Moreover, having reviewed the totality of circumstances, the court further noted that Franze and Schrufer managed client relations, hired and fired other workers, worked at their own convenience, did not receive fringe benefits and were not on Bimbo’s payroll — all indicators of being independent contractors. The court observed that its analysis and conclusion that Franze and Schrufer were not employees of Bimbo for purposes of the FLSA was sufficient for it to find that they also were not employees for purposes of the NYLL, and therefore granted Bimbo’s motion for summary judgment.

**ANTITRUST**

**FEDERAL COURT CONCLUDES THAT TERMINATION OF DISTRIBUTION AGREEMENT FELL OUTSIDE OF NEW JERSEY FRANCHISE PRACTICES ACT AND ANTITRUST CLAIMS**

A federal court in New Jersey has dismissed claims that an ambulance manufacturer violated the New Jersey Franchise Practices Act (“NJFPA”) and state and federal antitrust laws. *First Priority Emergency Vehicles, Inc. v. REV Ambulance Grp. Orlando, Inc.*, 2019 WL 3423571 (July 30, 2019). First Priority became a party to two distributor agreements with the manufacturer, REV, that both required First Priority to use its “best efforts” to meet or exceed sales goals. On June 30, 2017, REV terminated the agreements based on First Priority’s failure to meet those sales goals. First Priority sued, alleging, among other things, that REV’s termination did not comport with the NJFPA and that REV’s exertion of control over the ambulance manufacturing market violated the Sherman Act.

The court dismissed the NJFPA claims because First Priority failed to show that the act applied to First Priority’s relationship with REV. To fall within the NJFPA, a franchisor must grant a license to use its marks and a community of interest must exist between the franchisor and franchisee. Although REV had given First Priority marketing materials, had listed First Priority on its website as an authorized dealer, and had allowed certain of REV’s trademarks to be displayed on First Priority’s headquarters, the court concluded that those facts did not amount to the granting of a “proprietary interest in REV’s trademarks” or show a sufficient “level of corporate entanglement” between REV and First Priority. The court also dismissed First Priority’s antitrust claims based on its failure allege a viable relevant market, which was required for its monopolization and exclusive dealing claims. First Priority alleged that the relevant market at issue was the market for newly manufactured ambulances, but the court rejected this market definition because used ambulances were reasonably interchangeable with new ambulances. Indeed, First Priority actually alleged that used ambulances had flooded
the market in 2016 and substantially reduced its ability to sell new ambulances, demonstrating
that the narrowly defined market was insufficient as a matter of law.

JURISDICTION AND PROCEDURE

FEDERAL COURT CONCLUDES THAT REMOVAL OF ADMINISTRATIVE HEARING TO FEDERAL
COURT NOT PERMITTED IN WISCONSIN DEALER DISPUTE

A federal court in the Western District of Wisconsin has concluded that an automobile
manufacturer is not permitted to remove a dealer dispute from the Wisconsin Division of
Hearings and Appeals (“DHA”) to federal court. Don Johnson’s Haywood Motors, Inc. v. General
Motors LLC, 2019 WL 2141818 (W.D. Wis. May 16, 2019). Twelve Wisconsin-based licensed
motor vehicle dealers filed an administrative complaint against GM with the DHA, alleging that
a per-vehicle surcharge imposed by GM to offset increased statutory warranty reimbursements
owed to dealers violated GM’s obligations to reasonably compensate dealers for warranty work
under the requirements of Wis. Stat. § 218.0116(8). In response, GM removed the matter to
federal court on the basis of diversity jurisdiction. The plaintiff dealers then moved to remand
the case to the DHA.

In keeping with the approach adopted in Floeter v. C.W. Transp., Inc., 597 F.2d 1100, 1102 (7th
Cir. 1979), the court analyzed the following considerations to determine whether removal was
proper: (1) whether the DHA’s procedures are substantially similar to those traditionally
associated with the judicial process, and (2) whether the state’s interest in providing a
convenient and expeditious tribunal outweigh the defendant’s right to remove the action to
federal court. Based on its analysis of the second Floeter factor, the court found in favor of the
plaintiffs. Specifically, the court noted that the plaintiffs’ case hinged on whether the surcharge
imposed by GM complies with state administrative law, which requires application of specific
public policy considerations enumerated by the state legislature. The court also noted that the
only way for a dealer to seek damages in court for violations of the specific section at issue is to
prevail with the DHA first, which suggests that the state legislature regarded agency
adjudication of claims under Wis. Stat. § 218.0116(8) as particularly significant to its regulatory
scheme. GM argued that because plaintiffs had previously filed a different action under the
same Wisconsin statute in federal court, the relationship at issue was not primarily a state law
concern. The court disagreed, noting that the present action was filed under a statutory
mechanism that could not have been initiated in federal court. Because removal of this matter
would achieve no overall judicial economy, the court concluded that Wisconsin’s interest in
regulating dealer relationships outweighed any countervailing federal interest and remanded
the matter to the DHA.
STATUTE OF LIMITATIONS

FEDERAL COURT FINDS THAT WHOLESALE DISTRIBUTOR’S CLAIMS UNDER THE LOUISIANA UNFAIR TRADE PRACTICES ACT CLAIMS ARE TIME-BARRED

The U.S. District Court for the Western District of Louisiana has held that a wholesale distributor’s claims against R.J. Reynolds (“RJR”) under the Louisiana Unfair Trade Practices Act (“LUPTA”) were perempted and time-barred. Caldwell Wholesale Co., L.L.C. v. R.J. Reynolds Tobacco Co., WL 2209165 (W.D. La. May 11, 2018). The wholesaler, Caldwell, alleged that RJR violated the LUPTA by terminating in 2004 Caldwell’s status as a direct purchaser of RJR’s tobacco products (thereby depriving Caldwell of favorable pricing incentives) and denying Caldwell’s subsequent requests in 2011 and 2014 to reinstate the pricing incentives. Caldwell also alleged that this conduct constituted tortious interference with business relations because it forced Caldwell’s customers to go to other distributors to get better pricing facilitated by the incentives now denied to Caldwell.

RJR filed a motion to dismiss the claims, arguing that both the LUPTA claim and the tortious interference claim were perempted or time-barred because the LUPTA contains a one-year limitations period. Caldwell alleged that its claims were not perempted because RJR’s conduct constituted a continuous and ongoing tort. The court disagreed, concluding that each of RJR’s decisions in 2004, 2011, and 2014, to deny Caldwell the favorable pricing incentives, was a distinct and separate act that triggered the running of the statutory period. Since this 2017 action was commenced more than one year after the 2014 denial, the court found that the one-year limitations period had run and therefore granted RJR’s motion to dismiss.

TERMINATIONS

MISSISSIPPI SUPREME COURT CLARIFIES TIME FRAME FOR AUTOMOBILE DEALERS TO CHALLENGE TERMINATIONS

The Mississippi Supreme Court has ruled that a terminated automobile dealership has until the effective date of termination to file a complaint challenging the termination, rejecting an argument that the Mississippi Motor Vehicle Commission law requires a dealer to file such a challenge within 60 days of receiving a notice of termination. Nissan N. Am., Inc. v. Tillman, 273 So. 3d 710, 711 (Miss. 2019). Nissan terminated plaintiff Ann C. Tillman’s Natchez, Mississippi car dealership, Great River, because of unsatisfactory sales. Great River’s agreement with Nissan required ninety days’ notice of termination, which Nissan provided on November 23, 2016. The effective date of the termination was February 21, 2017. Mississippi’s Motor Vehicle Commission law only requires an automobile manufacturer to provide at least 60-days’ notice of termination, but requires any dealer who wants to challenge termination to file a verified complaint “within the 60-day notice period.” Tillman’s complaint was filed February 17, 2017 —
more than 60 days after the dealership’s receipt of notice, but prior to the effective date of the termination. The Motor Vehicle Commission barred Tillman’s complaint as untimely filed, and the chancery court reversed.

The Mississippi Supreme Court agreed with the chancery court and rejected Nissan’s argument that the statutory language requiring a complaint to be filed “within the 60-day notice period” should be understood to mean that the complaint must be filed within sixty days of the dealer receiving notice of termination. Instead, the court pointed out that “[t]he only defined 60 day notice period involving the termination of a dealership agreement is the minimum sixty days preceding the proposed termination date.” Since that period is “plainly tethered to the effective date of termination,” a dealership has until the effective date — any time within the required 60-day notice period — to file a complaint. The court further observed that a separate provision of the same statute, § 63-17-73(1)(d)(ix), provided for filing a protest 60 days after “receipt of written notification,” demonstrating the legislature’s capacity to tie a notice period to the receipt of written notice. In dissent, Justice Griffis argued that the majority’s decision would undermine the attempt by a dealer to have disputes regarding termination resolved by the effective date of termination by providing greater notice than required by the statute. For instance, even if a manufacturer were to provide a year’s notice, the dealership would still have until the date of termination to file its complaint.
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