The GPMemorandum

TO: OUR FRANCHISE 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.

TERMINATION

EIGHTH CIRCUIT REJECTS DISTRIBUTOR'S WRONGFUL TERMINATION CLAIMS

In *Minnesota Deli Provisions, Inc. v. Boar's Head Provisions Co.*, 2010 U.S. App. LEXIS 10821 (8th Cir. June 11, 2009), the Eighth Circuit affirmed a grant of summary judgment dismissing plaintiff Minnesota Deli's claims arising out of the termination of its distributorship for Boar's Head deli products. In doing so, the court rejected Minnesota Deli's argument that its distributorship was not terminable at will. The court held that statements by Boar's Head executives allegedly telling Minnesota Deli it would "never be touched" as long as it grew its business satisfactorily and that Boar's Head "would never do anything" to Minnesota Deli were not "clear and definitive" promises to create a legally enforceable durational term. The court also affirmed the lower court's ruling that Minnesota Deli had no contractual right to sell its accounts to other Boar's Head distributors upon termination of its distributorship.

COURT ALLOWS CLAIM TO PROCEED DESPITE IMPOSSIBILITY DEFENSE RAISED BY BREWER AFTER SALE OF BRANDS

A New Jersey federal court issued a lengthy opinion last month addressing cross motions for summary judgment filed by a group of beer distributors and defendants InBev and Anheuser-Busch. The case is *Warren Distributing Co., et al. v. InBev, et al.*, 2010 U.S. Dist. LEXIS 55542 (D.N.J. June 7, 2010). While the court addressed several issues, it held that InBev could not succeed on its motion for summary judgment on the plaintiffs' breach of contract claim, finding that the plaintiffs had put forth viable evidence that InBev's reliance on the doctrine of impossibility/impracticability would fail at trial because InBev created the circumstances that caused the impossibility to occur.

The history of the case is complex, but the central issue involves whether the plaintiffs were paid fair market value for the termination of their beer distribution rights after InBev sold certain brands to Anheuser-Busch. In attempting to win summary judgment on the plaintiffs' breach of contract claim, InBev argued that it had good cause to terminate under the New Jersey Malt Alcoholic Beverage Practices Act because its duty to perform was discharged by the doctrine of impossibility/impracticability, as it no longer had the right to control the terminated brands and thus could not supply the plaintiffs. The plaintiffs countered that the impossibility was a circumstance of InBev's own making, since it had sold the brands to Anheuser-Busch. The court agreed with the plaintiffs, finding that there were at least genuine issues of fact as to whether InBev had created its own impossible circumstances, and denied InBev's motion as to the plaintiff's breach of contract claim.

SEVENTH CIRCUIT AFFIRMS SUMMARY JUDGMENT IN FAVOR OF FRANCHISOR REGARDING TERMINATION UNDER PMPA

In *Al's Service Center, et al. v. BP Products North America, Inc.,* 2010 U.S. App. LEXIS 6270 (7th Cir. Mar. 26, 2010), the Seventh Circuit affirmed a district court's summary judgment ruling in favor of BP, finding that BP had not violated the Petroleum Marketing Practices Act (PMPA). In this case, a gas station franchisee was notified by the Illinois Department of Transportation of a partial condemnation of its property for a road widening project, which would result in the closing of some of the entrances to its gas station and consequently would negatively impact its business. In March 2003, BP notified Al's that it would terminate the franchise 10 days before the condemnation took effect, pursuant to the provision in the PMPA that grounds for terminating the relationship "includes events such as . . . condemnation or other taking, in whole or in part, of the marketing premises pursuant to the power of eminent domain." The dealer's lease for the premises expired by its own terms a month after the 2005 condemnation, and BP told Al's to vacate the premises because the franchise had been terminated. Al's did not close the business, however, and BP continued selling it gasoline. A year later, as part of the widening project, the state removed Al's roadside pylon sign. Al's asked BP to replace it but BP refused. The sign was never replaced, and Al's abandoned the business in 2008 and brought suit alleging that BP violated the PMPA by improperly terminating its franchise agreement.

In affirming the district court's summary judgment order in favor of BP, the Seventh Circuit found that the March 2003 letter did not terminate the franchise at that time, as the condemnation did not occur for more than two years after the letter was sent. The Seventh Circuit also found that both Al's and BP continued to behave as if the franchise contracts remained in effect and that no change of practical significance in the franchise relationship occurred until more than three years after the letter. The Seventh Circuit further found that it was reasonably clear, though not certain, that BP was entitled under the PMPA to terminate the franchise or decline to renew the franchise relationship when the condemnation occurred. Finally, the court concluded that BP's refusal to replace the sign was not a constructive termination because a necessary PMPA element is that the franchisor's conduct forced an end to the franchisee's use of the franchisor's trademark, purchase of the franchisor's fuel, or occupation of the franchisor's service station, none of which happened here. Ultimately, the Seventh Circuit concluded that the franchise relationship ended only when Al's abandoned its business, which was not BP's fault.

EIGHTH CIRCUIT REJECTS DEALER'S CLAIMS FOR BREACH OF DISTRIBUTORSHIP AGREEMENT

In a case that has been in litigation for several years, the Eighth Circuit has ruled in favor of a manufacturer of farm equipment in *Cole v. Homier Distributing Co.,* 599 F.3d 856 (8th Cir. 2010). The background of the case, first reported in Issue 102 of *The GPMemorandum*, was that plaintiff Cole had entered into an oral agreement with manufacturer Homier under which Cole became a distributor and dealer of Homier's products. As a result of that agreement, Cole established more than 30 dealerships. The parties later memorialized their agreement through a written distributorship agreement.

Homier later terminated the distributorship agreement, claiming that Cole had failed to develop its territory and sell an adequate amount of products. Cole filed suit, claiming that Homier had breached the parties' written agreement. Among other things, Cole alleged that Homier had tortiously interfered with Cole's agreements with the dealerships Cole had established. The court rejected the claim, finding that Cole's relationship with its own dealers was predicated on its distributorship agreement with Homier. It found that a breach of the distributorship agreement, even if proved, would not support a tortious interference claim.

The court also rejected Cole's fraud claim, finding that Cole had failed to present any evidence that Homier had intended not to perform under the distributorship agreement at the time it was signed.

ANTITRUST

FEDERAL COURT DISMISSES TERMINATED DISTRIBUTOR'S ANTITRUST CLAIMS AGAINST HONEYWELL

A New York federal court recently granted Honeywell International, Inc.'s motion to dismiss a former distributor's antitrust claims, despite the plaintiff's allegation that it was terminated pursuant to an agreement among Honeywell and its other distributors, who allegedly objected to the plaintiff's discounting. In *Integrated Systems and Power, Inc. v. Honeywell Int'l, Inc.*, 2010 U.S. Dist. LEXIS 47283 (S.D.N.Y. May 13, 2010), the court found ISPI's allegations insufficient to state a claim for either *per se* or Rule of Reason violations of Section 1 of the Sherman Act.

First, the court rejected ISPI's claim that its termination was the result of a *per se* illegal horizontal conspiracy. Invoking the heightened pleading requirements announced by the Supreme Court in 2007, the district court found ISPI's allegation that Honeywell "was an active participant" in an agreement among its other distributors too conclusory to support a claim. While the other distributors had complained to Honeywell, the court found that the decision to terminate ISPI was made by Honeywell alone and thus constituted a vertical, rather than horizontal, restraint. Moreover, the other distributors had no occasion to refuse to deal with or boycott ISPI. In dismissing ISPI's Rule of Reason claim, the court held that the relevant product market that ISPI alleged—a single brand market comprised of the sale, installation, and servicing of NOTIFIER fire-detection alarm system products in New York City—was not legally cognizable because it did not provide for interchangeable substitute products.

FIRST CIRCUIT HOLDS THAT FRANCHISEE'S ANTITRUST COUNTERCLAIM WAS PROPERLY DISMISSED ON SUMMARY JUDGMENT

In Shell's suit against a former franchisee under the Petroleum Marketing Practices Act, the First Circuit held that the franchisee's price discrimination antitrust counterclaim was properly dismissed on summary judgment because the franchisee failed to show that it was competing with favored retailers of Shell Oil. *The Shell Oil Company (Puerto Rico) Ltd. v. Los Frailes Serv. Station, Inc.*, 605 F.3d 10 (1st Cir. 2010). The franchisee claimed that Shell was violating Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, as well as Puerto Rican antitrust law, by engaging in "secondary line violations" through the Competitive Adjustment Program (CAP) Shell implemented in 2001, which included different prices in different areas. Secondary line violations are actions "directed at injuring competition among the discriminating seller's customers."

One of the basic requirements of competitive injury is a showing of "actual competition" between the disfavored retailer (the franchisee in this case) and the retailers benefiting from a lower price. The First Circuit held that the franchisee presented no evidence that it was actually in competition with the retailers that it said were the beneficiaries of the CAP. It argued that under Puerto Rican law the entire island constituted a single price zone and, therefore, the other retailers were presumptively each other's competitors. The court held that the Puerto Rican law was irrelevant because it was implemented after the commencement of the lawsuit and after the CAP was discontinued. Furthermore, the defendant's deposition testimony showing that there were three other Shell stations within two miles of the defendant did not establish that those stations were "presumptively in competition" with the defendant's Shell station. Accordingly, the First Circuit held that the defendant's antitrust counterclaim was properly dismissed on summary judgment.

THIRD CIRCUIT UPHOLDS DISMISSAL OF MONOPOLIZATION AND CONSPIRACY CLAIMS AGAINST MANUFACTURER AND DEALERS

In an instructive opinion arising from the appeal of two related antitrust suits, the Third Circuit in *Howard Hess Dental Laboratories Inc. v. Dentsply International, Inc.*, 602 F.3d 237 (3d Cir. 2010), affirmed the dismissal of two dental laboratories' claims for monopolization against a manufacturer of artificial teeth and for conspiracy to monopolize and restrain trade against the manufacturer and its dealers. The laboratories, which purchased artificial teeth to make dentures, alleged that the manufacturer set anticompetitive prices for artificial teeth and prohibited dental dealers from carrying competitors' artificial teeth. Alleging an exclusive dealing arrangement, their theory was that the manufacturer served as the "hub" of a "hub and spoke" conspiracy with its dealers, *i.e.*, the "spokes," and that the "rim of the wheel" was the connecting agreements between all the dealers to assist the manufacturer in maintaining its monopolization of the distribution of artificial teeth. The district court had dismissed the complaint.

On appeal, the Third Circuit rejected the laboratories' argument that their monopolization claim could be established on collateral estoppel grounds because of the previous, successful monopolization action brought by the U.S. Department of Justice against the same manufacturer. In so doing, the court held that the laboratories failed to allege their injury and noted that the necessary issue in the DOJ suit was only injury to the manufacturer's competitors, not to "upstream purchasers" like the laboratories. Applying the heightened pleading standard under the recent *Twombly* Supreme Court opinion, the court found no factual allegations to "plausibly suggest" that the dealers knew about a monopolistic agreement, and that simply alleging, without more, that the dealers had knowledge was not enough. That the dealers independently had an economic motivation to abide by their agreements with the manufacturer so they could charge higher prices made logical sense to the court and implied parallel conduct, but the court found that this did not suggest joint action or give rise to an inference of any coordination between the dealers. Put another way, the allegations did not suggest to the court an unlawful "meeting of the minds" among the dealers. Interestingly, the court found some merit in the notion that several vertical conspiracies may have existed between the manufacturer and the dealers, which the laboratories argued as their alternative theory. Nevertheless, the court parsed the allegations of the complaint and found that it repeatedly characterized the conduct as one collective conspiracy among all the defendants and could not "be fairly understood" to allege several bilateral, vertical conspiracies.

STATE FRANCHISE LAWS

NO COMMUNITY OF INTEREST MEANS NO DEALERSHIP UNDER WFDL

In *The Dry Dock, LLC v. The Godfrey Conveyor Co.*, 2010 U.S. Dist. LEXIS 55628 (E.D. Wis. June 7, 2010), the plaintiff, a boat retailer, sued a manufacturer from which it purchased boats, claiming that the boats were defective and needed repairs. The retailer brought claims for breach of contract, breach of warranty, and violation of the Wisconsin Fair Dealership Law (WFDL), seeking consequential damages and reimbursement for the cost of repairs. The retailer claimed that the manufacturer's failure to honor warranty claims and its removal of the retailer from the "dealer locator" on its Web site amounted to an unlawful termination of its "dealership" in violation of the WFDL.

In moving for summary judgment, the manufacturer argued that: (1) the retailer had failed to follow the manufacturer's written warranty procedures (which included pre-approval for repairs over $100), (2) the manufacturer's express warranty excluded consequential damages, and (3) the retailer was not a dealer because there was no "community of interest" between the manufacturer and the retailer, as required under the WFDL. The district court applied Seventh Circuit precedent holding that for a "community of interest" to exist for WFDL purposes, a manufacturer must have such unequal bargaining power over a reseller that the reseller is "over a barrel" and has no functional ability to negotiate with the manufacturer. Here, the retailer had only been selling the manufacturer's products for 3.5 years, sold other brands in addition to the manufacturer's, was not charged a franchise fee, was not required to purchase a minimum number of boats or maintain minimum inventory, was not required to advertise the manufacturer's boats, and its sales of the manufacturer's products amounted to six percent and two percent of its total revenues in the previous two years.

Under these circumstances, no community of interest or "dealership" was found to exist and the WFDL claim was dismissed. The court also dismissed the claim for consequential damages, finding that the manufacturer's warranty unambiguously disclaimed such damages and that the manufacturer's required claims procedures were enforceable.

The retailer's suit was permitted to continue on a separate claim for breach of the implied warranty of merchantability. Under the Uniform Commercial Code, the warranty of merchantability is implied in all contracts for the sale of goods, unless the manufacturer's express warranty specifically excludes it, which it did not in this case.

CHOICE OF FORUM

FORUM-SELECTION CLAUSE OF EXPIRED SUPPLIER AGREEMENTS NOT ENFORCEABLE

In *Webb Candy, Inc. v. Walmart Stores*, 2010 U.S. Dist. LEXIS 55985 (D. Minn. June 7, 2010), the court examined the viability of a forum-selection clause after the expiration of the underlying distribution agreements. In this case, Walmart had one-year vendor contracts with two companies that allowed individual stores to buy merchandise directly from those two companies without contacting Walmart's corporate office. Both of those contracts had expired, but the vendor identification numbers of the companies were still in effect. Webb Candy, a third-party vendor that did not have its own contract with Walmart, subsequently paid those companies for the use of their vendor identification numbers and delivered merchandise directly to several Walmart stores. Webb Candy did not receive payment for the merchandise and sued Walmart in Minnesota. Walmart then moved to enforce the Arkansas forum-selection clause that was originally in the now-expired contracts with the two other companies. The plaintiffs conceded that had the agreements not expired, the clause would have been enforceable.

Walmart argued that the expired contracts (and therefore the forum-selection clause) still governed the transactions under the theories that the terms of the contracts were evergreen (they applied to all sales, even those made years after expiration), the expiration dates were waived by course of performance, and continuing to do business after expiration created a new contract under the same terms. The court was unconvinced. Noting the "sizable gap between the contracts' expiration dates and the plaintiff's deliveries, the paucity of evidence about the parties' course of performance before and after expiration, the contract's specific, repeated assurances that renewal would require a written agreement, […and the lack of clarity that the parties] intended the forum-selection clause to carry forward into [any implied or new] contract," the court denied Walmart's motion to dismiss or to transfer to an Arkansas court.

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