GRAY PLANT MOOTY

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, terminations, and class actions.

ANTITRUST

MANUFACTURER WINS JURY VERDICT DEFEATING ANTITRUST AND OTHER CLAIMS BY TERMINATED DISTRIBUTOR

Following a nine-day jury trial in the United States District Court for the District of Minnesota, a manufacturer of fireplaces and related products won a jury verdict defeating all counts in a product distribution and antitrust case tried earlier this year. *J&M Distrib., Inc. v. Hearth & Home Techs., Inc.*, No. 13-cv-00072-SRN-TNL (D. Minn. Jan. 23, 2015). The lawsuit, in which Gray Plant Mooty represented the manufacturer, Hearth & Home Technologies, followed the decision of Hearth & Home to terminate its wholesale, two-step distributor in Pennsylvania, Ohio, Maryland, and West Virginia, and to sell direct to several dozen dealers in those areas. The terminated distributor, J&M, alleged antitrust, contract, and tort claims, naming a large Pennsylvania dealer as a co-defendant on the antitrust and tort conspiracy counts. Following termination, J&M went out of business after thirty years as a distributor, and it claimed at trial to have lost its entire business value of $3.5 million, plus other "lost profits." All told, with potential damages tripled under antitrust law, J&M was seeking more than $10 million plus attorneys' fees. After eight hours of deliberation, the jury found no antitrust conspiracy, breach of contract, or tortious interference. This provided a complete trial victory for Hearth & Home. (Price discrimination claims had been dismissed by the judge earlier in the case.)

The case was of great importance to all concerned. In addition to avoiding an adverse judgment, Hearth & Home achieved confirmation of its right to terminate wholesale distributors and other intermediaries when it wants to sell directly to dealers or to others down the product distribution chain. Many manufacturing companies struggle with this same desire to improve their competitiveness and profitability by eliminating long-time wholesalers who no longer add sufficient value. Key fact issues in this case included whether statements and documents created an "implied" contract precluding termination except with good cause, and whether Hearth & Home had "conspired" with the large Pittsburgh dealer to eliminate as competitors J&M and some other Pittsburgh-area dealers J&M had supplied.

As reported in Issue 162 of *The GPMemorandum*, at the same time Hearth & Home sent its termination notice, it commenced a declaratory judgment action so that any litigation would be venued in its headquarters state, Minnesota. That earlier venue battle was won by Hearth & Home, which resulted in the trial being held in Minnesota as opposed to federal court in West Virginia, where J&M filed its own lawsuit.

FEDERAL COURT IN TEXAS ALLOWS PLAINTIFF TO PROCEED WITH PRICE DISCRIMINATION CLAIM AGAINST NIKE

A federal court recently allowed a price discrimination claim against Nike to proceed to discovery. *Games People Play, Inc. v. Nike, Inc.*, 2015 U.S. Dist. LEXIS 33217 (E.D. Tex. Feb. 12, 2015). Games People Play (GPP) is a golf retailer in Texas that had been selling Nike apparel and equipment since 1986. In 2010, GPP discovered what it considered to be a significant price disparity between what it was paying for specialty Nike golf clubs and what its competitors were paying for the same clubs. GPP alleged that in the two years after it complained to Nike about this price disparity, Nike refused on multiple occasions to sell to GPP merchandise that was being offered to GPP's competitors. GPP filed suit in 2014 alleging various violations of state and federal law, including price discrimination claims under the Robinson-Patman Act.

Nike moved to dismiss GPP's Robinson-Patman Act claims, arguing that GPP had failed to allege a sufficient injury to competition to maintain a price discrimination claim under section 2(a) of the Act. Nike argued that GPP could not show a direct injury based on sales diverted from GPP to a favored purchaser, nor could GPP show that the isolated disparity in golf club prices created a significant price differential over a substantial period of time such that GPP could rely on a judicial inference of harm. The court acknowledged that Nike's argument may ultimately prove meritorious, but it declined to dismiss the claim before discovery had been commenced. The court did, however, dismiss GPP's claims under sections 2(d) and 2(e) of the Act, which prohibit a seller from discriminating against certain buyers with regard to promotional favors, such as advertising and merchandising. The court concluded that GPP's allegations about discrimination in promotional opportunities were limited to examples of Nike refusing to sell specific products to GPP, but it is well settled that a refusal to deal does not constitute a violation of the Robinson-Patman Act.

WISCONSIN DISTRICT COURT HOLDS DISCRIMINATORY OFFERING OF PACKAGE SIZES FOR RESALE MAY VIOLATE ROBINSON-PATMAN ACT

The United States District Court for the Western District of Wisconsin denied a motion to dismiss a lawsuit alleging violations of the Robinson-Patman Act based on the discriminatory offering of different product sizes to sellers for resale. *Woodman's Food Mkt., Inc. v. Clorox Sales Co.*, 2015 U.S Dist. LEXIS 11656 (W.D. Wis. Feb. 2, 2015). After Clorox informed Woodman's that it would no longer offer Woodman's the large pack products that it offered to bulk retailers like Sam's Club and Costco, Woodman's brought suit against Clorox under the Robinson-Patman Act's price discrimination provisions. The provisions upon which Woodman's relied prohibit product sellers from providing promotional services to aid some buyers but not others in the resale of the products. Woodman's argued that the offering of larger packages to only some retailers constituted a discriminatory provision of promotional service, because the larger package sizes aided the bulk retailers in their resale of the products.

Clorox moved to dismiss Woodman's claims, arguing that the offering of different package sizes to resellers does not constitute a promotional service but rather the offering of different products, and that the Robinson-Patman Act does not prohibit a seller from selling different products to retailers at its choosing. Relying on dated administrative decisions and more recent FTC guidelines, the court denied Clorox's motion to dismiss, holding that the discriminatory use of "special packaging" and "package sizes" may amount to an unlawful provision of promotional services, in violation of the Robinson-Patman Act.

TERMINATIONS

SECOND CIRCUIT OPINION HIGHLIGHTS DIFFERENCE BETWEEN "EXPIRATION" AND "TERMINATION" OF DISTRIBUTION AGREEMENT

In *Sleepy's LLC v. Select Comfort Wholesale Corp.*, the United States Court of Appeals for the Second Circuit reversed the dismissal of a distributor's breach of contract claims, holding that the terms of the parties' distribution agreement may have remained in place after its expiration date. 779 F.3d 191 (2d Cir. 2015). The distributor, Sleepy's, claimed that the manufacturer, Select Comfort, had breached the nondisparagement provision in the parties' distribution agreement. The trial court found that the distribution agreement ceased to operate after its stated expiration date, and the court refused to consider evidence of Select Comfort's alleged disparaging conduct occurring after that date. In holding that the agreement ceased to operate, the court reasoned that the agreement expressly required a signed waiver in order to extend its terms "after termination," and no party executed such a waiver after the expiration date. Because Sleepy's did not present evidence of disparagement occurring prior to the distribution agreement's expiration date, the court dismissed Sleepy's breach of contract claim.

Drawing a distinction between "expiration" and "termination" of the distribution agreement, the Second Circuit reversed and remanded. The appellate court noted that the distribution agreement did not expressly require a signed waiver in order to extend its terms where it merely expired as opposed to terminated. Therefore, it directed the trial court to examine whether the distribution agreement (and its nondisparagement provision) continued to operate, even after the agreement's expiration date.

FEDERAL COURT UPHOLDS MANUFACTURER'S RIGHT TO TERMINATE

A Washington federal court granted Volvo's motion for partial summary judgment, finding that the implied covenant of good faith and fair dealing had no bearing on the exercise of Volvo's unrestricted contractual right to terminate a dealership agreement. *Volvo Constr. Equip. N. Am., LLC v. Clyde/West., Inc.*, 2014 U.S. Dist. LEXIS 168264 (W.D. Wash. Dec. 3, 2014). Volvo terminated its dealership agreement with Clyde, a dealer of Volvo's heavy construction equipment, under a provision of the agreement that allowed either party to terminate the relationship for any reason after providing 180 days advance written notice. A different section of the dealership agreement specified that, in the event of a breach, either party "may" give the breaching party written notice and sixty days to cure. If the breach was not timely cured, the nonbreaching party was allowed to terminate the dealership agreement. After the termination, Clyde alleged that Volvo had ended the relationship because it believed that Clyde had breached the agreement by underperforming in the marketplace. Clyde contended that the covenant of good faith and fair dealing required Volvo to provide it with sixty days to cure the breach before termination.

The court refused to apply the implied covenant of good faith and fair dealing because the parties had expressly agreed that either of them could terminate the agreement for any reason after providing 180 days written notice. Volvo's reason for termination was irrelevant, the court held, because its right to terminate was unrestrained. The court also held that a claim Clyde brought under the Federal Dealer Act failed as a matter of law because the parties did not manufacture or deal in "automobiles" as contemplated by the Act.

STATE FRANCHISE LAWS

DISTRIBUTION AGREEMENT NOT A "FRANCHISE" UNDER MINNESOTA FRANCHISE ACT

A federal court in Minnesota has found that the parties' exclusive distribution agreement did not meet the definition of a franchise under the Minnesota Franchise Act (MFA). *Rogovsky Enter., Inc. v. MasterBrand Cabinets, Inc.,* 2015 U.S. Dist. LEXIS 24834 (D. Minn. Feb. 13, 2015). The agreement provided for Rogovsky (the franchisor of the "Kitchen and Home Interiors" system of kitchen and bath remodeling businesses) to source cabinetry products for its franchisees exclusively through MasterBrand. MasterBrand terminated the agreement approximately two years into its seven-year term. Rogovsky sued for breach of contract and also alleged (among other things) that MasterBrand had violated the MFA and the franchise relationship laws of several other states. Although neither party was a resident of or had a principal place of business in Minnesota, Rogovsky filed suit there. MasterBrand moved to transfer venue to Indiana based on a forum selection clause. The court's venue analysis turned in large part on whether the public interest of Minnesota, embodied by the MFA, should be considered. Thus, the court had to first determine whether the agreement was a franchise contract or an area franchise contract under the MFA.

Without reaching the other two definitional elements (the right to engage in a business using franchisor's trademark and community of interest), the court found the agreement not to be a franchise because Rogovsky was not required to pay a franchise fee. Rogovsky alleged that it had made $300,000 in improvements to its MasterBrand training facility and had discontinued sales of competing cabinetry product. The combination of these two factors, Rogovsky argued, constituted payment of a franchise fee. The court disagreed. First, the plain language of the agreement did not require a fee, and the MFA specifically provides that the purchase at "fair market value" of supplies or fixtures necessary to enter into business does not constitute a franchise fee. Second, Rogovsky's discontinued sales of competitor products simply did not, in the court's view, constitute a fee, either. The agreement also was not an "area" franchise contract because it did not give Rogovsky the right to sell franchises in the name of or on behalf of MasterBrand. The court noted Rogovsky's disclosure document for the "Kitchen and Home Interiors" franchise offering "*does not even mention MasterBrand*, let alone describe the franchise as a MasterBrand cabinet franchise." Because Rogovsky was unable to show the relationship was covered by the MFA, the court was not required to consider public interest considerations articulated under the MFA and there was therefore no compelling reason to ignore the agreement's forum selection clause. MasterBrand's motion to transfer venue was granted.

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COURT FINDS ISSUE OF MATERIAL FACT WITH RESPECT TO DISTRIBUTOR'S CLAIM UNDER THE WISCONSIN FAIR DEALERSHIP LAW

In *DeTemple v. Leica Geosystems Inc.*, Bus. Franchise Guide (CCH) ¶ 15,460 (N.D. Ga. Feb. 9, 2015), the United States District Court for the Northern District of Georgia determined that a genuine issue of material fact existed as to whether a manufacturer and its distributor shared a community of interest within the meaning of the Wisconsin Fair Dealership Law (WFDL). The dispute arose when Leica Geosystems, a manufacturer of surveying and construction products, terminated DeTemple d/b/a TPSG, one of its Wisconsin-based distributors, after TPSG failed to meet performance targets. TPSG brought suit under the WFDL and alleged that Leica lacked good cause to terminate the relationship. Leica then moved for summary judgment on the WFDL claim, arguing that the parties' distribution agreement did not fall within the definition of a "dealership" under the WFDL.

Based on the facts in the record and legislative directives to construe the WFDL broadly, the court held that it could not determine the existence of a dealership on summary judgment. The court focused its analysis on the community of interest prong of the WFDL and considered whether the termination of the business relationship between the parties would have a significant impact on TPSG's financial interests. In finding that a question of fact existed, the court was persuaded by the following key factors: (1) the percentage of revenue that TPSG derived from the sale of Leica's products; (2) TPSG's need to hire new personnel to devote to its alleged dealership; (3) TPSG's purchase of a building to house a dedicated showroom; (4) cooperation between the parties in setting sales targets; and (5) TPSG's advertising expenditures for Leica's products.

CLASS ACTIONS

CLASS CERTIFICATION DENIED FOR INDEPENDENT APPLE SPECIALISTS

A California state appellate court affirmed the denial of a motion for class certification for a group of independent Apple dealers (known as Specialists) in *Siechert & Synn v. Apple, Inc.*, 2015 WL 513645 (Cal. Ct. App. Feb. 6, 2015). The plaintiffs failed to show that common questions predominated over individual issues or that a class action would be superior to individual suits. The court also found that facts related to the statute of limitations, causation, and alleged misrepresentation should all be determined on an individual basis.

All of the plaintiffs were in the business of selling Apple products and claimed that Apple's decision to open its own retail stores was part of a fraudulent scheme to drive independent Apple Specialists out of business. Some of the plaintiffs published their opinions on this issue on an Apple Specialist listserv as early as 2001. This led the court to conclude that each plaintiff would be required to individually prove delayed discovery in order to overcome Apple's statute of limitations defense. The plaintiffs argued that class-wide reliance on Apple's representations should be presumed because Apple made similar statements to each of the Specialists. However, the plaintiffs' deposition testimony indicated that they recalled different representations, thereby distinguishing this case from others in which there was evidence that uniform representations were made to each putative class member. The court also found that each plaintiff would need to separately prove that the alleged fraud caused their losses as opposed to other variable factors such as the individual store's market, location, local economy, level of service, and management expertise. Finally, the court held that there was no commonality among the high-demand products the retailers claimed were withheld from their stores. Instead, a "Specialist-by-Specialist and product-by-product" inquiry would be required for each plaintiff to prove actual damages.

ENCROACHMENT

APPOINTMENT OF A NEW DEALER IN EXISTING DEALER'S MARKET DOES NOT VIOLATE PENNSYLVANIA BOARD OF VEHICLES ACT

The Commonwealth Court of Pennsylvania recently reversed a decision by the State Board of Vehicle Manufacturers, Dealers and Salespersons that prohibited Arctic Cat from appointing a new dealer to sell ATVs within an existing dealer's market. *Arctic Cat Sales, Inc. v. State Bd. of Vehicle Mfrs., Dealers, and Salespersons,* 2015 Pa. Commw. LEXIS 78 (Pa. Commw. Ct. Feb. 23, 2015). The existing dealer, Nieman, filed a protest before the board alleging that the addition of a new ATV dealership in its market would result in a price war that would cause one or both dealers to withdraw from the market, thereby eliminating competition. This, Nieman claimed, provided good cause under the Board of Vehicles Act, which required the board to consider whether the addition of a new vehicle dealer would increase competition in a manner that benefits consumers, for the board to disallow the entry of the new dealer. The board found in favor of Neiman, and Arctic Cat sought review by the Commonwealth Court of Pennsylvania.

The court found that, under the Act, the protesting dealer had the burden of proving that there was good cause to prohibit a manufacturer from establishing additional dealerships within its market. In reviewing Nieman's claim that the new dealership would lead to decreased competition, the court noted that Nieman did not offer any market analysis or statistical studies to support its allegations. It instead relied on the testimony of its principals and evidence that a prior dealer had discontinued selling ATVs in Nieman's market due to competition with Nieman and the entry of a big box competitor into a nearby market. Because Neiman did not present any evidence to support its allegation that competition would be suppressed by the addition of a new dealer, the court reversed the board's decision.

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