Department of the Secretary of State

Maine Motor Vehicle Franchise Board

Matthew Dunlap
Secretary of State

Darling's, Plaintiff

v. M.M.V.F.B. No.03-01

Ford , Defendant

DECISION

This is a Decision on the Remand of the Superior Court's order on this Board's decision of March 31, 2006 in this matter. That Decision of the Board addressed Counts IV, V, and VI of the pending complaint. Most of Counts IV and V were Dismissed on September 14, 2005, based upon res judicata and standing, and the Board ruled on the warranty claims remaining under those Counts; it also ruled that Darling's did not have standing to challenge the REACT Program under Count VI

The Superior Court let stand the Board's rulings on the merits of the claims the Board heard, and it affirmed the Board's ruling that some or those claims were barred by res judicata. But it reversed the Board's ruling that Darling's lacked standing to press under Counts IV and V, claims which had been resolved. Unfortunately, the Court characterized that as a ruling on Count VI. The parties settled those claims before the hearing on Remand.

The Court did not, however, squarely address the merits of the Board's Dismissal for lack of standing of the REACT claim under Count VI. This order will therefore address only Count VI of the Complaint and will consider that the Court reversed the Board's order on standing.

On October 16, 2008, the parties presented closing arguments. Darling's objected to the Board as constituted for the Remand. Dealers Adam Lee and Wally Camp sat

on the Board which heard the matter originally; neither of those two members heard the remand. Bud Morrison heard the Remand along with Board Members Kontos, Dowling and Carlson. The Chair overruled that objection. Board Member Carol Kontos disclosed that her husband worked for Reynolds and Reynolds, a company which had been mentioned in testimony; neither party objected to her hearing the case. The Board questioned counsel and then deliberated in open session.

The Board adopts and sets forth below the relevant Findings of Fact and Conclusions of Law from its Decision of March 31, 2006.

Findings of Fact

1. Darling's is a Ford Dealer and became one by a Sales and Service Agreement dated September 20, 1989. Darling's began submitting information to be considered for Ford's Inventory Management ("IMA") program in June 2004, and enrolled in the REACT! Program on December 23, 2004. This finding is based upon the parties' agreement.

2. Starting in 1998, Ford implemented the React Program, to obtain information on dealers' parts inventory and customer service. Enrolled dealers agreed that Ford could obtain the information directly from their computers. Ford intended the program to help dealers increase their parts and service business, so it sends a monthly report to dealers on their parts and service performance and identifies potential areas for growth. The Program cost dealers nothing. (Levey 201, 216, 221-22) Dealers who did not have computers could enroll in React by agreeing that Ford would have access to the information as soon as they began using computers. (Merchak, 148; Levey 159, 216)

3. From before 1989, when Darling's became a franchise, Ford dealers had ordered parts from Ford weekly, paying prices which varied depending upon when

they ordered and how soon they needed the part. Starting In 2002, Ford changed the way it supplied parts to its dealers. The new system allowed dealers to order parts any day of the week, with discounts based upon how efficiently they managed their inventory. (Darling, 14-23; Merchak, 85-8, 103 et seq., 121-22; Levey 213)

4. In order to obtain those discounts, dealers also had to enroll in the React Program. (Darling, 21-33; Merchak, 102-110) Only one Maine Ford dealer is not enrolled in React, although there was no evidence why. (Merchak, 148; Levey 159, 216)

5. The monthly report from Ford is helpful to Darling's business. But the old ordering system was more profitable for Darling's than the new one. (Darling, 61-70, 81-82; Merchak, 99-105; Levey 173-175)

6. Darling's has argued that the old system by which Ford supplied parts to dealers was legal, because all dealers were under the same ordering program. That system yielded greater discounts than the React Program. (Darling, 80; Merchak, 118-119) Darling's maintains that the React Program violates subsection (G), by requiring dealers to enroll in the React Program in order to be eligible for discounts on parts. Finally, Darlings argued that Ford violated the franchise agreement in the way it implemented the React Program without that the signature of the authorized individual. (BDF 0034 of Ex. 1)

7. Ford's response is that neither React nor any other incentive program automatically results in two-tier pricing in violation of the statute, that the same discounts are available to all dealers and that the sales and service agreement allows it to set up incentive programs and provides that dealers must supply information to Ford. (Ex. 1 ¶¶ 6(g), 10) Finally, Ford renewed its argument that Darling's lacks standing to question the Program.

8. Discount / promotional programs like React have been common in the business for thirty years. (Darling, 46, 77; Merchak, 122) Indeed, Mr. Darling agreed that the program which immediately preceded React was consistent with the statute. (Darling, 46)

9. Darling's agreed that Ford did not violate the franchise agreement in implementing the React Program.

Conclusions of Law

10. In the pre hearing Order, this Board ruled that Darling's had standing to question Ford's REACT Program even though Darling's was enrolled in the Program. The Board so ruled because Darling's had alleged that it had been "adversely affected," under § 1173, and, therefore denied Ford's Motion to Dismiss Count VI.

11. Darling's did not establish that it had been adversely affected by the React Program in a way which would entitle it to relief under § 1173. There was no evidence that its relations with its customers were affected, nor that its business was affected in any other way.

12. "Standing is a threshold issue bearing on the court's power to adjudicate disputes." *Nichols v. City of Rockland, Me., 324 A.2d 295, 296 (1974).* Further, standing is jurisdictional, so a court or a party can raise the issue at hearing or even on appeal. M.R.App. P. 4(d) *Delogu v. City of Portland, 2004 ME 18, n.1, 843 A.2d 33,* and see M.R.Civ.P. 12(h) (3)4(d) which governs Board Procedure under Maine Motor Vehicle Franchise Board Rule § 1(1.)

13. In denying Ford's motion before hearing, this Board implicitly ruled that "…the facts relating to personal jurisdiction are so intertwined with the facts relating to the merits of the case, that it would be difficult to decide jurisdiction…" before hearing the merits of the case. *Dorf v. Complastik Corp., 1999 ME 133, P15, 735 A.2d 984, 989.* and see, *Unisys Corp. v. Dep't of Labor, 220 Conn. 689, 600 A.2d 1019, 1023 (Conn. 1991).* Now that the Board has heard the case, and found that Darling's does not have standing, Count VI must be dismissed as moot.

14. The Court in *Madore v. Maine Land Use Regulation Comm'n, 1998 ME 178, P8, 715 A.2d 157, 160,* set forth these difficult concepts.

> Standing and mootness are closely related concepts describing conditions of justiciability….A justiciable controversy involves a claim of present and fixed rights based upon an existing state of facts….To have standing, a party must have a sufficient personal stake in the controversy, at the initiation of the litigation, to seek a judicial resolution of the controversy. Mootness, in contrast, has been referred to as 'the doctrine of standing set in a time frame: The requisite personal interest that [existed] at the commencement of litigation (standing) must continue throughout its existence (mootness).' When a party initially holds the requisite personal interest, but is later divested of that interest, the justiciability concept at issue is best described as mootness. A court confronted with a claim of mootness must determine "whether there remain sufficient practical effects flowing from the resolution of the litigation to justify the application of limited judicial resources. (internal citations omitted)

15. M.R.S. Section 1174 provides in part as follows:

> The following acts shall be deemed unfair methods of competition and unfair and deceptive practices. It shall be unlawful for any: …
>
> **3. Certain interference in dealer's business.** Manufacturer, distributor, wholesaler, distributor branch or division, factory branch or division, or wholesale branch or division, or officer, agent or other representative thereof: …
>
> E. To offer to sell or to sell any new motor vehicle at a lower

actual price therefor than the actual price offered to any other motor vehicle dealer for the same model vehicle similarly equipped or to utilize any device including, but not limited to, sales promotion plans or programs which result in such lesser actual price; provided, however, this paragraph shall not apply to sales to a motor vehicle dealer for resale to any unit of the United States Government; and provided, further, the provisions of this paragraph shall not apply to sales to a motor vehicle dealer of any motor vehicle ultimately sold, donated or used by said dealer in a driver education program; and provided further, that this paragraph shall not apply so long as a manufacturer, distributor, wholesaler or any agent thereof, offers to sell or sells new motor vehicles to all motor vehicle dealers at an equal price. This paragraph shall not apply to sales by a manufacturer, distributor or wholesaler to the United States Government or any agency thereof.

F. To offer to sell or lease or to sell or lease a new motor vehicle to any person except a distributor at a lower actual price than the actual price offered and charged to a motor vehicle dealer for the same model vehicle similarly equipped or to utilize any device that results in a lesser actual price;

F-1. To vary or change the cost or the markup in any fashion or through any device whatsoever to any dealer for any motor vehicle of that line make based on:

(1) The purchase by any dealer of furniture or other fixtures from any particular source; or

(2) The purchase by any dealer of computers or other technology from any particular source;

G. To offer to sell or to sell parts or accessories to any new motor vehicle dealer for use in his own business for the purpose of replacing or repairing the same or a comparable part or accessory, at a lower actual price therefor than the actual price charged to any other new motor vehicle dealer for similar parts or accessories for use in his own business; provided, however, in those cases where motor vehicle dealers operate and serve as wholesalers of parts and accessories to retail outlets, nothing contained in this chapter shall be construed to prevent a manufacturer, distributor, wholesaler or any agent thereof from selling to a motor vehicle dealer who operates and services as a wholesaler of parts and accessories, such parts and accessories as may be ordered by such motor vehicle dealer for resale to retail outlets, at a lower price than the actual price charged a motor vehicle dealer who does not operate or serve as a wholesaler of parts and accessories.

16. The Legislature explicitly stated its intent in the Franchise Act.

§1182. Public policy

Any contract or part thereof or practice thereunder in violation of any provision of this chapter shall be deemed against public policy and shall be void and unenforceable.

The Legislature finds that the manufacture, distribution and sale of motor vehicles in the State vitally affects the general economy of the State and the public interest and public welfare; that the manufacturers of motor vehicles whose physical manufacturing facilities are not located within the State and distributors are doing business in the State through their control over and relationship and transactions with their dealers in the State; that the geographical location of the State makes it necessary to ensure the availability of motor vehicles and parts and dependable service for motor vehicles throughout the State to protect and preserve the transportation system, the public safety and welfare and the investments of its residents. The Legislature declares, on the basis of these findings, that it is necessary to regulate and to license motor vehicle manufacturers and distributors and their branches and representatives, motor vehicle dealers and any other person engaged in the business of selling or purchasing vehicles in the State in order to prevent frauds, impositions and other abuses against residents and to protect and preserve the economy, the investments of residents, the public safety and the transportation system of the State.

17. In construing this statute, this Board looks to the stated legislative intent and to the entire statutory scheme. *Fernald v. Maine State Parole Board*, 447 A.2d 1236 (Me. 1982) The Maine statute shows no intent to preclude normal business practices. Rather, it is intended to regularize and make uniform those business practices. Further, the very broad language of subsection F-1 makes it clear that the legislature prohibited any practice or program which requires dealers to purchase furniture or technology from the manufacturer. This language indicates that if the legislature had intended to prohibit programs like React, it would have used similar language to do so.

18. Accepting Darling's argument would lead to inconsistency in the statute

and lead to an absurd result, *State v. Webster,* 2008 ME 125, ¶ 14, 955 A.2d 240, a result inconsistent with the public interest. *State v. Chittim*, 2001 ME 125, ¶ 7, 775 A.2d 381.

19. It may be observed to that strict adherence to the words of the Act would result in the same outcome. The "actual price charged" to all dealers was the same whether they participated in React or not. The benefits of the React Program were provided to participating dealers by means other than the "price." Here, as in *Acadia Motors, Inc., et al. v. Ford Motor Company,* 2002 ME 102.¶ 11, 799 A.2d 1228, 1231, the statute shows no intent, nor does the language preclude, incentive programs like React.

20. In *Knauz Continental Autos, Inc. v. Land Rover North America, Inc.*, 842 F. Supp. 1034, 1036-37 (E.D.Il., 1993), the Court considered the following language:

> to offer to sell or lease, or to sell or lease, any new motor vehicle to any motor vehicle dealer at a lower actual price there for than the actual price offered to any other motor vehicle dealer for the same model vehicle similarly equipped or to utilize any device including, but not limited to, sales promotion plans or programs which result in such lesser actual price or fail to make available to any motor vehicle dealer any preferential pricing, incentive, rebate, finance rate, or low interest loan program offered to competing motor vehicle dealers in other contiguous states.

There, the dealer objected to a promotion plan which reimbursed dealers based upon their service programs and upon their reporting certain information to the manufacturer. The Court held that "actual price" must mean the same in all three places where it appears in the quoted paragraph and therefore the only logical construction was that sales promotion plans could affect the "actual price" dealers paid as long as the plans were offered to all dealers.

21. In *New Hampshire Automobile Dealers Assoc., Inc., Et Al., v. General Motors Corporation,* 801 F.2d 528, 531 (1st Cir., 1986), the dealer argued that fleet sales violated the law. The District Court rejected the argument. The Court frankly construed "sales" in the Act narrowly, so as not to outlaw fleet sales because the"…statute does not seem primarily aimed at stopping fleet sales," especially when the legislature knew of that "…widespread and important practice." Outlawing the practice would lower supply and therefore raise prices, both effects the statute sought to avoid. Upholding Darling's claim would lead to a similar result here.

22. Neither the letter nor the spirit of Maine's Franchise Law indicates that Ford's react program violated that Act.

Following the Parties' closing arguments on October 16, 2008, the Board deliberated and voted three to one to deny Count VI of the Complaint and find that Ford's React program did not violate to section 1174(3) (G) of the statute. Nelson Carlson, Bud Morrison and Bill Dowling formed the majority; Carol Kontos disagreed.

WHEREFORE

Count VI of the Complaint is DENIED.

SO ORDERED

December 22, 2008 _____

John C. McCurry, Chairman