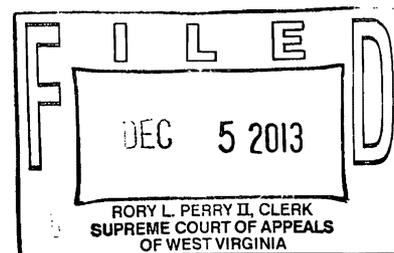


NO. 13-0675



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

KING COAL CHEVROLET COMPANY, Plaintiff Below,

Petitioner

v.

GENERAL MOTORS LLC, Defendant Below,

Respondent

From the United States District Court
for the Southern District of West Virginia
(Civil Action 2:12-5992)

**RESPONSE OF PETITIONER KING COAL CHEVROLET, INC. TO
BRIEF OF THE ALLIANCE OF AUTOMOBILE MANUFACTURERS
AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT,
GENERAL MOTORS LLC**

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I. INTRODUCTION

The goal of the Alliance of Automobile Manufacturers (hereafter “the Alliance”) is to seek to repeal the current protections afforded to those for whom the West Virginia Dealers Act was designed to protect – West Virginia Auto Dealers. When this legislation was first enacted in 1982, the West Virginia Legislature found that the protections afforded new car dealers under the Act were necessary, in pertinent part, to “avoid undue control of the independent new motor vehicle dealer by the vehicle manufacturer or distributor” W.Va. Code, § 17A-6A-1. Though the Act may have been amended over the years, the Legislature has never amended the Act’s stated purpose. Now, however, General Motors and the Alliance – whose members represent the manufacturers of 77% of all car and light truck sales in the United States – seeks to have this Court judicially rewrite Section 17A-6A-12(4) of the West Virginia Code.

By doing so, the Alliance seeks to take a plain and unambiguous word such as “reopen” and broaden its definition so that it becomes imbued with meaning that can only be inferred if the word itself is modified by other words. In the case of General Motors, it was “reopen by reestablishing”. Here, the Alliance goes even further in suggesting that the term “reopen” should include the “reappearance of a competitor” even if that “competitor” is not the one that had recently closed or was sold but includes a “proposed new motor vehicle dealer” that opens its doors for the very first time. Not only would such a construction of the term undermine the intent of the Legislature, but would require judicial activism on the part of this Court. Such a result cannot be permitted to occur, lest the protections afforded to new car dealers in this State under the Act be subject to a constant judicial erosion of the safeguards put in place by the Legislature.

II. ARGUMENT

A. The Alliance has failed to demonstrate that the protections afforded new car dealers under the West Virginia Car Dealer Act are anticompetitive.

The primary thrust of the Alliance's position is that, from an economic analysis standpoint, consumers are harmed by Retail Market Area (RMA) or "entry-restricting" laws such as The West Virginia Dealers Act, Section 17-A-6A-1 et seq. See, e.g., W.Va. Code, § 17A-6-12(2) (providing notice requirements for establishing or relocating new motor vehicle dealer in a "relevant market area."). Although the Alliance correctly recognizes that "any further debates about [the] wisdom [of such laws] *vel non* must occur in state legislatures," the entirety of their *amicus curiae* brief challenges the wisdom of the laws in the first place and seeks to undue the protections specifically provided by the legislature by and through The West Virginia Dealers Act.

In this regard, the Alliance relies almost entirely on a report from the Bureau of Economics Staff to the Federal Trade Commission entitled "The Effect of State Entry Regulation on Retail Automobile Markets." See R. Rogers, *The Effect of State Entry Regulation on Retail Automobile Markets*, Bureau of Economics Staff Report to the Federal Trade Commission (Jan. 1986). By citing to the report, the Alliance seeks to convince this court that any law restricting the entry of a new car dealership in the relevant market area of an existing new car dealer serves only to "raise[] car prices by a significant amount and decrease[] sales."

The conclusions of this report, though, are inherently unreliable because the data on which it is based is approximately 37 to 39 years old. Even though the report was written almost 28 years ago (in January 1986), the sales data on which it was based are from the years 1976 through 1978. See *id.*, at 7. The report itself recognizes that it was precluded from using any data more recent than this because, "at the time the study was designed, data were [sic] not

available for any subsequent year in which the auto market was not undergoing major dislocations due to oil price changes and/or the business cycle.” See *id.*, at 7 n.3. Certainly, the data upon which the study is based becomes more problematic in recent times where the bottom dropped out of the automotive industry requiring Detroit’s “Big Three” automakers to seek funds from Congress in order to survive. Times have changed since 1978 and the Alliance offers no more recent analysis than that based upon data that can no longer be viewed as reliable for the purpose of shaping public policy.

But assuming, *arguendo*, that the data set forth in the report was still valid today, the study itself demonstrates that, at least in West Virginia, the affect RMA laws may have on consumers would be negligible, at best. While the Alliance maintains that consumers are harmed by RMA laws to the tune of \$3.2 billion per year, the report concedes that if the actual price effect is smaller in a given area, then the increased consumer expenditures as a result of the law would be smaller as well. See *id.*, 8 n.6. This is consistent with the study’s finding that “increasing population growth leads to greater RMA effects” and that zero or negative population growth will lower these effects. See *id.*, 7.

In West Virginia, the percentage of population growth between 1990 and 2000 was .86% -- second to the lowest in the nation. See <http://worldpopulationreview.com/west-virginia-population-2013/> last visited December 5, 2013. Between 2001 and 2010 the population grew slightly better at 1.17%. *Id.* But projections for the future are bleak with -1.52% and -4.5% population growths for 2020 and 2030, respectively. *Id.* This negligible impact is reinforced by the report’s rejection of the “contract failure” theory which would predict a larger RMA impact in low and negative growth areas. See R. Rogers, *The Effect of State Entry Regulation on Retail Automobile Markets*, Bureau of Economics Staff Report to the Federal Trade Commission (Jan.

1986), 12. Consequently, even if the report's findings are still valid almost forty years later, the impact on West Virginia consumers would not be significant enough to warrant the repealing of the protections afforded new car dealers under the Act.

To be sure, though, the report is much more noteworthy for its discussion of the relationship of manufacturers and dealers in states that have RMA laws like West Virginia's, than it is for its analysis of outdated data. For instance, the report correctly notes that the RMA laws "limit but do not preclude the entry of new car dealers into local areas where incumbent dealers of the same car-make already exist." The report describes the "contract failure" hypothesis which downplays the effect of the laws on price but emphasizes its impact on the relative bargaining power of the dealers and manufacturers. See, generally, *id.*, 23-24. It is upon this basis that the West Virginia legislature justified the purpose of the Act:

[The contract failure hypothesis] suggests that the laws may correct for the asymmetrical bargaining position of the dealers vis-à-vis the manufacturers. The dealers, it is argued, develop resources that cannot be readily transferred to another use because they are specialized to the selling of a particular car at a particular location. As a result, a manufacturer may be able to take actions that reduce the profitability of a dealership without causing the dealer to quit distributing the manufacturer's vehicles.

It can be argued that because of these specialized assets, if the manufacturer was not constrained by the RMA laws, he could increase sales by establishing new dealerships and covering a given geographic area more thoroughly. This would be true even if the present dealers were made economically unprofitable as a result. By using the threat of new franchises, the manufacturer could also coerce its retailers into behaving as it desires even if it means an unprofitable dealer operation. The contract failure hypothesis posits that the RMA laws, by preventing or at least discouraging the manufacturer from creating or threatening to create new competing dealers, give the present franchisees some protection from this eventuality.

Because this is a report relied upon by the Alliance, it is not surprising to read that the report finds this hypothesis – which is also called the "hold-up" theory -- as an invalid public

policy justification for RMA laws. Further unsurprising is the fact that the report finds that the “pay-off from opposing the passage of the laws and from repealing them where they already exist seems to be even greater than we had previously thought.” *Id.*, 12. Consequently, the report recommends that “efforts to oppose or repeal these laws should be concentrated on the states containing areas with absolutely large population growth because it is there that the laws appear to have the greatest effect.” Similar in its approach, the other source cited by the Alliance in section (a) of its brief, advocates that it is critical to wipe out the state dealer acts in each state in order to “overhaul the entire regulatory scheme.” See C. McMillian, *What Will It Take to Get You in a New Car Today?: A Proposal for a New Federal Automobile Dealer Act*, 45 *Gonz. L. Rev.* 67, 93 (2010).

But, again, as noted by the Alliance itself, such questions are best left to the Legislature.

B. The West Virginia Legislature has taken clear and concise steps to effectuate a level playing field between dealers and manufacturers while still advancing its goal of protecting car dealers.

The Alliance’s recitation of the legislative history of The West Virginia Dealers Act is succinct and fairly accurate – personal, self-serving commentary aside. But what is most striking about the Legislature’s amendments to the Act is that the legislative findings upon which it is based have never been altered since 1982. See W.Va. Code, § 17A-6A-1. In this regard, from the date of its enactment, the Act has been designed to protect new car dealers in West Virginia from the “undue control of the independent new motor vehicle dealer by the vehicle manufacturer or distributor” *Id.* It is this goal, then, that this Court should seek to further in answering the certified question now before this Court.

C. The term “reopen” should be construed strictly in order to protect West Virginia new car dealers because the statute was designed to protect the new motor vehicle dealer from undue control of the manufacturer.

In furtherance of the Act's stated purpose, Section 17A-6A-12 of the Act provides existing dealers of the same line-make the opportunity to get notice and the right to protest the "relocation or establishment of additional dealers." Subsection (4) of Section 17A-6A-12 provides an exception to the existing dealer's right to notice and protest stating that the exception applies if the "new motor vehicle dealer" has been closed or sold within the preceding two years and if the established place of business of the "new motor vehicle dealer" is within four miles of the established place of business of the closed or sold "new motor vehicle dealer."

Section 17A-6A-3 of the Act provides definitions that apply to words and phrases used throughout the Chapter. Subsection (11) of the definitional section defines "new motor vehicle dealer" as a "person who holds a dealer agreement granted by the manufacturer or distributor for the sale of its motor vehicles, who is engaged in the business . . . and is licensed by the Division of Motor Vehicles." Subsection (13) defines "proposed new motor vehicle dealer" as a "person who has an application pending for a new dealer agreement with a manufacturer or distributor." It goes on to clarify that a "proposed new motor vehicle dealer" does not include a "person whose dealer agreement is being renewed or continued." Thus, summarizing the definitions, a "new motor vehicle dealer" is an existing dealer of the manufacturer who is licensed by the DMV for the particular line-make and a "proposed dealer" is a dealer who has not yet obtained a dealer agreement for the line-make or a license from DMV for the particular line-make.

Strict construction of the statute results in the conclusion that the exception identified in Section 17A-6A-12(4) only applies to the reopening of the "new motor vehicle dealer that has been closed or sold." Here, that is Lewis who was stripped of its opportunity to sell by the GM bankruptcy. The exception does not apply to a "proposed dealer" that has no nexus to the "closed" dealer has GM as argued. Such a conclusion would require the Court to ignore the

plain meaning of the stated definitions in the statute as well as fly in the face of the stated purpose of the statute which should be strictly construed to protect the rights of existing dealers.

In Ohio, the Motor Vehicle Commission has taken this very position twice in interpreting a similar exception to the right of existing dealers to get notice and opportunity to protest. See *Clay Matthews Pontiac, Inc. v. G.M. Corp.*, Case No. 01-05-MVDB-258-D (May 16, 2001) and *Steve Barry Buick, Inc. v. G.M. Corp.*, Case No. 05-12-MVDB-314-D (January 31, 2006).

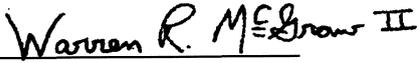
The protection of the dealers as a whole and strict construction of the statute is more important than usual given the facts in this case where GM has trampled on the rights of its existing dealers using the bankruptcy court to trump protections provided to dealers by state statutes. Here, unfortunately, GM successfully circumvented the termination provisions of the West Virginia Code when it eliminated Lewis from the GM market during the bankruptcy process and has arguably acted opportunistically in “back filling” a point it eliminated during that process. The West Virginia statutory scheme in this instance was designed to protect Lewis and failed to do so because bankruptcy trumped the West Virginia Code. GM should not now be given a *carte blanc* to tread on the rights of existing dealers by attempting to back fill a location it eliminated through bankruptcy claiming it was necessary for GM’s viability.

I. CONCLUSION

The Alliance seeks to repeal the protections afforded new motor vehicle dealers under The West Virginia Dealers Act. Since its enactment in 1982, the West Virginia Legislature has modified the Act where *it* deemed appropriate while consistently maintaining the stated purpose of the Act. The Legislature chooses its words carefully. Words have meaning. Its is a deliberative process where the voice of the dealers and the voice of manufacturers have equal right to access and lobby for their firmly-held positions. Legislative changes in statutory

language must remain within the province of the legislature. The question certified to the West Virginia Supreme Court from the United States District for the Southern District of West Virginia asks simply for this court to construe the meaning of Section 17A-6A-12(4) of the West Virginia – not to rewrite it as the Alliance now seeks this Court to do.

**KING COAL CHEVROLET COMPANY,
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CERTIFICATE OF SERVICE

I, Warren R. McGraw II, do hereby certify that true and exact copies of the foregoing "Response of Petitioner King Coal Chevrolet, Inc., To Brief of the Alliance of Automobile Manufacturers as Amicus Curiae in Support of the Respondent, General Motors LLC" has on this the 5th day of December, 2013, been forwarded to opposing counsel of record by depositing same in the United States Mail, first class postage prepaid, and addressed as follows:

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