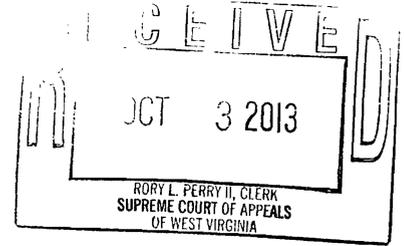


No. 13-0675



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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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**KING COAL CHEVROLET COMPANY,**  
Plaintiff Below,

Petitioner,

v.

**GENERAL MOTORS LLC,**  
Defendant Below,

Respondent.

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**BRIEF OF THE ALLIANCE OF AUTOMOBILE MANUFACTURERS  
AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT,  
GENERAL MOTORS LLC**

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Upon a Certified Question from the  
United States District Court for the Southern District of West Virginia  
(Civil Action No. 2:12-cv-5992)

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## I. IDENTITY AND INTEREST OF THE ALLIANCE

The Alliance of Automobile Manufacturers (hereafter “the Alliance”)<sup>1</sup> is a nonprofit trade association comprised of twelve leading motor vehicle manufacturers. Collectively, the members of the Alliance account for 77% of all car and light truck sales in the United States. These members are BMW Group; Chrysler Group LLC; Ford Motor Company; General Motors; Jaguar Land Rover; Mazda; Mercedes-Benz USA; Mitsubishi Motors; Porsche Cars North America; Toyota; Volkswagen Group of America; and Volvo Car Corporation.

The Alliance seeks to further the common interests of its members as manufacturers, importers, and sellers of motor vehicles in the United States. It is the leading advocacy group for the automobile industry, and it expresses the needs and interests of its members to the public at large and to local, state, and national government. In this role, the Alliance has often offered its views as *amicus curiae* to state and federal courts, including the Supreme Court of the United States.

The Alliance has a broad and experienced perspective on the certified question before this Court, and a strong interest in its appropriate resolution. The members of the Alliance sell their products to independently owned and operated dealerships throughout West Virginia. This Court’s interpretation of West Virginia’s anti-encroachment statute could have significant implications for the Alliance’s members. If the Court were to adopt Petitioner’s view of the statute, the ability of Alliance members to maintain their desired level of market presence would be directly and unjustifiably hampered, because any effort to simply re-establish a

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<sup>1</sup> No counsel for a party authored this brief in whole or in part. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than the Alliance of Automobile Manufacturers made a monetary contribution to the preparation or submission of this brief. Although, as is stated in the main text above, General Motors is a member of the Alliance and financially supports it as such, General Motors made no special or otherwise out-of-the-ordinary contribution to the Alliance in connection with this brief.

previously existing – but recently closed – retail location could be thwarted by litigation (or simply the threat of litigation). Moreover, because dealers like King Coal would be able to use the statute as a weapon to exclude competitors, the bargaining power of West Virginia consumers would inevitably suffer. The Alliance believes that the Legislature clearly intended otherwise, and it submits this brief to advance that view.

## I. ARGUMENT

The United States District Court for the Southern District of West Virginia certified this question to the Court:

Do the circumstances in this case permit GM to avail itself of the safe harbor found in West Virginia Code section 17A-6A-12(4) or, instead, is it required to provide to King Coal the statutory notice commanded by section 17A-6A-12(2)?

The Alliance submits that General Motors must be entitled to this safe harbor. By their very nature, anti-encroachment statutes protect a car dealer's turf against competitors. In an economy in which competition is vigorously protected by the law, such statutes are striking anomalies. Whether enactment of such a law was a wise legislative choice is of course not the question before the Court. On the other hand, the Court must note – as Petitioner's brief glaringly does not – that our state Legislature was sensitive to the anticompetitive effects of its enactment, and it has affirmatively sought to mitigate those effects. The provision at issue is just such an affirmative effort, and it should be interpreted and applied as such.

*a. Dealer anti-encroachment laws are anticompetitive, by their nature and as proven by empirical studies.*

It is timeworn economic wisdom that artificial limitations on supply in a market harm buyers by making it possible for a dominant firm or firms to raise prices beyond the level that a freely competitive market, with maximum availability of supply, would yield. See generally *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007)

(discussing nature of business practices that are *per se* illegal because of their tendency to “restrict competition and decrease output”). Such restraints can be effected (among other ways) through outright monopolization or through horizontal arrangements among competitors to fix prices, limit supplies, or carve up territories. It is therefore no accident that prohibition of monopolies and horizontal arrangements in restraint of trade are the very core of our antitrust laws. 15 U.S.C. §§ 1, 2; W.Va. Code §§ 47-18-3, -4.

Automobile dealer anti-encroachment statutes stand this bedrock policy on its head. They not only *permit* dealers to have exclusive territories – a result that dealers could never lawfully achieve on their own<sup>2</sup> – but also lend the machinery of the state itself to *assist* in the effort. In some states, a special board or agency decides how much competition should be allowed; in West Virginia, the task falls to the courts. *Compare* Ohio Rev. Code § 4517.57 (protests by existing dealers heard by state’s Motor Vehicle Dealers Board) *with* W.Va. Code § 17A-6A-12(3), (5).

Moreover, the ill effect on competition wrought by such laws is not merely a conjecture based on prevailing economic theory – it has been proved through careful research. A number of reliable studies have revealed that laws limiting the establishment or relocation of car dealerships have a negative impact on competition. In addition, car buyers, when made aware of these laws and how they work, have displayed displeasure and dissatisfaction with such restrictions on consumer choice.<sup>3</sup>

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<sup>2</sup> See W.Va. Code § 47-18-3(b)(1)(C) (specifically forbidding contracts, combinations, or conspiracies “[a]llocating or dividing customers or markets, functional or geographic, for any commodity or service”); *Leegin*, 551 U.S. at 886 (horizontal agreements to “divide markets” are ordinarily illegal *per se* under § 1 of the Sherman Act).

<sup>3</sup> See M. Cooper, *Bringing New Auto Sales and Service Into the 21<sup>st</sup> Century: Eliminating Exclusive Territories and Restraints on Trade Will Free Consumers and Competition*, Consumer Federation of America, at 6 (Oct. 2002) (available as of this writing at <http://www.consumerfed.org/pdfs/InternetAutos102902.pdf>).

The seminal study of these laws was undertaken by the Federal Trade Commission (“FTC”) in the mid-1980s. *See generally* R. Rogers, *The Effect of State Entry Regulation on Retail Automobile Markets*, Bureau of Economics Staff Report to the Federal Trade Commission (Jan. 1986).<sup>4</sup> At the time of the study, thirty-six states had passed anti-encroachment or Relevant Market Area (“RMA”) laws, which the FTC described as “laws restricting the establishment of new automobile dealerships in the vicinity of present dealers selling cars of the same make.” *Id.* at 1.<sup>5</sup> Using data from the thirteen states in which RMA laws had been in place for at least two years, the FTC concluded that the laws “raised car prices by a significant amount” and decreased auto sales. *Id.* at 6-10. It further estimated that the total loss to consumers in the form of increased prices was about \$3.2 billion (in 1985 dollars) across all brands in all states that then had RMA laws. *Id.* at 10-11. These results were again no surprise, because suppressing the supply of new vehicles to a given geographic market inexorably leads to increased retail prices. *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).

*b. The West Virginia Legislature has recognized the anticompetitive effects of anti-encroachment laws and acted affirmatively to mitigate those effects.*

These anticompetitive effects being no secret, state legislatures, including West Virginia’s, have recognized and attempted to mitigate them. Specifically, the West Virginia Legislature created – and has expanded – exceptions to dealers’ rights to challenge the establishment or relocation of a competing dealer of the same line-make. *See* W. Va. Code § 17A-6A-12.

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<sup>4</sup> The full text of this study is available as of this writing on the FTC’s website at <http://www.ftc.gov/be/econrpt/231955.pdf>.

<sup>5</sup> These laws had been enacted between 1963 and 1984. *Id.* at 1. West Virginia’s statute dates from 1982. *See* Acts of the Legislature (1982), ch. 109.

In this regard, the 2007 amendments to § 17A-6A-12 are particularly illuminating.

These amendments were contained in an enactment bearing this title:

AN ACT to amend and reenact § 17A-6A-3, § 17-6A-10 and § 17A-6A-12 of the Code of West Virginia, 1931, as amended, all relating to the establishment or relocation of additional motor vehicle dealers within a relevant market area; redefining “relevant market area”; creating exceptions for certain relocations and transfers; exceptions for purposes of adding dealerships to an area; and providing notice requirements to existing dealers.

Acts of the Legislature (2007), ch. 177.

True to this title, the 2007 amendments substantially reduced the ambit of the statute’s anti-encroachment provisions. For example, after the amendments, a dealer of the same line-make within the affected relevant market area is no longer permitted to bring a declaratory judgment action if a proposed relocation site would be *farther away* from the challenging dealer than the original location. *Compare* W. Va. Code § 17A-6A-12(3) (2000) *with* W. Va. Code § 17A-6A-12(3) (2007). Under the pre-2007 section, a dealer had the power to do so even though its business was obviously unlikely to suffer from being ceded more potential turf by a competitor.

Similarly, the 2007 amendments redefined “relocate” and “relocation” to exclude another type of dealership movement. Prior to the amendment, a “relocation” was exempt from the statute’s notice requirements if the dealer moved to a site within two miles of “*its* established place of business.” W.Va. Code § 17A-6A-12(1) (2000) (emphasis added). The 2007 Legislature not only expanded the geographical scope of exempt “relocations” – from two to four miles – but also their character: after 2007, such exempt relocations also include the “s[ale] or transfer[] [of] the dealership to a new owner[.]” § 17A-6A-12(1) (2007). Once again, the Legislature’s action decreased the number of situations in which one dealership could challenge the movement of another dealership. It did so where it was highly unlikely that the “relocation”

would occasion any significant change in the local competitive market. Because sales of existing dealerships do not change the geographical saturation of market participants, the Legislature recognized that there was no justification in regulating them.

Legislative purpose can sometimes be difficult to discern or even inscrutable. But here the salutary purposes of the amendments are manifest, from the title of the Act itself to the operation of its key provisions. Our Legislature, recognizing the inherently anticompetitive dangers of dealership anti-encroachment statutes, acted to prevent established dealers from turning their statutory turf shields into turf-acquisition swords. Hence, it took action to prevent abuses of the statute's protection by permitting challenges to the relocation or establishment of dealerships only where such relocation or establishment would truly increase the number of established competitors in a relevant market area.

In sum, cognizant of the potential for the statute's protections to be abused in an anticompetitive way, the Legislature has fashioned a common-sense approach to whether a dealership ought to have the right to challenge the establishment or relocation of another dealership. That approach should guide the Court here.

- c. *“Reopen” should be defined in a broad sense and in harmony with the manifest purpose of the Legislature to diminish the unnecessarily anticompetitive effects of the statute.*

Just like the amendments discussed above, the specific issue in this dispute between King Coal and General Motors involves an exception to the notice requirement. The statute specifically excludes a

reopening in a relevant market area of a new motor vehicle dealer that has been closed or sold within the preceding two years if the established place of business of the new motor vehicle dealer is within the four miles of the established place of business of the closed or sold new motor vehicle dealer.

W. Va. Code § 17A-6A-12(4). This provision should be read *in pari materia* with the statute's other exceptions and in light of the Legislature's common-sense approach to balancing dealer and consumer protection. This exception prevents a stationary dealership from challenging the reopening of a former competitor as long as the reopening occurs before any long-term changes in the market have occurred; in the Legislature's judgment, that period is two years. Again, one may quibble with whether that time period is the wisest choice that it could have made, but the Legislature has ample latitude to make that judgment. Yet again its purpose is plain to see: the reappearance of a competitor who has just been temporarily out of the market does not upset the settled, long-term, investment-backed expectations of other local dealers; hence, those dealers ought not be given a statutory weapon to opportunistically squelch competition. King Coal's preferred interpretation of the statute would provide it with just such a weapon, and for a reason (lack of sufficient affiliation with the former owner) that is not only arbitrary but has nothing whatever to do with the level of competition in a given geographic market.

Accordingly, this Court should interpret the provision at issue in light of the statute as a whole and the Legislature's attempts to prevent abuse and misuse of the unusual economic protections that anti-encroachment laws bestow upon car dealers.

## II. CONCLUSION

Car dealership anti-encroachment laws are anomalies that use state power to restrain trade among horizontal competitors, and, for its part, the Alliance firmly believes that they harm consumers and are poor public policy. They nonetheless have been enacted in most states, and any further debates about their wisdom *vel non* must occur in state legislatures.

On the other hand, past legislative policy debate has already shaped the very statute and question that are before the Court. The issue in this case turns on what the Alliance

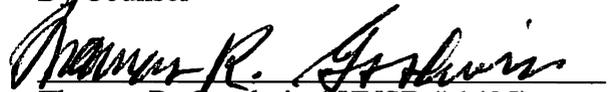
submits was a deliberate, conscientious, and commendable effort by the West Virginia Legislature to strike a balance between the avoidably and unavoidably anticompetitive effects of its statute. The provision at issue – like others discussed in this memorandum – is plainly designed to mitigate those anticompetitive effects. That design would be thwarted if King Coal’s arbitrary distinction is unnecessarily read into a statute in which it does not explicitly appear.

For these reasons, the Alliance of Automobile Manufacturers supports the position of Respondent General Motors LLC and urges this to Court adopt Respondent’s interpretation of W. Va. Code § 17A-6A-12.

Respectfully submitted,

**THE ALLIANCE OF AUTOMOBILE  
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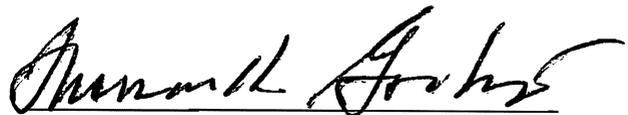
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**CERTIFICATE OF SERVICE**

I, Thomas R. Goodwin, certify that I serves the foregoing “Motion of the Alliance of Automobile Manufacturers for Leave to File a Brief as *Amicus Curiae* in Support of the Respondent, General Motors LLC” and “Brief of the Alliance of Automobile Manufacturers as *Amicus Curiae* in Support of the Respondent, General Motors LLC” this 3<sup>rd</sup> day of October, 2013, by placing true and correct copies thereof in the United States Mail, postage prepaid, and addressed as follows:

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A handwritten signature in black ink, appearing to read "Thomas R. Goodwin", written over a horizontal line.

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