Two Sides to Every Story

EDWARD WOOD DUNHAM

Edward Wood Dunham

The recent exchange in these pages between Michael Dady and Michael Lockerby on the subject of market withdrawals was not the typical fare of most scholarly legal journals.[1] Several readers have suggested that the tone of the Lockerby piece may have been too harsh. I understand and respect that reaction, but do not share it. Messrs. Dady and Lockerby are not genteel academics mulling abstruse theories. They are hard-nosed (and thick-skinned) litigators representing clients in high-stakes litigation. Their articles were dispatches from the field, where they are contesting matters of real moment to the country's commercial life and their courtroom advocacy is helping shape the law in this important, still evolving area. The *Journal* is fortunate that each of these able practitioners chose this forum to share his views.

The latest development on market withdrawal is a ruling in *Beck Motors, Inc. v. General Motors Corp.*,[2] one of the first cases challenging GM's decision to stop manufacturing the Oldsmobile line. The opinion by Judge Charles B. Kornmann of the South Dakota federal court is a reminder that it may take considerable time, and much more litigation, before a truly coherent body of market withdrawal law emerges.

Beck is a car dealership in Pierre, South Dakota. In 1995, it signed a Pontiac dealer agreement with GM. In 1998, Beck "entered into an Exchange of Dealership Franchise Agreement" with another Pierre dealer, relinquishing its rights to sell the Pontiac line in exchange for the right to sell Oldsmobiles, plus $100,000 from the other dealer and $100,000 from GM.[3] At the same time, Beck and GM agreed to terminate their Pontiac franchise agreement. About two years later, GM announced "that it will be phasing out the Oldsmobile line and will discontinue the manufacture of that line at some point."[4]

Beck sued, contending that it executed the 1998 contracts only because it had GM's assurances that GM "would not be discontinuing the Oldsmobile line."[5] Beck seeks rescission of the 1998 agreements, damages, and punitive damages, alleging violation of the federal Automobile Dealer's Day in Court Act and South Dakota's Unfair Cancellation of Dealer Franchise Act, fraud, and breach of the implied covenant of good faith and fair dealing.[6]

GM moved to dismiss the entire complaint. Judge Kornmann concluded that Beck had not pleaded the essential elements of fraud with the requisite specificity and therefore dismissed two counts, but granted leave to amend.[7] He also struck the separate count for punitive damages because Beck had requested punitives in its prayer for relief, and under South Dakota law a punitive damage claim is not "a separate or independent cause of action."[8] In all other respects, the court let the complaint stand. Given the leave to amend on fraud, the decision may have done nothing to reduce GM's exposure.

The final outcome of this dispute is obviously unknown. As Judge Kornmann observed at the close of his opinion, GM "cites facts, which if true, may, under South Dakota law, entitle it to eventual dismissal of Beck's claims."[9] This ruling illustrates nonetheless that national franchisors operate under significantly different standards from state to state, and that conduct that might easily pass muster in certain jurisdictions can founder on statutes or common law doctrines in others. South Dakota's Unfair Cancellation of Dealer Franchise Act regulates relationships in a surprising array of industries: not only motor vehicles and motorcycles, but also "industrial and construction equipment," agricultural implements, and even "office furniture, equipment and supplies."[10] Besides giving the dealer a cause of action for wrongful termination, the Act makes it a misdemeanor for a manufacturer "unfairly, without due regard to the equities of the dealer and without just provocation, to cancel the franchise of any dealer."[11] As a statutory standard governing the end of a commercial relationship, that is a mouthful, which gives judges and juries ample room to safeguard local businesses whose livelihoods are threatened. Indeed, one wonders whether, in practice, this language yields any objective standard at all, or simply allows cases to be decided on the fact finders' gut reactions.

To franchisors and their counsel, that is a chilling prospect. But franchisees and their counsel would argue that local business owners need all the help that they can get to balance the enormous power of gigantic corporations like GM. As my friends Dady and Lockerby have skillfully demonstrated, there are two sides to this market withdrawal story—and each is legitimate. That is, of course, true of many issues in franchising, but especially easy to appreciate in market withdrawal

---

Edward Wood Dunham is the Editor-in-Chief of the Franchise Law Journal. *This column expresses his personal opinions and does not reflect the viewpoint of the ABA's Forum on Franchising or the* Franchise Law Journal.

disputes because none of the stock caricatures of franchising applies. There is no deadbeat franchisee refusing to pay its bills or flouting system standards and no rapacious franchisor peddling false earnings claims or cannibalizing franchisees with encroaching outlets. The Oldsmobile market withdrawal illustrates the point. Presumably, GM did not come lightly to the decision to abandon the venerable Oldsmobile mark, with all of the attendant consequences for employees, suppliers, and dealers. Past a certain point, however, capitalism, at least as practiced in the United States today, demands that loyalty to those constituencies and nostalgia for a brand's glory days give way to management's responsibility to preserve and enhance shareholder value.

To the dealers losing the Oldsmobile line, some of whom have sold the cars for several generations, GM shareholder value is a decidedly abstract concern compared to the potentially crippling, and perhaps fatal, impact on their own businesses. Those dealers have, after all, done nothing wrong; they are innocent victims of economic shifts completely beyond their control, examples of what the novelist and essayist Wendell Berry has called the lost "dignity of continuity"[12] in American life.

Americans rely upon the law to resolve conflicts between competing legitimate interests. The law is often a blunt, unsatisfying instrument, however, because statutes and litigation, whatever their intent and outcome, rarely compensate in full for the human costs of wrenching economic change. For those of us who believe that Mike Lockerby has the better half of the legal argument on market withdrawal, that fact should keep us humble and mindful that the other side of the story will always have a powerful appeal.

Endnotes

1. J. Michael Dady, *The Olds Market Withdrawal: Is What's Past, Prologue?*, 21 FRANCHISE L.J. 65 (2001); Michael J. Lockerby, *Revisionist History? Kicking the Tires of J. Michael Dady's Market Withdrawal Cases*, 21 FRANCHISE L.J. 177 (Spring 2002).
2. No. CIV 01–3014 CBK (S.D. Mar. 29, 2002).
3. *Id.* at 1.
4. *Id.*
5. *Id.*
6. *Id.* at 2.
7. *Id* at 8.
8. *Id.* at 10.
9. *Id.*
10. S.D. CODIFIED LAWS § 37–5-3 (2001).
11. *Id.*
12. In his novel *Jayber Crow*, Wendell Berry described the economic and spiritual dislocation of farmers in a small Kentucky River valley town as their traditional way of life withered, unable to withstand the forces of agribusiness: "The dignity of continuity had been taken away. Both past and future were disappearing from them, the past because nobody could remember it, the future because nobody could imagine it." WENDELL BERRY, JAYBER CROW 278 (2000). This passage captures an essential truth about too much of modern life, but that is a subject for another day and a different publication.