NH's New Law Of Unintended Consequences

November 08, 2013

Michael J. Lockerby

In most states, franchised dealers of motor vehicles have long been granted far more statutory “protections” from their suppliers than have franchisees, dealers and distributors in other industries. New Hampshire recently became the first state in the nation to expand the definition of “motor vehicles” for purposes of its dealer franchise statute.

Effective Sept. 23, 2013, the statutory definition of “motor vehicles” now includes (1) tractors, (2) farm implements, (3) construction, industrial and forestry equipment, and (4) lawn and garden equipment. To qualify as “motor vehicles,” the equipment need not even have a motor. As a result, “lawn and garden equipment” covered by the statute may include not only lawn mowers but also wheelbarrows and fertilizer spreaders.

It is certainly possible — as its advocates hope and its opponents fear — that the New Hampshire statute becomes a model for the nation. But equipment manufacturers have already begun to fight back, both in litigation and through the legislative process.

In a New Hampshire state court, three equipment manufacturers recently won the first skirmish. On Sept. 19, 2013, the Superior Court of Hillsborough, N.H., entered a preliminary injunction in favor of the plaintiff manufacturers. With respect to “existing contracts” only, the “state of New Hampshire is preliminarily enjoined from including farm and equipment manufacturers within the definition of motor vehicles of RSA 357-C as provided for under SB 126.”[1]

Because it is limited to “existing contracts” only, the preliminary injunction — even if made permanent — would not provide long-term relief to equipment manufacturers as they renew existing dealer agreements or appoint new dealers. And the preliminary injunction has no effect whatsoever on New Hampshire’s preexisting regulation of motor vehicle franchises.

The statute as a whole, however, is attracting increasing scrutiny and attention. Over time, it is certainly foreseeable that an unintended consequence of this enactment will be to prompt challenges to preexisting provisions of the New Hampshire statute that have long applied to

motor vehicle dealers. Some of these provisions are of dubious constitutionality and/or may be preempted by federal law.

Known as S.B. 126, the New Hampshire legislation amended the state's motor vehicle dealer statute, RSA 357-C. Besides making certain changes to the preexisting statutory provisions applicable to motor vehicle dealers, S.B. 126 simultaneously (1) repealed the equipment dealer statute and (2) expanded the statutory definition of "motor vehicle" to include "equipment."[2]

By making equipment manufacturers subject to the motor vehicle dealer statute, S.B. 126 imposed restrictions on dealer agreements that — while relatively common in the automotive industry — are virtually unheard of in the equipment industry.

For equipment manufacturers, the new restrictions include the following:

- ***"Protected Territory Provision"*** — A dealer's assigned territory (aka "relevant market area") cannot be changed without "good cause," defined to "include, but not be limited to, changes in the dealer's registration pattern, demographics, customer convenience and geographic barriers" (RSA 357-C:3, III(o));

- ***"Noncompete Provision"*** — A manufacturer cannot compete with a dealer or appoint another dealer in the dealer's relevant market area unless the state dealer board finds "good cause" or certain other narrow exceptions are satisfied (RSA 357-C:3, III(k), RSA 357-C:3, III(l), and RSA 357-C:9);

- ***"No Minimum Capital Provision"*** — A manufacturer can no longer set the minimum equity or capital levels that a dealer must maintain but rather must negotiate such a requirement with the dealer (RSA-C:3, III(h));

- ***"Order Fulfillment Provision"*** — A manufacturer no longer has discretion to delay, fail to accept, or refuse to accept a dealer's order or ship product to a dealer (RSA 357-C:3, III(a) and RSA 357-C:3, III(q));

- ***"No Immediate Termination Provision"*** — Termination or nonrenewal, even for "good cause," cannot take place immediately and requires a finding of "good cause" by the state dealer board (RSA-C:3, III(c));

- ***"No Arbitration Provision"*** — Arbitration clauses are unenforceable,[3] "good cause" disputes must be decided by the state dealer board, and all disputes arising under dealer agreements may be litigated before the state dealer board (RSA-C:3, III(p)(3); RSA-C:7; and RSA-C:12);

- ***"Warranty Reimbursement Provision"*** — A manufacturer must compensate a dealer for warranty service at the dealer's labor rate and product cost (RSA 357-C:5(b));

- ***"Full Line Make Provision"*** — A dealer is entitled to every type of equipment that the manufacturer sells under its brand name (RSA 357-C:3, III(q));

- ***"No Exclusivity Requirements Provision"*** — A manufacturer cannot prohibit a dealer from selling competing lines of equipment ((RSA-C:3, II(c)); and

- ***"Open Supply Provision"*** — A manufacturer cannot restrict a dealer's source of supply (RSA-C:3(w)(1)).

The Open Supply Provision makes it unlawful for a manufacturer to:

Require a dealer to purchase goods or services from a vendor selected, identified or designated by a manufacturer, factory branch, distributor, distributor branch or one of its affiliates by agreement, program, incentive provision, or otherwise without making available to the dealer the **option to obtain the goods or services of substantially similar quality and overall design from a vendor chosen by the dealer and approved by the manufacturer, factory branch, distributor or distributor branch; provided that such approval shall not be unreasonably withheld**, and further provided that the dealer's option to select a vendor shall not be available if the manufacturer or distributor provides substantial reimbursement for the goods or services offered. Substantial reimbursement is equal to or greater than 65 percent of the cost, which shall not be greater than the cost of reasonably available similar goods and services in close proximity to the dealer's market.

(Emphasis added).

Many of the foregoing restrictions have long been applied to motor vehicle franchises. The fact that they have not previously been challenged, however, does not immunize them from attack.

In the long run, invalidation of the New Hampshire statute only with respect to "existing contracts" only will be of little benefit to equipment manufacturers. Equipment manufacturers are likely to seek other grounds besides impairment of contracts for invalidating the New Hampshire statute. And they may even join forces with manufacturers of motor vehicles in an effort to do so.

One requirement of the New Hampshire statute that seems particularly vulnerable to such a challenge is the Open Supply Provision. On its face, this provision presents an irreconcilable conflict with federal law. Like virtually every franchise statute, RSA 357-C applies only to agreements that include a license to use the supplier's trademark.

The New Hampshire statute defines "franchise" as an agreement whereby, inter alia, "[t]he franchisee is granted the right to be substantially associated with the franchisor's trademark, trade name or commercial symbol."[4] Under federal law, the trademark owner alone has the right to decide what goods and services are associated with its federally registered

trademarks.

The federal trademark statute, the Lanham Act, prohibits any use of a federally registered trademark by anyone except the registrant and a "related company."[5] Section 45 of the Lanham Act defines "related company" as "any person who legitimately controls or is controlled by" the trademark owner "in respect to the nature and quality of the goods or services in connection with which the mark is used."[6]

The New Hampshire statute, however, permits dealers in one state to substitute for the goods and services chosen by the trademark owner different goods and services that New Hampshire dealers decide are "of substantially similar quality and overall design." The New Hampshire statute's Open Supply Provision thus deprives manufacturers of their rights under Section 45 of the Lanham Act.

In this regard, the actual quality of goods and services that dealers might choose to substitute is irrelevant. The Lanham Act preserves trademark owners' "right to control the quality of" the goods and services associated with their trademarks.[7]

Section 45 of the Lanham Act — the same provision that permits (and indeed requires) trademark owners to exercise quality control — also contains language that expresses congressional intent to preempt inconsistent state laws. Specifically, Section 45 states that among the purposes of the Lanham Act is "to protect registered marks used in interstate commerce from interference by state or territorial legislation."[8]

In view of the foregoing language, it is not surprising that the federal courts that have recognized that "[t]he express terms of § 45 of the [Lanham] Act … provide for its preemption of state law."[9] What is surprising is that manufacturers have not yet asserted their federal trademark rights to protect against this interference by the state of New Hampshire.

--By Michael J. Lockerby, Foley & Lardner LLP

Michael Lockerby is a partner in Foley & Lardner's Washington, D.C., office and co-chairman of the firm's Distribution and Franchise practice.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Deere & Co., CNH America LLC and Agco Corp. v. The State of New Hampshire, Case No. 216-2013-CV-00554 (N.H. Super. Ct., Hillsborough), Order entered Sept. 19, 2013, at p. 30.

[2] S.B. 126 defines "equipment" to mean "farm and utility tractors, forestry equipment, industrial equipment, construction equipment, farm implements, farm machinery, yard and garden equipment attachments, accessories and repair parts." RSA 357-C:1.

[3] Arbitration agreements in motor vehicle dealer franchise agreements are already unenforceable under federal law.

[4] RSA 357-C:1, IX(c).

[5] 15 U.S.C. §§ 1051, 1055.

[6] 15 U.S.C. § 1127 (emphasis supplied).

[7] Shell Oil Co. v. Commercial Petroleum Inc., 928 F.2d 104, 107 (4th Cir. 1991); El Greco Leather Prods. Co. v. Shoe World Inc., 806 F.2d 392, 395 (2d Cir. 1986); Edward J. Sweeney & Sons Inc. v. Texaco Inc., 637 F.2d 105, 123 (3d Cir. 1980), aff'ing 478 F. Supp. 243, 279-80 (E.D. Pa. 1979).

[8] 15 U.S.C. § 1127.

[9] Spartan Food Systems Inc. v. HFS Corp., 813 F.2d 1279, 1284 (4th Cir. 1987). See also Am. Auto. Ass'n v. AAA Ins. Agency Inc., 618 F. Supp. 787, 798 (W.D. Tex. 1985) ("[S]tate law cannot defeat or limit in any way the protection given to federally registered marks under the Lanham Act."); Davidoff Extension S.A. v. Davidoff Comercio E Industria Ltda., 747 F. Supp. 122, 127 (D.P.R. 1990) ("Through 15 U.S.C. § 1127, Congress has

established the policy of prohibiting state interference with those rights afforded to federally registered trademarks.”).