MAINE MOTOR VEHICLE FRANCHISE BOARD

Darling's,
Petitioner,

v. M.V. Bd. No. 13-01

Chrysler, LLC,
Respondent.

Pending before the Board is Darling's four count Complaint under the Business Practices Between Motor Vehicle Manufacturers, Distributors and Dealers Act (Dealers Act), 10 M.R.S. §§ 1171 to 1190-A. Darling's filed the complaint on January 30, 2013. Counts I and II seek, Civil Penalties, and costs and attorney's fees based upon its claim that Chrysler Group (Chrysler) violated § 1176 of the Dealers Act by failing to timely pay Darling's average percentage markup on its reimbursements for warranty repairs performed after October 27, 2012.

Count III seeks damages, Civil Penalties, costs and attorney's fees based upon its claim that Chrysler violated § 1176 of the Dealers Act by failing to pay Darling's its average percentage markup on "exchange parts" used in warranty repairs since January 30, 2009, and a declaration that § 1176 requires Chrysler to continue to pay that markup on those parts.

Count IV seeks damages, Civil Penalties, and costs and attorney's fees based upon its claim that Chrysler violated § 1176 of the Dealers Act by failing to pay Darling's its average percentage markup on "core parts" used in warranty repairs after January 30, 2009. It also seeks a declaration that § 1176 requires Chrysler to pay that markup on those parts.

On October 31, and November 1, 2013, the Board held hearings in this matter. Seven Board Members attended the hearings; they were citizen members Jill Goodwin and William Dowling; Dealer Members Donald Lee, William Sowles, and Charles Gaunce; and Manufacturer Member Russell McLellan. Citizen Member Timothy Leavitt attended to observe. John McCurry, Esq. conducted the Hearing; Judy Metcalf, Esq. and Noreen Patient, Esq. represented Darling's and Robert Cultice, Esq., Daniel Rosenthal, Esq., Lucy Ewins, Esq., and Wendy Mirkin-Fox, Esq., represented the Chrysler Group. John Darling and Darling's employee George Delle Chiaie testified along with Chrysler employees Alan Stasiak, and Ralph Vargo. The parties submitted Closing Arguments on November 25, and Replies on December 9, 2013.

Having considered the Closing Arguments and Replies, the Board members who had heard the case, except for Tim Leavitt, met on January 7, 2014, to decide the pending Complaint. Hearing Counsel for Darling's and the Chrysler attended along with several members of the public.

Darling's was no longer seeking damages on Counts I and II, but it pressed its demand for Civil Penalties, and costs and attorney's fees based upon its claim that Chrysler violated § 1176 of the Act by failing to pay Darling's average percentage markup on parts used in warranty repairs from October 27, 2012, to November 28, 2012. Darling's pressed its claims in Counts III and IV for damages, Civil Penalties, costs and attorney's fees and an injunction ordering Chrysler to pay Darling's average percentage markup on "exchange parts" and "core parts" used in warranty repairs.

The Board found that Chrysler had violated § 1176 of the Act in Counts I and II; it imposed a Civil Penalty of $10,000, and will assess costs and attorney's fees. It found that Chrysler had violated § 1176 of the Act in its treatment of "exchange parts" as claimed in Count III; it awarded damages, imposed Civil Penalties of $13,000, and will assess costs and attorney's fees. The Board denied Darling's request that it issue an injunction covering reimbursement for "exchange parts." Finally, it found that Chrysler had not violated § 1176 of the Act in its treatment of "core parts" as claimed in Count IV, and therefore provided no relief on that Count.

On January 21, 2014, the Law Court ruled that the Franchise Board lacks jurisdiction over actions seeking damages under the Dealers Act. *Ford Motor Company v. Darling's et al.*, 2014 ME 7, ¶¶ 41- 43, 47. The Board's vote to award damages to Darling's under Count III of its Complaint is void.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The parties agree that Darling's is engaged in the retail sale and service of new Chrysler motor vehicles under Chrysler sales and service agreements at dealerships in Ellsworth, and Augusta, Maine.

2. The parties agree that before October 27, 2012, Chrysler reimbursed Darling's for parts used in warranty work at cost plus an 85% markup.

3. The pending issues are governed by the italicized language of § 1176.

> *If a motor vehicle franchisor requires or permits a motor vehicle franchisee to perform labor or provide parts in satisfaction of a warranty created by the franchisor, the franchisor shall properly and promptly fulfill its warranty obligations*, in the case of motor vehicles over 10,000 pounds gross vehicle weight rating, shall adequately and fairly compensate the franchisee for any parts so provided and, *in the case of all other motor vehicles, shall reimburse the franchisee for any parts so provided at the retail rate customarily charged by that franchisee for the same parts when not provided in satisfaction of a warranty. A franchisor may not otherwise recover its costs for reimbursing a franchisee for parts and labor pursuant to this section. For purposes of this section, the retail rate customarily charged by the franchisee for*

> *parts may be established by submitting to the franchisor 100 sequential nonwarranty customer-paid service repair orders or 60 days of nonwarranty customer-paid service repair orders, whichever is less in terms of total cost, covering repairs made no more than 180 days before the submission and declaring the average percentage markup. The average percentage markup so declared is the retail rate, which goes into effect 30 days following the declaration, subject to audit of the submitted repair orders by the franchisor and adjustment of the average percentage markup based on that audit. Only retail sales not involving warranty repairs, not involving state inspection, not involving routine maintenance such as changing the oil and oil filter and not involving accessories may be considered in calculating the average percentage markup. A franchisor may not require a franchisee to establish the average percentage markup by an unduly burdensome or time-consuming method or by requiring information that is unduly burdensome or time-consuming to provide, including, but not limited to, part-by-part or transaction-by-transaction calculations. A franchisee may not change the average percentage markup more than 2 times in one calendar year.* Further, the franchisor shall reimburse the franchisee for any labor so performed at the retail rate customarily charged by that franchisee for the same labor when not performed in satisfaction of a warranty; as long as the franchisee's rate for labor not performed in satisfaction of a warranty is routinely posted in a place conspicuous to its service customer.

4. Darling's submitted two average percentage parts markup declarations to Chrysler on September 27, 2012. The submissions declared Darling's average percentage parts markup as 131% for its Ellsworth location and 113% for Augusta. (Combined Exhibits 9, 10)

5. Darling's submission identified 398 consecutive repair orders for its Ellsworth location and 628 consecutive repair orders for Augusta, and entered them individually onto a spreadsheet. It identified the 100 repair orders within each group which it used to establish its average percentage markup and sent copies of those repair orders themselves to Chrysler. (Combined Exhibits 9, 10)

6. The 100 repair orders Darling's did provide included state inspections, routine maintenance such as changing the oil and oil filter, and accessories, thus they could not be counted under §1176. The submissions therefore included 59 qualifying repair orders for the Ellsworth dealership, and 68 qualifying repair orders for Augusta. (Combined Exhibits 9, 10)

7. Chrysler notified Darling's that it did not consider its submissions sufficient under § 1176, on October 17, 2012, "because of the lack of sequential repair orders." When other Maine dealers had established markups with Chrysler after 2003, they had supplied copies of all the repair orders referenced in their submissions. Chrysler asked Darling's to submit copies of all the repair orders which it had not supplied, but which it had listed on the spreadsheet. Darling's refused to do so. (D. Ex. 14-15; C. Ex. 32; T. 75-76, 81-86, 255-56, 303, 308-09, 312, 336-48, 389-90, 512-516)

8. On October 17, 2012, Chrysler asked Darling's to submit copies of all the repair orders listed on the spreadsheets. (D. Ex. 14-15; T. 510-16)

9. Darling's contends that its submissions met the requirements of § 1176, and that Chrysler's reading of the section would itself be inconsistent with the statement that "…[a] franchisor may not require a franchisee to establish the average percentage markup by an unduly burdensome or time-consuming method or by requiring information that is unduly burdensome or time-consuming to provide."

10. As sought by Count I, and consistent with the advice of counsel, Chrysler changed its position and began paying Darling's an average percentage markup of 131% for both its Ellsworth and Augusta dealerships on November 29, 2012; it has since paid that markup on parts Darling's purchased for warranty repairs between October 27, and November 28, 2012. (D. Ex. 21, 50: T. 46, 161, 166, 321-22, 332, 352, 390-94, 509-16)

11. Chrysler also paid the amount claimed due by Darling's in Count II for Ellsworth warranty repairs it had not reimbursed at the 131% markup. Only the markup on core deposits remains unpaid by Chrysler. (Darling's Ex. 27-29, 32, 3 T. 46; 321-22, 332, 352, 390-94, 509-16)

12. Darling's calculated its average percentage parts markup by calculating the average markup on each part and then averaging the averages. Chrysler faults that computation as inconsistent with § 1176, but it is not now seeking to lower Darling's markup. (T. 464-69)

13. Chrysler has continued to pay Darling's the 131% markup for parts used in warranty repairs, but has refused to pay that markup on "exchange" or "core" parts. (T. 332, 338-40, 467-68)

14. Darling's seeks Civil Penalties pursuant to § 1171-B (3); Chrysler opposes the imposition of Civil Penalties.

Count III: Exchange Parts

15. Chrysler provides a small number of what it calls "Exchange components" for warranty work to Darling's at no cost. It has never paid Darling's its average percentage markup on those parts. (T. 97-106, 443-47)

16. Exchange components are typically audio and electronic components not regularly stocked by dealers. Dealers do not regularly keep these components as inventory because they tend to be vehicle-specific, high-cost electronic components. Chrysler witness Ralph Vargo testified that the class of exchange parts is growing because certain parts are now considered electrical rather than mechanical. (T. 443-47)

17. Darling's charges non-warranty customers its average percentage markup on Exchange components when it installs the equivalent non-warranty parts as part of a repair. (T. 51, 67, 481)

Count IV: Core Deposits

18. Chrysler supplies certain parts to Darling's which it calls "Core components." (T. 288-94, 417-32)

19. These "Core components" are replacement parts, to be installed to replace a part which is not then working properly, but which retains value to Chrysler because it can be rebuilt or recycled. (Combined Ex. 3, 7; T. 37-40, 288-94, 417-32)

20. Chrysler charges Darling's for these "core components" and also assesses a "core deposit" at the time it sells the new replacement part to the dealer. (T. 288-94, 417-32)

21. The "Core deposit" is refunded to the dealer if the dealer returns the failed "Core component" to Chrysler within 60 days after Chrysler ships the replacement "core part" to Darling's. (T. 365-68, 457)

22. Darling's customer paid service repair orders show that it does not markup the "Core deposit" when it sells a part with a "Core component" to a nonwarranty customer, except in the limited instance where a nonwarranty customer does not return the "Core component" to Darling's. (C. Ex. 8-10; T.144, 243, 522-23)

Conclusions of Law

Counts I and II: Average percentage markup submission

23. In order to establish a dealer's "customary retail rate," § 1176 requires the submission of 100 sequential nonwarranty customer-paid service repair orders; it does not require that those repair orders be consecutive. The evidence establishes that such repair orders are simply not generated by a dealer consecutively.

24. Neither does § 1176 require the franchisee to submit each one of the larger group of consecutive repair orders from which it drew the 100 repair orders upon which it based its customary retail rate.

25. Darling's method of computing its average percentage markup was appropriate under § 1176. That section does not set out a required method of calculation.

26. Darling's average percentage markup for its Ellsworth and Augusta dealerships was established as 131% under § 1176, from October 27, 2012. In this matter, the franchisee submitted repair orders according to the law; the franchisor did not audit the submissions and adjust the average percentage markup; rather, it completely rejected the submissions because they did not contain copies of all the sequential repair orders which Darling's had listed in its spreadsheets. On November 27, 2012, Chrysler began to pay the increased average percentage markup; it paid that markup on Darling's warranty repair orders between October 27, and November 27, and has continued to do pay Darling's the 131% markup on warranty work.

27. Darling's made Chrysler aware that it was asking to be paid its average percentage markup on "exchange parts" starting on December 21, 2011. (C. Ex. 44; T. 188-90).

Count III: Exchange Parts

28. Section 1176 was enacted to ensure that manufacturers pay the same amounts for warranty repairs that retail customers pay for non-warranty repairs. *Acadia Motors, Inc. v. Ford Motor Company*, 44 F.3d 1050, 1056 n. 9 (1st Cir. 1995). Doing so protects retail customers from having to pay "inflated prices charged by dealers who are attempting to maintain their average profit margins in the face of a manufacturer's below-retail reimbursement rates." Further, in *Darling's d/b/a/ Darling's Bangor Ford v. Ford Motor Company*, 1998 ME 232, ¶ 9, 719 A.2d 111, the Law Court found that the Legislature was concerned "…that manufacturers were using their superior bargaining power to reimburse dealers at artificially low prices for warranty repairs, thereby causing dealers to charge nonwarranty customers inflated repair prices."

29. The history of § 1176, and these decisions clearly established its intent almost twenty years ago. The statute now requires the franchisor to "reimburse" the franchisee for any parts used in warranty repairs "…at the retail rate customarily charged by that franchisee for the same parts when not provided in satisfaction of a warranty."

30. Chrysler argues that "reimburse" means to "pay back," and since it supplies "exchange parts" to Darling's at no cost, there is nothing to pay back, and § 1176 does not require it to "reimburse" Darling's its average percentage markup. Darling's responds that "reimburse" means not only "pay back," but "to make repayment to for expense or loss incurred." *Random House Dictionary of the English Language*, 1625 (2d Edition, 1987), and argues that its receipt and handling of "exchange parts," like any other parts, contribute to the overhead costs which the average percentage markup is intended to cover. (T. 51, 67, 179, 183-88, 258)

31. The Law Court recently restated rules of statutory construction which bear on the present question. In *John Doe et al. v. Regional School Unit 26,* 2014 ME 11, ¶¶ 14, 15, January 30, 2014, it stated that the "first task when interpreting a statute is to ascertain the real purpose of the legislation," *State v. Niles*, 585 A.2d 181, 182 (Me. 1990), in order to "give effect to the Legislature's intent, avoiding results that are inconsistent or illogical 'if the language of the statute is fairly susceptible to such a construction.'" *Cote v. Georgia-Pacific Corp.*, 596 A.2d 1004, 1005 (Me. 1991).

32. Rather, the Court will consider the "practical operation and potential consequences," when it construes a statute. *Id* at ¶ 15, citing *Clark v. State Emps. Appeals Bd.*, 363 A.2d 735, 738 (Me. 1976). The Court continued "[w]hen one construction would lead to a result that is inimical to the public interest, and a different construction would avoid that result, the latter construction is to be favored unless the terms of the statute absolutely forbid it. Id. A court can even ignore the literal meaning of phrases if that meaning thwarts the clear legislative objective." *Niles*, 585 A.2d at 182.

33. Applying these rules of construction, § 1176 requires Chrysler to "reimburse" Darling's for "exchange parts" at Darling's "retail rate," established by its average percentage markup. The narrow construction of "reimburse" urged by Chrysler would thwart the purpose of § 1176: to enable Maine new car dealers to compete in the marketplace - to cover their overhead and realize a profit – without Maine consumers having to pay dealers more for nonwarranty repairs to their vehicles, than new car manufacturers pay dealers for warranty repairs. In an analogous situation, the Law Court refused to strictly construe the language of § 1176 when it held that it applied to sublet warranty repairs, repairs which the dealer itself had not performed. The Court held that the Dealers Act required the manufacturer to reimburse a dealer for the cost and markup of warranty repair work which the dealer had to sublet because it could not complete all of the repair on its premises. *Darling's d/b/a/ Darling's Bangor Ford v. Ford,* 1998 ME 232, ¶ 21.

Count IV: Core Deposits

34. Section 1176 requires that manufacturers pay their dealers the same amount for warranty repairs, as retail customers pay for those repairs; it does not require Chrysler to pay Darling's its average percentage markup on "Core components." Section 1176 does not require that manufacturers reimburse dealers for "Core deposits" at their average retail rate.

Conclusion

35. Chrysler violated § 1176 of the Act based upon its failure to timely pay Darling's the increase in its average percentage markup from 85% to 131% which Chrysler was required to begin paying to Darling's on October 27, 2012. The maximum § 1171-B (3) Civil Penalty of $10, 000.00 is imposed.

36. Chrysler violated § 1176 when it failed to pay Darling's its average percentage markup between December 21, 2011 and the January 7, 2014 deliberations. A majority of the Board voted to impose the minimum Civil Penalty of $1, 000.00 for each of the thirteen 60-day periods pursuant to § 1171-B (3), that $13,000, Civil Penalty is imposed.

37. The Board has no power to issue injunctions. It refused Darling's request to issue an injunction ordering Chrysler to continue to pay Darling's its established average percentage markup on "exchange parts."

38. Chrysler did not violate § 1176 of the Dealers Act when it refused to pay Darling's its average percentage markup on "Core components."

39. Pursuant to § 1188 (2) and the Board's Conclusion that § 1176 requires Chrysler to pay Darling's established average percentage markup on "exchange parts," the Chrysler is ORDERED to continue to do so.

WHEREFORE, Counts I and II of Darling's Petition are GRANTED as set forth above, Chrysler is ORDERED to pay a Civil Penalty of $10, 000.00 under § 1171-B; Count III of Darling's Petition is GRANTED as set forth above, Chrysler is ORDERED to pay a Civil Penalty of $13, 000.00 under § 1171-B; Count IV of Darling's Petition is DENIED, .

So ORDERED

Dated April 4, 2014

___/s/ John _C. McCurry____
John C. McCurry, Chairman

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