

Expert Witness Topics In Dealer Litigation

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How Long An Arm?

Can a state law prohibiting direct sales to consumers by a manufacturer have an extra-territorial reach into another state? The Fourth Circuit has said it cannot.

The case involved a Volvo and GM truck dealer, Carolina Trucks & Equipment, Inc. (CT&E) which found itself in an out-of-trust situation in 2002 with its floor plan lender, Volvo Commercial Finance (VCF). Later, after termination of its dealer agreement, the dealer settled with VCF. It had also sued Volvo Trucks North America, the manufacturer; one of its complaints was that VTNA was selling used trucks direct through its Arrow Truck Sales unit (although specifically permitted by its dealer agreement). My expert report stated:

“Arrow Truck Sales does not have a facility in the State of South Carolina; its nearest location to Columbia is Atlanta, a distance of over 200 miles. It is thus highly unlikely that CT&E lost used truck business to Arrow, and

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CT&E claims no such losses.”

At trial in the United States District Court for the District of South Carolina, the jury found

for the defendant, VTNA, on all causes of action except the one alleging the improper sales of used trucks by Arrow Truck Sales, and awarded the dealer damages of \$583,245, which VTNA appealed to the Fourth Circuit.¹

Testimony had established that Arrow did advertise in South Carolina, and did sell 78 trucks to South Carolina residents over a five-year period, 54 of which were within CT&E’s AOR. However, there was no evidence that any of these sales took place anywhere but in Atlanta. CT&E argued that the relevant state dealer act should be read to prohibit sales to South Carolina residents regardless of where the sales occurred; and that the 78 “sales” occurred in part within South Carolina because Arrow Trucks advertised there. The court rejected both arguments.

The court quoted from the Dealers Act: a manufacturer “may not sell, directly or indirectly, a motor vehicle to a consumer in this State”² except through the franchises that manufacturers are generally prohibited from owning themselves. Commenting on the ambiguity of the phrase “in this state,” the court did not find that it gave the state’s laws extraterritorial reach, and that “...state laws may not generally operate extraterritorially...” To find otherwise, the court went on, would raise constitutional Commerce Clause issues.

Arrow’s advertising, the court held, was an “even more tenuous link between South Carolina and Arrow’s sales in Atlanta...” To find

¹ Case No. 06-1263, decided July 6, 2007

² S.C. Code Ann. §§ 56-15-45(D)

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otherwise would be to ban out-of-state advertising of goods and services.

On-Line Dealer Directories (II)

In the last newsletter (Volume 12, Issue 2, September 2007) I described how manufacturers' on-line directories of dealers can be helpful in litigation. A recent case caused me to discover yet another use for them.

The objective was to identify all dealers within a six-mile radius of a particular address, a possible site for a new point or dealer relocation. The on-line directories allow the user to type in a zip code; many allow the user to display dealers within increments of distance such as 10 or 25 miles. Using the site zip code, I worked through the dealer directories of all makes except exotics like Ferrari or Rolls-Royce. This enabled me to construct a spreadsheet of dealer names, makes, and addresses, with distances from the zip code boundary of the possible site.

However, I needed the specific distances from the site address to each dealer, in order to determine whether that dealer fell within the six-mile radius that would allow it, under state law, to protest any new or relocated dealer. To do this, I turned to MapQuest®, an on-line application³ widely used by manufacturers themselves in their directories. It provides boxes for "Starting Location" and "Ending Location," and returns the distance in driving (road) miles to two decimal places.

Since driving distance by road would always be longer than straight-line distance, it was safe to conclude that any dealer with a driving distance of less than six miles would qualify to protest. Two other dealers were just outside the six-mile radius as measured by driving distance and might be under six miles as measured in a straight line.

After listing all the dealers, I sorted by distance from the site. The attorneys who retained me were able to obtain statements or

affidavits from many of the listed dealers—that they weren't interested in the site, and/or that they would protest any move-point or new-point initiative by the manufacturers they represent.

Discovery of Expert Work Product

Experts and their retaining attorneys must be careful to comply with Federal Rule of Evidence 26, and with the various state rules that parallel the Federal rule. My experience has been that attorneys deposing experts spend inordinate amounts of time delving in the *process* by which the expert arrived at conclusions, when the time would be better and more effectively used to pose questions about the conclusions themselves. Draft reports and notes seem to be a favorite area of inquiry.

For an attorney, the ideal way to avoid controversy about expert work product is to have an agreement with the other side that it won't be discoverable. Usually I am brought into a case too late to make this suggestion, so only one or two of my retaining attorneys have actually done it. Without such an agreement, the expert must take care with drafts and other work product, including e-mail.

As to e-mail, my personal practice is not to use it to convey: suggestions for trial strategy; preliminary opinions; alternative approaches to any issue; or anything else of a substantive nature. Exchanges about dates and timing, the sending of newly-received documents from attorney to expert, and the like, are fine—as long as there are no written comments on the quality or credibility of the documents conveyed. I check spelling and grammar in all e-mails, and keep in mind how the e-mail might sound if read aloud in court.

Last year, as a discovery deadline neared, I had a telephone call from my retaining attorneys in a case. One asked if I had completed a draft of my expert report for our dealer client. When I told him I had, he said, "Send me the draft." I reminded him that if I sent the draft,

³ <http://www.mapquest.com/>

it would become discoverable; his partner agreed, and suggested I summarize it by phone with them, which I did.

It is a rare expert report—I've had two in the last five years—to which a retaining attorney doesn't make some contribution, suggestion, or correction. I am almost always asked at deposition whether the attorney suggested any changes, and I will readily agree that this usually happens—to state otherwise would strain credibility. Some attorneys make more suggestions than others, and I can't always remember the details of who suggested what—nor do I feel required make a list of changes. When the report is completed and sent, however, I must be able to say that it is my work product, and that I agreed with any lawyer suggestions before incorporating them into the report.

Occasionally, I regret agreeing to a lawyer suggestion. In another termination case, I prepared on behalf of the dealer a detailed expert report. The lawyer I dealt with was a substitute for his partner who was tied up with another trial at the time. I read him most of the report over the telephone, in several sessions. I did incorporate some language that his partner wanted to include without changing the main conclusions about the case issues on which I was asked to opine. When deposed in this case, I admitted to these changes, but wished I had used different language. Next time I'll read it aloud to see how it sounds!

I don't retain either paper or electronic drafts; my office has a shredder, and electronic versions are overridden with any changes made.

In many cases, lawyers ask me to prepare questions to depose or cross-examine opposing experts or lay witnesses, and questions for my own direct examination at hearing or trial. No one has ever suggested that these questions should be turned over to the other side prior to the deposition, hearing or trial.

Case Selection by Experts

Attorneys who regularly retain experts have probably read and determined from experience many helpful ideas on how a potential expert should be vetted. Most attorneys want a person experienced in expert work and familiar with the industry; whose testimony has not been rejected by courts; and who appears to be a good “fit” for the case. It's a bit like hiring an employee—you look for the right “chemistry” that makes for a good working relationship.

Little has been written, however, about how experts should select cases and clients. I have developed a feel for what cases would be good fits for my background—and when to say “no thanks.” Such a case was offered to me last year.

The offer came from an attorney with whom I had been working on another case, and involved a multi-franchise dealer who had been served with a breach of agreement letter by one of his manufacturers. Based on what I was initially told, the case didn't sound like one I wanted to take, but I didn't think it fair to turn it down without further information. So I constructed a list of documents that I wanted to review. I received a stack about three inches high, and reviewed them.

Leafing through the breach letter, I initially noted that the manufacturer appeared dissatisfied with virtually every aspect of the dealer's performance: sales and market penetration, customer satisfaction, staffing, facilities, service and parts performance, advertising and signage, and new vehicle inventory. Documented deficiencies in any one of these areas could, in my experience, provide justification for a termination of the franchise. I was intrigued by the breadth of the breaches, and wondered what the dealer expected an expert to do.

As I went further into the documents, I found a group of letters and forms detailing warranty irregularities. Then I found correspondence

between the dealer and the manufacturer's captive finance company about problems with retail customers. At this point I turned to the Internet. By typing the dealer's name into Google, I was presented with several web sites containing complaints about the dealer's sales practices.

Going back to the documents, I looked at the dealer's sales of this manufacturer's product, and found they had dropped by 46% in four years. The dealer provided little or no written explanation for the drop in sales and for the other deficiencies. I thought about the possibility of affirmative defenses, such as flawed sales objectives, unfair assignment of census tracts, or over-dealing of the area—but this dealer raised none of these points in correspondence with the manufacturer. On some of them, the dealer made it clear that he was not prepared to take any action whatever.

After my review of the documents, I could see that this was not a case that would advance my reputation or the reputation of experts generally. I called the lawyer who had offered it to me, and politely declined. He asked why, and I told him that there were simply too many strikes against the dealer to leave any possibility of a favorable outcome.

An expert needs to determine whether an offered case is sufficiently funded. I had a call last fall from a lawyer in solo practice who was about to file a class action lawsuit against an auto manufacturer. He didn't explain how he and his clients were going to fund it. On other occasions, I have worked on a case for two or three months and sensed that the client was surprised at how quickly expert bills add up—especially if the client's lawyers are handling the case on a contingency basis. While I carefully explain why an expert could not do this, sometimes I wonder if the client really understands the ethical and credibility issues.

There have been situations in which a client or its attorneys did not furnish me with data or documents that I would have asked for, had I known they existed. In one case, I found out

only at my deposition about a transcript of an earlier hearing that might have changed my opinions and testimony. I had been asked to analyze two aspects of a dealer termination, and had concluded that manufacturer actions in these two areas had adversely affected the dealer. My revised consulting agreement now requires the retaining attorney to furnish me with all relevant documents.

An attorney recently e-mailed me and described a factory-dealer case in which he represented the dealer. He asked me whether I could help with the case, and wanted to know my background and fee schedule.

I responded promptly and furnished the information he requested. He then replied, saying only, "Thanks very much for your prompt reply. The issues here seem well within your areas of expertise." On first read, this sounded like he was quite interested—but more than three weeks later, as I write this, I have heard nothing further. Was the response in reply to my hourly rate and retainer request? Did his dealer client throw up his arms upon hearing the financial terms? If so, this could be one of those insufficiently funded cases on which an expert should proceed with caution.

Dealers, who don't regularly participate in litigation, often don't understand the process, the time involved, or the considerable cost of going to court. It's up to their retained attorneys, and sometimes their experts, to give them this information.

Attorneys looking for experts might look carefully at the expert who agrees to take a case without knowing the full scope of the expert assignment. This expert could come back to haunt you. Ask how many cases this expert has turned down in the last year, and why. There have been cases offered to me in which I knew I could provide expert work on some of the issues, but was less certain about others. So you might check with the expert you do retain to determine that person's level of comfort before the assignment continues. You may need a second expert.