STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals

LaFONTAINE SALINE, INC., d/b/a LaFONTAINE CHRYSLER JEEP DODGE RAM,

Plaintiff-Appellee,

vs.

CHRYSLER GROUP, LLC, and IHS AUTOMOTIVE GROUP, LLC d/b/a CHRYSLER JEEP OF ANN ARBOR,

Defendants-Appellants.

Docket No. 146722

Court of Appeals No: 307148

Washtenaw County Circuit Court
Case No: 10-001329-CZ

REPLY BRIEF OF DEFENDANT-APPELLANT CHRYSLER GROUP

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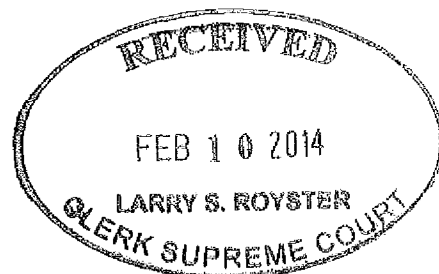

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I. THE COURT OF APPEALS FAILED TO FOLLOW THE LAW GOVERNING THE IMPERMISSIBLE RETROACTIVE APPLICATION OF A STATUTORY AMENDMENT.

At issue is the amendment to the Motor Vehicle Manufacturers, Distributors, Wholesalers and Dealers Act (the "Dealer Act"), effective Aug. 4, 2010, that changed the definition of "relevant market area" ("RMA") from a six-mile radius to a nine-mile radius. MCL 445.1566(1)(a). All agree that the factors to be considered when addressing potential retroactive application of a statutory amendment are set forth in *In re Certified Questions*, 416 Mich 558, 570-71; 331 NW2d 456 (1982): whether (1) there is specific language providing for retrospective or prospective application; (2) retroactive application will take away or impair vested rights, create a new obligation and impose a new duty, or attach a new disability with respect to transactions already past; and (3) a statute can be classified as remedial or procedural, in which case – and only in which case – there is an exception to the well settled presumption against retroactivity.[1]

A. The 2010 Amendment Does Not Provide for Retroactive Application.

LaFontaine admits that "the 2010 Amendments do not contain express language directing that the amendments be applied retroactively." (Appellee's Br, p. 25.) This omission was purposeful, particularly since the Legislature has demonstrated on past occasions that it knows how to give amendments to the Dealer Act retroactive effect. For example, when the Legislature amended the Dealer Act in 1988, it expressly provided that the amendments would "apply to

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[1] The other "factor" is an admonition by the Court that a statute is not regarded as operating retroactively solely because it relates to an antecedent event. Contrary to LaFontaine's claim (Appellee's Br, p. 23), this second listed factor is not applicable here. "Second rule cases relate to measuring the amount of entitlement provided by a subsequent statute in part by services rendered pursuant to a prior statute....Examples of second rule cases are measuring the amount of a judicial pension not only by years served subsequent to enactment but also by years served under a previous act...and measuring the amount of highway entitlement not only by expenditures subsequent to enactment but also by expenditures under a previous act." 416 Mich at 571 (cites omitted).

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agreements in existence on the effective date of this section...." MCL 445.1582a. The Legislature elected not to include such language when it passed the 2010 Amendment to the RMA provision, but it did include retroactive application language for one of the 2010 amendments unrelated to the RMA provision, MCL 445.1574(1)(x), stating it applies "if a new motor vehicle dealer is a party to a dealer agreement on the effective date...." That the Legislature elected not to make the 2010 Amendment to the RMA provision retroactive and/or expressly applicable to existing dealer agreements cannot be ignored.

LaFontaine implies that this Court should *assume* that the Legislature intended for the 2010 Amendment to apply retroactively to the proposed addition of the Dodge vehicle line at the IHS Chrysler and Jeep dealership in Ann Arbor because, according to LaFontaine, the sole purpose of the Act is to protect dealers. (Appellee's Br at 9, 10, 11, 13, 14, 27.) First, the Act is designed to balance the interests of many parties; indeed, the Act states at its outset that it is to regulate "the dealings between manufacturers, distributors, wholesalers, dealers, and consumers." 1981 PA 118, Preamble. Second, even assuming *arguendo* that LaFontaine is correct in its myopic interpretation, LaFontaine ignores that IHS is itself a dealer seeking to add the Dodge line to its Chrysler Jeep dealership. Accordingly, this case is not merely manufacturer vs. dealer, but also involves an existing dealer that has a substantial interest in adding a vehicle line. Such an addition will enable IHS to sell the same complete line-up of vehicles that LaFontaine and most other Chrysler Group dealers sell, thereby increasing competition and convenience to benefit the public. IHS is no less deserving of protection under the Act than LaFontaine, and all parties deserve the predictability and stability relating to pre-existing contracts that are advanced by the well-settled doctrine prohibiting the impermissible retroactive application of a statutory amendment.

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LaFontaine also argues that the Court should assume that the 2010 Amendment was meant to be retroactive because otherwise, different rules will apply to dealer agreements based on when the agreements were entered into. (Appellee's Br, pp. 9, 13, 16, 30.) It is true that application of the retroactivity rules will mean that some dealer agreements are subject to the pre-August 2010 RMA and some to the post-August 2010 RMA. Frankly, there is nothing wrong with that – to the contrary, it makes contracts and doing business more predictable if the parties know what law will apply and, as a result, what they can and cannot do. The necessary result of the presumption that new statutes and amendments are to apply prospectively only is that different laws will apply in different situations. The fact that different laws apply to different dealer agreements is due to the Legislature designating some, but not all, provisions of the Dealer Act retroactive or applicable to pre-existing contracts.

Nor does this mean, as LaFontaine and the Auto Dealer's Association suggest, that a dealer agreement is set in stone and can never be affected by later changes in the law. The Legislature has the power to expressly provide for retroactive effect for future amendments to the Dealer Act, as it has done from time to time in the past. And existing dealers may sell their businesses, which, under the Chrysler Group system, necessitates the signing of a new dealer agreement which will be governed by the law in existence at that time.[2] Dealer agreements, like any other contract, are governed by the law in place at the time of their execution.[3]

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[2] Even a dealer agreement that predates an amendment to the Dealer Act may be subject to the amendment if the agreement is amended in a material way after the amendment is enacted.

[3] LaFontaine ignores the undisputed fact that the parties opted not to include in the Dodge Sales and Service Agreement entered into between Chrysler Group and LaFontaine in September 2007 ("LaFontaine Dodge Agreement") a provision that would have bound them to future changes in the Dealer Act. In the absence of a clear expression of intent by the parties, "changes in the law subsequent to the execution of a contract are not deemed to become part of [the]agreement." 11 *Williston on Contracts* § 30:23 (4th ed 1990); *see also Rutherford Farmers Coop v MTD Consumer Grp, Inc*, 124 F App'x 918, 920 (CA 6, 2005).

LaFontaine's reliance on *Anderson's Vehicle Sales, Inc v OMC-Lincoln*, 93 Mich App 404; 287 NW2d 247 (1980), is misplaced. First, even if LaFontaine's interpretation of that case is accepted, there is a serious question as to whether it remains good law in light of more recent case law regarding retroactivity. As the Sixth Circuit stated in *Dale Baker Oldsmobile v Fiat Motors of N America*, 794 F2d 213, 218 (CA 6, 1986), "it seems fairly clear that ... *Anderson's* goes against the teachings of the cases previously discussed and, more importantly, is contrary to the Michigan Supreme Court's subsequent opinion in *In re Certified Questions*...." Second, the statutory amendment given retroactive effect in *Anderson's* concerned how much advance notice was required under the Dealer Act before a manufacturer could seek to terminate a dealer agreement. The new amendment required 60 days notice and the manufacturer had sent, per the terms of the dealer agreement involved, a 30 day notice. The amendment also began with the statement, "notwithstanding the terms, provisions, or conditions of a dealer agreement,..." The court found that the amendment applied and 60 day notice was required, not only because the termination would not occur until after the effective date, but also because the amendment expressly indicated an intent that it apply to pre-existing contracts. In our case, on the other hand, retroactive application of the 2010 Amendment does not affect *only* conduct that will occur after the effective date, it affects conduct that occurred *prior* to the effective date, namely, the September 2007 execution of the LaFontaine Dodge Agreement and the February 2010 execution of the Letter of Intent ("LOI") with IHS. And unlike in *Anderson's*, the 2010 Amendment does not expressly provide that it applies to pre-existing contracts.

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B. The Court of Appeals' Retroactive Application Impairs Defendants' Rights Under Pre-Existing Agreements and the Law In Effect At the Time.

The third factor from *In re Certified Questions* also weighs heavily in favor of reversal. LaFontaine insists that it is not seeking to have the 2010 Amendment's enlargement of the RMA

provision applied retroactively because the dealer agreement between Chrysler Group and IHS will not be signed until after the amendment was effective, thus, LaFontaine claims, the 2010 Amendment will be applied only in a legally permissible prospective manner. (Appellee's Br, pp. 8, 11, 17, 25.) The Sixth Circuit in *Kia Motors America, Inc v Glassman Oldsmobile Saab Hyundai, Inc*, 706 F3d 736, 740 (CA 6, 2013) rejected this exact argument, holding that it "ignores the fact that the Amendment affects [the manufacturer's] rights under a contract that pre-dates the Amendment...." This Court should do the same.

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The retroactive application of the nine-mile RMA would alter key aspects of the bargain between Chrysler Group and LaFontaine—namely, the existing contractual provision where the parties agree that Chrysler Group may establish additional dealers where it deems appropriate, and that LaFontaine's right to sell and service Dodge vehicles is nonexclusive. Retroactive application would also override the RMA in effect at the time of contracting – namely, that Chrysler Group could establish an additional dealer provided that the establishment was no closer than six miles from an existing dealer selling the same vehicle line. Accordingly, when Chrysler Group and LaFontaine entered into the LaFontaine Dodge Agreement, Chrysler Group had the vested legal right to add the Dodge vehicle line at the IHS Chrysler and Jeep dealership because that dealership was located more than six miles from LaFontaine. If the 2010 Amendment's enlargement of the RMA from six to nine miles applied retroactively, as LaFontaine argues, LaFontaine would acquire a substantive legal right – indeed, a new cause of action – that it did not have when it signed the LaFontaine Dodge Agreement, and Chrysler would be burdened with a new and substantially more burdensome legal obligation that it did not have under its Dealer Agreement with LaFontaine and the RMA provision in effect at the time that Agreement was executed. Similarly, the retroactive application of the 2010 Amendment

would deprive Chrysler Group and IHS of legal rights vested in the LOI. The LOI was entered into before the 2010 Amendment went into effect and provided, *inter alia*, for the renovation of IHS' existing Chrysler and Jeep dealership to accommodate the addition of the Dodge line, as a condition for the award to IHS of a Dodge dealer agreement. Chrysler Group and IHS relied on the LOI and RMA in effect at the time in planning for, and beginning, the renovation the LOI required. If LaFontaine's argument in favor of retroactive application is accepted, IHS and Chrysler Group would not only be subjected to costly and time consuming litigation regarding "good cause" under the Dealer Act concerning the proposed establishment, they could also be deprived altogether of their pre-existing legal right to add the Dodge line to IHS' Ann Arbor location. To be deprived of these rights after-the-fact by an amendment to the existing law is a classic case of impermissible retroactive application of a statutory amendment.

LaFontaine argues erroneously that Chrysler Group's right to establish an additional Dodge dealer is the creature of the Dealer Act and therefore can be taken away with impunity by a subsequent act of the Legislature, claiming "what the legislature gives, it may take away." (Appellee's Br, pp. 12, 28-29.) LaFontaine, however, is incorrect when it attributes the creation of Chrysler Group's right to establish additional dealers to the Dealer Act. In fact, Chrysler Group explicitly reserved the right to establish additional dealers in the LaFontaine Dodge Agreement. The source of its right is contractual, subject only to the relevant law in existence at the time of the contract, that is, the six-mile RMA. (Nor has Legislature taken any right away, because it decided not to make the 2010 Amendment retroactive to pre-existing agreements.)[4]

[4] LaFontaine goes so far as to argue that whenever a statute is amended, the prior version ceases to exist for any reason. (Appellee's Br, p. 18, citing *Lahti v Fosterling*, 357 Mich 578, 588; 99 NW2d 490 (1959)). But per *Lahti* this is only the case "in the absence of a savings clause" (*id.*), and Michigan has a general savings clause. MCL 8.4a. In any event, such a rule would read this Court's case law regarding retroactivity out of existence as every amendment

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LaFontaine's reliance on *Lahti* and *Rookledge v Garwood,* 340 Mich 444; 65 NW2d 785 (1954) is misplaced. Both held that amendments to the Worker's Compensation Act could apply to persons injured before the effective dates because the amendments did not create new causes of action against, or impose new liabilities upon, employers, and were remedial in nature and therefore came within the exception to the presumption against retroactivity. But as shown above, the 2010 Amendment *does* impose new liabilities against manufacturers, and creates new causes of action in that it allows dealers to bring suit under circumstances in which they previously could not. And as discussed below, the 2010 Amendment is not remedial.[5] LaFontaine also relies on *Chrysler Corp v Kolossos Auto Sales, Inc*, 148 F3d 892, 894 (CA 7, 1998), but that case is distinguishable because there, unlike here, the amendment at issue expressly stated that is was applicable to existing contracts.

LaFontaine cannot distinguish *Kia Motors,* so it just argues that the Sixth Circuit got it wrong, and in any event, this Court is not bound by a Sixth Circuit decision. (Appellee's Br, pp. 13, 14, 31.) Chrysler Group agrees that this Court is the final word on Michigan law and is not bound by the decisions of other courts, but where, as here, the Sixth Circuit correctly follows this Court's precedents and correctly interprets Michigan law, its reasoning can, and should, be adopted. The Sixth Circuit also got the Dealer Act and retroactivity law right in *Dale Baker,* which held that a dealer could not require a manufacturer to comply with the termination provisions set forth in the Dealer Act enacted in 1981, where at the time the dealer agreement was entered into a different act governed. The court considered *Rookledge, Anderson's* and *Lahti* and found them to be inapplicable, concluding there was "no doubt that application of [the

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would be automatically retroactive in every case. Of course, this is not the law.

[5] *Rookledge* also noted that the Legislature expressly rejected a proposed amendment that the act at issue could be applied only prospectively. 340 Mich at 790. *Cosby v Pool*, 36 Mich App 571; 194 NW2d 142 (1971) addressed whether a statutory increase in interest on judgments required an insurance company to pay the increased amounts, and is therefore inapplicable.

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1981 Act] would impose substantial new duties on [the manufacturer] as well as giving [the dealer] substantive rights, neither of which existed by law or contract" and thus could not be applied. 794 F2d at 219. The same is true here. LaFontaine attempts to distinguish *Dale Baker* on the grounds that its cause of action is created purely by statute. (Appellee's Br, p. 32). This is precisely Chrysler Group's point – the cause of action was created by the 2010 Amendment and does not exist in the parties' contract and therefore should not be applied retroactively.[6]

Finally, LaFontaine repeats, as it if were a mantra, that the auto dealer industry is heavily regulated. (Appellee's Br, pp. 9-11, 41, 43-44.) Yet the rules regarding retroactivity apply just as equally in regulated industries as in any other, and this is a distinction without a difference.[7]

C. The Statutory Amendment Cannot Be Classified as Remedial or Procedural.

"[S]tatutes which operate in furtherance of a remedy or mode of procedure and which neither create new rights nor destroy, enlarge, or diminish existing rights are generally held to operate retrospectively unless a contrary legislative intent is manifested." *Frank W Lynch & Co v Flex Technologies, Inc,* 468 Mich 578, 583: 624 NW2d 180 (2001). The enlargement of the RMA provision is no "minor" procedural change, as LaFontaine claims (Appellee's Br, pp. 31, 38, 39, 40, 41); rather, it creates substantive rights that had no prior existence in law or contract. Before the 2010 Amendment, the Dealer Act permitted Chrysler Group to establish the Dodge

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[6] Confusingly, LaFontine argues on p. 32 that "the cause of action in the case at bar is purely statutory" and "the law in effect at the time that the cause of action arose is the law that applies", but then states on p. 24 that "the 2010 Amendments did not create a new cause of action,..." Clearly, a new cause of action was created by the 2010 Amendment. And to the extent LaFontaine is suggesting that the Dealer Act does not deprive a manufacturer of a contractual right to expand because the expansion may go forward after a court challenge if good cause is established, (Appellee's Br, p. 32) as the court stated in *Kolossos*, "there is a big difference between having a right...and having a right that depends on showing that there is good cause for its exercise." 148 F3d at 894.

[7] LaFontaine's argument that manufacturers should have been aware that the RMA may change (Appellee's Br, pp. 10, 41, 43-44) ignores the fact that for almost three decades the RMA remained fixed at a six mile radius. Moreover, it should go without saying that laws may always change; to allow one to avoid the presumption against retroactivity by arguing the other side should have known that a change may someday come would turn retroactivity law on its head.

vehicle line at the IHS location because it was more than six miles from LaFontaine. After the 2010 Amendment, if applied retroactively to the IHS expansion as the Court of Appeals' opinion requires, Chrysler Group is required to provide notice to LaFontaine and, upon LaFontaine's protest, prove "good cause" in a court of law.[8] The 2010 Amendment imposes new substantive duties, and provides a new substantive right; it does not simply change how protesting dealers can exercise an existing right, it gives protesting dealers more rights and more opportunities for protest. Therefore, the 2010 Amendment is not procedural, and the presumption against retroactivity applies.

II. RETROACTIVE APPLICATION OF THE 2010 AMENDMENT DEPRIVES CHRYSLER GROUP OF CONSTITUTIONAL RIGHTS.

Even if the Court were to find that the 2010 Amendment applies retroactively, it could still reverse on the grounds that this violates constitutional prohibitions against laws "impairing the obligations of contracts." US Const, art I, § 10; Const 1963, art I, § 10. LaFontaine and Chrysler Group have a contractual relationship, and the 2010 Amendment, if applied retroactively, constitutes a change in the law that substantially impairs that relationship. *General Motors Corp v Romein*, 503 US 181; 112 S Ct 1105; 117 L Ed 2d 328 (1992). Here too, LaFontaine relies on the fact that the automobile dealer industry is regulated. But as *Kolossos* provided, "a history of regulation is never a sufficient condition for rejecting a challenge based on the contracts clause." 148 F3d at 897. If, as here, the law substantially impairs a contract, there must be a "significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem" for it to pass muster. *Energy*

[8] That Chrysler Group sent a letter to LaFontaine formally informing it of the proposed expansion is not a concession that the amended RMA applies, or a waiver, as LaFontaine claims. (Appellee's Br, p. 3, n. 1, p. 19.) That Chrysler sent such a notice as a precaution, in the event the 201 Amendment was found to apply does not create an obligation where one does not exist under the law, or trump the law regarding retroactivity and make a prospective-only amendment retroactive. Chrysler Group does not have that power.

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Reserves Group, Inc v Kansas Power &Light Co, 459 US 400, 412; 103 S Ct 697; 74 L Ed 2d 569 (1983) (cited by Appellee, p. 8). LaFontaine has not established, and cannot establish, that the expansion of the RMA was to remedy a "broad social problem."

CONCLUSION AND RELIEF REQUESTED

This Court should reverse the Court of Appeals and grant summary disposition to Defendants because Plaintiff lacks standing to protest the proposed expansion.

Dated: February 10, 2014

Respectfully submitted,

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