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Wisconsin Dairy Equipment Manufacturer Gets Milked By Court

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BouMatic is a Wisconsin dairy equipment manufacturer. Tilstra Dairy Equipment was its dealer in southwestern Ontario. BouMatic was not happy with Tilstra's performance and wanted to end the relationship. Unfortunately, due to its own missteps, BouMatic got milked by the trial and appeals court, ending up with damages assessed against it of close to $500,000. (*Sid Tilstra and Tilstra Dairy Equipment, Ltd. v. BouMatic,* No. 14-3333, 7th Circuit Court of Appeals, June 30, 2015)

Tilstra had been a BouMatic dealer in southwestern Ontario for around 20 years. Tilstra's territory, according to a BouMatic district sales manager, was "arguably the richest dairy county in Canada" with 55,000 dairy cows. Tilstra made a profit of around $400,000 per year.

The dealer agreement had some unusual, and inconsistent, terms. BouMatic had "the right to change, at its sole discretion, the assigned territory." However, the agreement also provided that "BouMatic shall not terminate this [dealership] Agreement or effect a substantial change in the competitive circumstances of this Agreement without good cause and only upon at least ninety (90) days' advance written notice sent by certified mail. The term ‘good cause' means Dealer's failure to comply substantially with essential and reasonable requirements imposed upon Dealer by BouMatic."

This may have been BouMatic's first mistake. Although not noted by the court, the "good cause" language closely resembles the language from the Wisconsin Fair Dealership Law (WFDL). (Wisconsin Statutes, Chapter135) The WFDL has been the bane of suppliers to Wisconsin dealers for many years. The WFDL makes it difficult to terminate a Wisconsin dealer without risk of substantial damages. Even worse, it applies, not just to terminations, but to non-renewals. As a result, in Wisconsin, a supplier and a dealer cannot enter into a contract for a fixed period of time without the application of the WFDL. The WFDL requires that the contract be renewed in perpetuity unless there is "good cause" to terminate or not to renew. One often-heard joke (with an element of truth) is that, in Wisconsin, it is easier to terminate a marriage than to terminate a dealer.

But the statute only protects Wisconsin dealers. Ordinarily it would not protect a dealer not located in Wisconsin. So Tilstra could not use the WFDL to protect itself from termination or non-renewal, except for the provision in the Agreement.

So the provision regarding termination for "good cause" was inserted voluntarily. It is unclear why BouMatic would include such a pro-dealer provision in its Dealer Agreement. Of course, it could have resulted from

negotiations. If so, then it hardly seems consistent with language permitting BouMatic to change the assigned territory "at its sole discretion."

The second mistake by BouMatic was the indiscreet use of e-mails by its employees. Adjacent to Tilstra was another BouMatic dealership called Dortmans, which wanted to buy Tilstra's dealership. A BouMatic sales manager felt Tilstra was not doing a good job and Dortmans, whose territory had only about half the dairy cows of Tilstra, could do a better job. So another BouMatic sales manager hatched a scheme which she helpfully (for Tilstra) memorialized in a 2009 e-mail.

> "We [should] approach Sid [Tilstra] again and ask him to sell. If he refuses or makes it too difficult, we would in the short term, modify the territory lines in favor of Advanced [another adjacent BouMatic dealer] and Dortmans. This would . . . put unbearable pressure on Sid [to sell] without cancelling him outright or immediately."

Shortly afterward, BouMatic met with Tilstra and told him that BouMatic would eliminate his territory completely unless he sold his dealership to Dortmans by January 1, 2010. The court also noted evidence that BouMatic threatened to stop selling dairy equipment to Tilstra.

Tilstra was actually willing to sell to Dortmans, but they could not agree on terms. On January 8, 2010 BouMatic's Director of Sales sent a letter to Tilstra reminding him that BouMatic had decided to "have Dortmans . . . take over the territory covered by your company. . . . [O]ur decision. . . is not negotiable and . . . we will proceed with or without your cooperation."

BouMatic's strategy worked. Although Tilstra valued its dealership at $1.5 million, BouMatic's decision pressured him to sell the dealership in March 2010 to Dortmans for $500,000 plus a five year consulting contract valued at $310,000 in consulting fees. Tilstra then filed suit against BouMatic.

Tilstra charged that BouMatic, in bad faith, forced him to sell his dealership at a below-market price. Tilstra won a jury verdict of $471,124 in damages and BouMatic appealed.

Judge Posner, who wrote the opinion for the 7th Circuit Court of Appeals, first had to consider whether there was sufficient evidence to sustain the jury verdict. This is where the language in BouMatic's Agreement came back to haunt BouMatic. The provision noted above required "good cause" to terminate. Of course, BouMatic argued that it did not terminate Tilstra. But, to the appeals court, this was a distinction without a difference. ". . . [B]y telling Tilstra that unless he sold out to Dortmans his territory would be shrunk to zero, BouMatic was telling him that he was finished, his dealership doomed; for without a territory his position as a BouMatic dealer would be untenable."

But didn't the Agreement permit BouMatic to change the territory "at its sole discretion?" Judge Posner responded, "Elimination of a dealership's entire territory is certainly a change, but were it a change permitted by the contract, it would amount to allowing termination "without good cause," contrary to an explicit contractual term. That would not be a tenable interpretation of the contract."

BouMatic then argued that it had "good cause" to terminate Tilstra. But, as Judge Posner pointed out, BouMatic still did not comply with the procedures in the Agreement, namely giving BouMatic 90 days' notice of the termination.

Finally, BouMatic objected to the damages calculation using what Judge Posner called a "blunderbuss of objections." The court dismissed all of these. But there was one objection that the court might have discussed in more detail. BouMatic pointed out that the Agreement stated that "regardless of which party terminates this Agreement, Dealer shall not be entitled to any termination compensation or to any compensation for goodwill." Apparently, the court refused to apply this provision as a matter of contract interpretation. This language appeared in the same section that gave BouMatic the right to terminate Tilstra on 90 days' notice for good cause. ". . . BouMatic did not comply with those conditions and so cannot rely on the provision [limiting compensation]." The limit on Tilstra's compensation would only apply if BouMatic had terminated Tilstra's dealership for good cause on 90 days' notice.

The court probably reached the right result. But the argument that the limitation on damages did not apply warrants further discussion. In an analogous situation, Uniform Commercial Code Article 2 (the law governing the sale of goods) permits a seller to exclude incidental and consequential damages. But "where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act." (UCC 2-719(2)) Courts have long struggled with whether a seller in breach can still take advantage of the exclusion of incidental and consequential damages, and decisions in this regard have not been consistent.

In other words, does freedom of contract permit an aggrieved party to disclaim a remedy in advance, even in a situation where the other party is in breach? Probably BouMatic argued, or would have argued, that the limitation on Tilstra's compensation was intended to apply even in the case of BouMatic's own breach. By using contract interpretation to deny BouMatic the benefit of the limitation, Judge Posner does not answer the broader question – can a party disclaim a remedy in advance even when the other party breaches?

It's an interesting question, probably not answerable with a yes or no. The answer could depend on the situation. Perhaps a consumer or a party to an adhesive contract should not be denied compensation or damages when the other party is in breach. On the other hand, perhaps a sophisticated business party should be able to limit its compensation and remedies, even when the other party is in breach. Many courts have permitted breaching sellers the benefit of a contract denying buyers incidental and consequential damages and thereby limiting their exposure. In either case, it is likely courts will continue to struggle with the application of contract provisions limiting compensation and remedies.