Nos. 94-2073 & 94-2138

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

KRONON MOTOR SALES, INC.,	)	Appeal for the United
	)	States District Court for
Plaintiff-Appellant,	)	the Northern District of
	)	Illinois, Eastern Division
v.	)	
	)	No. 93 C 2853
	)	
FORD MOTOR COMPANY,	)	Hon. Harry D. Leinenweber,
	)	Judge, Presiding.
Defendant-Appellee.	)	

BRIEF OF DEFENDANT-APPELLEE
FORD MOTOR COMPANY

August 26, 1993

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STATEMENT OF JURISDICTION

Plaintiff's statement of jurisdiction is complete and correct.

STATEMENT OF THE CASE

A. Nature of the Case. This is a diversity case involving § 6 of the Illinois Motor Vehicle Franchise Act, 815 ILCS § 710/6. See App., infra, 1a.[1] Kronon Motor Sales, Inc. ("Kronon") has been an authorized dealer of Lincoln-Mercury vehicles for Ford Motor Company ("Ford") since 1972. Kronon's primary claim in this case is that, for parts and services provided to customers while a vehicle is under the manufacturer's warranty, it is entitled under § 710/6 to be reimbursed by Ford at the same level that Kronon charges its retail customers for parts and labor on non-warranty work. R. 1, ¶ 10. Ford's policy for warranty work is to reimburse labor at the dealer's retail rate, but for parts, Ford reimburses the dealer's cost plus a mark-up of 30-40%. See pp. 6, 8, infra. Plaintiff seeks to recover the purported difference between what Ford paid Kronon and Kronon's retail prices.

B. The Course of Proceedings and Disposition in the District Court. In the district court, Ford contended that § 710/6 did not apply to this case. First, Ford argued (R. 13; R. 15, pp. 2-4) that the retail reimbursement requirement in § 710/6 applies only to labor, not parts, since the "principal factor" considered in determining

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[1] The appendix to Ford's brief is cited as "App., infra," followed by the page number. (Our appendix includes a copy of the statute in effect when suit was filed because plaintiff included an older version of § 710/6 in the appendix to its brief.) In addition, documents filed in the district court will be cited as "R." followed by the docket number and, if applicable, the page number, paragraph number or exhibit designation. The plaintiff's opening brief on appeal and its appendix are referred to as "Pl. Br." and "Pl. App."

"reasonable compensation" under that section of the statute is the "prevailing wage rates being paid by the dealer." 815 ILCS § 710/6(b). The district court did not reach this issue. Pl. App. 16. Nor did the court rule on Ford's argument that § 710/6 -- first adopted in 1979 and amended in 1983 -- cannot be applied retroactively to the 1972 contract between Ford and Kronon because that would alter Ford's previously vested contract right to set the level of reimbursement for parts and labor provided by dealers for warranty work. R. 12; R. 16, pp. 4-6; R. 28, pp. 7-11.

The court granted summary judgment to Ford on two other grounds. First, the court held that Kronon had not complied with the statutory requirement that it must submit its warranty claims to Ford and that, under Illinois law, "[w]here a statute sets a prerequisite to a claim, it must be complied with" or the case will be dismissed. Pl. App. 15. (In the district court, Kronon "admit[ted] that it did not submit a claim to Ford seeking reimbursement at the higher level requested in the complaint." Id. at 13.) Second, the court also held that the Ford-Kronon contract required Kronon to present any warranty reimbursement claims to Ford within one year of when the labor was performed or the parts provided and that Kronon's failure to do so barred its pursuit of claims more than one year old. Id. at 15.

STATEMENT OF THE ISSUES

1. Whether the retail reimbursement requirement in the Illinois Motor Vehicle Franchise Act ("MVFA") applies only to labor, not parts, when the "principal factor" set forth in the statute for determining reasonable compensation to the dealer is "the prevailing wage rates being paid by the dealer."

2. Whether, under Illinois law, the MVFA, which was adopted in 1979 and amended in relevant part in 1983, can be applied retroactively to the 1972 contract between Ford and Kronon.

3. Whether the district court concluded correctly that submitting a claim to the manufacturer requesting warranty reimbursement at the dealer's retail prices was a prerequisite to proceeding under § 710/6 of the MVFA, which provides for the procedures that "shall" be followed in the "submission" to manufacturers of "claims * * * made by motor vehicle dealers."

4. Whether the district court concluded correctly that, under the explicit terms of the parties' contract, Kronon cannot pursue warranty reimbursement claims that it did not submit to Ford within one year of when the warranty work was performed.

THE STATUTE INVOLVED

Prior to 1979, the Illinois statutes did not address the subject of reimbursing dealers for parts or labor provided for vehicles covered by a manufacturer's warranty; the area was left to be governed entirely by contract. That changed in June 1979, with the adoption of the MVFA. R. 17, ¶ 2; R. 23 ¶ 2. Section 6 of that act, then designated as Ill. Rev. Stat. ch. 121-1/2 ¶ 756 and later redesignated as 815 ILCS § 710/6, originally provided with respect to warranty reimbursement only that each manufacturer "shall * * * adequately and fairly compensate each of its motor vehicle dealers for labor and parts." R. 16, Ex. C. This language is still in the statute. 815 ILCS § 710/6(a).

The Illinois legislature, however, added to that language in 1983, when it amended section 6 of the MVFA. The key passage in the amended statute provides as follows:

> "In the determination of what constitutes reasonable compensation under this Section, the <u>principal factor</u> to be given consideration shall be the prevailing <u>wage rates</u> being paid by the dealer in the relevant market area in which the motor vehicle dealer is doing business, and in no event shall such compensation of a motor vehicle dealer for <u>warranty service</u> be less than <u>the rates</u> charged by such dealer for <u>like service to retail customers for nonwarranty service and repairs</u>."

815 ILCS § 710/6(b) (emphasis added) (App., <u>infra</u>, 1a). The statute also explains in detail the procedures to be followed with respect to the "submission" of "all claims" to manufacturers for warranty reimbursement "made by motor vehicle dealers." <u>Id</u>.

STATEMENT OF FACTS

A number of the "facts" asserted in plaintiff's brief are wholly without evidentiary support, as we will point out below, and must therefore be disregarded. The statement of facts that follows is based on the evidence actually submitted by the parties at the summary judgment stage.

A. The Parties' Agreement. Kronon became an authorized Lincoln-Mercury dealer on June 1, 1972, when Ford and Kronon entered into Lincoln and Mercury Sales and Service Agreements (collectively the "Agreement"). R. 16, Ex. A, ¶ 6 & Ex. A-1; R. 17, ¶ 1; R. 23, ¶ 1. The Agreement provided that it "shall continue in force and effect from the date of its execution until terminated by either party." R. 16, Ex. A-1, p. iv. Neither party has exercised its right to terminate the contract; Kronon is still a Lincoln-Mercury dealer. R. 8, ¶¶ 7-8.

B. The Agreement's Provisions Concerning Claims for Warranty Reimbursements. The Agreement sets forth the dealer's responsibilities with respect to providing labor and parts for vehicles under warranty, in accordance with the "then current" Warranty Manual "and supplements

thereto," which are incorporated into the Agreement by reference. R. 16, Ex. A-1, pp. 5, 7-8. The Agreement also states the rules governing submission of warranty reimbursement claims to Ford:

> "[t]he Dealer shall submit claims to the Company for reimbursement for the parts and labor used in performing warranty * * * work and the Company shall reimburse the Dealer therefor, in accordance with the provisions of the Warranty Manual * * * and the Dealer's approved warranty labor rate."

R. 16, Ex. A-1, p. 8.

The Warranty Manual is revised and reissued annually (since new vehicles come out every year). R. 16, Ex. B, ¶ 3; R. 22, Kronon Affid., ¶ 4; Pl. App. 10. The Manual establishes the parts prices and labor rates that will be reimbursed (R. 25, Ex. C, pp. 2.0-6 to 2.0-8), and sets forth the "approved procedures for making, evaluating and processing dealer warranty reimbursement claims" (Pl. App. 11). At all relevant times, the Manual required dealers' claims to be submitted within one year of the date of repair:

! "**Claims over one year from date of repair will not be accepted.**" R. 25, Ex. C, p. 6.0-16 (emphasis in original).

! "**After 1 year from date of repair -- Warranty and ESP [extended service program] claims will not be accepted.**" R. 25, Ex. C, p. 6.4-1 (emphasis in original).

The one-year requirement is designed to "ensure that warranty reimbursement claims are supported by adequate records maintained by the dealer." R. 16, Ex. B, ¶ 6.

Typically, dealers submit their warranty reimbursement claims to Ford via computer, on "Form 1863." R. 25, Ex. C, p. 6.4-1. The parties' contract also allows dealers to mail in their claims. Id. The minimal information required by Ford for warranty reimbursement claims is (1) the date the repair occurred, (2) the serial number of

the vehicle repaired, (3) the date the vehicle was sold, and (4) the mileage on the vehicle. R. 17, ¶ 4; R. 23, ¶ 4. In addition, a warranty reimbursement claim for labor requires a statement of the work performed and the number of hours involved; for a parts warranty reimbursement claim, the dealer must provide the part number replaced and the quantity of the part involved. Id.

If the amount paid on a warranty reimbursement claim is "different" from that claimed by the dealer, or if the amount is "paid as requested," but "additional credit [is] requested," Ford provides an appeal procedure for its dealers. R. 25, Ex. C, p. 6.5-1. The dealer is required to write a letter to Ford explaining the reasons for the appeal and attach certain information concerning its claims. Id.

C. Reimbursement for Labor. Since 1978, Ford has reimbursed warranty labor at the dealer's approved warranty labor rate, which is based on the dealer's standard retail labor rate. R. 28, Rebholz Affid., ¶ 5; R. 25, Ex. C, p. 2.0-7. Kronon's labor reimbursement for a given repair is calculated by multiplying its approved labor rate by a standard time allotment for that type of repair. R. 22, Kronon Affid., ¶ 8. Ford has ratified several changes in Kronon's approved labor rate since 1983 (R. 22, Kronon Affid., ¶ 9), and Ford submitted evidence that it paid Kronon's approved labor rate on all of Kronon's claims for labor reimbursement (R. 16, Ex. A, ¶ 5; see also R. 25, Ex. C, p. 6.0-14).

Plaintiff did not submit any evidence to the contrary. John Kronon's affidavit on this point stated only that "[o]ver the years Kronon has made a number of requests for changes and has complied with Ford's procedures for making such requests." R. 22, Kronon Affid., ¶ 9. As a result, the district court held that, as of the date this suit was filed, "Ford has paid Kronon for each and every claim for warranty work, including parts and labor submitted." Pl. App. 11.

When Kronon filed a motion under Rule 60(b) for reconsideration of the Court's ruling that Ford had paid all of Kronon's labor claims, Kronon stated in its brief that Ford had sometimes denied its requests to increase its approved labor rate to Kronon's retail rate (R. 35, p. 6), but it did not submit any evidence of that.[2] In short, the undisputed evidence was that Kronon systematically submitted reimbursement claims at its approved labor rate, and Ford paid all of those claims.

D. Reimbursement for Parts. Only Ford parts are used in warranty repairs. R. 28, Rebholz Affid., ¶ 4. For those parts, Ford formerly reimbursed dealers at the rate of 30% above the dealer's cost, but Ford now reimburses dealers at a rate of 40% above the dealer's cost for warranty parts on 1994 vehicles, 35% for 1993 vehicles, and 30% for previous years' vehicles. Id., ¶ 5; R. 16, Ex. B, ¶ 7 & Ex. B-

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[2] Kronon attached to its brief in support of its Rule 60 motion a 1992 Warranty Labor Rate Request form (R. 35, Ex. B), but that form is not accompanied by an affidavit, nor is there any evidence of Ford's response to that request. In any event, "[m]otions for reconsideration * * * `cannot in any case be employed as a vehicle to introduce evidence that could have been adduced during the pendency of the summary judgment motion.'" Green v. Whiteco Industries, Inc., 17 F.3d 199, 202 n.5 (7th Cir. 1994).

2. When "discounts" from the dealer's price and "incentives" are taken into account, the dealer's "effective markup is higher than the stated percentage." R. 16, Ex. B, ¶ 7.

Kronon could have asked to be reimbursed for parts at a higher price by submitting a claim to Ford in writing, R. 25, Ex. C, p. 6.4-1, but Kronon never did that. Kronon could also have sought higher reimbursements on parts by appealing individual parts reimbursement requests to Ford and asking to be reimbursed at Kronon's retail rates; Ford has a specific appeal procedure for requests for additional reimbursement. R. 25, Ex. C, p. 6.5-1; see p. 6, supra. There was no evidence that Kronon ever tried to use this route either. Indeed, Kronon "admit[ted]" in the district court that, until it filed this action, "it did not submit a claim to Ford seeking reimbursement at the higher level requested in the complaint." Pl. App. 13; see also R. 16, Ex. A, ¶ 5. In short, Kronon never submitted a claim to Ford specifically requesting reimbursement for warranty parts at the retail mark-up that Kronon charges its non-warranty customers. Kronon also acknowledged in the district court that the demand letter its lawyer sent to Ford on the eve of filing suit (Pl. Br. 6) was "not a warranty claim." R. 23, ¶ 4.

Plaintiff contends (Pl. Br. 10) that Ford "repeatedly" stated that it would not reimburse warranty parts at Kronon's retail prices, but the record does not support that statement. As already explained, Kronon never submitted a single claim to Ford asking that it be reimbursed at the retail prices it charged non-warranty customers for parts. The record does include evidence of one discussion between

Kronon and Ford on Ford's general policy: John Kronon stated that a Ford representative told him in August 1991 that Ford "would not pay retail rates for parts reimbursement." R. 22, Kronon Affid., ¶ 11. However, Kronon's own notes of that conversation also indicate that Ford was willing to discuss this issue with the National Dealer Council, a group of Ford dealers: the Ford representative stated that Kronon should "go thru [sic] [the] Dealer Council" to discuss proposed "change[s]" to the parts reimbursement program. R. 25, Ex. E.[3/]

E. The 1990 Amendment to the Agreement. In 1990, Ford amended the Agreement to require each dealer to do warranty work for all Lincoln-Mercury vehicles rather than limiting that work to vehicles sold by that dealer and vehicles sold by other dealers to whom the customer could not easily take the vehicle. R. 16, Ex. A-3. "[M]ost dealers already follow[ed] the policy formalized by this amendment," id., and the amendment "in no way altered the terms or manner in which

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[3/] The National Dealer Council periodically raises various issues with Ford on behalf of the dealers. R. 25, Ex. D. In the past, the Dealer Council has persuaded Ford to make changes in certain policies. For example, the Dealer Council made a number of requests for "parts reimbursement increases" between 1989 and 1992. See id. (a collection of newsletters reflect-ing the group's attempts to raise the 30% warranty parts mark-up); R. 22, Kronon Affid., ¶ 12. Plaintiff asserts (Pl. Br. 6) that Ford "ignored" those requests, but the undisputed evidence is to the contrary; as noted in the text, the deal-ers' mark-up on warranty parts has now been increased to 40%.

John Kronon states in his affidavit that he has made oral inquiries about "a parts reimbursement increase but have always been informed that Ford has a rigid across the board policy applicable to all dealers." R. 22, Kronon Affid., ¶ 10 (emphasis added). This is apparently the same "parts reimbursement increase" that Kronon explained the National Dealer Council was trying to obtain (and ultimately did). See id., ¶ 12.

dealers were reimbursed for the warranty work which they performed," R. 16, Ex. A, ¶ 6.

Plaintiff, however, claimed that this amendment "placed an additional burden on the dealership" due to its "limited capacity." R. 22, Kronon Affid., ¶ 3. Plaintiff also claimed that "to the extent" the amendment "has the effect of requiring the dealership to do more warranty work and less retail work, warranty work is less profitable," because the 30-40% mark-up that Ford pays for warranty parts reimbursements is "substantially below the mark-up that the dealership charges retail customers." Id., ¶¶ 3, 15. Plaintiff did not, however, offer any evidence on "the extent" to which, if any, the 1990 amendment has affected the dealership's profitability. In fact, Kronon appears to have actively solicited the warranty repair work of owners who bought their vehicles from other dealers. R. 28, p. 10 n.9.

SUMMARY OF ARGUMENT

The threshold question in this litigation is whether § 710/6, the sole basis for plaintiff's claim, even applies to this case. It does not, for two independent reasons.[4/]

First, the retail reimbursement clause in the statute applies only to labor, not parts. The statute provides that the dealer's compensation for "service" shall be the dealer's retail rates for

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[4/] Our arguments why § 710/6 does not apply -- because the statute does not require retail reimbursement for warranty parts and does not apply retroactively to the parties' 1972 contract -- were both made, but not ruled on, in the district court. See pp. 1-2, supra. Because this Court "may affirm [the district court's] judgment on any properly preserved ground that the record supports," Eckstein v. Balcor Film Investors, 8 F.3d 1121, 1129 (7th Cir. 1993), plaintiff is incorrect in stating (Pl. Br. 8 n.1) that these alternative grounds for affirmance are "not before this Court."

similar "service" and that the "principal factor" to be considered in determining reasonable compensation shall be "the prevailing wage rates being paid by the dealer in the relevant market area." § 710/6(b) (emphasis added). The "prevailing wage rates" can only be relevant to a labor reimbursement claim, not to a parts reimbursement claim. See pp. 13-18, infra.

Second, the statute, adopted in 1979 and amended in 1983 to include the retail reimbursement provision, does not apply to the parties' 1972 Agreement. A long line of Illinois cases holds that the MVFA does not apply to vested contractual rights that took effect before the statute was enacted. Under the 1972 Agreement, Ford had a vested right to determine the level of reimbursement that Kronon receives for warranty parts and labor. See pp. 19-25, infra.

Even if the MVFA does apply, the district court correctly ruled that Ford was entitled to summary judgment, on two other grounds that Ford argued. To start, the court properly held that Kronon's claims were barred because it did not comply with the statutory requirement that it submit its retail reimbursement claims to Ford. That statutory mandate would be meaningless if, as Kronon contends, a dealer could bypass the statutory procedure for reimbursement claims and file a lawsuit instead. Until a dealer submits a claim to the manufacturer, and the manufacturer denies it, there is no violation of § 710/6; the manufacturer cannot wrongfully disapprove a claim unless it has first had an opportunity to consider the claim. Plaintiff's contention that it would have been futile to go through this statutorily-mandated process is specious. A futility exception is not applied to statutory

requirements, and in any event, the undisputed evidence in the record is that there were several avenues available to dealers seeking more than the standard reimbursement. See pp. 25-32, infra.

The district court was also correct in granting judgment to Ford because Kronon did not submit its retail reimbursement claims to Ford within one year of the warranty work, as required by the parties' contract. Kronon's failure to comply with this reasonable contractual requirement means that it has forfeited its substantive right to pursue those claims. See pp. 32-34, infra.

ARGUMENT

It is important at the outset to understand the scope of the parties' dispute on appeal. In the district court, the plaintiff raised claims concerning Ford's reimbursement for both parts and labor. Ford, however, submitted evidence that its policy since 1978 has been to reimburse for labor costs at the retail level and that it has always paid Kronon's approved rate (which is based on Kronon's retail rates). Kronon did not offer any evidence to the contrary, nor did it submit any evidence that Ford had ever denied one of Kronon's requests to increase its approved labor rate. See pp. 6-7, supra. Moreover, in this Court, Kronon does not dispute the district court's holding (Pl. App. 11) that Ford paid Kronon for each warranty labor claim that Kronon submitted to Ford. The upshot of all this is that Kronon has abandoned its labor claims. This appeal, therefore, turns on the narrower question whether the district court correctly held that, under the MVFA, Kronon could not recover on its claim that Ford was required

to reimburse Kronon for parts based on the retail prices that Kronon charges its non-warranty customers.

Because this case is on appeal from a summary judgment, this Court's review is de novo. Colip v. Clare, 26 F.3d 712, 714 (7th Cir. 1994). This Court must affirm if -- considering the evidence the parties submitted in the district court and giving the nonmoving party the benefit of all reasonable inferences from that evidence -- there is no genuine issue of material fact and if Ford is entitled to judgment as a matter of law. Id.; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

I. THE ILLINOIS MOTOR VEHICLE FRANCHISE ACT DOES NOT APPLY TO THIS CASE.

A. The Act Does Not Require That Parts Used In Warranty Work Be Reimbursed At The Dealer's Retail Rates.

It is striking that plaintiff's brief never actually quotes the statutory language on which its case is based. Instead, plaintiff simply assumes that the retail reimbursement provision in § 710/6(b) applies to parts, as if that were self-evident from the statute. Pl. Br. 3-5, 10. It is not. In fact, the language used in the statute -- particularly when considered in light of the standards used to interpret Illinois statutes -- demonstrates conclusively that this provision applies only to labor, not parts.

1. The retail reimbursement clause plainly refers only to labor, not parts.

In a diversity case, this Court must decide issues of state law as it believes the state's highest court would decide them. Todd v. Societe BIC, S.A., 21 F.3d 1402, 1405 (7th Cir. 1994) (en banc). Thus, this Court "`must apply the state law that would be applied in this

context by the' [Illinois] Supreme Court." Fidelity & Guar. Ins. Underwriters, Inc. v. Everett I. Brown Co., 25 F.3d 484, 486 (7th Cir. 1994). And in the context of statutory interpretation, this Court must follow the rules that state courts follow in construing their own statutes. Sherman v. Community Consol. School Dist., 980 F.2d 437, 442 (7th Cir. 1992); K-S Pharmacies, Inc. v. American Home Products Corp., 962 F.2d 728, 730 (7th Cir. 1992); Ace Cycle World, Inc. v. American Honda Motor Co., 788 F.2d 1225, 1228 (7th Cir. 1986).

Under Illinois law, "[t]he plain meaning of the language used is always the safest guide to follow in construing any act," Hagen v. City of Rock Island, 18 Ill. 2d 174, 179, 163 N.E.2d 495, 498 (1959), and a statute's words "should be given their plain and ordinary, or commonly accepted or popular, meaning unless to do so would defeat the legislative intent," Droste v. Kerner, 34 Ill. 2d 495, 503, 217 N.E.2d 73, 78 (1966). If the "legislative intent can be ascertained" from the statute's language, "it must prevail and will be given effect without resorting to other aids for construc-tion." Western Nat'l Bank v. Village of Kildeer, 19 Ill. 2d 342, 350, 167 N.E.2d 169, 173 (1960). Thus, "the courts have no right to read into a statute words not found therein either by express inclusion or by fair implication," Hagen, 18 Ill. 2d at 179, 163 N.E.2d at 498, nor can a court "declare that the legislature did not mean what the plain language of the statute imports," or "inject provisions not found in the statute however desirable they may appear to be," Western Nat'l Bank, 19 Ill. 2d at 349-50, 167 N.E.2d at 173-74. Finally, a "statute should be read as a whole with all relevant parts considered" and "construed so that no

word or phrase is rendered superfluous or meaningless." Kraft, Inc. v. Edgar, 138 Ill. 2d 178, 189, 561 N.E.2d 656, 661 (1990).

Applying these standards here leads inexorably to one conclusion: the retail reimbursement requirement applies only to labor, not parts. Section 710/6(b) (set forth in full at App., infra, 1a) begins by stating that dealers must receive "reasonable compensation for diagnostic work, as well as repair service and labor" -- a clear reference to work performed by human beings. The statute then elaborates, in the following two sentences, on what is to be considered in determining "reasonable compensation" for diagnostic work, repair service and labor. First, it states that "[t]ime allowances" for "diagnosis and performance of warranty work and service shall be reasonable and adequate for the work to be performed." Id. (emphasis added). This, too, can only refer to the work done by people; car manufacturers establish "time allowances," which reflect the average amount of time it takes a mechanic to perform certain routine repairs. See R. 22, Kronon Affid., ¶ 8. Finally, the next sentence in § 710/6(b) states that in determining "reasonable compensation" -- for diagnostic work, repair service and labor, as indicated by the first sentence of § 710/6(b) --"the principal factor" to be considered "shall be the prevailing wage rates being paid by the dealer * * *, and in no event shall such compensation of a motor vehicle dealer for warranty service be less than the rates" -- a shorthand for "prevailing wage rates" earlier in the same sentence -- "charged by such dealer for like service to retail customers for nonwarranty service and repairs." App., infra, 1a (emphasis added).

This sentence, like the two that precede it in the statute, does not include the word "parts." Rather, these sentences are built around the concepts of "prevailing wage rates" and "[t]ime allowances" -- concepts that are meaningful only in relation to the work that is done by individuals. The same is true of the references to "diagnostic work" and "repair service and labor." And since "warranty work and service" unquestionably refers to human labor -- otherwise "[t]ime allowances" for that work would make no sense -- then "warranty service" must have the same meaning in the very next sentence: "in no event shall such compensation * * * for warranty service be less than the rates charged by such dealer for like services to retail customers."[5]

These sentences would not make any sense if, as plaintiff believes, they apply to parts. The "prevailing wage rates" being paid by the dealer cannot possibly be relevant, let alone be "the principal factor," in determining reasonable reimbursement for parts. So too with "[t]ime allowances for * * * performance of warranty work and service"; that can only apply to labor. Indeed, to interpret the retail reimbursement requirement as applying to parts would effectively read out of the statute entirely the provision that the "principal factor" in determining reasonable compensation is "prevailing wage

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[5] Dictionary definitions of "service" also recognize that it means work done by human beings. See XV Oxford English Dictionary, p. 38 (2d ed. 1989) ("To perform routine maintenance or repair work on (a motor vehicle or other piece of equipment)"); Webster's Ninth New Collegiate Dictionary, p. 1076 (1987) ("to repair or provide maintenance for"); New Merriam-Webster Dictionary, p. 662 (1st ed. 1989) ("to do maintenance or repair work on or for"). Illinois courts use dictionary definitions in construing statutes. See, e.g., Droste, 34 Ill. 2d at 503-04, 217 N.E.2d at 78-79; Western Nat'l Bank, 19 Ill. 2d at 352, 167 N.E.2d at 174.

rates." That is not permissible under Illinois law. See Kraft, Inc., 138 Ill. 2d at 189, 561 N.E.2d at 661 ("A statute should be construed so that no word or phrase is rendered superfluous or meaningless"). If the legislature had intended to include parts in this provision, the "principal factor" to be considered would have been the retail prices set by the dealer for parts sold to non-warranty customers.[6]

If the Illinois legislature wanted to apply the retail reimbursement requirement to parts, it would have been simple to do so. Indeed, § 710/6(a) specifically provides that manufacturers must "adequately and fairly compensate" dealers "for labor and parts." (Emphasis added.) (The rest of the MVFA similarly distinguishes between parts or goods on the one hand and labor or services on the other. See 815 ILCS § 710/4(c)(1) (dealers cannot be coerced into accepting "parts or * * * service or services" that the dealer has not voluntarily requested) (emphasis added); § 710/8 (the MVFA applies to agreements for "sales of goods, services or advertising") (emphasis added).) The legislature could have included the same kind of explicit reference to "parts" in § 710/6(b) if it wanted the retail reimbursement provision to apply to services and parts. For example, the statute could have said:

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[6] Compare Ga. Code Ann. § 10-1-641 (under the Georgia Motor Vehicle Warranty Practices Act, "the principal factors to be considered shall be the retail price paid to dealers for parts and the prevailing hourly labor rates paid to dealers doing the repair, work, or service") (emphasis added). The New Jersey Franchise Practices Act also provides a striking contrast to the Illinois statute. See N.J.S.A. § 56:10-15(a) (manufacturers must reimburse dealers for warranty work "in an amount equal to the prevailing retail price charged by such motor vehicle franchisee for such services and parts in circumstances where such services are rendered or such parts supplied other than pursuant to warranty") (emphasis added).

> * * * and in no event shall such compensation of a motor vehicle dealer for warranty service [<u>or parts</u>] be less than the rates [<u>or prices</u>] charged by such dealer for like service [<u>or parts</u>] to retail customers * * *.

The statute, however, does not include language like that appearing in the brackets, and this Court should not read the statute as if it did.

2. The legislature sensibly distinguished between parts and labor in enacting the retail reimbursement provision.

The legislature's decision to distinguish between parts and labor in the context of warranty reimbursement is perfectly rational. A dealer must pay its employees the same amount whether they are doing warranty work or non-warranty work; reimbursing labor at the retail rate allows the dealer to recover that cost. That is not true with parts. Ford sells parts to its dealers and then, in essence, buys them back (at substantial mark-ups) for warranty work. The statute leaves it up to Ford and its dealers to determine a reasonable profit for the dealer. Kronon's recovery of <u>at least</u> a 30-40% profit on parts (and sometimes more), see p. 8, <u>supra</u>, is undoubtedly "adequate[] and fair[] compensa-t[ion]," § 710/6(a) -- and that is all the statute requires.

If dealers could recover their retail prices for parts on warranty work, they would have an incentive to <u>increase</u> the prices they charge consumers for parts on non-warranty work so that they could receive the same increase from the manufacturer on warranty work. In the long run, the consumer would pay for the increase on both ends: when buying the vehicle (because an increase in the amount Ford reimbursed dealers would be reflected in the purchase price) and <u>again</u> when the vehicle needs non-warranty repairs. Illinois has opted against this type of

adverse effect on consumers; motor vehicle dealers are not encouraged to artificially raise the retail prices for parts. The effect of the statute -- to discourage price-gouging on parts -- is thus in accord with the legislative intent to "regulate dealers of motor vehicles * * * in order to prevent frauds, impositions and other abuses upon its citizens * * * and to provide adequate and sufficient service to consumers generally." 815 ILCS § 710/1.1.

This legislative decision should be respected. Federal courts are wary of requests that they expand state law, Lamb v. Briggs Mfg., 700 F.2d 1092, 1096 (7th Cir. 1983), particularly with respect to a state statute's express terms, Butler v. Sentry Ins. Co., 640 F. Supp. 806, 812 (N.D. Ill. 1986). Since it is clear that the retail reimbursement provision of § 710/6(b) does not apply to parts, Ford is entitled to judgment as a matter of law.

B. Under Illinois Law, The MVFA Does Not Apply Retroactively To The Parties' 1972 Contract.

Even if the MVFA required reimbursement of parts at the retail prices set by dealers, it would still not apply to this case. The statute cannot be applied retroactively to the Ford-Kronon contract without violating established Illinois law.

1. The MVFA would impair Ford's vested contractual right to determine the level of warranty reimbursements.

The Ford-Kronon Agreement has been in effect since 1972, more than seven years before the MVFA was enacted and 11 years before the statute was amended to include the retail reimbursement provision for labor. Illinois follows the rule that "[w]ithout an express statutory provision stating an act is to have retroactive effect, it can only be

applied prospectively." Village of Wilsonville v. SCA Services, Inc., 86 Ill. 2d 1, 18, 426 N.E.2d 824, 832 (1981). The MVFA has no such provision, and thus, as this Court has noted, Illinois courts

> "have uniformly found that the Motor Vehicle Franchise Act will not be applied retroactively and that application of the Act to a franchise agreement that preexisted the Act is retroactive and thus an impermissible burden on vested contractual rights."

Ace Cycle World, 788 F.2d at 1227 (collecting cases).

A statute is an "impermissible burden on vested contractual rights" under Illinois law, Ace Cycle World, 788 F.2d at 1227, if it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past." Fireside Chrysler-Plymouth Mazda, Inc. v. Chrysler Corp., 129 Ill. App. 3d 575, 581, 472 N.E.2d 861, 865 (1st Dist. 1984). In short, "retroactivity is defined in terms of the effect a law would have on vested contractual rights." Marquette Nat'l Bank v. Loftus, 117 Ill. App. 3d 771, 774, 454 N.E.2d 11, 13 (1st Dist. 1983). And "rights under a contract become `vested,' for purposes of the retroactive application of a statute, when the contract is entered into, rather than when rights thereunder are asserted." Weisberg v. Royal Ins. Co., 124 Ill. App. 3d 864, 870, 464 N.E.2d 1170, 1174 (1st Dist. 1984).

Here, there is no question that Ford, under the 1972 Agreement, had a vested contractual right to determine the level of reimbursement that Kronon receives for warranty parts and labor. The Agreement provides explicitly that "reimbursement for the parts and labor used in performing warranty * * * work" will be "in accordance with" the provisions of the "then current" Warranty Manual, which is revised

every year. R. 16, Ex. A-1, pp. 5, 8, & Ex. B, ¶ 3; Pl. App. 10. This unequivocal language gave Ford a vested contractual right to determine reimbursement levels for parts and labor. See McKay Nissan, Ltd. v. Nissan Motor Corp., 764 F. Supp. 1318, 1320 (N.D. Ill. 1991) (where the dealer's "right to reimbursement" for warranty work is "defined solely by the franchise agreement," which was signed before the MVFA was enacted, "[t]he parties' rights vested prior to the Act's effective date and, therefore, [the dealer] cannot resort to the Act's provisions for a remedy").[7/] Throughout the existence of its relationship with Kronon, Ford has periodically exercised its contractual right to determine reimbursement levels for parts and labor. See pp. 6, 8, supra. Taking that right away from Ford would unquestionably "take[] away" Ford's vested rights under the 1972 Agreement or "attach[] a new disability" to Ford. Fireside Chrysler-Plymouth Mazda, 129 Ill. App. 3d at 581, 472 N.E.2d at 865.

[7/] See also Ace Cycle World, 788 F.2d at 1229 (manufacturer had vested contractual right to establish new dealerships within vicinity of existing dealership; the dealer thus "has no remedy under the Illinois Act") Fireside Chrysler-Plymouth Mazda, 129 Ill. App. 3d at 581-82, 472 N.E.2d at 865-66 (same); McAleer Buick-Pontiac Co. v. General Motors Corp., 95 Ill. App. 3d 111, 113, 419 N.E.2d 608, 610 (4th Dist. 1981) (vested contractual right to terminate dealer without showing good cause; applying MVFA "would impose a new duty" on the manufacturer); North Broadway Motors, Inc. v. Fiat Motors of North America, Inc., 622 F. Supp. 466, 470 (N.D. Ill. 1984) (MVFA did not apply retroactively because it imposed "`new dut[ies]'" on the manufacturer concerning allocations of cars to dealers and prices for repurchased inventory).

2. Kronon and Ford have not entered into a new agreement since signing the 1972 contract.

A statute can apply retroactively to a previous agreement in one limited situation: if the agreement is amended after the effective date of the statute, and the amendment so "material[ly] alter[s]" the "parties' rights and obligations" that it "can be said that the parties intended a new contract" that "replaced the original franchise agreement." McKay Nissan, 764 F. Supp. at 1319, 1320. Accord Yamaha of Downers Grove, Inc. v. American Suzuki Motor Corp., 1993 U.S. Dist. Lexis 1910, at *3 (N.D. Ill. Feb. 19, 1993) (App., infra, 2a); Northwest Lincoln-Mercury v. Lincoln-Mercury Division, 158 Ill. App. 3d 609, 613, 511 N.E.2d 810, 812 (1st Dist. 1987). To meet this standard, however, it is not enough that some "changes were made to the contract"; rather, the contract modifications must go "to the very heart of the parties' contractual rights." McKay Nissan, 764 F. Supp. at 1319 & n.3; Yamaha of Downers Grove, 1993 U.S. Dist. Lexis 1910, at *3. In other words, the amendments must indicate that "the parties were making a fresh decision whether to continue the contractual relationship." Bitronics Sales Co. v. Microsemiconductor Corp., 610 F. Supp. 550, 557 (D. Minn. 1985).

To date, courts construing the MVFA have found exactly one type of contractual change near enough to "the very heart of the parties' contractual rights" to indicate that the parties intended to "replace[] the original franchise agreement" (McKay Nissan, 764 F. Supp. at 1319 n.3, 1320): a formal contract amendment, signed by both parties, changing the ownership of the dealership. See Yamaha of Downers Grove,

1993 U.S. Dist. Lexis 1910, at *3; Northwest Lincoln-Mercury, 158 Ill. App. 3d at 613, 511 N.E.2d at 812. But courts have held as a matter of law that parties do not "replace" the original agreement when they execute "apparently routine contract modifications" or "d[o] not renegotiate the terms of the franchise agreement." McKay Nissan, 764 F. Supp. at 1319-20. See also Yamaha of Downers Grove, 1993 U.S. Dist. Lexis 1910, at *2-3 (a 1991 modification establishing a $100 per unit restocking charge for repossessed vehicles and acknowledging certain federal standards did not "so materially alter[]" the 1984 agreement that the 1991 agreement "became an entirely new franchise agreement").

Kronon argued in the district court that the MVFA applied retroactively because the Warranty Manual was revised every year, Ford approved new labor rates for Kronon, Ford frequently issued various bulletins and memoranda that the dealers had to follow, and Ford amended the contract in 1990. R. 22, pp. 1-7. These items, however, do not come close to being at "the very heart of the parties' contractual rights," McKay Nissan, 764 F. Supp. at 1319 n.3, and did not result in the creation of "an entirely new franchise agreement," Yamaha of Downers Grove, 1993 U.S. Dist. Lexis 1910, at *3.[8/]

The annual updating of Ford's Warranty Manual and periodic changes in Kronon's approved labor rate and the reimbursement levels were all

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[8/] Plaintiff did not put in any evidence concerning the substance of Ford's directives and bulletins, and thus there is no basis at all for concluding that they "went to the very heart of the parties' contractual rights." McKay Nissan, 764 F. Supp. at 1319 n.3. The only evidence regarding those documents is that Ford issued them "frequent[ly]," the dealers are "required to follow" them, and "[m]any such documents have been issued since 1983." R. 22, Kronon Affid., ¶ 7.

"routine contract modifications," McKay Nissan, 764 F. Supp. at 1319, that the parties fully anticipated when they executed the Agreement in 1972 (R. 16, Ex. A-1) -- the Agreement specifically provided for automatic changes in the future when it stated that reimbursement for parts and labor would be in accordance with Ford's "then current" Warranty Manual. See E.A. Dickinson & Assocs. v. Simpson Elec. Co., 509 F. Supp. 1241, 1247 (E.D. Wis. 1981) (notification of a "routine modification" in the defendant's product line, which was "anticipated by the parties * * * at the time" of their agreement and occurred "from time to time" during the parties' relationship, did not constitute a new contract between the parties). It would be anomalous to hold that "an entirely new franchise agreement," Yamaha of Downers Grove, 1993 U.S. Dist. Lexis 1910, at *3 (emphasis added), was adopted each time Ford exercised its rights under the 1972 Agreement -- an Agreement that "continue[s] in force and effect * * * until termi-nated by either party." R. 16, Ex. A-1, p. iv. See North Broadway Motors, 622 F. Supp. at 470 n.1; compare Reinders Bros., Inc. v. Rain Bird Eastern Sales Corp., 627 F.2d 44, 50 (7th Cir. 1980) (where the contract terminated each year, "the parties could con-tinue their relationship only through some affirmative conduct").

The 1990 amendment is likewise "insufficient to create a new agreement." Yamaha of Downers Grove, 1993 U.S. Dist. Lexis 1910, at *2-3. That amendment, which required dealers to perform warranty work on all Lincoln-Mercury vehicles wherever they were purchased, was adopted in an effort to help Ford and its dealers sell more vehicles; "[a]ll other domestic and most foreign manufacturers" had already

adopted similar policies (R. 16, Ex. A-3). But there was no evidence at all that Ford and Kronon thought in 1990 that this amendment ended the 1972 Agreement and created a "new" agreement between the parties. Moreover, the 1990 amendment simply formalized a policy already followed by most dealers and did not fundamentally alter Ford's relationship with Kronon. Compare Bitronics, 610 F. Supp. at 557 (a reduction in the plaintiff's sales territory was not a material modification of the parties' agreement). In short, the 1990 amendment was not at "the very heart of the parties' contractual rights." McKay Nissan, 764 F. Supp. at 1320.

Applying the MVFA to this case would unquestionably impair Ford's vested contractual right, established under the 1972 Agreement, to establish reimbursement levels for parts and labor provided on warranty work. Since there is no basis for concluding that Ford and Kronon entered into a new agreement at any time after 1972, the MVFA cannot be applied to the Ford-Kronon contract, and Ford is thus entitled to judgment in this case.

II. THE DISTRICT COURT PROPERLY HELD THAT KRONON DID NOT COMPLY WITH THE STATUTORY REQUIREMENT THAT IT SUBMIT A CLAIM TO FORD SEEKING THE REIMBURSEMENT REQUESTED IN THE COMPLAINT.

Even if § 710/6(b) applied to this case, the district court correctly granted summary judgment to Ford. Kronon apparently agrees, as it did in the district court (Pl. App. 13), that § 710/6(b) requires a dealer to submit warranty reimbursement claims to the manufacturer. It would be difficult to argue otherwise given the statute's many references to "claims" and the procedural requirements established for those "claims":

- "[a]ll claims, either original or resubmitted, made by motor vehicle dealers hereunder * * * shall be either approved or disapproved within 30 days following their submission";

- "[a]ll approved claims shall be paid [by the manufacturer] within 30 days" of approval;

- dealers must be notified in writing within 30 days of "a claim which is disapproved";

- the dealer is permitted to "correct and resubmit * * * disapproved claims" within 30 days of disapproval;

- "[a]ny claims not specifically disapproved in writing within 30 days from their submission shall be deemed approved" and must be paid within 30 days; and

- Manufacturers have the right to audit "such claims" within one year "from the date the claim was paid or credit issued by the manufacturer * * *, and to charge back any false or unsubstantiated claims."

815 ILCS § 710/6(b) (emphasis added) (App., infra, 1a). The district court properly held that Kronon did not comply with this statutorily-mandated procedure for submitting warranty reimbursement claims.

A. A Dealer Cannot File Suit Concerning Warranty Reimbursement Claims Unless It First Submitted Those Claims To The Manufacturer.

Kronon's argument on appeal is that the detailed statutory scheme set forth in § 710/6 can be disregarded -- that a dealer's failure to "submi[t]" a "claim" to the manufacturer in accordance with the statute does not preclude the dealer from suing the manufacturer under the statute. See Pl. Br. 12-13. Kronon did not make this argument in the district court and thus has waived it. Jean v. Dugan, 20 F.3d 255, 265 (7th Cir. 1994).[9]

In any event, the argument is meritless. Under Kronon's view, all of the statute's references to dealers' "claims" and "submission[s]"

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[9] Kronon's argument below was that a claim was not necessary because Ford already had all of the necessary information and a claim would have been futile. R. 22, pp. 7-12.

would be rendered meaningless. If filing a claim with the manufacturer is not necessary to have a cause of action under the statute, then there would be no need for a dealer ever to submit a warranty reimbursement claim to the manufacturer; instead, dealers could elect to go straight to court and ask the judiciary to make decisions on routine requests for warranty reimbursement. This would be absurd. A far more sensible reading of the statute is that dealers do not have a cause of action under § 710/6(b) unless they first submit a claim to the manufacturer and the manufacturer denies it. Only in that instance would there be even an arguable basis for an "action[] arising out of" § 710/6. 815 ILCS § 710/14. The manufacturer cannot be charged with violating the statutory mandate of "adequate[] and fair[] compensat[ion]," § 710/6(a), when the dealer never gave the manufacturer an opportunity to approve the dealer's request for warranty reimbursement.

Kronon also asserts (Pl. Br. 13) that it "seeks damages only for claims that Kronon actually submitted" to Ford, and not for "any claim that it failed to submit." That is preposterous. Kronon is seeking recovery for the difference between Ford's reimbursements for warranty parts and Kronon's higher retail prices for parts -- and Kronon "admit[ted]" in the district court "that it did not submit a claim to Ford seeking reimbursement at the higher level requested in the complaint." Pl. App. 13.[10/]

[10/] Kronon makes much of the district court's comment (Pl. App. 14) that it "acquiesced" in Ford's reimbursement rates (Pl. Br. 10-11, 21), but Kronon has ignored the context in which that remark occurred. The court made that statement in the course of holding that Kronon was required under the MVFA to submit a claim to Ford requesting retail reimbursement. Pl. App.
(continued...)

Kronon contends (Pl. Br. 13-14) that its submissions to Ford "were in complete compliance with Ford's requirements" and that Ford's warranty reimbursement forms do not require dealers to state the amount being claimed. But Kronon's submissions to Ford -- all of which Ford paid -- were claims to be reimbursed at Ford's standard rate, not claims to be reimbursed at a higher rate. Kronon never told Ford, in the reimbursement claims it submitted, that it was requesting a greater reimbursement than Ford normally allowed. If Kronon wanted to receive more money from Ford, it was obligated to tell Ford. Ford cannot be expected to divine from a standard parts reimbursement submission that the dealer is really asking for reimbursement at the dealer's retail price.[11]

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[10](...continued)
14-15. Kronon, however, did nothing, and its silence,the court held, was "not the same as making a claim," which is "required" under the MVFA. Id. at 14. The court granted summary judgment to Ford not because Kronon "acquiesced" in a statutory violation, as plaintiff suggests, but because Kronon never submitted a claim to Ford requesting that its retail prices should be used as the basis for parts reimbursements.

[11] Kronon mistakenly believes that accord and satisfaction was a "central" part of the court's decision. Pl. Br. 21. Once again, plaintiff has overlooked the context of the court's statements. The court held that "Kronon did not submit a claim for reimbursement at its retail rate," but went on to say that even if Kronon's "inquiries" were sufficient to create a "dispute" with Ford, then Ford's payment at a lesser rate, and plaintiff's acceptance of that amount, constituted an accord and satisfaction. Pl. App. 14-15. Assuming that a dispute existed, as the district court did, the fact that Kronon systematically demanded warranty reimbursement from Ford and continually accepted reimbursement from Ford without a protest or a reservation of rights (Pl. App. 15) supports the conclusion that there was an accord and satisfaction. See Seeder v. Zoros, 315 Ill. App. 60, 63-64, 42 N.E.2d 134, 136 (1st Dist. 1942). Kronon demanded payment, and Ford complied with Kronon's demands. Ford thought the payments were in full satisfaction of its debts to Kronon (R. 16, Ex. A, ¶ 5) and Kronon offered no contemporaneous evidence to suggest that it did not share that belief at the time it made its demands for payment. All the elements of an accord and satisfaction are thus satisfied. See A.F.P. Enterprises, Inc. v. Crescent Pork, Inc., 243 Ill. App. 3d 905, 911, 611 N.E.2d 619, 623 (2d Dist. 1993). Kronon's argument
(continued...)

B. **There Is No Legal Or Factual Basis For Applying A Futility Exception To The Statute's Requirements.**

Finally, Kronon contends (Pl. Br. 14-17) that it can disregard the statute's mandate that it submit its claims to Ford because the right to file suit cannot be conditioned on requiring the plaintiff to engage in conduct that, although required by statute, is futile. This argument is legally unsupported and factually groundless.

For starters, the Illinois cases on which Kronon relies (Pl. Br. 14-15) are all inapposite because they involve either common law claims or judicially-created prerequisites to suit. None of the cases stands for the proposition that a statutory precondition can be ignored.[12/]

A futility exception is not applied to requirements that the legislature has included in a statute. See In re Rochford, 91 Ill. App. 3d 769, 778, 414 N.E.2d 1096, 1104 (1st Dist. 1980) (rejecting the

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[11/](...continued)
(Pl. Br. 19-21) hinges on its erroneous assertion that Ford voluntarily "tendered" reimbursements to Kronon; in actuality, Ford paid in full all of the money that Kronon asked for -- a key fact that is ignored by Kronon.

[12/] See Adams v. Meyers, 250 Ill. App. 3d 477, 486, 620 N.E.2d 1298, 1305 (1st Dist. 1993) (common law derivative suit); A.T. Kearney, Inc. v. Inca Int'l, Inc., 132 Ill. App. 3d 655, 664, 477 N.E.2d 1326, 1334 (1st Dist. 1985) (common law conversion action); Builder's Concrete Co. v. Fred Faubel & Sons, 58 Ill. App. 3d 100, 106, 373 N.E.2d 863, 869 (3d Dist. 1978) (breach of contract case); Rock Island Y.W.C.A. v. Bestor, 48 Ill. App. 3d 761, 764-65, 363 N.E.2d 413, 416 (3d Dist. 1977) (same); City of Oakbrook Terrace v. LaSalle Nat'l Bank, 186 Ill. App. 3d 343, 351, 542 N.E.2d 478, 482 (2d Dist. 1989) (judicially-created condition precedent in condemnation cases); Rudin v. King-Richardson Co., 311 Ill. 513, 526, 143 N.E. 198, 203 (1924) (common law replevin action). Finally, Kiehn v. Love, 143 Ill. App. 3d 434, 493 N.E.2d 79 (1st Dist. 1986), involved a judicially-created condition precedent in taxpayer suits, on which see generally People ex rel. City of Chicago v. Schreiber, 322 Ill. App. 452, 483, 54 N.E.2d 862, 875 (1st Dist. 1944).

claim that it was "futile" to serve a writ of execution on a judgment, as required by statute to create a judgment lien; "[t]he statute * * * is quite clear on the method by which a judgment may become a lien," and since plaintiff "did not comply" with the statute, he did not obtain a judgment lien). In Illinois, courts "strictly construe[]" statutes that set forth requirements that must be met before a plaintiff can bring a cause of action under the statute, and the plaintiff has the burden of complying with those requirements in order to preserve its cause of action. Patinkin v. RTA, 214 Ill. App. 3d 973, 977, 979, 574 N.E.2d 743, 746, 747 (1st Dist. 1991) (suit dismissed where plaintiff did not provide CTA with prior notice of suit, as required by statute).[13/]

Applying a futility exception to statutory mandates would mean that many legislative commands would be effectively eviscerated. If this Court adopted plaintiff's legal position, every motor vehicle dealer in Illinois could file a lawsuit rather than "submi[t]" its warranty reimbursement "claims" to the manufacturer, as required by § 710/6(b). This Court should not adopt a rule that would "render[] words or phrases in a statute superfluous." In re County Collector of

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[13/] Accord, e.g., Langguth v. Village of Glencoe, 253 Ill. 505, 508-09, 97 N.E. 1052, 1053-54 (1912) (plaintiff failed to satisfy the statutory requirement that prior notice of suit be given to the Village); Eddy v. Kerr, 96 Ill. App. 3d 680, 682-83, 422 N.E.2d 176, 178 (2d Dist. 1981) (failure to serve defendant in accordance with Forcible Entry and Detainer Act was ground for dismissal). See also Caruso v. Board of Trustees, 129 Ill. App. 3d 1083, 1087, 473 N.E.2d 417, 420 (1st Dist. 1984) (refusing to award attorneys' fees where plaintiff did not comply with a statutory requirement that a demand be made more than three days before suit is filed).

Kane County, 132 Ill. 2d 64, 72, 547 N.E.2d 107, 110 (1989).

There is no factual basis for a futility argument either. Plaintiff's argument is based largely on its assertion (Pl. Br. 10, 11, 16) that it "repeatedly" asked Ford to pay retail prices for parts, but Ford always refused. There is no such evidence in the record. The record contains evidence of precisely one conversation between plaintiff and Ford concerning plaintiff's request to be paid its retail prices for parts (see p. 9, supra), and the Ford representative told John Kronon that he should "go thru [sic]" the National Dealer Council to try to "change" the parts reimbursement program (R. 25, Ex. E) (emphasis added). This hardly indicates that it would have been "`useless'" (Pl. Br. 14) to ask Ford to pay retail prices on parts. More significantly, Ford has a specific appeal procedure for situations when a reimbursement claim is "paid as requested," but "additional credit [is] requested." R. 25, Ex. C, p. 6.5-1; see also R. 25, Ex. D, Nov. 20, 1991, p. 11 (noting that dealers can "request[] a mark-up in excess of the current policy"). Although Kronon now admits that this appeal procedure is "applicable to this case" (Pl. Br. 18), it never bothered to submit an appeal to Ford.

Finally, Kronon contends that futility is demonstrated because, on the computer system dealers can use to submit reimbursement claims, "it is impossible to submit claims other than at rates established by Ford." Pl. Br. 16. This is nonsense. Submitting claims via computer is optional. The Warranty Manual specifically permits dealers to "submit[] the claims by mail"; "[p]re-addressed claims mailing envelopes" are even available. R. 25, Ex. C, p. 6.4-1. See also id.

at p. 6.5-1 (to appeal Ford's decision on a reimbursement claim, the dealer must "[w]rite a letter stating [the] reason for [the] appeal"). As the district court recognized, "Kronon obviously could have bypassed Ford's computer claim submission procedure and submitted a claim directly to Ford in written form." Pl. App. 15. Accord Acadia Motors, Inc. v. Ford Motor Co., 844 F. Supp. 819, 828 (D. Maine 1994). In fact, since the district court's ruling, Kronon has done exactly that: it has submitted written claims to Ford. R. 35, Ex. A.

* * * * *

Kronon's arguments why it failed to submit its retail reimbursement claims to Ford are wholly unpersuasive. The statute requires dealers to submit "[a]ll claims, either original or resubmitted." § 710/6(b). Kronon certainly made "original" claims, and Ford paid them -- that is not in dispute. But Kronon never "resubmitted" its parts claims to request reimbursement at the retail price level. Common sense and the plain language of the statute dictate that if a dealer wants to be reimbursed at its own retail price levels it must ask. Kronon never asked. The district court ruled correctly that Kronon's failure to make that request meant that it could not proceed with its cause of action.

III. THE DISTRICT COURT PROPERLY HELD THAT REIMBURSEMENT CLAIMS SUBMITTED MORE THAN TWELVE MONTHS AFTER PERFORMANCE OF THE WARRANTY WORK ARE BARRED UNDER THE PARTIES' CONTRACT.

Kronon's cause of action is also barred because, as the district court held, Kronon did not comply with the terms of the parties' Agreement, which at all relevant times required Kronon to submit its warranty reimbursement claims to Ford within one year of performance of

the work. See p. 5, supra. "[C]laims submitted after one year will not be accepted by Ford." Pl. App. 11.

Plaintiff does not dispute that manufacturers and dealers may agree in their contracts to set conditions that must be complied with for dealers to receive warranty reimbursements. Nor does plaintiff dispute the validity of the one-year provision in this contract. Instead, Kronon contends that the contract's one-year requirement did not set a limit "for filing suit." Pl. Br. 17. This argument misses the mark.

The district court concluded that Kronon's claims were barred because Kronon's reimbursement "request" was not "presented" to Ford within one year. Pl. App. 15. Ford was entitled to judgment because Kronon "failed to submit its claim" -- to Ford -- "on a timely basis," (id.), not because the complaint was filed too late. In other words, the one-year period set forth in the contract is a substantive limitation on the right to sue. For Kronon to have a warranty reimbursement claim at all, it must present that claim to Ford within one year of when the work was performed. See, e.g., Willis v. West Kentucky Feeder Pig Co., 132 Ill. App. 2d 266, 271, 265 N.E.2d 899, 903 (4th Dist. 1971); see also Equity General Ins. Co. v. Patis, 119 Ill. App. 3d 232, 237-38, 456 N.E.2d 348, 352 (1st Dist. 1983); Graman v. Continental Casualty Co., 87 Ill. App. 3d 896, 901-02, 409 N.E.2d 387, 392 (5th Dist. 1980). If Kronon does not present claims to Ford within the one-year period, then it has no right to receive warranty reimbursement for those items -- it has forfeited those claims. When a dealer does not comply with reasonable contractual requirements that

must be met in order to receive warranty reimbursements, it cannot ask a court to relieve it of the consequences of its own default.

Kronon also asserts (Pl. Br. 17-18) that it complied with the one-year requirement when it submitted reimbursement claims to Ford, but Kronon's claims gave no hint that Kronon was seeking reimbursement for the retail prices Kronon charged its non-warranty customers for parts. See pp. 27-28, supra. Moreover, Kronon contends, it is entitled to ask for additional money relating to those claims at any time pursuant to § 6.5-1 of the Warranty Manual (the appeal procedure). However, Kronon did not raise this argument in the district court and thus has waived it.

Even if Kronon had preserved its argument under § 6.5-1, the time has long since expired for Kronon to appeal Ford's implicit disapproval of Kronon's implicit request for retail reimbursement. The statute specifically provides that a dealer must "correct and resubmit * * * disapproved claims within 30 days of receipt of disapproval." § 710/6(b) (emphasis added). Kronon did not do that. In any event, Kronon has not followed the mandated appeal procedure under § 6.5-1: it sent a demand letter to a Ford lawyer (R. 1, Ex.) -- which it conceded was "not a warranty claim" (R. 23, ¶ 4) -- but it did not submit copies of the "claim[s]" being appealed or of Kronon's warranty and policy statement, nor did it mail those documents to Ford's "Warranty Claims Payment" office, all as required by the Warranty Manual (R. 25, Ex. C, p. 6.5-1).

The requirement set in the parties' agreement should be enforced. Since plaintiff did not submit its claims for retail reimbursement to Ford within one year of the warranty work involved, it has lost its

right to pursue those claims. The district court correctly concluded that this contractual provision barred Kronon's claims.

CONCLUSION

The judgment of the district court should be affirmed.

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Respectfully submitted,

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