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# FRANCHISE TRENDS

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## [Car Dealership Franchisee Pulls Out of the Gate Too Late to Maintain Claims](#)

[Crown Chevrolet, Plaintiff v. General Motors, LLC, et al., CCH ¶15,232. U.S. District Court, N.D. California \(January 22, 2014\)](#)

An automobile dealer's federal Racketeering ("RICO") and state unfair trade practices claims against General Motors, arising from an allegedly coerced sale of the dealership, were dismissed by the United States District Court in the Northern District of California because, according to the Court, the franchisee's claims were time-barred by the four-year statutes of limitations.

The dealer, Crown Chevrolet claimed that in 2008 General Motors conspired and planned to force it and certain other GM franchisees out of business and to sell their dealerships to the California Automotive Retailing Group (CARG). The Plaintiff alleged that by forcing the car franchisees to sell their dealerships to CARG, this would benefit GM because CARG would permit GM to control the operations of the dealerships. With regard to specific methods, Crown alleged that GM used its finance affiliate, Ally Financial, to threaten that it would withdraw inventory financing if its various financial demands were not met. According to the Complaint, these wrongful demands by GM left Crown no choice but to sell the dealership to CARG for less than fair market value.

Interestingly, Crown Chevrolet further alleged that to compensate for the



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Franchise Discrimination - Video 1 of 2



Franchise Discrimination - Video 2 of 2



Franchise Law: Fraud and Good Faith in  
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Franchise Law – Franchisees' Franchise  
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forced sale, Crown entered into a separate side agreement with CARG, which was to make up for the loss in dealership sale price. However, CARG later defaulted on the side agreement, and Crown reached a settlement with CARG for its default. In response, GM moved to dismiss on grounds that the claims were barred by the civil RICO four-year statute of limitations, arguing that the claims accrued in 2008 but the lawsuit was not brought until 2013. Crown's injury, the alleged forced sale of its dealership, occurred in September and October 2008, which would have put it outside the time period of the statute. Crown, however, argued that it had no reason to suspect that General Motors had entered into a RICO scheme at that time, and instead, it was not until June 2009, when CARG defaulted on its side agreement, that it recognized it had been injured.

The Court rejected the plaintiff's argument, stating that although Crown may not have realized the full extent of the alleged racketeering scheme until June 2009 or later, it was the injury that started the statute of limitations period. A plaintiff is not required to discover that the injury is part of a pattern of racketeering for the period to begin to run, according to the Court.

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## Franchisor Prevented From Dragging 'Half of Franchisee' to Out-of-State Court

H.H. Franchising Systems, Inc. v. Klaits, United States District Court, S.D. Ohio, Western Division. March 31, 2014 Slip Copy 2014 WL 1308505 1:12CV709

On September 18, 2012, Plaintiff H.H. Franchising filed its Complaint against Defendants Drew Klaits and Shore Help, LLC. Plaintiff, the franchisor, brought claims for (1) breach of contract; (2) operation of a franchise without a home care agency license; (3) refusal to adopt a smart platform as required by the franchise agreement; (4) establishment of an independent website as required by the franchise agreement; (5) trademark infringement; (6) an action for an accounting; and (7) unjust enrichment. Defendants, the franchisees, Klaits and Shore Help, filed their Answer and also filed a Counterclaim. Defendants' counterclaims were (1) breach of the franchise agreement through establishment of a competing franchise; (2) fraud and misrepresentation; (3) negligent misrepresentation; and (4) breach of good faith and fair dealing. On May 23, 2013, Defendants moved to dismiss all claims against them, arguing that Plaintiff failed to perfect service upon Klaits within 120 days of the filing of the Complaint and also arguing the Court did not have personal jurisdiction over Shore Help.

The provision in the agreement provided:

**Income Tax Franchisor's Incomplete Paperwork Prevents Immediate Offensive Use of Franchisee's Release**

FasTax, Inc. v. Jackson Hewitt, Inc., United States District Court, D. New Jersey. March 20, 2014 Slip Copy 2014 WL 1117951

Defendant Jackson Hewitt, Inc. ("JH"), the franchisor, filed a motion to dismiss Plaintiff franchisee's Complaint based upon the franchisee's allegedly having signed a release of all claims against JH upon the execution of a new franchise agreement. In response, the franchisee, FasTax, Inc.. ("FastTax") filed a motion directly targeting the release and requesting that the Court rule that the release was invalid and should be set aside. Although the case was procedurally complicated by a lengthy bankruptcy of the franchisor, the release issue pivoted primarily off of the following facts.

FasTax operated Jackson Hewitt income tax return preparation business franchises in Oregon, Idaho, and California. The underlying dispute began in 2009, and FasTax alleged that Jackson Hewitt owed FasTax over \$1.1 million for acts relating to the Idaho Territories. All of FasTax's claims arose before the effective date of the bankruptcy Plan.

As the bankruptcy ended, in August 2011, Jackson Hewitt presented FasTax with a new franchise agreement to replace one that had expired in 2009. In connection therewith, Jackson Hewitt asked Plaintiff to execute certain release agreements ("The Release"). The Release would extinguish any claims Plaintiff had against Jackson Hewitt independently of the bankruptcy proceedings. FasTax placed handwritten notes on the Release, stating that it "ONLY PERTAINS TO OREGON BASED TERRITORIES." On October 6, 2011, five individual FasTax owners and guarantors sent this modified Release back to Jackson Hewitt.

Thereafter, according to the franchisee's Complaint, JH fraudulently removed FasTax's handwritten notes on the Release so that the Release would pertain to all FasTax's territories. JH admitted that it told FasTax via e-mail that the handwritten notes limiting the Release to the Oregon Territories were unacceptable. It was undisputed that Jackson Hewitt sought FasTax's authorization via e-mail to remove the hand-written notes. FasTax's only reply to this request was an e-mail from a FasTax representative that said, "So just say ok? Or are you going to fax me something to sign?"

JH responded via e-mail, "Your consent via e-mail is sufficient, as we already have the signature pages you previously submitted." JH received no further communication from FasTax. The Court concluded that "Apparently, Jackson Hewitt replaced the pages containing handwritten notes with "clean" copies and sent an executed copy of an unmarked Release back to FasTax." FasTax also alleged that it promptly contacted Jackson Hewitt officials to dispute Jackson Hewitt's actions.

Franchisee hereby consents and agrees that the following courts shall have personal jurisdiction over Franchisee in all lawsuits relating to or arising out of this Agreement, and hereby submits to the jurisdiction of the following courts and irrevocably waives any defense Franchisee may have of lack of personal jurisdiction in any such lawsuits filed in these courts: ... (b) all courts of the United States of America sitting within the State of Ohio, including, without limitation, all United States District Courts within the State of Ohio.

The Court began its analysis by pointing out that conceptually there are two kinds of personal jurisdiction: general and specific jurisdiction. In this regard, the Court stated: "Jurisdiction may be found to exist either generally, in cases in which a defendant's "continuous and systematic" conduct within the forum state renders that defendant amenable to suit in any lawsuit brought against it in the forum state ... or specifically, in cases in which the subject matter of the lawsuit arises out of or is related to the defendant's contacts with the forum." However, the Court explained that under relevant unique Ohio law, the United States Court of Appeals for the Sixth Circuit has concluded that "a court may exercise personal jurisdiction over a non-resident defendant only if specific jurisdiction can be found under one of the enumerated bases in Ohio's long-arm statute."

In turn, the Court proceeded to focus upon the forum selection clause itself, which the franchisor, of course, argued stated that the franchisee consents to jurisdiction in the U.S. District Court for the Southern District of Ohio. Although the Court recognized that "A party to a contract may waive its right to challenge personal jurisdiction by consenting to personal jurisdiction through a forum selection clause," it also correctly observed that the franchise agreements in the case stated that the agreement is between Klaitis and Plaintiff, and not between the entity, Shore Help and the franchisor. The agreements named Klaitis as the franchisee, without any mention of Shore Help.

After elucidating this asymmetry, the Court observed that the franchise agreements were form contracts. In this regard, the franchise agreement provided two alternative signature lines for the franchisee. One was for "INDIVIDUAL/PARTNERSHIP FRANCHISEE(S)" and the other was for "CORPORATE/LIMITED LIABILITY COMPANY FRANCHISEE." Klaitis signed as an individual on the signature line for individuals, but the signature line for the limited liability company was left blank. Moreover, while Klaitis signed an addendum to one of the franchise agreements on behalf of Shore Help, the addendum said nothing about changing the parties to the original franchise agreement. Therefore, the Court concluded that Shore Help was not bound by the forum selection clause in the franchise agreement

The franchisor also argued that Shore Help "purposely availed" itself by coming to Cincinnati to sign the franchise agreement. However, as discussed above, it was Klaitis who traveled to Cincinnati and Shore Help was not a party to the franchise agreements. The Court also rejected the franchisor's argument that Shore Help was subject to jurisdiction because it communicated with Plaintiff through email and telephone calls, concluding that "Plaintiff's claims are not based upon these emails and telephone calls, and it appears that these are the only

The franchisee sought a declaratory judgment that the Release was "invalid and/or inapplicable and should not preclude FasTax's claims against Jackson Hewitt pertaining to the Idaho Territories." JH argued alternatively that the Release discharged FasTax's claims. FasTax filed its own motion for a declaration that the Release was invalid. The court denied both motions so that discovery on the issue of FasTax's consent could take place.

The Court began its analysis by pointing out that under New Jersey Law, an enforceable contract is created when two parties agree on essential terms and manifest an intention to be bound by those terms, and that the offeree must demonstrate assent to the terms unequivocally. Applying this legal standard, the Court held that "The court cannot find that FasTax gave unequivocal consent to remove the pages with the critical handwritten notations." The Court identified four reasons for its ruling on this point:


Construing the facts alleged (or so far produced) in FasTax's favor, as the legal standard requires, the court finds a lack of unequivocal assent for four reasons. First, FasTax used handwritten notations to demonstrate its intent to limit the scope of the Release to the Oregon Territories. The logical inference is that FasTax placed this writing on the Release so as not to give up the \$1.1 million claim regarding the Idaho Territories. An e-mail from Jackson Hewitt even recognized FasTax's intent to have the Release apply to only the Oregon Territories. Jackson Hewitt's e-mail stated, "[W]e noticed that you wrote on the [Release] that the terms only pertain to the Oregon based territories. These releases apply to all territories and are not state specific." Second, FasTax never sent via e-mail unequivocal consent to remove the hand-written notations. Third, FasTax claims that it promptly voiced its objections to Jackson Hewitt's unilaterally substituting "clean" pages" of the Release for the ones with the handwritten notations on them. Finally, the February 6, 2011 letter from FasTax's lawyer to Jackson Hewitt regarding the claims over the Idaho Territories seems inconsistent with FasTax having given its consent to remove the handwritten notes.

At the same time that the Court found that the facts demonstrated a lack of unequivocal assent to release Jackson Hewitt from its liabilities arising out of the Idaho Territories, it also found that the relevant facts did not warrant granting JH's motion to dismiss on the grounds of a valid Release:

[T]he undisputed facts on the record, when construed in the light most favorable to Jackson Hewitt, do not warrant an order of summary judgment that the Release was invalid. The facts so far adduced in discovery could lead a rational jury to conclude that Christina Phillips's e-mail that stated, "So just say okay?" amounted to consent. In the absence of complete discovery, it would be premature for the court to conclude that FasTax did not

contacts Shore Help made with someone in Ohio."

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## NEWLY-FILED CASES

[Burger King Europe Gmbh V. Groenke](#), April 17, 2014, TX U.S. DIST. CT., (Defendant allegedly wrongfully failed to pay the required amounts as obligated by the franchise agreement).

[Goddard Systems, Inc. V. Migliaccio](#), April 16, 2014, PA U.S. DIST. CT., EAST (Defendant allegedly breached his obligation under the franchise agreement by his alleged failure to make royalty payments and advertising contributions, and allegedly wrongfully continuing the use of Goddard School trademark and trade name).

Certain specific rights and prohibitions in the Washington Franchise Statute's Franchisee Bill of Rights include the following. Please note, however, that the provisions listed below are merely illustrative, and not intended to be comprehensive and complete.

\* The parties shall deal with each other in good faith.

\* It shall be an unfair or deceptive act or practice or an unfair method of competition and therefore unlawful and a violation of this chapter for any person to:

- Restrict or inhibit the right of the franchisees to join in an association of franchisees.
- Require a franchisee to purchase or lease goods or services of the franchisor or from approved sources of supply unless and to the extent that the franchisor satisfies the burden of proving that such restrictive purchasing agreements are reasonably necessary for a lawful purpose justified on business grounds, and do not substantially affect competition.
- Sell, rent, or offer to sell to a franchisee any product or service for more than a fair and reasonable price.
- Obtain money, goods, services, anything of value, or any other benefit from any other person with whom the franchisee does business on account of such business unless such benefit is disclosed to the franchisee.
- If the franchise provides that the franchisee has an exclusive territory, which exclusive territory shall be specified in the

manifest its assent to the Release.

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franchise agreement, for the franchisor or sub-franchisor to compete with the franchisee in an exclusive territory or to grant competitive franchises in the exclusive territory area previously granted to another franchisee.

- Impose on a franchisee by contract, rule, or regulation, whether written or oral, any standard of conduct unless the person so doing can sustain the burden of proving such to be reasonable and necessary.
- Terminate a franchise prior to the expiration of its term except for good cause.

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