

You are receiving this periodical based upon previous specific and general contacts with the Goldstein Law Group regarding franchise law issues. We look forward to keeping you updated on the current trends in franchise court decisions around the country in both state and federal courts.

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# FRANCHISE TRENDS

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## Franchisee Wins Contract Ambiguity Case

Home Instead, Inc. v. Florance (8th Cir. 2013)

A provider of senior care services filed for declaratory judgment against a franchisee, seeking to interpret renewal terms of the franchise agreement. The trial court denied the franchisee's motion for preliminary injunction and the franchisee appealed. The Court of Appeals found that the franchise agreement was ambiguous regarding renewal terms and remanded the case to district court for further findings.

In this case, the franchisor and franchisee with sixteen-year franchise relationship failed to negotiate the renewal of a franchise agreement. The franchisor attempted to raise the minimum monthly performance requirement in the renewal agreement, and the franchisee asserted that the prior renewal agreements had locked in performance requirements. Under Nebraska law, when a court is faced with a question of contract interpretation it must determine whether a contract truly is unambiguous. Reviewing the issue de novo, the Court of Appeals found that franchise agreement was ambiguous regarding whether franchisor could raise minimum monthly performance requirements upon renewal of the franchise agreement.

The appellate court further found that contract ambiguity existed because separate provisions in the franchise agreement could reasonably be interpreted to support at least two different positions regarding what minimum performance requirements could be upon renewal. The court found that the trial court had exceeded its discretion in denying the franchisee's motion for preliminary injunction, which would have allowed

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Franchise Law – Franchise Discrimination 1:2  
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Franchise Discrimination - Video 1 of 2




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Franchise Law: Fraud and Good Faith in  
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it to operate its franchise during trial proceedings, and ordered the case to be remanded for review.

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## **No Termination Without Proper Notice: Trial Franchisee Prevails Under PMPA**

*Jimico Enterprises, Inc. v. Lehigh Gas Corp.* (2d Cir. 2013)

The franchisee of a trial franchise brought suit against franchisor for termination of franchises without proper notice and in violation of the Petroleum Marketing Practice Act ("PMPA"). The Court of Appeals upheld summary judgment and damage awards for franchisee, finding that franchisee had a right of action under the PMPA and that franchisee was entitled also to attorney's fees for defending appeal.

In this case, a franchisee entered into agreements with franchisor to operate five service gas stations along the New York State Thruway as trial franchises. Without notice, franchisor terminated franchises before the end of their trial terms. An appellate court held that the structure and purpose of the PMPA intend for the notice requirements of the act to apply to trial franchises, and that under the act, a franchisee is guaranteed a trial period free from arbitrary or sudden termination. The appellate court upheld the district court's finding that franchisor had violated the notice requirements of Section 2804 of the PMPA when it terminated trial franchises without giving proper notice. As a result, the appellate court upheld compensatory and punitive damages for franchisee, as well as reasonable attorney's fees and costs to franchisee for having to defend the appeal.

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## **Franchisor Not Liable for Tortious Interference; NJ Forum-Selection Clause Upheld**

*BK Tax Service, Inc. v. Jackson Hewitt, Inc.* (S.D.Miss. 2013)

The plaintiff, BK Tax Service, Inc. ("BK Tax"), a Mississippi franchisee of Jackson Hewitt, alleged that Jackson Hewitt violated the exclusivity provision of the plaintiff's Franchise Agreement when Jackson Hewitt awarded the franchisee's competitor, CMTC, a competing Jackson Hewitt franchise that would operate at a Wal-Mart in BK's county. The franchisee also alleged that it had entered negotiations to sell its franchise to CMTC just a few months earlier, but the talks failed.

The franchisee's Complaint alleged that CMTC "broke off negotiations in bad faith and entered into a clandestine plot with [Jackson Hewitt] to



Franchise Law – Franchisees' Franchise Termination Damages

## **Failure to Pay Rent and Taxes Leads to Termination**

### **Dunkin' Donuts Franchised Restaurants LLC v. Claudia I, LLC (E.D. Penn. 2013)**

Franchisor brought suit against franchisee for breach of franchise agreement and sublease; franchisor filed a motion for preliminary injunction on claims of trademark infringement, unfair competition, and enforcement of restrictive covenant. In this case, parties' franchise agreement required remodeling and refurbishment of franchise by a certain date and that there would be no cure if the lease for the franchise is terminated or if a franchisee had received three or more previous notices to cure.

At the preliminary injunction hearing, franchisor argued that franchisee had breached sublease agreement and consequently, the franchise agreement, by not paying base rent and common area expenses for 18 consecutive months and totaling over \$304,000. Franchisor also argued that franchisee had breached the agreement by failing to remodel the unit and for not paying sales and payroll taxes by the date set forth in the agreement, even in light of multiple notices to cure such deficiencies. Franchisee argued that the case was about failure to pay rent and about monetary damages, and that a preliminary injunction would lead to irreparable harm for them.

The trial court found that franchisee had breached the franchise agreement by failing to pay rent and taxes and that preliminary injunction was thus justifiable. Though an injunction may be harmful to the franchisee, it was

procure a ... franchise, at the highly lucrative Wal-Mart location, only a few miles from the Plaintiff's franchise. As a result, Plaintiff lost the prospective sale of his Jackson Hewitt Franchise, as well as an opportunity to expand into the highly lucrative Wal-Mart location."

Jackson Hewitt sought to have the case removed to federal court and also to have the case transferred to New Jersey. The federal court granted Jackson Hewitt's requests in both regards.

First, the court held that the competing franchisee and potential purchaser could not be held liable for tortious interference. "Viewed in the light most favorable to BK Tax, these allegations suggest that CMTC was, at some point, involved in negotiation with the plaintiff to purchase its franchise but that those talks failed, leading CMTC to pursue a contract directly with the franchisor. That sort of behavior, however, does not constitute an actionable tort under Mississippi law." The court continued, suggesting that it might have ruled differently had the plaintiff franchisee thought to allege that "CMTC knew of the nature of plaintiff's agreement with Jackson Hewitt or of the plaintiff's plan to expand to the Wal-Mart location, such that this Court might infer the intent needed to satisfy the willfulness and calculation elements of the plaintiff's claims."

Second, the court ruled in favor of Jackson Hewitt's motion to transfer venue pursuant to the Franchise Agreement's forum selection clause. As the court pointed out, "[t]he clause unequivocally provides that the parties intended to litigate cases like this one in the United States District Court in New Jersey." The clause stated in part: "You agree that in all litigation brought against us, our present or former agents and employees, our Affiliates ... for any reason that arises out of or relates to your franchise relation with us, including, but not limited to, any and every aspect of the process of entering into the franchise relation, this Agreement, any Guaranty or other Collateral Agreements with us or our Affiliates, our performance in connection with the franchise relation, any termination, rescission, cancellation or nonrenewal of the franchise relation ... shall be brought and venue shall be proper only in ... New Jersey."

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## **Franchisee's Claims Dismissed**


### **Hameed v. IHOP Franchising LLC (9th Cir. 2013)**

Here, a franchisee filed claims against franchisor, alleging violations of California's Unfair Competition Law ("UCL"), breach of contract, and unjust enrichment stemming from three contracts entered into by both parties. An appellate court found that the trial court did not err in dismissing franchisee's claims under the UCL regarding increases in property taxes owed. Franchisee had failed to plead the existence of a "new lease" in support of his UCL claims. Moreover, even if a new lease existed, the sale of franchisee's property (rather than the existence of a new lease) had led to increases in franchisee's property tax.



justifiable because the franchisee had control over whether or not to make rent and tax payments. Trial court granted motion and ordered franchisee to cease operation of franchise and surrender subleased premises to franchisor within a 48-hour period.

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The courts also found that the franchisee did not claim that he had suffered any losses necessary to trigger the application of the Development Impact Assistance Program under the UCL, further enforcing a lack of a cause of action.

The courts also found that dismissal of franchisee's unjust enrichment claim stemming from the parties' Equipment Lease was appropriate. Under California law, unjust enrichment claims do not proceed if the parties have a valid contract regarding the same subject matter. Here, the Equipment Lease was found to be a valid contract, not unconscionable, and not alleged by franchisee to have had any procedural defects during its formation. Thus, franchisee's unjust enrichment claim was dismissed.

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