FRANCHISE TRENDS

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"Notice"

Bray v. Tejas Toyota, Inc., 363 S.W.3d 777 (Tex. App. 2012), reh'g overruled (Feb. 14, 2012)

Here, the Plaintiff, an automobile dealer franchisee, sought judicial review of a final order of the Motor Vehicle Division of the Texas Department of Transportation ("MVDTDT"). In ruling, the MVDTDT adopted an Administrative Law Judge's ("ALJ") recommendation to reject the franchisee's claim that the licensed franchisee violated the duty of faith and fair dealing under vehicle dealership franchising statutes when offering a replacement franchise agreement for renewal of the franchise. The MVDTDT, however, did not adopt the ALJ's recommendation to find that distributor franchisor violated the notice and good cause requirements under the statutes.

The Plaintiff franchisee was offered a replacement franchise agreement, which under its terms renewed the agreement for an additional two years on substantively identical terms. A Texas statute, however, prohibits a distributor from modifying or replacing an existing franchise "if the modification or replacement would adversely affect to a substantial degree the dealer's sales, investment, or obligations to provide service to the public, unless" two conditions are met: (1) appropriate notice is given, and (2) any protest is resolved in favor of the modification or replacement. The Plaintiff claimed the different franchise agreement would substantially affect his sales. Thus, according to the Plaintiff, the Defendant franchisor could not replace the prior franchise agreement with the new franchise agreement without (1) providing notice to the Plaintiff regarding its right to protest the replacement contract, and (2) establishing good cause for the replacement. The Defendant contended that notice is necessary under the

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Franchisor Competency, Video 4

statute only if the new franchise agreement would adversely affect to a substantial degree the Plaintiff's sales, which the Defendant franchisor claimed it would not.

The Court of Appeals agreed with the Defendant franchisor that the statute requires notice only if there would be a substantial adverse affect of the Plaintiff's sales. Further, the Court of Appeals ruled that because there was no substantive difference between the prior franchise agreement and the replacement franchise agreement that as a matter of law the replacement agreement did not substantially adversely affect the Plaintiff's sales.

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"Not in the State? Not Covered"
Johnson Bros. Liquor Co. v. Bacardi U.S.A., Inc., 830 F. Supp. 2d 697 (D. Minn. 2011)

Here, a Plaintiff distributor, which was a subsidiary of a parent company, brought an action against an alcohol manufacturer, alleging violations of the Minnesota Franchise Act (MFA) and federal antitrust law. The Defendants moved to dismiss and to stay or transfer the action.

The Plaintiff and Defendant had a long standing relationship, and in 2004 the Defendant entered into an agreement with the Plaintiff's parent company. This agreement gave either party the right to terminate the agreement on ninety days notice without cause. Subsequently, within the ninety days the Defendant called the Plaintiff to inform him of their intent to terminate the agreement.

The Plaintiff franchisee argued, however, that the parties had created a de facto franchisee-franchisor relationship. Therefore, the Plaintiff argued that the distribution agreement could not be terminated except with good cause. The Court noted that Minnesota's common law allows for a contract of any sort to be implied in fact and can be oral or written. The Court ruled, however, that beyond the Defendant's notice to the Plaintiff franchisee of its intent to terminate the franchise agreement no other relationship existed. Rather the express agreement between the two parties granted a different-named company the power to use the franchisor's name. The Court also noted that even where a party to a franchise agreement is a Minnesota corporation, the agreement is not within the realm of the MFA if the franchisee is neither located in nor operates in Minnesota. Thus, Minnesota cannot regulate any franchise agreements that are formed and executed in different states.

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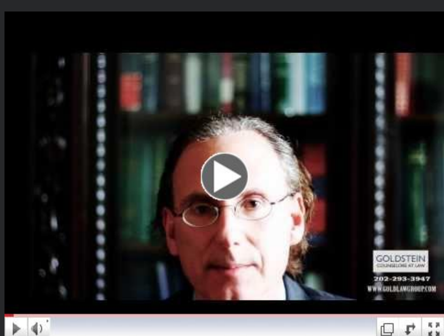
Franchise Law – Franchise Discrimination 1:2 - Jeff Goldstein: Franchise Lawyer

Jeff Goldstein GOLDSTEIN LAW GROUP Nat'l Franchise Law

Franchise Discrimination - Video 1 of 2



Franchise Discrimination - Video 2 of 2

Franchise Law: Fraud and Good Faith in Franchise Law

Franchise Law – Franchisees' Franchise Termination Damages

"Best Laid Plans"

In re Chicago Investments, LLC, 470 B.R. 32 (Bankr. D. Mass. 2012).

In this case a hearing was held on a Chapter 11 debtors' motion to assume their contracts with franchisor and to estimate franchisor's claims, as well as on franchisor's objections to the debtors' proposed reorganization plan.

The Bankruptcy Court ruled on several issues. First, the Court found that the franchisor's unexercised right of first refusal could not be raised at a hearing concerning confirmation of the debtors' proposed plan solely for the purpose of preventing assumption and assignment of the franchise agreements.

Second, the Court held that it was procedurally improper for the franchisor to file a claim objection that was almost entirely duplicative of contentions which the debtors had raised in an adversary proceeding against the creditor filing the challenged proof of claim.

Further, the Court found that the debtor-franchisee's inability to provide adequate assurance of future performance of the franchise precluded any assumption of the development agreement despite the development agreement between the franchisor and franchisee not being terminated pre-petition and remaining an "executory contract." Lastly, the Court evaluated the debtor-franchisee's proposed plan to decide whether the plan was made in "good faith." In order for a plan to be proposed in "good faith" the law requires that there must be a reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code. The Court noted that unwarranted and discriminatory treatment of insiders' claims that favors those claims over those of creditors may preclude confirmation of a Chapter 11 plan, as lacking the requisite "good faith."

Here, the proposed Chapter 11 plan provided for restructuring of the Chapter 11 debtors' business so that the franchisee's health clubs could continue to operate, with the transfer of four of the six health clubs to parties designated by debtors' principal secured lender. Further, these designees would assume the debtors' existing obligations to the franchisor and lender, and as a result of the lender's agreement to subordinate its claim to that of other

"Wildly Unfair"

Buffalo Wild Wings Int'l, Inc. v. Grand Canyon Equity Partners, LLC, 829 F. Supp. 2d 836 (D. Minn. 2011).

In this case a Plaintiff sports bar franchisor filed a suit against several former franchisees alleging that their continued use of Buffalo Wild Wings' ("BWW") trademark after termination of their franchise agreements constituted trademark infringement and a breach of contract. The Plaintiff franchisor moved for preliminary injunction.

Specifically, the Plaintiff alleged that three former BWW franchisees infringed its trademark and breached the terms of their franchise agreements by continuing to use its trademarks, trade names, slogans, symbols, etc. and its system of doing business after their franchise agreements were terminated.

For the Plaintiff to obtain the preliminary injunction, it was required to show that he had a fair chance of prevailing on his claims. The District Court noted that the "franchisees were using the mark without authorization, the franchisees' continued use was likely to cause consumer confusion or lead to mistaken beliefs that the restaurants were still franchises." The Defendants' contended that BWW's continued interaction with them regarding operational matters, and such interaction, amounted to implied consent. The District Court ruled, however, that because BWW was attempting to enforce its legal rights, such conduct was not implied consent for the Defendant franchisees to continue to use mark, since BWW clearly put the Defendants on notice that it did not consent.

Moreover, the District Court found that the Plaintiff franchisor had a likelihood of success on the merits of its breach of contract claim, as required for the issuance of a preliminary injunction, because "despite termination of the franchise agreements, franchisees continued to operate their restaurants and hold them out as franchises, failing to remove signage or take any other actions to de-identify with the franchise. Additionally, the District Court noted that the Plaintiff would suffer irreparable harm to its reputation because the BWW mark was widely known and associated exclusively with approved vendors and franchises, and the mark represented and embodied franchisor's considerable goodwill and favorable reputation. Lastly, the District Court noted that public policy supported issuing the preliminary injunction because "public interest would be promoted by preventing customer confusion and infringement of trademarks."

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"You Don't Work For Me"

Aleksick v. 7-Eleven, Inc., 205 Cal. App. 4th 1176, 140 Cal. Rptr. 3d 796 (2012)

In this case an employee of a franchisee brought a class action suit against the franchisor claiming that the franchisor violated the Unfair creditors the designees would provide a 100% distribution to these other creditors with interest. The Court concluded that this proposal was made in the "good faith" necessary for confirmation of the plan.

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Competition Law ("UCL") in the provision of payroll services to franchisees. Specifically, the Plaintiff franchisee employees argued that the payroll service violated both the "unlawful" and "unfair" prongs of Business and Professions Code section 17200. The trial court granted summary judgment to the franchisor and the employees appealed.

The employees claimed that the franchisor's practice of converting any partial hour worked in a pay-period from minutes to hundredths of an hour shorts the employees of a few seconds of time, and commensurate pay, and therefore the practice violates Labor Code wage statutes.

The Court of Appeal, however, found several failures with their claim. First, the Court held that an employee of franchisee cannot pursue a UCL claim for unlawfulness against the franchisor because the Labor Code, which the UCL adheres to in these matters, governs only the employer-employee relationship. The Court of Appeal cited several cases establishing that 7-Eleven was not the employer of the employees in question. The Court stated, "[p] roviding a 'payroll service to a franchisee's employees does not in any manner create an indicia of control over labor relations sufficient to demonstrate that the franchisor is a joint employer." Thus, because 7-Eleven did not constitute the employee's employer, but instead was more akin to an independent contractor, no action could be brought against 7-Eleven under the Labor Code statute. This is the case even though the franchise agreement required the franchisee to use 7-Eleven's payroll processing service because "no generally applicable rule of law imposes on anyone other than an employer a duty to pay wages."

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Thanks for your interest in our Newsletter, and we look forward to answering any questions you might have either on the cases discussed in this issue of Franchise Trends, or on general trends in franchise law.

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