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.

FRANCHISE TRENDS

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Franchisor Competency, Video 4

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Paccar Inc. v. Elliot Wilson Capitol Trucks LLC, D. Maryland

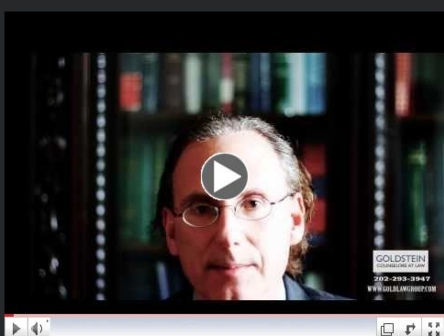
Franchisee Wilson owned two multibrand dealerships and then decided that he wanted to sell the Ford portion of one of them to another area dealer, Norris. Franchisor Peterbilt opposed the sale because it resulted in the new owner having a measure of control over the Wilson's remaining Peterbilt operations and because it had not approved the transaction. Peterbilt then filed suit against Wilson. Subsequently, Wilson sold his remaining Peterbilt stake to Norris. Wilson and Norris then tried to get approval from Peterbilt, but Peterbilt denied the sale and terminated Wilson's franchise rights. Peterbilt then reversed course by exercising its right of first refusal and rescinding Wilson's termination notice. In the midst of these transactions, Wilson filed a massive counterclaim against Peterbilt and a regional Peterbilt franchisee, Arscott, owner of PB of Baltimore.

Wilson claimed that Peterbilt was trying to coerce him in violation of the Maryland Commercial Code. Wilson put forward detailed allegations of (1) Peterbilt's continued refusal to approve sales of his franchise; (2) Peterbilt's bias against non-exclusive dealers and its desire to convert them into exclusive dealers; (3) Peterbilt's further bias against smaller dealers through discriminatory financing approval, and the court said that these claims could proceed. For similar reasons, the court also sustained Wilson's claim under the Federal Automobile Dealer's Day in Court Act. The court also sustained Wilson's breach of the "best efforts" clause of the agreement because Wilson sufficiently alleged that Peterbilt refused to give proper consideration to his requests to sell to Norris, a non-exclusive dealer, and instead tried to have him sell to an exclusive dealer. The court granted Wilson additional time to amend his complaint concerning notice

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

of termination under the Delaware Vehicle Franchising Practice Act.

Under what it called the expansive Maryland law regarding unfair competition, the court also let stand Wilson's claims against Peterbilt's favored buyer, Arscott, for public statements he made concerning Wilson's dispute with Peterbilt and his impending loss of the franchise. Relatedly, the court also let stand Wilson's tortious interference claim against Arscott and PB of Baltimore since Wilson properly alleged conversations between Arscott and Peterbilt about whether Peterbilt should approve Wilson's sale to Norris. Accordingly, the court also sustained Wilson's claim against Arscott and Peterbilt for tortious interference with prospective economic relations, a broader tort which does not require actual breach of contract, as well as his claim against Arscott for aiding and abetting tortious conduct. Wilson's civil conspiracy claim, however, failed for those same reasons, as the court held that Arscott and PB of Baltimore did not have duties under the dealer-manufacturer statute, and so could not be co-conspirators.

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EA Independent Franchisee Ass'n, LLC v. Edible Arrangements Intern., Inc., D. Connecticut

In the underlying action, franchisee association, EAIFA, filed a lawsuit on behalf of several of its members and against franchisor Edible Arrangements. The suit stemmed from changes that Edible Arrangements made to its operating requirements that EAIFA alleged imposed undue and unfair financial and operational burdens on the franchisees. The claims were for breach of the respective franchise agreements, breach of the covenant of good faith and fair dealing, and for violation of the Connecticut Unfair Trade Practices Act. Edible Arrangements then sought to compel arbitration, not with EAIFA, but with the several named and unnamed franchisees.

Earlier in the action, EAIFA had successfully argued that it had associational standing to sue on behalf of the franchisees. In opposition to Edible Arrangement's motion to compel, it again put forth that argument and supplemented it by arguing that Edible Arrangements had waived its right to arbitrate by filing a motion to dismiss the suit brought by EAIFA. Because the claims asserted by EAIFA were derived from the franchise agreements that Edible Arrangements had signed with the respective franchisees, and because the court found that Edible Arrangements had clearly reserved the right to arbitrate these claims when it filed its motion to dismiss, the court dismissed both arguments. The court was likewise not swayed by the argument that the parties would be prejudiced by an order compelling arbitration at the present stage of litigation since the burden such far had been taken by EAIFA and not the individual franchisees. The court granted the motion to compel arbitration by each of the represented franchisees according to their respective franchise agreements.

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Franchise Law – Franchisees' Franchise Termination Damages

Bimal Enterprises, Inc. v. Lehigh Gas Corp., E.D. Pennsylvania

Franchisee gas station operator Bimal Patel brought a suit for wrongful termination against Franchisor Lehigh Gas under the federal Petroleum Marketing Practices Act. In order to terminate a gas station operator's franchise agreement, the PMPA requires the franchisor to detail to the franchisee the reasons why the agreement is being terminated and, if challenged by the franchisee, to defend the challenge based upon those stated reasons. Here, Lehigh terminated Bimal Patel's agreement over misreported fuel discounts entered by Patel's manager, Singh.

Patel's initial burden was met by showing that the franchise had been terminated. Lehigh argued that Patel failed to comply with substantial and material provisions of the agreement, however, the court noted, the misreporting incident was the only negative in the otherwise long and positive relationship between Patel and Lehigh. Furthermore, the court found that Patel did not have knowledge of the misreporting until his manager told him about it. Lehigh also argued that Patel failed to adequately supervise the manager; this was not, however, stated in the termination notice and as such was not a valid position for Lehigh to argue at trial. The court held that the manager's behavior could not be imputed to Patel because Patel reasonably delegated this task to a manager who had a good track record. Accordingly, Lehigh's termination of the agreement was without any permissible defense and was therefore improper under the PMPA.

7-Eleven, Inc. v. Dhaliwal E.D. California.

Franchisor 7-Eleven was granted a preliminary injunction against franchisee Brinderjit Dhaliwal; the order restrained Dhaliwal from continuing to operate a 7-Eleven franchise and from using 7-Eleven's trademarks. Dhaliwal had been a 7-Eleven franchisee for many years and had a good relationship with the company. The store that he operated was on land leased by 7-Eleven. When the lessor decided not to renew the company's lease, Dhaliwal's franchise agreement terminated. Per the agreement, Dhaliwal could have either a partial refund of his franchise fee or could transfer his current franchise rights to another available, and currently operational, location. Dhaliwal chose the latter option, but it was some time before a location opened up. He eventually transferred to a brand new store, and therefore the waiver did not apply so Dhaliwal had to pay the full fee.

Revenues in the first year were far below Dhaliwal's expectations. As per the agreement, he was required to maintain the store with a net worth of $15,000. The store's net worth quickly dropped below this amount and 7-Eleven notified Dhaliwal who was able to make up the difference. Then, it slipped again, but this time Dhaliwal was not able to bring it back to compliance. Dhaliwal was then sent a termination notice and told to cease operations. Dhaliwal continued to operate and 7-Eleven sought a preliminary injunction to eject Dhaliwal and affect return of its trademarks.

In determining 7-Eleven's likelihood of success on the merits, the court observed that Dhaliwal had clearly failed to comply with the net worth requirement, and that 7-Eleven was thus likely to prevail on its breach of contract claim. Accordingly, the court also determined that the company was likely to prevail on its claim for misuse of its trademarks. Dhaliwal argued that 7-Eleven was unlikely to sustain irreparable harm because he was otherwise operating the store in full compliance with 7-Eleven's policies. The court dismissed his argument, finding that irrespective of Dhaliwal's care in operating the franchise, that the unauthorized use of its trademarks was irreparable harm to 7-Eleven in that it could confuse customers. The court noted that the balance of equities weighed in the franchisor's favor, since any financial harm done to Dhaliwal could be more easily quantified. The final step in the court's analysis also used the consumer confusion rationale and thus a preliminary injunction served the public interest.

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Andy Mohr Truck Center, Inc. v. Volvo Trucks North America, S.D.

Lehigh also brought claims against BEI, Patel, and Singh. The court noted that upon initial questioning by the police, Patel said that he had submitted the reports; the court dismissed this due to Patel's difficulty with English and his clear intent to say that BEI had done so. The court found Singh liable for fraudulent misrepresentation and conversion and, as Singh's employer, BEI was vicariously liable. Based on the court's findings that Patel had no reason to suspect Singh, he was not personally liable. The court also found in favor of Lehigh on its breach of contract claim against BEI and Patel. Since Patel coordinated with Lehigh to pay back its losses, the court awarded Lehigh only nominal damages on the breach of contract claim.

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Cold Stone Creamery, Inc. v. Nutty Buddies, Inc., D. Arizona

The National Independent Association of Cold Stone Creamery Franchisees, Inc. ("NIACCF"), a national franchisee group, filed a lawsuit court against Cold Stone Creamery seeking damages due to its members from Cold Stone. The suit was filed in state court in Florida. Pursuant to the franchise agreement, Cold Stone filed a petition to compel arbitration in federal court in Arizona and also petitioned the federal court for the Southern District of Florida to stay the initial state court filing. The Southern District agreed to stay the proceedings, pending the resolution of the Arizona court on whether each franchisee must independently arbitrate its claims with Cold Stone.

Cold Stone's argument was that the legal grounds sued under by the NIACCF were covered by the franchise agreement's arbitration clause. The Arizona District Court agreed, finding that Cold Stone Creamery's Arizona petition to compel

Indiana

Mohr, a well-recognized auto dealer in Indiana, was approached by Volvo to operate a Volvo Truck franchise since Volvo's previous local dealer had terminated its agreement. Among other claims, Mohr alleged that, per his request, Volvo agreed to also give Mohr a Mack Truck franchise since it was Mohr's belief that operating the two simultaneously would be a better business move. Mohr agreed to operate the Volvo franchise on the understanding that the Mack franchise would also be forthcoming. In his complaint, Mohr alleged that Volvo knew at the time in which it made the agreement that Mohr would not, in fact, be given a Mack franchise.

Mohr brought this claim under the Indiana Crime Victims' Act. Volvo defended this aspect of the suit by claiming that the ICVA did not apply in this situation. The court, however, found that the Act was broad enough to encompass Mohr's claim. This was because Volvo allegedly used "unauthorized control" over him in order to secure money and services from him which he only gave as a result of being under the impression that he would receive a Mack dealership as part of the deal.

Among his other claims, Mohr also alleged that Volvo breached the contract by failing to provide him "support" in the form of price concessions to complete a $1.6 million sale. The court allowed this as well, saying that the allegation sufficiently informed Volvo of Mohr's "support" claim. The last of Mohr's claims was for breach of oral contract concerning the Mack dealership. As to that, the court again ruled that Mohr's allegations concerning Volvo's assurances regarding the Mack dealership were sufficient to proceed.

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InBev USA LLC v. Hill Distributing Co., S.D. Ohio

InBev USA brought a declaratory judgment action against three Ohio beer distributors in order to terminate the franchise agreements entered into between the distributors and Labatt USA LLC, a subsidiary of InBev Belgium. InBev USA sought to utilize the "successor manufacturer" provision of the Ohio Franchise Act. The provision allows a successor manufacturer to terminate existing distribution agreements within 90 days of completion of a merger or acquisition. The defendants refused to terminate their agreements and had previously sought, and were granted, a preliminary injunction against InBev.

Reaching the merits, the court noted that Labatt USA was a subsidiary of InBev Belgium and that the absorption of Labatt USA into InBev USA was a restructuring of corporate assets. The OFA specifically provides that "'the restructuring ... of a manufacturer's business organization' is not just cause for termination of a franchise." The court held that InBev Belgium's actions were a "reshuffling" of its structure. Therefore, InBev USA did not meet the Ohio Franchise Act's definition of a "successor manufacturer" to Labatt USA and InBev USA could not terminate the agreements. The court noted that allowing InBev's arguments "would create arbitration contained sufficient allegations that the dispute was one that should be arbitrated between Cold Stone and Nutty Buddies. The Arizona District Court therefore denied Nutty Buddies' motion to dismiss Cold Stone's petition to compel arbitration.

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an enormous loophole" in favor of manufacturers to simply revise their corporate structures any time they wanted to get out of a contract.

Since the court had previously granted a preliminary injunction against InBev USA's termination of the distribution agreements, it denied the distributors' claims for breach of contract. It did, however, make the injunction against InBev permanent.

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