FRANCHISE TRENDS

Join Our Mailing List!

Consulatation

Contact Us

View our videos on YouTube

Franchisor Competency, Video 4

GOLDSTEIN LAW GROUP, PC
JEFFREY M. GOLDSTEIN, ESQ.
www.goldlawgroup.com
202-293-3947

Franchisees Snagged by Arbitration Clause

Awuah v. Coverall North America, Inc., 1st. Cir. (Mass.)

Plaintiff franchisees in a janitorial business brought various claims against franchisor Coverall in a class action lawsuit. The franchisees were a subgroup of franchisees that came into Coverall's system through various transfer agreements, each of which purported to incorporate the pre-existing franchise agreements.

In response to their claims, the franchisor sought to enforce the arbitration clauses from the incorporated agreements. The dispute arose because the transfer agreements did not, by their terms, contain arbitration clauses. The transfer agreements contained language such as "[Transferees] succeed to all of Franchisee's rights and obligations under Franchisee's Janitorial Franchise Agreement." The district court held that the transfer agreements provided insufficient notice to the transferees about the arbitration clause due because the clause was not mentioned in the transfer agreements.

On appeal, the First Circuit reversed the district court's "special heightened notice requirement" and held that the transferees were bound by the broad reading of the word "all" in the above-mentioned clause. The court based its holding on both Massachusetts contract law principles and on federal cases construing the Federal Arbitration Act. The transferee franchisees were thus held to have sufficient notice by the wording of the transfer agreements, despite the word "arbitration" not appearing in the documents that they each signed. The franchisees were not without recourse because, as the court noted, the alleged unconscionability of the incorporation of the arbitration clause could be submitted to the arbitrator.

Home | About Us | Consultation | State Franchise Laws | Blog | Guest Columns | Press Releases | FAQ | Contact

Send to a Colleague

Federal Court Not Very Receptive to NJ State Pro-Franchisee Act

McPeak v. S-L Distribution Co., Inc., D.N.J.

A former distributor, McPeak, brought a class action suit against the defendant, S-L Distribution Co., under the New Jersey Franchise Practices Act (NJFPA) seeking damages for wrongful termination. The gist of the franchisees' argument was that they, while termed "distributors" and "independent contractors" under their respective agreements with Defendant, were in actuality franchisees of the defendant, and as such, were covered by the NJFPA and entitled to damages for wrongful termination in violation of that statute.

The court noted that the NJFPA was amended in 2010 to give courts the discretion to construe its terms more broadly. The NJFPA describes a franchise as an agreement that grants "a license to use a trade name, trade mark, service mark, or related characteristics, and in which there is a community of interest in the marketing of goods or services at wholesale, retail, by lease, agreement, or otherwise." The court's analysis focused on whether the franchisees were granted a license within the terms of the NJFPA and, after finding they were not, dismissed their claims against S-L.

In particular, the court considered the fact that although the New Jersey legislature had sought to broaden courts' interpretation of the NJFPA, the New Jersey Supreme Court had limited the situations in which a franchise relationship could be found to exist. Such situations require there to be "a reasonable belief on the part of the consuming public that there is a connection" between the parties sought to be classified as franchisor-franchisee. Here, the court did not find such a connection because even though the franchisees held exclusive sales area, they were not licensed to use-nor did they use-S-L's trademarks. The court distinguished this case from a prior one where a party was expressly granted the right to use a trademark.

By not taking the agreement at issue in this case purely at face value, the court gives some decided leeway to the labels used by parties in their agreements. Nevertheless, the language granting an exclusive sales region is insufficient in and of itself to create a franchisor-franchisee relationship, and courts applying the NJFPA will look closely at the parties' relationship.

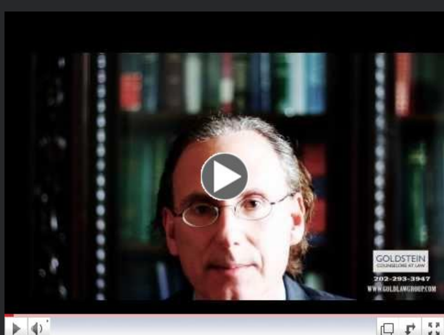
Home | About Us | Consultation | State Franchise Laws | Blog | Guest Columns | Press Releases | FAQ | Contact

Send to a Colleague

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

Franchisor Permitted to Shorten Statute of Limitations

Creative Playthings Franchising Corp. v. Reiser, Mass.

In response to a question certified to it by the federal district court in Massachusetts, the Supreme Judicial Court of Massachusetts clearly affirmed that agreements purporting to shorten a limitations period below that otherwise statutorily required are valid and enforceable in Massachusetts. In doing so, the court noted its agreement with federal precedent under the Federal Arbitration Act and traced its analysis to its own cases dating to the mid-19th century.

The case arose as a dispute between franchisor, Creative Playthings, a Massachusetts company, and a former franchisee, Reiser, a resident of Florida. Following the termination of their relationship, Creative Playthings brought suit against the franchisee for various breaches of the franchise agreement and violations of Creative's trademark rights. The franchisee counterclaimed for breach of the implied covenant of good faith and fair dealing, fraudulent inducement, and violations of against unfair and deceptive trade practices under Florida law. Creative sought to dismiss the franchisee's claims as time-barred since they arose at the execution of the contract.

In agreeing with Creative, the Court noted that agreements modifying the limitations period are not universally enforceable and stated that unreasonable restrictions would not be enforceable. The court stated that while the franchisee raised

Long-Arm Statute Not Long Enough to Grab Franchisor Developer

Zuchowski v. Doctor's Associates, Inc. dba Subway Restaurants, Conn. Super.

A franchisee brought a series of statutory and common law claims arising from a failed franchise agreement against two defendants-Subway and one of Subway's franchise development agents: Faddoul. In this case, the court addressed a motion to dismiss brought by defendant Faddoul. Faddoul based his argument on a lack of personal jurisdiction. The franchisee argued that Faddoul, by certain actions, was under the jurisdiction of the Connecticut long-arm statute.

In the fraud claim against Faddoul, the franchisee argued that Faddoul was subject to jurisdiction in Connecticut by virtue of the fact that Faddoul conducted business in Connecticut by receiving royalties from Subway, and the fact that Faddoul's agreements with Subway provided that disputes between it and Faddoul would be arbitrated in Connecticut under Connecticut law. The Court dismissed both of these reasons as insufficient. While Faddoul received royalties from Subway, a Connecticut corporation, these royalties were based on sales made by stores under Faddoul's supervision in Ohio. It was also shown that Faddoul only travelled to Connecticut once a year. Lastly, it was undisputed that the specifics of the fraud at issue were based on acts which all took place in Ohio.

Thus, the court concluded that there was no factual connection between the fraud claims alleged by the franchisee and Faddoul's contact with Connecticut and that to exercise jurisdiction over him in this matter would be a violation of the Due Process Clause. The court granted Faddoul's motion to dismiss.

Home | About Us | Consultation | State Franchise Laws | Blog | Guest Columns | Press Releases | FAQ | Contact

Send to a Colleague

Franchisor's Attempt to Reverse Arbitrator Rejected

Budget Blinds, Inc. v. LeClair, C.D. Cal.

A former franchisee sought to confirm an arbitration award against franchisor Budget Blinds which, in turn, sought to vacate the arbitrator's award. Budget Blinds argued that the arbitrator exceeded its power, manifestly disregarded the law, and issued an award in violation of public policy.

The dispute arose when the franchisee sought to branch out its business to include offering cleaning services for blinds. The franchisee initially posed the idea to Budget Blinds executives, but they were not interested in several policy arguments, including the issue of unequal bargaining power, that whether public policy dictated making such limitations reductions unenforceable was a question for the legislature, not the courts.

Home | About Us | Consultation | State Franchise Laws | Blog | Guest Columns | Press Releases | FAQ | Contact

Send to a Colleague

Franchisee Terminated for Failed EFT Payments

Joseph v. Sasafrasnet, LLC, N.D. Ill.

A gas station franchisee initially sought a preliminary injunction in order to restrain successor-in-interest franchisor, Sasafrasnet, from terminating its franchise agreement. The franchisee originally entered into an agreement with BP. BP then assigned its rights and obligations to Sasafrasnet. During two separate periods in 2009 and 2010, an issue arose because electronic fund transfer (EFT) payments from the franchisee's account were repeatedly denied for insufficient funds. As a result, Sasafrasnet required the franchisee to prepay for its deliveries; this process continued for some time until Sasafrasnet agreed to resume accepting EFT payments from the franchisee.

Shortly thereafter, in July 2010, two more payments were returned for insufficient funds. This time, the reason was because the franchisee had changed banks but was late in notifying Sasafrasnet before it attempted to withdraw funds from the now-depleted account. Over the next few days, two more EFTs failed-one a result of Sasafrasnet improperly attempting to withdraw from the franchisee's former account, the other as a result of the alleged combined failures of both parties to make sure the proper funds were in the new account. In November 2010, Sasafrasnet informed the franchisee that his agreement was being terminated for those failed EFTs.

pursuing it. The franchisee then set up a separate company and operated both businesses independently. A neighboring franchisee of Budget Blinds complained about its activities and Budget immediately filed a Demand for Arbitration under the franchise agreement.

At the arbitration hearing, franchisee argued that Budget Blinds "constructively terminated" him by failing to communicate with it concerning his other business and by accusing it of breaching the franchise agreement. The district court found that the arbitrator's classification fit well within established precedent and was not a manifest disregard for the law. As to damages, Budget Blinds also took issue with the arbitrator's award of prospective damages to the franchisee, but the court found ample justification from the record and noted that Budget Blinds was merely attempting to relitigate the arbitration hearing. As to Budget Blinds' public policy argument, the court dismissed that out of hand stating that absent a clearly compelling policy justification, arbitration awards rarely violate public policy. The arbitration award was therefore confirmed.

Home | About Us | Consultation | State Franchise Laws | Blog | Guest Columns | Press Releases | FAQ | Contact

Send to a Colleague

Post-Term Covenant Legally Massaged by Court Against Franchisee

Novus Franchising, Inc. v. Superior Entrance Systems, Inc., W.D. Wis.

Following a settlement agreement entered into between a franchisor, Novus, and several of its franchisees, the district court was required to clarify the scope of the non-compete agreement between the parties. The court had previously exercised its "blue pencil" power to modify the non-compete agreement that was otherwise unduly burdensome to the former franchisees.

Of particular concern was the effect of the non-compete agreement on a nonsignatory, Superior Glass, Inc. (SGI). SGI was owned by one of the defendants, an individual, who was a party to the agreement containing the non-compete clause. The court noted that the *de facto* entity sought to be restrained from competing was SGI-despite SGI not being an actual party to the agreement. The court in effect used a veil-piercing technique to "blue pencil" the non-compete so as to take a form more akin to that which Novus sought to compel.

Home | About Us | Consultation | State Franchise Laws | Blog | Guest Columns | Press Releases | FAQ | Contact

Send to a Colleague

Car Dealer Prevails on Bad Faith Claim

The district court denied the franchisee's request for a preliminary injunction but, on appeal, the Seventh Circuit reversed and directed the district court to determine whether the franchisee was at fault for the returned EFTs. The standard under the Petroleum Marketing Practices Act (PMPA), it noted, was whether the franchisee had a "reasonable chance of success on the merits," or in other words, whether the failed EFTs were within its "reasonable control."

On remand, the district court determined that each of the failures was sufficiently within the franchisee's control and that they were important to the franchise relationship, and as a result, the franchisee could not show a reasonable chance that Sasafrasnet improperly terminated the agreement.

Legend Autorama, Ltd. v. Audi of America, Inc., N.Y. App. Div.

Plaintiffs, franchisee car dealers, brought a lawsuit against auto manufacturer Audi alleging that Audi's appointment of a new franchisee dealer within 13 miles of the existing franchisees' dealerships constituted express breaches of their respective dealer agreements, the covenant of good faith and fair dealing, and Audi's fiduciary obligations to them. The trial court denied Audi's motion for summary judgment and Audi appealed.

On appeal, the court agreed with the denial of summary judgment as to the franchisees' claims for breach of the dealer agreements, as well as the franchisees' claim for breach of the covenant of good faith and fair dealing. The court held that the franchisees' argument that Audi improperly exercised its contractual discretion in granting this new dealership made for a classic instance of the breach of the covenant of good faith and fair dealing. Further, the franchisees' claims for breach of the dealer agreement properly survived summary judgment since Audi normally provided its struggling dealers with support prior to authorizing a new dealership, but did not do so in this case.

As to the franchisees' claims for breach of fiduciary duty, the court agreed with Audi in stating that, barring "special circumstances" there is typically no fiduciary duty inherent in the franchisee-franchisor relationship. While giving consideration to the auto manufacturer's typically dominant position over franchise dealers, the court held that dominance did not, in and of itself, give rise to a confidential relationship and a fiduciary obligation. Accordingly, the court ordered that summary judgment be entered in favor of Audi on this claim, but that the Plaintiffs other claims survive.

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.

Jeff Goldstein
Goldstein Law Group
www.goldlawgroup.com

Home | About Us | Consultation | State Franchise Laws | Blog | Guest Columns | Press Releases | FAQ | Contact

GOLDSTEIN, P.O. Box 1707, Leesburg, VA 20177 MAIN: 202-293-3947 FAX: 202-315-2514