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

Franchisor Competency, Video 4

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'Hit and Run' by Adjacent Auto Franchisee Not Actionable in Federal Court

General Motors LLC v. Englewood Auto Group, LLC 2014 WL 4441769 (D.N.J. 2014)

Plaintiff General Motors LLC ("GM") brought this breach of contract action against Defendant Englewood Auto Group, LLC ("EAG"), seeking a declaration that it may lawfully terminate its franchise agreements with EAG. EAG filed Counterclaims against GM and GM's affiliate, Argonaut Holdings, Inc. ("Argonaut"). GM claimed that the franchisee deserved to be terminated because EAG allegedly did not hit the required minimum sales (RSI's), and EAG claimed that GM had breached the Dealer Agreements and, in doing so, contributed to EAG's inability to meet the RSIs.

This case shows again how generally treacherous it is for franchisees under current franchise law in many federal courts, in this case the New Jersey federal court. This is ironic to some extent given that the New Jersey Franchise Practices Act provides some of the most far-sweeping pro-franchisee relationship law in the United States.

GM manufactures and distributes motor vehicles through a network of authorized dealers. Since 1999, EAG had been an authorized dealer of

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

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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

Chevrolet autos and products under successive Dealer Sales and Service Agreements (the "Chevrolet Dealer Agreement" or the "Chevrolet Franchise Agreement"). Since 2002, EAG had also been an authorized dealer of Buick and GMC automobiles and products under successive Dealer Sales and Services Agreements (the "Buick GMC Dealer Agreement" or the "Buick Franchise Agreement", and, together with the Chevrolet Dealer Agreement, the "Car Dealer Agreements"). EAG, at the time of the legal battle, operated both its Chevrolet dealership and its Buick GMC dealership in Englewood, New Jersey. EAG sublet the Buick GMC dealership facility from Argonaut under a dealer sublease (as amended, the "Sublease").

On June 1, 2009, Old GM filed for bankruptcy. In connection with the bankruptcy, GM and EAG entered into two Participation Agreements, one for the Chevrolet Dealer Agreement and the other for the Buick GMC Dealer Agreement (the "Participation Agreements"). The Participation Agreements allowed EAG to continue acting as a Chevrolet and Buick GMC dealer following the bankruptcy.

The Participation Agreements contained a sales performance requirement, called the Retail Sales Index ("RSI"). GM argued that EAG failed to meet the required RSIs at both its Chevrolet and GMC Buick dealerships for several years, and thereby filed the Complaint, seeking a declaration that it may lawfully terminate its contractual relationship with EAG.

EAG replied by filing the Counterclaims against GM and Argonaut, alleging violations of the New Jersey Franchise Practices Act, breach of contract, unjust enrichment, reformation based on mistake, and breach of the implied covenant of good faith and fair dealing. GM and Argonaut both moved to dismiss several of EAG's Counterclaims. The Counterclaims alleged, inter alia, that GM had breached the Dealer Agreements and, in doing so, contributed to EAG's inability to meet the RSIs. EAG maintained that GM breached the Dealer Agreements in two ways.

The first counterclaim involved EAG's contractual obligation, under the Dealer Agreements, to not sell GM vehicles to or through brokers to end users. EAG argued the Dealer Agreements also imposed an obligation on GM to prevent other dealers from engaging in brokered sales, and that GM had failed to do so. Specifically, EAG alleged that GM had breached the Dealer Agreements by failing to ensure that third-party dealers comply with the obligations not to sell GM vehicles to or through brokers to end users.

The primary provision concerning brokered sales was in Section 5.1.4 of GM's Standard Provisions, which are incorporated into each Dealer Agreement. Section 5.1.4 provides that: "[U]nless otherwise authorized in writing, Dealer agrees to purchase Motor Vehicles only for resale to customers for personal use or primary business use other than resale. Dealer is not authorized by this Agreement to directly or indirectly sell Motor Vehicles to persons or parties (or their agents) engaged in the business of reselling, brokering (including but not limited to buying services) or wholesaling of Motor Vehicles."

California governor signs SxS franchise reform bill

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LAKE ELSINORE, Calif. - Side-by-side dealers in California now receive the same protections motorcycle and ATV dealers do, thanks to new legislation signed by Gov. Jerry Brown.

"This law will bring Recreational Off-Highway Vehicles, as they are officially known in California, or 'side-by-sides,' as they are commonly known, under the jurisdiction of the California New Motor Vehicle Board for franchise law disputes that they are empowered to consider," the California Motorcycle Dealers Association announced.

"The passage and signing of AB 988 into law levels the uneven playing field between dealers and manufacturers when it comes to side-by-side franchise disputes, such as an OEM locating a like-brand dealership within 10 miles of an existing dealer" said CMDA Executive Director John Paliwoda. CMDA sponsored the legislation introduced by Assemblyman Brian Jones.

Until 2012, ROVs were considered all-terrain vehicles for registration and enforcement purposes. "Even though they grew directly from an all-terrain vehicle base, it was necessary to give them their own [DMV] definition and category," CMDA noted. AB 988 amends Sections 111, 3001 and 3003 of the California Vehicle Code.

"These days, California motorcycle and motorsport dealers need all the help they can get, still trying to recover from the deleterious effects of the Great Recession," Paliwoda said. "AB 988 will help by adding another product that dealers sell to the franchise protections that California law already affords them."

From a press release

A Better Deal for Franchisees and Workers

By THE EDITORIAL BOARD, New York

In addition to Section 5.1.4, EAG also relied for its claim on brokering on the "Purpose of Agreement" section at the beginning of the Standard Provisions, which noted that the mutual dependence of between General Motors and its dealers "requires a spirit of cooperation, trust and confidence." EAG also cited to Section 4.1, which stated that "dealers must be appropriate in number, located properly, and have proper facilities ... to permit each dealer the opportunity to achieve a reasonable return on investment...." Section 4.1, further pointed to by EAG, stated that "[t]o maximize the effectiveness of its dealer network, General Motors agrees to monitor market conditions and strive, to the extent practicable, to have dealers appropriate in number, size and location." EAG also referred to Section 4.2, which provided that each dealer is responsible for effectively selling, servicing, and otherwise representing GM products in its Area of Primary Responsibility. Finally, EAG highlighted Section 6.1, which stated that GM "will endeavor to distribute new Motor Vehicles among its dealers in a fair and equitable manner."

Based on these contractual provisions noted above, EAG asserted two contractual breach theories. First, EAG argued that GM breached its direct obligations to EAG under the Dealer Agreements by failing to prevent brokered sales. To state a claim for breach of contract in Michigan, the Court noted that a plaintiff must allege: (1) the existence of a valid contract between the parties, (2) the terms of the contract; (3) that defendant breached the terms of the contract, and (4) that the defendant's breach caused the injury to the plaintiff.

The Court did not appear swayed that the terms of the Franchise Agreements contained such a broad-sweeping obligation. "Here, much of the language that EAG cites in support of its claim is general and aspirational, and does not place any specific obligation upon GM." The Court continued its assault on EAG's argument, stating: "Moreover, nothing in the Dealer Agreements obligates GM to prevent, or even prohibits GM from permitting, brokered transactions. In fact, Section 5.1.4 expressly acknowledges the possibility of a dealer receiving written authorization to engage in brokered transactions. EAG thus has failed to allege a direct breach of the Dealer Agreements."

For its second breach of contract theory, EAG argued that it was a third-party beneficiary of GM's dealer agreements with other dealers, and that GM had breached its obligations to it by allowing those other dealers to breach those agreements. Specifically, EAG argued that EAG was third-party beneficiary of GM's obligations to police its dealer network and fairly allocate vehicles, which EAG alleged included enforcing the prohibition against brokered sales.

The Court quickly and forcefully rejected this third-party beneficiary argument, stating: "A person is a third-party beneficiary of a contract only when that contract establishes that a promisor has undertaken a promise directly to or for that person." And, the Court continued: "Courts use an objective standard to determine, from the form and meaning of the contract itself, whether the promisor undertook to give

Times, AUG. 27, 2014

Fast-food workers, who **have been striking regularly** for higher pay and an unimpeded right to unionize, are not the only people fed up with powerful corporate bosses.

The California Legislature recently passed **a bill** to redress several imbalances of power between corporations and small-business franchisees, which include owners of fast-food restaurants, convenience stores and other chain outlets.

The bill would bar a corporation from closing a franchise business for minor violations of the franchise agreement, a tactic that some **convenience store owners say** corporations have used to shut down established locations in order to resell them at high prices to new owners. It would protect franchise owners from unreasonable interference if they chose to sell or transfer their business. It also would protect them from corporate retaliation for joining any of various franchisee **associations** devoted to addressing problems in franchising.

Gov. Jerry Brown has not said whether he would sign or veto the bill. He has until Sept. 30 to decide. He should sign it. By improving the legal rights of franchisees, the bill would begin to offset damaging trends in antitrust and contract law that have given corporations ever more control over franchisees.

Equally important, by proving that significant reforms to the franchise system are possible, the bill could provide momentum in the fight to raise the pay of franchise workers.

Currently, corporations dictate virtually every aspect of a franchisee's operations, while extracting heavy fees, royalties and other payments. **That arrangement** boosts corporate profits but squeezes franchise owners, which leads to low wages because workers are paid not by the rich corporation but by the often struggling franchisee. The solution - which fast-food **workers have been fighting for** - is to raise worker pay through **a more equitable distribution** of corporate profits.

Franchising is big business in California, where more than 80,000 franchises generate annual revenue of $94 billion and employ nearly one million workers. A new and improved legal framework there would encourage broad and needed reforms in other aspects of the business model and in other states. Mr. Brown could thus mitigate inequities not only in California but the nation as a whole.

or to do or to refrain from doing something directly to or for the person claiming third-party beneficiary status."

The Court finally dismissed the third party claims stating that "EAG fails to allege that GM has breached any obligation to it as a third-party beneficiary. As stated previously, nothing in the Dealer Agreements imposes any duty or obligation on GM to prevent, or prohibits GM from permitting, brokered sales." The Court also, in his conclusory remarks, pointed out that the Standard Provisions expressly preclude enforcement by third-party beneficiaries: "This Agreement is not enforceable by any third parties and is not intended to convey any rights or benefits to anyone who is not a party to this Agreement."

Finally, the Court dealt with the anticipated argument by EAG that the franchisor breached two covenants of good faith and fair dealing implicit in the Dealer Agreements. EAG alleged that GM had breached these implied covenants by: (1) failing to enforce its policy of prohibiting brokered sales and (2) denying EAG the right to perform warranty work for the discontinued Saturn brand but granting that right to other nearby dealers. EAG argued that this conduct had sabotaged its ability to meet GM's sales expectations.

Before going to the guts of the covenant of good faith and fair dealing claims, the Court was diverted momentarily to the world of the Michigan Uniform Commercial Code (the "UCC") to determine whether the UCC was applicable at all in the automobile dealership context. "The UCC applies to contracts for the purchase or sale of goods. When determining whether the UCC applies to claims arising under an automobile dealer agreement, Michigan courts have considered both the language of the contract and the subject matter of the litigation." According to the Court, "Where the dealer agreement characterizes itself as a "personal service agreement," and the case concerns the sufficiency of a party's performance of services under the agreement, the UCC does not apply."

Here, as identified by the Court, the Standard Provisions specifically stated that "this is a Personal Services Agreement, entered into in reliance on the qualifications, integrity and reputation of Dealer Operator ...." The Court on this issue concluded that the UCC was inapplicable: "And this is a case about the sufficiency of EAG's performance of services under the Dealer Agreements, and EAG's defenses thereto, not the purchase or sale of goods. Michigan common law, and not the UCC, thus applies to this claim."

After deciding the UCC issue, the Court concluded that Michigan common law recognizes an implied covenant of good faith and fair dealing in certain circumstances, depending on the nature of the parties' contractual arrangement. However, "Michigan law does not imply the good faith covenant where the parties have clearly expressed their respective rights." The Court then was very careful to point out that any application of the covenant of good faith and fair dealing would need to necessarily very narrow: "The implied covenant of good faith and fair dealing essentially serves to supply limits on the

Dunkin's Attempts to Slam Doors on Terminated Franchisee for Failing to Remodel Rejected by Federal Court Finding that Injunction would be a Death-Knell to Franchisee

Dunkin' Donuts Franchising LLC v. Claudia III, LLC 2014 WL 3900569 (E.D.Pa., Aug 11, 2014)

The key question in this case was whether a Dunkin' franchisee's failure to timely remodel its store constituted irreparable harm to the franchisor. Specifically, plaintiff Dunkin' Donuts Franchising, LLC and related companies (collectively, "Dunkin'"), sued one of their franchisees, Claudia III, LLC, as well as the franchisee's members, Manfred and Lynn Marotta. ("Claudia"). The failure to complete renovations within the contractually required schedule, argued Dunkin', terminated the franchise agreement, which, in turn, prevented Claudia from continuing to operate the store under the Dunkin' Marks.

Dunkin' argued that Claudia's continued operation was in violation of the franchise agreement and constituted irreparable harm as a matter of law. Dunkin' sought a preliminary injunction prohibiting Claudia from continuing to operate under the Dunkin' name, which would require Claudia to close its store completely. The motion for preliminary injunction, however, was denied by the Court because it concluded that irreparable harm had not been proven by Dunkin'.

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parties' conduct when their contract defers decision on a particular term, omits terms or provides ambiguous terms." The Court explained that the analysis requires that the agreement have in fact created discretionary rights. "[A]n implied obligation to act in good faith can arise when, for instance, the specific contractual terms make a party's performance under the contract entirely discretionary."

In rejecting application of the good faith claim and defense of the franchisee, the Court stated:

> Here, the contract explicitly sets forth the parties rights as to brokered sales. The Dealer Agreements prohibit dealers from engaging in brokered sales without obtaining written consent from GM, but do not impose any duties or obligations on GM as to brokered sales. And none of the contractual language referenced by EAG places any specific contractual obligation on GM regarding the circumstances under which it may permit brokered sales or how it should distribute the warranty work for other brands. EAG has thus failed to allege any specific contractual obligation anchoring its claim for breach of the implied covenant of good faith and fair dealing.

This case is another example of a franchisee attempting to legally coerce a franchisor to enforce a separate franchise agreement with a third party franchisee by arguing that the first franchisee is being harmed by the unlawful conduct of the third party franchisee. Such a scenario usually arises where the third party franchisee is violating the exclusive territory provision in its franchise agreement and in so doing infringing on the business of the first franchisee in its exclusive territory. Most franchisors nowadays include an explicit provision in their agreements that states that the agreement provides no third party beneficiary rights to anyone, including other franchisees. Almost all courts respect this language and accordingly refuse to allow franchisees the right to sue for injury arising out of franchisors' refusals to enforce contracts with third party franchisees.

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