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## Walk-in tub seller's operations qualify as franchises

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By E. Darius Sturmer, J.D.

A marketer/seller/installer of walk-in bathtubs in the New York and New Jersey area could qualify as a franchise with standing to assert counterclaims against Safe Step Walk In Tub Co. under the franchising laws of those states and Connecticut and Rhode Island, the federal district court in New York City has ruled. Therefore, a motion by Safe Step for dismissal of these counterclaims was denied. However, because the allegations were outside the ambit of New York and Rhode Island's "Little FTC" Acts, claims brought under those statutes were dismissed. The court also discarded numerous claims for unfair competition and breach of the implied covenant of good faith and fair dealing ([\*Safe Step Walk In Tub Co. v. CKH Industries, Inc.\*](#), March 17, 2017, Roman, N.).

Safe Step had sued bathtub marketer/seller/installer CKH Industries, claiming nonpayment of certain marketing fees related to the use of Safe Step's trademarks. CKH counter-sued, alleging that Safe Step was in fact a franchisor who attempted to structure "Dealership/License" agreements to avoid federal and state franchise laws. CKH alleged that Safe Step defaulted under the agreements by refusing to honor its obligations and by terminating those agreements, or failing to renew them, despite CKH's performance of its side of the bargains. CKH contended that the manufacturer's actions violated state franchise laws and state laws prohibiting unfair or deceptive business practices, and constituted a fraud designed to intentionally escalate CKH's costs in order to constructively terminate the alleged franchises and compete directly against CKH.

**Franchisor-franchisee relationship.** Given the basis of the allegations and the plain terms of the regional agreements, it was easy to find that the parties' relationship could plausibly constitute a franchisor-franchisee relationship under the FTC Rule, the court noted. However, that finding and accepting the allegations that Safe Step did not provide CKH with the disclosures required under the FTC Act did not provide CKH with an actionable claim. CKH had to establish that the agreements constituted franchises under the laws of Connecticut, New Jersey, New York, and Rhode Island.

CKH's operations with Safe Step qualified as franchises under the laws of each of the four states, the court found. Although Tennessee law governed the action, the court said, "Tennessee would honor the protections available under the franchise acts of states where [CKH] allegedly ha[d] franchises." The definition of a franchise under each state's scheme was comparable to the FTC definition with only minor differences, in the court's view. CKH satisfied this standard by virtue of its allegations of a substantial association with Safe Step's marks, a marketing plan prescribed in substantial part by the manufacturer, a community of interest between the companies in the marketing of the products, and CKH's establishment of business operations in each of the states. Thus, it was entitled to pursue the "additional protections" of the franchise laws, and those causes of action.

**"Little FTC" Act claims.** Claims asserted under the "Little FTC" Acts of New York and Rhode Island were not, however, viable, in the court's view. Both states' relevant laws were aimed at fraudulent conduct having a substantial or broad impact on consumers. Given that the conduct complained of was the violation of the FTC Act and state franchise law disclosure obligations, the claims arose out of the parties' contractual relationship and were not directed at consumers. Thus, "whatever protections [were] available under the New York and Rhode Island franchise statutory schemes for the alleged wrongful termination of failure to renew the agreements [would] have to suffice," the court concluded.

The case is [No. 15 Civ. 7543 \(NSR\)](#).

Attorneys: John Sellner (Winthrop & Weinstine PA) for Safe Step Walk-In Tub Co. Donald Joseph Feerick, Jr. (Feerick Lynch MacCartney & Nugent, PLLC) and Jeffrey M. Goldstein (Goldstein Law Group) for CKH Industries, Inc.

Companies: CKH Industries, Inc.; Safe Step Walk-In Tub Co.

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