

FRANCHISING (& DISTRIBUTION) CURRENTS

CURRENTS EDITOR: MICHAEL J. LOCKERBY

CONTRIBUTING EDITORS: RONALD T. COLEMAN, JR., SARAH A. JOHNSTON, AND KIMBERLY S. TOOMEY



Michael J. Lockerby



Ronald T. Coleman, Jr.



Sarah A. Johnston



Kimberly S. Toomey

Advertising and Marketing

***Manoochehr Fallah Moghaddam v. Dunkin' Donuts, Inc.*, 322 F. Supp. 2d 44, Bus. Franchise Guide (CCH) ¶ 12,858 (D. Mass. June 10, 2004)**

This case is discussed under the topic heading "Good Faith and Fair Dealing."

Antitrust

***Golka v. Elegant Awnings*, No. G031952, 2004 WL 1304412, Bus. Franchise Guide (CCH) ¶ 12,854 (Cal. Ct. App. June 14, 2004)**

This unpublished opinion of the California Court of Appeals affirmed the trial court's grant of a motion for non-suit on the plaintiff's tying claims under state antitrust law. The plaintiff was an installer of retractable awnings for a retailer called Home Base. Home Base terminated the plaintiff for refusing to purchase his awnings exclusively from defendant Elegant Awnings. Thereafter the plaintiff sued both Home Base and Elegant Awnings alleging, among other things, unlawful tying. In its opinion, the court provided a thorough—and

Michael J. Lockerby is a partner in the Richmond, Virginia, office of Hunton & Williams LLP. Ronald T. Coleman, Jr., is a partner with the law firm of Parker, Hudson, Rainer & Dobbs LLP in Atlanta. Sarah A. Johnston is an attorney with the law firm of Dady & Garner, P.A., in Minneapolis. Kimberly S. Toomey is an attorney with the Philadelphia office of Wiggin and Dana LLP.

sometimes humorous—summary of and commentary on the law of franchise tying claims. Ultimately the *Elegant Awnings* court concluded that the plaintiff had failed to prove any of the essential elements of such a tying claim.

The court first held that the plaintiff had not presented sufficient evidence that Home Base had any appreciable market power in the market for home awnings, much less in what the court characterized as the more relevant market for home awning installation franchises. Thus, the court found dispositive the U.S. Supreme Court's decision in *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984). The court rejected the plaintiff's attempt to resurrect the musty decision in *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971). *Siegel* held that the franchisor's trademark itself created a presumption of market power sufficient to sustain a tying claim.

The California Court of Appeals rejected the plaintiff's attempt to rely on *Siegel* for three reasons. First, the U.S. Supreme Court's decision in *Jefferson Parish* had superseded the Ninth Circuit's holding in *Siegel*. Second, the *Elegant Awnings* court found *Siegel's* analysis itself "flawed." Finally, the California court distinguished *Siegel* on the grounds that the fast food market "implicates a different set of dynamics" than the retractable awnings market, where the court concluded that customers do not have the same kind of "subjective brand preference[s]."

The court summed up its view of this case in the first sentence of its opinion: "Seldom do you see an easier case in such a tough area of law."

***In re New Motor Vehicles Canadian Export Antitrust Litig.*, 307 F. Supp. 2d 136, Bus. Franchise Guide (CCH) ¶ 12,848 (D. Me. Mar. 4, 2004) (*Canadian Motor Vehicles Antitrust I*)**

In a pair of companion antitrust cases, Judge Hornby, sitting for the MDL Panel, ruled on defendants' motions to dismiss for failure to state a claim and for lack of personal jurisdiction. The plaintiffs, American automobile consumers, brought antitrust claims against the American and Canadian affiliates of Honda, BMW, DaimlerChrysler, Ford, General Motors, Mercedes-Benz, Nissan, and Toyota, as well as the Canadian Automotive Dealers Association and the National Automobile Dealers Association. The plaintiffs alleged that the defendants had entered into unlawful agreements with American and Canadian automobile dealers not named as parties. These agreements were allegedly intended to prevent automobiles earmarked for Canada from being sold in the United States or to American consumers who would bring them back to the U.S. They further alleged that many makes and models of automobiles are sold for substantially less in Canada than in the U.S., and that the agreements in question served to prevent the emergence of a discount distribution channel for American customers. The plaintiffs alleged that

automobile prices were thus maintained at artificially high levels in the American market, and that a possible discount channel was foreclosed.

In *Canadian Motor Vehicles Antitrust I*, the court addressed defendants' motion to dismiss on the basis of the Supreme Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The court explained that *Illinois Brick* limited standing in these types of antitrust cases to the direct purchasers of the goods in question, rather than the downstream indirect purchasers. This limitation was deemed necessary to eliminate the risk of multiple recoveries against a single group of defendants by both direct and indirect purchasers. The court then analyzed each of the three theories of liability advanced by the plaintiffs under this limitation.

First, it said that while the higher prices allegedly charged to American dealers may have been passed on to American consumers, the dealers were the direct purchasers and the ones directly injured by the higher prices. The court explained that the plaintiffs could only recover if they could prove that the dealers were willingly and illegally involved in the alleged conspiracy. Otherwise the risk of double recovery by both consumers and dealers prevented a claim against the manufacturers. The plaintiffs were given sixty days to add American dealers if they wished to proceed with this theory.

Second, the court considered claims that the restrictions imposed by the manufacturers effectively foreclosed a wholesale discount distribution channel in which Canadian dealers might have sent cars to American dealers who then might have sold them to American consumers, passing along part of the discount. The court explained that, under this theory, to exclude the possibility of a double recovery, the plaintiffs would have to prove the willing and illegal participation of Canadian dealers. Again, plaintiffs were given additional time to add these dealers as parties if they so chose.

Third, the court analyzed the plaintiffs' claim that they had been harmed by policies that effectively prevented them from buying directly from Canadian dealers. The court noted that, as the Canadian dealers were also being harmed by the restrictions, the *Illinois Brick* prohibitions against indirect purchasers still applied. The court acknowledged that limitations on personal jurisdiction over these Canadian dealers could make joining them an impossibility.

In *Canadian Motor Vehicles Antitrust I*, the court addressed an argument by the plaintiffs that, since the dealers in question had functional unity with the manufacturers, they should be entitled to proceed under the ownership or control exception to *Illinois Brick*. The court declined to extend this exception, which allows indirect purchasers to challenge such vertical restraints when the direct purchasers are actually or functionally owned and/or controlled by the manufacturers. The court found that automobile dealers and manufacturers do not function as a unitary entity on the distribution chain.

Finally, the court considered the plaintiffs' request for injunctive relief. Finding that an injunction posed no risk of a double recovery, as the manufacturers should be able to comply with multiple injunctions from both consumers and

dealers, the court ruled that *Illinois Brick* did not apply to this type of relief and allowed the plaintiffs' claims for injunctive relief to proceed.

The second decision in this case, *Canadian Motor Vehicles Antitrust II*, is discussed under the topic heading "Jurisdiction."

***Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp.*, 374 F.3d 701, Bus. Franchise Guide (CCH) ¶ 12,852 (8th Cir. July 12, 2004)**

In *Reeder-Simco*, the U.S. Court of Appeals for the Eighth Circuit upheld a federal district court judgment from Arkansas. As discussed under the topic heading "Statutory Claims," the jury verdict and district court judgment found that Volvo Truck failed to deal in good faith and in a commercially reasonable matter as required by the Arkansas Franchise Practice Act. The Eighth Circuit also upheld a judgment against Volvo Truck for violation of the Robinson-Patman Act (the "RPA") based on "secondary-line" injury. A secondary-line RPA violation occurs when a seller's price discrimination injures competition among its customers. In the proceedings before the district court, Volvo Truck stated its intention to more than double the average market size of its dealers and to decrease the number of dealers from 146 to 75. Volvo Truck also refused to give the complaining dealer the same price concessions granted to other, more favored dealers. Reviewing the damage award in favor of the plaintiff, the Eighth Circuit held that the plaintiff was a "purchaser" under the RPA and that Volvo Truck discriminated in price between the plaintiff and more favored dealers in a manner that substantially affected competition for truck sales in interstate commerce. Further, the Eighth Circuit concluded that the plaintiff had not only demonstrated a reasonable possibility of competitive injury sufficient to show an RPA violation, it had also shown actual injury sufficient to recover treble damages under the RPA.

***American Top English, Inc. v. Lexicon Mktg. (USA), Inc.*, No. 03-C-7021, 2004 WL 1403695, Bus. Franchise Guide (CCH) ¶ 12,856 (N.D. Ill. June 21, 2004)**

This case is discussed under the topic heading "Statutory Claims."

***Cupp v. Alberto-Culver USA, Inc.*, 310 F. Supp. 2d 963, Bus. Franchise Guide (CCH) ¶ 12,866 (W.D. Tenn. Mar. 29, 2004) (*Cupp II*)**

An earlier decision in this case (*Cupp I*) is discussed under the topic heading "Jurisdiction." In *Cupp II*, certain defendants in an antitrust suit sought to dismiss a hair care distributor's complaint against them. The plaintiff distributor sued a French manufacturer, its American subsidiaries, other hair care products manufacturers and their subsidiaries, and a local distributor. The plaintiff's antitrust claims were based upon the defendants' alleged unlawful failure to provide the plaintiff with hair care products for resale. More specifically, the plaintiff alleged that its supply of "exclusive salon hair care products" from two local distributors in Memphis had been unlawfully restrained because—following the distributors' acquisition by the defendant hair care manufacturers—the manufacturers

threatened to cease the supply of beauty products for resale in plaintiff's salons unless the plaintiff signed an unfavorable distribution agreement. The plaintiff refused to sign the unfavorable contract. Thereafter the defendants ceased supplying product for resale to the plaintiff. The plaintiff suffered severe economic losses as a result and filed its antitrust complaint in the U.S. District Court for the Western District of Tennessee.

In considering whether it should dismiss the plaintiff's antitrust claims, the court first noted that dismissal was proper because it could not identify either the relevant geographic market or product market where the injury occurred. More specifically, it was impossible to isolate a geographic market in view of the plaintiff's conflicting allegations. The plaintiff spoke of the defendants' international reach with respect to the distribution of hair care products yet the alleged antitrust injury was localized in nature. Moreover, the plaintiff's claim that it suffered antitrust injury in the "exclusive salon hair care products" market was insufficiently vague for purposes of maintaining an antitrust claim, the court held. The court observed that there were numerous suppliers, manufacturers, and brands of hair care products throughout the world. The plaintiff's complaint was devoid of any explanation as to which of these brands were interchangeable with the brands that the defendants allegedly prevented the plaintiff from distributing. The court thus found that it was impossible to determine any actual boundaries of the "exclusive salon hair care products" market without a more specific definition and an accounting of which brands and suppliers should be included in the relevant market definition.

Further, there could be no unlawful conspiracy where the defendants' conduct in refusing to sell hair care products from five manufacturers to the plaintiff for resale did not result from any sort of concerted action. Rather, the only connection that existed between three of the manufacturers and the local distributor was that the distributor sold their products. With respect to the local distributor and the remaining two manufacturers, there was no concerted action because the remaining two manufacturers were actually parent companies of the local distributor. As a result, these entities constituted a "single enterprise" for purposes of antitrust claims.

There was also an insufficient allegation of monopoly power to support the plaintiff's claims for violation of Section 2 of the Sherman Act. The plaintiff's complaint was deficient in that it alleged only conclusions, rather than facts, to support its allegation of a monopoly. The court therefore had no way of determining to which defendant(s) the allegation of monopoly power related. These allegations—when coupled with the plaintiff's failure to define the relevant market area, its failure to allege any predominant market share, and the lack of any claim that the defendant companies had the power to control prices or product distribution—were insufficient to withstand a motion to dismiss.

Finally, had the plaintiff made the necessary showing of a relevant market for antitrust injury, the acquisition of the local

hair care distributor by certain manufacturers might have been sufficient to support finding a restriction on competition—a necessary element for antitrust injury. However, the court also noted that the acquisitions took place without any stock or asset transfer, thereby exonerating the defendants from any alleged liability under Section 7 of the Clayton Act. In the court's words, simply "having a company distribute a product does not result in that company acquiring assets of the corporation that manufactures that product."

The court ultimately dismissed the plaintiff's complaint on the grounds that it failed to adequately allege a relevant market, failed to allege concerted action among the defendants, the possession of a monopoly power by any defendant, or the acquisition of stock of another corporation by any defendant other than one. In the process, the court denied the plaintiff's motion for summary judgment and denied the plaintiff's concurrent motion to enjoin the acquisitions.

***Green Country Food Mkt., Inc. v. Bottling Group, LLC*, 371 F.3d 1275, Bus. Franchise Guide (CCH) ¶ 12,869 (10th Cir. June 22, 2004)**

In this case, the U.S. Court of Appeals for the Tenth Circuit refused to apply a *Kodak* "lock in" theory to sustain a claim under the Oklahoma Antitrust Reform Act brought by a group of retail stores against their local distributor of Pepsi and affiliated beverage products. The plaintiffs alleged that the defendant, Bottling Group, unlawfully discontinued sales to the plaintiffs' stores in response to a price discrimination lawsuit the plaintiffs had previously brought against Bottling Group's predecessor-in-interest. The plaintiffs asserted state law claims for monopolization, attempt to monopolize, conspiracy to monopolize, and denial of access to an essential facility. The Tenth Circuit affirmed the district court's grant of summary judgment in favor of the defendant.

Because the Oklahoma Act is construed in accordance with federal antitrust law, the Tenth Circuit analyzed the claims under comparable provisions of the Sherman Act. The central issue was the definition of a relevant product market. The court noted that, in general, a manufacturer's own products do not themselves comprise a relevant product market. The plaintiffs, however, argued for application of the exception to this rule recognized in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992). In *Kodak*, the Supreme Court held that, because *Kodak* equipment owners were "locked in" to *Kodak*'s parts and services, *Kodak*'s parts and services were not interchangeable with the parts and services of other manufacturers and thus constituted their own product market.

The Tenth Circuit refused to apply *Kodak* to these facts, however. The court concluded that the soft drink industry was a "prototypical example of an industry in which products are so interchangeable that control over one brand cannot be an illegal monopoly." The court also rejected the plaintiffs' argument that the group of products offered by Bottling Group constituted a "cluster market" that could sustain their antitrust claims. A "cluster market" exists where a seller provides a full line of products or services that itself is the object of consumer demand. It thus constitutes a separate product market consisting

of that particular “cluster” of products or services. The court rejected this argument as well because the plaintiffs presented no evidence that the 155 different products distributed by Bottling Group constituted a cluster that itself was the object of customer demand. The court also found no evidence that Bottling Group had monopoly power in such a cluster market.

This case is consistent with the relatively restrictive application of the *Kodak* rationale to franchising and distribution cases. This case was an easier call than most, however, because of both the inherent interchangeability of the products involved and the plaintiffs’ apparent failure of proof on the key issues.

***Goodloe v. Nat’l Wholesale Co., Inc.*, No. 03-C-7176, 2004 U.S. Dist. LEXIS 13630, Bus. Franchise Guide (CCH) ¶ 12,886 (N.D. Ill. July 19, 2004)**

In this case, the U.S. District Court for the Northern District of Illinois found that an electronics retail franchise was not a commodity that could give rise to a claim for violation of the Robinson-Patman Act.

Goodloe, apparently a frequent litigant, entered into an agreement for a license to sell electronics, indirectly, for National Wholesale Company (NWC). This arrangement was accomplished through an agreement whereby Goodloe leased NWC’s franchise services from a third party named Axin. When NWC did not provide the level of service that Goodloe expected, he stopped making payments on the lease and sued NWC and Axin alleging numerous federal and state law claims.

Among the claims asserted by Goodloe was an allegation that defendants discriminated against him in violation of the Robinson-Patman Act. Specifically, Goodloe contended that the defendants charged him higher prices and offered him less favorable lease terms than they offered his purported competitors. The *Goodloe* court dismissed this count for failure to state a claim upon which relief could be granted “because it allege[d] no facts about who his putative competitors are or the favorable prices and terms actually granted to his competitors.” Likewise, the court held that the Robinson-Patman Act applied only to “commodities.” According to the *Goodloe* court, “the licenses and services leased to Goodloe [including the operation of an electronics retail franchise] do not constitute ‘commodities’ under the Robinson-Patman Act.” For these reasons, the *Goodloe* court concluded that Goodloe’s claims could not survive the defendants’ motion to dismiss.

Arbitration

***Birmingham News Co. v. Horn*, Nos. 1020552, 1020553, 1020554, 1020555, 1020556, 1010557, 2004 WL 1293993, Bus. Franchise Guide (CCH) ¶ 12,857 (Ala. June 11, 2004)**¹

A newspaper supplier, *Birmingham News*, appealed to the Alabama Supreme Court a lower court’s confirmation of an arbitration award in a proceeding against former franchisees. The *News* opposed confirmation on the basis that—in determining liability and damages—the arbitrators manifestly disregarded the law.

The burden on a party seeking to vacate an arbitration award on grounds of “manifest disregard” is a heavy one. The complaining party must show that the panel knew of a governing legal principle and refused to apply it, and that the legal principle ignored was one that was defined, explicit, and applicable to the case. Analyzing the facts of the dispute, the panel did not manifestly disregard the law with respect to its finding of promissory fraud, the Alabama Supreme Court held. The panel found that the *News* defrauded the plaintiffs by intentionally and falsely representing to them that their dealerships would be renewed so long as they adequately performed. Moreover, the *News* presented no legal authority in support of its arguments to the contrary—including its claim that the plaintiffs’ fraud claims were allegedly barred by the statute of limitations. The supplier’s lack of contrary legal authority and its failure to provide any conflicting facts allowed the court to easily determine that the panel’s decision on the fraud claims would remain intact.

Moreover, the panel did not manifestly disregard the law in determining that the various franchisees’ claims should be consolidated. Rather, the panel is afforded wide discretion in structuring arbitration proceedings. Notably, to avoid any issues concerning unlawful consolidation, the arbitrators in this case established various safeguards to properly direct the flow of testimony and other evidence at the hearing.

The Alabama Supreme Court held that the panel was correct in determining that each plaintiff was entitled to significant damages as a result of the *News*’s unlawful conduct. The panel manifestly disregarded the law in one respect, however, the court held. In addition to punitive damages and damages for mental anguish, the panel awarded each plaintiff damages for lost profits *and* lost franchise value. The panel characterized the awards for lost future profits and lost franchise value as distinct. The court disagreed, however, finding these damages awards to be “plainly duplicative.” In the absence of any guidance from the complaining party as to which category of damages the court should allow, plaintiffs were allowed to keep the higher of the two categories: lost future profits. Finally, because the panel carefully calculated its punitive damage award as 2.5 times the amount of the total damages suffered by each plaintiff, the court could find no basis to reverse the panel’s award as to punitive damages.

***Choice Hotels Int’l, Inc. v. Niteen Hotels (Rochester) LLC*, 103 Fed. Appx. 489, Bus. Franchise Guide (CCH) ¶ 12,855 (4th Cir. July 9, 2004)**

Counsel for the franchisee in this case, Niteen Hotels (Niteen), was properly excluded from an arbitration hearing when the franchisee failed to inform opposing counsel and the arbitrator that its representative would attend the hearing until nearly the eve of the arbitration proceeding. AAA Rule 26 requires that a party “shall notify” opposing counsel and the arbitrator of the name of its representative at least three days before the hearing. In view of that requirement, the court held that the arbitrator acted within his

authority by determining that Niteen's counsel was not permitted to attend the arbitration hearing.

Niteen also complained that the arbitrator abused his discretion by refusing to extend the date of the arbitration hearing so as to comply with the three days' notice requirement of Rule 26. The court disagreed, observing that Niteen was not previously prohibited from notifying the other parties and the AAA of its representative's name. It was therefore proper for the arbitration hearing to proceed as scheduled.

Finally, Niteen argued that the arbitrator's decision violated Maryland's strong policy in affording persons a right to counsel. The parties' arbitration agreement specifically mandated that only the *substantive* laws of Maryland would govern their dispute, whereas procedure would be subject to the AAA Commercial Arbitration Rules. Therefore, the arbitrator did not abuse his discretion in refusing to allow Niteen's counsel to appear at the arbitration hearing when the arbitrator and opposing counsel did not receive timely notification of the party representative's name until the eve of the hearing.

***Sharif v. Wellness Int'l Network, Ltd.*, Bus. Franchise Guide (CCH) ¶ 12,872 (7th Cir. July 21, 2004)**

In this case, the U.S. Court of Appeals for the Seventh Circuit reversed the district court's denial of the defendant's motion to compel arbitration. The plaintiff had signed distributorship agreements with defendant Wellness International Network (WIN). He later sued for alleged violations of RICO, federal securities law, and the Illinois Consumer Fraud Act, claiming that WIN was an illegal pyramid scheme. Shortly after filing this action, the plaintiff filed another lawsuit against the same defendant alleging substantially similar claims as a class action. In the related case, WIN filed a motion to compel arbitration based on the arbitration provisions in the distributorship agreements. The district judge in the related case granted WIN's motion.

In *Sharif*, however, WIN first filed motions to dismiss for improper venue under Federal Rule of Civil Procedure 12(b)(6) and 28 U.S.C. § 1406(a). Before the court ruled on the motions to dismiss, WIN also filed a motion to compel arbitration, citing the order compelling arbitration in the related case. The district court in *Sharif* denied WIN's motion, however. The district court concluded that the motion to compel arbitration was "superfluous" because WIN already had pending motions to dismiss, including one for improper venue based on the designated arbitral forum.

The Seventh Circuit made short work of the district court's decision. It explained that the Federal Arbitration Act provides that, if the parties have an arbitration provision and the asserted claims are within its scope, a motion to compel arbitration cannot be denied. The Seventh Circuit also rejected the plaintiff's attempt to support the lower court's decision on the ground that WIN waived its right to arbitrate by pursuing its motions to dismiss. The court noted that a contractual right to arbitrate may be waived by pursuing a judicial forum for resolution of the dispute. WIN had not waived its right to arbitrate, however, merely by filing these motions to dismiss. The court noted that the diligence or lack thereof of the parties seeking arbitration should weigh heavily in any waiver

decision. In other words, did the party "do all it could reasonably have been expected to do to make the earliest feasible determination of whether to proceed judicially or by arbitration?" The court noted that no discovery had taken place. It distinguished other waiver cases where the party had removed a state action to federal court, propounded and received substantial discovery, and waited until shortly before trial to invoke the arbitration clause.

Finally, the court also rejected the plaintiff's effort to meet the contractual exception to the arbitration clause for claims worth more than \$100,000. The plaintiffs' individual claims were each less than the \$100,000 threshold. The court held that the plaintiffs could not aggregate their claims to exceed that threshold, citing authority holding that arbitration claims of multiple parties generally cannot be consolidated.

***BDK, Inc. v. Escape Enters., Inc.*, No. 03-35178, 2004 U.S. App. LEXIS 12406, Bus. Franchise Guide (CCH) ¶ 12,888 (9th Cir. June 22, 2004)**

This case is discussed under the topic heading "Statutory Claims."

***Asia Pac. Indus. Corp. v. Rainforest Café Inc.*, 380 F.3d 383, Bus. Franchise Guide (CCH) ¶ 12,892 (8th Cir. Aug. 23, 2004)**

Asia Pacific illustrates that even preliminary agreements to arbitrate may be deemed enforceable by a court. In *Asia Pacific*, the franchisor entered into a broker agreement with Asia Pacific whereby the broker was obligated to find a suitable franchisee to open a Rainforest Café franchise in Asia. A dispute developed between the parties concerning the brokerage fee amount owed by Rainforest Café. After suing Rainforest Café in federal court, the broker moved to compel arbitration pursuant to an allegedly enforceable arbitration agreement between the parties. Rainforest Café defended on the grounds that the parties never executed an enforceable arbitration agreement. The *Asia Pacific* court reviewed correspondence relating to the commencement of the brokerage relationship. Based on that review, the court determined that—while all the details of the agreement to arbitrate were not finalized—the parties certainly envisioned arbitration as the appropriate dispute resolution mechanism for their business relationship. As the court noted, the parties had agreed to arbitration, and it only remained for the lawyers to work through the details. Rainforest Café later proposed numerous revisions to the preliminary agreement to arbitrate. By the time those changes were suggested, the court held, the parties had already reached an agreement to arbitrate. Under the circumstances, the follow-up correspondence was merely a request to change the terms of the parties' already existing contract, the court held.

Attorney Fees

***Dryvit Sys. Inc. v. Great Lakes Exteriors, Inc.*, 96 Fed. Appx. 310, Bus. Franchise Guide (CCH) ¶ 12,870 (6th Cir. Apr. 20, 2004)**

Under Michigan law, attorney fees are considered "damages" rather than a "cost" of pursuing an action. As a result, a manufacturer that prevailed in a dispute with its franchisee and

later moved in a separate action for an award of attorney fees was barred from doing so by *res judicata*.

As *Dryvit* suggests, it is prudent for all parties to at least plead their entitlement to attorney fees in the underlying action given the distinction between damages and costs. In this case, the manufacturer neither pled any entitlement to attorney fees in the underlying action nor actually sought recovery of such attorney fees in the previous action. As a result, the court would not later hear a claim for damages relating to the underlying lawsuit in a separate action.

Another lesson of *Dryvit* is that a franchisor or manufacturer should never deny—as it did here – the applicability of a contract clause providing for attorney fees to the prevailing party, especially when that clause is raised by the franchisee in its initial pleadings.

***Doctor's Assocs., Inc. v. Duree*, 375 F.3d 618, Bus. Franchise Guide (CCH) ¶ 12,877 (7th Cir. July 15, 2004)²**

In a procedurally complicated case, Doctor's Associates, Inc., the franchisor of Subway restaurants, filed a statutory interpleader action seeking guidance from an Illinois federal court over attorney fees it was ordered to pay to franchisee counsel. After Doctor's Associates litigated with its franchisees, it was ordered to pay the franchisees' attorney fees; this order was later upheld on appeal. By the time the appeal was resolved, however, franchisees' counsel had split into separate law firms. Both law firms served Doctor's Associates with a notice of lien, seeking payment of the fees and costs. The interpleader action sought court intervention to determine which law firm Doctor's Associates was required to pay. In response to the interpleader action, the franchisees and their counsel filed counterclaims asserting that the action amounted to malicious prosecution. The franchisees' counsel simultaneously filed an Illinois state court action for malicious prosecution. The state court granted Doctor's Associates' motion to dismiss the malicious prosecution claims, and franchisee counsel appealed.

As the state court appeal was pending, the federal court dismissed Doctor's Associates' interpleader action—including all counterclaims—without prejudice. The dismissal was based on the conclusion that the state court appellate decision could have preclusive or persuasive effect with respect to the federal claims. The franchisees and their counsel appealed the dismissal of their federal counterclaims to the U.S. Court of Appeals for the Seventh Circuit. As a threshold matter, the Seventh Circuit held that it lacked appellate jurisdiction over the case because the dismissal without prejudice was not a final, appealable order. According to the court, dismissals without prejudice are only appealable when a statute of limitations has run. Because this case did not involve a statute of limitations issue, the Seventh Circuit dismissed the appeal for lack of jurisdiction.

Choice of Forum

***American Top English, Inc. v. Lexicon Mktg. (USA), Inc.*, No. 03-C-7021, 2004 WL 1403695, Bus. Franchise Guide (CCH) ¶ 12,856 (N.D. Ill. June 21, 2004)**

In *American Top English*—as discussed under the topic

headings “State Disclosure/Registration Laws” and “Statute of Limitations”—the U.S. District Court for the Northern District of Illinois dismissed a number of claims for violation of the Illinois Franchise Disclosure Act (the IFDA). The IFDA did not apply to franchise sales outside Illinois, the court held, and other claims for violation of the IFDA were clearly time-barred.

The *American Top English* court also concluded that because the IFDA did not apply to these sales, it could not invalidate a forum selection clause requiring litigation to be brought in Los Angeles. Because the forum selection clause was enforceable, the court dismissed for improper venue the plaintiff's claims on one of its three distribution agreements. The supplier-defendant argued that all of the plaintiff's claims were interrelated and should be dismissed, including claims based on other agreements that did not contain forum selection clauses. Declining to extend the forum selection clause to the other agreements, the court retained jurisdiction over the other claims. The court concluded that the hardships on the parties in conducting parallel litigation did not justify dismissal of claims that were not governed by the contractual choice of forum.

Class Actions

***In re New Motor Vehicles Canadian Export Antitrust Litig.*, 307 F. Supp. 2d 136, Bus. Franchise Guide (CCH) ¶ 12,848 (D. Me. Mar. 4, 2004) (*Canadian Motor Vehicles Antitrust I*)**
This case is discussed under the topic heading “Antitrust.”

***In re New Motor Vehicles Canadian Export Antitrust Litig.*, 307 F. Supp. 2d 145, Bus. Franchise Guide (CCH) ¶ 12,849 (D. Me. Mar. 4, 2004) (*Canadian Motor Vehicles Antitrust II*)**
This case is discussed under the topic heading “Jurisdiction.”

Contract Issues

***Sookhoo v. Becton Dickinson & Co.*, 104 Fed. Appx. 825, Bus. Franchise Guide (CCH) ¶ 12,883 (3d Cir. July 28, 2004)**

The plaintiff in *Sookhoo* claimed exclusive distribution rights for Becton Dickinson (BD) in Trinidad. In support of this claim, however, the plaintiff could not produce a copy of any written agreement. Based on the absence of an agreement and BD's assertion that any agreement was between plaintiff and one of BD's foreign subsidiaries, the district court dismissed the case for lack of subject matter jurisdiction. The U.S. Court of Appeals for the Third Circuit reversed this decision. The Third Circuit held that dismissal was inappropriate because the plaintiff had presented an issue of fact regarding the existence of a contract that BD did not effectively controvert. The Third Circuit also based the reversal on the district court's failure to consider the plaintiff's “instrumentality” argument, i.e., that BD's control over its subsidiaries was so pervasive as to render them a single entity for purposes of the lawsuit.

Copyrights

***Practiceworks, Inc. v. Prof'l Software Solutions of Ill., Inc.*, Nos. JFM-02-1205, JFM-02-1206, 2004 WL**

1429955, Bus. Franchise Guide (CCH) ¶ 12,868 (D. Md. June 23, 2004)

The plaintiffs in this case were software licensors that sought to enjoin a terminated dealer from continuing to use the plaintiffs' dental management software to service end user customers to which the defendant had previously sold the software. Upon termination, the dealer agreement required the dealer to return "any and all materials regarding the Products [which included the software program] in any form whatsoever . . . provided [plaintiffs] will pay Dealer for the price Dealer paid for any unopened Products and shall pay fair value for other items of value which were purchased from [plaintiffs]."

Following its termination as a dealer, the defendant returned some of the materials that it was obligated to return. The defendant did not return all copies of the software in its possession, however. The plaintiffs claimed that the defendant's failure to return and ongoing use of the software violated both the dealer agreement and the Copyright Act.

The court first concluded that the dealer agreement was unambiguous and required the defendant to return all copies of the software. The court held that the defendant also breached the dealer agreement and committed copyright infringement by using the software on its computers to service end users. The court held that the defendant copied or reproduced the software each time it used the software. To use the software, the defendant loaded it into a computer's random access memory (RAM), which requires copying the software from a disk or other storage media into the RAM. The Maryland district court noted that numerous other courts have held that loading software into a computer's RAM constitutes copying of the software in violation of the Copyright Act.

This holding has significance for terminated franchisees or licensees that attempt to use after termination copies of proprietary software they might have acquired from the franchisor or licensor even at some cost. If the terms of the license require the licensee to return the software upon termination, the licensee will not be able to continue to use the software following termination.

***Tempco Elec. Heater Corp. v. Temperature Eng'g Co.*, No. 02-C-3572, 2004 U.S. Dist. LEXIS 10124, Bus. Franchise Guide (CCH) ¶ 12,845 (N.D. Ill. May 27, 2004)**

***Tempco Elec. Heater Corp. v. Temperature Eng'g Co.*, No. 02-C-3572, 2004 U.S. Dist. LEXIS 12130, Bus. Franchise Guide (CCH) ¶ 12,846 (N.D. Ill. June 29, 2004)**

This case is discussed under the topic heading "Trademark Infringement."

Damages

***JGR, Inc. v. Thomasville Furniture Indus., Inc.*, 370 F.3d 519, Bus. Franchise Guide (CCH) ¶ 12,850 (6th Cir. June 3, 2004)**

The issue on appeal in *JGR* was whether a furniture franchisee could establish damages through lay witness testimony. The purported "lay" witness admitted that he had no knowledge of the plaintiff's business operations. Instead, he relied primarily on information supplied by the franchisee's

principal owner without any independent verification of that information.

A secondary issue on appeal was whether the district court properly excluded the manufacturer's request to submit proposed interrogatories to the jury. In the manufacturer's view, these interrogatories were necessary to ensure that the jury did not focus upon testimony concerning a previous oral contract between the parties in determining the existence of a breach of the written agreement at issue in this action.

The underlying dispute arose when Thomasville allowed a competing furniture retailer to set up shop across the street from the plaintiff's gallery. The competing retailer had showroom space significantly less than the 7,500 square feet that Thomasville agreed all dealers would maintain. Before the dispute, Thomasville requested that the plaintiff sign a revised gallery agreement. The revised gallery agreement required the plaintiff to maintain at least 7,500 square feet of showroom space dedicated to the Thomasville line. The plaintiff signed the agreement but made notes on the back of the agreement. The plaintiff's notes reiterated statements from the manufacturer that "all Thomasville dealers existing or new will be held to the same requirements."

At trial, the plaintiff attempted to prove its damages through a lay witness who was a CPA and lawyer who had never been an owner, officer, or director of the retailer. This "lay" witness simply regurgitated information provided to him by the plaintiff's principal owner. The jury ultimately determined that Thomasville breached the parties' agreement by refusing to demand that all other Thomasville dealers maintain showroom space of at least 7,500 square feet. Based upon that finding of liability, the jury awarded damages to the terminated plaintiff in the amount of \$1.5 million. The U.S. Court of Appeals for the Sixth Circuit held that a new trial was warranted on the issue of damages. The Sixth Circuit based its holding on the fact that the plaintiff's damage witness was not properly qualified as a lay witness because he did not testify to his own perceptions. Instead, he simply repeated the information that he had been provided by the plaintiff.

The plaintiff alleged that Thomasville made previous oral promises that it would not sell Thomasville furniture to the competitor located across the street. Those promises were not a subject of the plaintiff's claims in *JGR*. The court nevertheless allowed some evidence of the alleged oral agreements as background testimony concerning the relationship between *JGR* and Thomasville before execution of the current written agreement. In doing so, the court instructed the jury to consider the oral agreements only to the extent that they could help the jury understand the intentions of the parties when they signed the written agreement in dispute. On appeal, the Sixth Circuit found that, contrary to Thomasville's objections, the district court did not abuse its discretion in refusing the manufacturer's request to submit its own proposed jury instructions given that those instructions were consistent with the district court's charge to the jury.

***Amoco Oil Co. v. Gomez*, 379 F.3d 1266, Bus. Franchise Guide (CCH) ¶ 12,890 (11th Cir. Aug. 6, 2004)**

As discussed under the topic heading “Termination and Nonrenewal,” Amoco appealed the trial court’s decision to submit its dealer’s breach of contract claim to the jury. The dealer alleged that Amoco breached the parties’ commission agreements by failing to maintain in working order the fuel pumping equipment at the dealer’s station. On appeal, Amoco claimed that the jury’s \$205,725 damages award to the dealer was improper for two reasons. First, the damages question should not have been submitted to the jury. Second, the plaintiff lacked standing to recover amounts paid by her closely held entities. The U.S. Court of Appeals for the Eleventh Circuit agreed that amounts paid by the dealer’s corporations in connection with the franchise and other agreements could not be recovered by the dealer in this litigation. In addition, the court held that because the trial court granted summary judgment in favor of Amoco on the dealer’s claim that Amoco breached the Trial Franchise Lease, the jury should never have deliberated damages on that claim. After reducing the damages award by amounts paid by nonparties and amounts awarded under dismissed claims, the Eleventh Circuit held that the trial court should have reduced the judgment as a matter of law by \$198,428 and awarded the dealer only \$7,297.

***Birmingham News Co. v. Horn*, Nos. 1020552, 1020553, 1020554, 1020555, 1020556, 1010557, 2004 WL 1293993, Bus. Franchise Guide (CCH) ¶ 12,857 (Ala. June 11, 2004)**

This case is discussed under the topic heading “Arbitration.”

Definition of Franchise

***International Truck & Engine Corp. v. Bray*, 372 F.3d 717, Bus. Franchise Guide (CCH) ¶ 12,847 (5th Cir. June 3, 2004)**

This case is discussed under the topic heading “Statutory Claims.”

***Auto-Chlor Sys. of Minn., Inc. v. JohnsonDiversey*, 328 F. Supp. 2d 980, Bus. Franchise Guide (CCH) ¶ 12,861 (D. Minn. July 19, 2004)**

This case is discussed under the topic headings “Good Faith and Fair Dealing” and “Unfair Competition/Unfair and Deceptive Practices.”

Encroachment

***JGR, Inc. v. Thomasville Furniture Indus., Inc.*, 370 F.3d 519, Bus. Franchise Guide (CCH) ¶ 12,850 (6th Cir. June 3, 2004)**

This case is discussed under the topic heading “Damages.”

***Auto-Chlor Sys. of Minn., Inc. v. JohnsonDiversey*, 328 F. Supp. 2d 980, Bus. Franchise Guide (CCH) ¶ 12,861 (D. Minn. July 19, 2004)**

The encroachment implications of this case are discussed under the topic heading “Good Faith and Fair Dealing.” See also the discussion under the topic heading “Unfair Competition/Unfair and Deceptive Practices.”

***Franklin Tractor Sales v. New Holland N. Am., Inc.*, No. 03-3520, 2004 U.S. App. LEXIS 16333, Bus. Franchise Guide (CCH) ¶ 12,887 (6th Cir. Aug. 5, 2004)**

In *Franklin Tractor*, the U.S. Court of Appeals for the Sixth Circuit affirmed the district court’s grant of summary judgment in favor of New Holland, a construction equipment manufacturer. The plaintiff, an equipment dealer, had asserted claims for tortious interference because New Holland had begun a national accounts program whereby it began selling equipment directly to the plaintiff’s customer, NationsRent.

The decision of the Sixth Circuit stands in sharp contrast to a number of arbitration decisions in which dealers have obtained substantial damage awards for similar conduct. The efforts by equipment manufacturers to sell directly to certain customers reflects changes in the competitive marketplace. These include the growth of “rent to rent” businesses such as NationsRent and Hertz Equipment Rental that have large operations on a nationwide basis. In the national accounts program at issue in *Franklin Tractor*, New Holland even paid dealers a commission for national account sales in their territory. The plaintiff alleged, however, that it would have received more sales and more money if the national accounts program had not been instituted.

Regardless of whether the plaintiff’s allegation had any merit, the Sixth Circuit easily disposed of the dealer’s tortious interference claim as a matter of law. Applying Ohio law, the Sixth Circuit considered the factors relevant to whether alleged interference is privileged:

- (1) the nature of the actor’s conduct;
- (2) the actor’s motive;
- (3) the interests of the other with which the actor’s conduct interferes;
- (4) the interests sought to be advanced by the actor;
- (5) the proximity or remoteness of the actor’s conduct to the interference;
- (6) the social interests in protecting the freedom of contract and the interference with such; and
- (7) the relations between the parties.

One of the facts that was critical to the Sixth Circuit’s holding in *Franklin Tractor* was the language of the dealer agreement. The dealer agreement expressly reserved to New Holland the right to “make sales, loans or leases of products to others without liability to the Dealer.” Especially in light of that contractual provision, the court found no tortious interference as a matter of law.

In reaching its conclusion, the Sixth Circuit noted that New Holland had begun direct sales in response to an approach from and to protect its relationship with NationsRent. A critical factor in the *Franklin Tractor* decision seemed to have been the sixth factor relevant to tortious interference claims under Ohio law, “the social interests in preserving freedom of contract.” The Sixth Circuit observed:

In this regard, although plaintiff may have worked for many years to develop its profitable relationship with NationsRent, economic reality dictates that as circumstances changed, the parties remained free to pursue the most advantageous relationships as they presented themselves. Public policy does not require that plaintiff, defendant and NationsRent to [sic] remain locked in their earlier arrangement in order to protect plaintiff’s interests, no matter how hard plaintiff worked to develop them.

Fraud

***Auto-Chlor Sys. of Minn., Inc. v. JohnsonDiversey*, 328 F. Supp. 2d 980, Bus. Franchise Guide (CCH) ¶ 12,861 (D. Minn. July 19, 2004)**

The allegations of promissory fraud involved in this case are discussed under the topic heading “Good Faith and Fair Dealing.”

***Birmingham News Co. v. Horn*, Nos. 1020552, 1020553, 1020554, 1020555, 1020556, 1010557, 2004 WL 1293993, Bus. Franchise Guide (CCH) ¶ 12,857 (Ala. June 11, 2004)**

This case is discussed under the topic heading “Arbitration.”

FTC Franchising Rule

***Federal Trade Comm’n v. Nat’l Bus. Consultants, Inc.*, 376 F.3d 317, Bus. Franchise Guide (CCH) ¶ 12,853 (5th Cir. June 25, 2004)**

In 1991, the Federal Trade Commission had obtained a \$3 million judgment against National Business Consultants, Inc. and its sole shareholder, Robert Namer, for numerous violations of the FTC Rule. These violations included the use of unsupported earnings claims, misrepresentations to franchisees, and failure to provide required disclosures. Ten years later, the judgment remained unsatisfied. The FTC therefore conducted a judgment debtor examination under the Federal Debt Collection Procedure Act (the FDCPA) to determine whether Namer had sufficient assets to satisfy the judgment. Based on the examination, the court ruled that Namer violated the FDCPA by fraudulently transferring his income and assets into his closely held entities. Based on this finding, the court amended the FTC judgment to include these entities as additional debtors, and the additional debtors appealed.

The U.S. Court of Appeals for the Fifth Circuit rejected the appellants’ argument that the FTC judgment was not a “debt” to the government under the FDCPA because a portion of the judgment represented damages to be paid to defrauded franchisees. The court held that the scope of the FDCPA was not limited to judgments in which the government was the sole beneficiary. Affirming the lower court’s decision, the Fifth Circuit held that the FDCPA authorized amendment of the judgment to include Namer’s closely held entities. The Fifth Circuit also found that the record supported the district court’s finding that Namer fraudulently transferred his assets to avoid paying the FTC judgment.

Good Faith and Fair Dealing

***Manoochehr Fallah Moghaddam v. Dunkin’ Donuts, Inc.*, 322 F. Supp. 2d 44, Bus. Franchise Guide (CCH) ¶ 12,858 (D. Mass. June 10, 2004)**

This case involved the construction of a franchise agreement provision relating to permissible advertising and promotional fund expenditures by the franchisor. The franchisee-plaintiff claimed that Dunkin’ Donuts breached the franchise agreement and the implied covenant of good faith and fair dealing. These claims were based on the franchisor’s practice of charging certain loss prevention expenses to the advertising

fund and diverting to its own account monies recovered from the franchisees through loss prevention audits, rather than depositing these monies into the fund.

Both parties took extreme positions on the interpretation of the relevant provisions of the franchise agreement. In fact, the court characterized both parties’ positions as “unreasonable.” The court rejected Dunkin’ Donuts’s position that it should be allowed to pay the cost of all loss prevention activities—even those unrelated to the advertising fund—out of the fund’s administrative expenses. The court observed that charging expenses for unrelated loss prevention activities would violate the duty of good faith and fair dealing. However, the court agreed that Dunkin’ Donuts could pay the costs of loss prevention activities related to advertising from the fund (subject to a contractual percentage cap).

On the issue of what Dunkin’ Donuts must repay into the advertising fund, the court also agreed with the franchisor. It held that Dunkin’ Donuts must only repay advertising fees to the fund after a fair allocation of the costs of collection of those fees. The evidence was undisputed that Dunkin’ Donuts’s costs expended in recovering advertising fees from underreporting franchisees exceeded its actual recovery of advertising fees for each of the years in question. The court therefore granted summary judgment to Dunkin’ Donuts because the plaintiff failed to introduce sufficient evidence to create a genuine issue of material fact that Dunkin’ Donuts’s alleged breach of contract had actually caused the plaintiff any harm.

***Auto-Chlor Sys. of Minn., Inc. v. JohnsonDiversey*, 328 F. Supp. 2d 980, Bus. Franchise Guide (CCH) ¶ 12,861 (D. Minn. July 19, 2004)**

The *Auto-Chlor* opinion spends much time analyzing the implied covenant of good faith and fair dealing and delivers mixed results to franchisors and franchisees alike. As the court notes, the implied covenant of good faith and fair dealing is implied in all contracts under Tennessee law. A dishwasher manufacturer did not violate the covenant, the court held, when it refused to (i) undertake additional product development, (ii) promote its individual dealers’ businesses, (iii) develop national and chain accounts for the benefit of its dealers, (iv) prevent its subsidiaries and competing dealers from selling product into the dealers’ exclusive territories, and (v) provide the dealers with its proprietary chemical formulas and specifications.

In reaching its conclusion, the court emphasized that none of the foregoing alleged violations was identified as an obligation of the manufacturer in the various written agreements between the parties. Rather, the contracts provided that the manufacturer would undertake to *research* new products. The contracts did not impose any actual *development* obligations on the manufacturer. The manufacturer *was* contractually obligated to support its dealers’ efforts to promote their respective businesses. The manufacturer had no separate exclusive obligation to do so, however. Nor did the agreements charge the manufacturer with developing national and chain accounts or providing certain trade secrets and proprietary chemical formulas, as alleged by the plaintiffs.

Moreover, under a strict reading of the contract, it was apparent to the court that the manufacturer had not impermissibly encroached on the dealers' exclusive territories. After a series of corporate mergers and acquisitions, a competitor of the Auto-Chlor system (that was now owned by one of the manufacturer's related companies) began distributing competitive product into the dealers' exclusive territories. The dealer agreements prevented the manufacturer from distributing product bearing its own trademark within the dealers' exclusive territories, the court observed. The court held that the manufacturer did not violate the parties' agreement by allowing a subsidiary to distribute competing product in the same territory so long as such product did not bear the "Auto-Chlor" trademark. As the court pointed out, the dealer agreements contained no promise that the manufacturer's affiliates would not compete with the dealers by selling trademarked products other than "Auto-Chlor" in the territory. Thus, to restrict the sale of non-Auto-Chlor products in the territory—by the manufacturer's affiliate—in the absence of any contractual provision to this effect would be to imply a restrictive covenant where none originally existed. Given that restrictive covenants are generally disfavored in the law, and the court's refusal to rewrite the parties' agreement, the dealers' exclusivity arguments were dismissed.

One other dealer complained that the manufacturer violated the exclusivity provisions of the agreement by selling its product to a third party located outside the exclusive territory. This third party then resold the same Auto-Chlor products to customers residing within the dealer's exclusive territory. Looking only to the first sale in the chain of relevant transactions, the court held that the manufacturer's sale to an out-of-state third party did not violate the exclusivity afforded to the dealer under the parties' agreement. The manufacturer therefore did not violate any implied covenant of good faith and fair dealing incorporated therein.

The court refused, however, to dismiss the dealers' overcharging claims as all of these claims were grounded in alleged breaches of contract and the implied covenant of good faith and fair dealing. Specifically, material issues of fact remained concerning whether the manufacturer exercised its discretion to set open price terms for chemicals and products with honesty in fact. Material issues of fact also remained as to whether the manufacturer breached its obligation to sell the same products to other dealers "virtually at cost," as provided for in certain of the governing agreements. Although the dealers would be allowed to pursue their claims based upon overcharges, the court prohibited the dealers from pursuing claims that were more than four years old—the applicable statute of limitations for a breach of contract for sale under Tennessee law. The dealers argued that the statute of limitations had been tolled by the manufacturer's alleged fraudulent concealment of the overcharges. The court concluded, however, that the plaintiffs failed to carry their initial burden of proof with respect to the alleged fraudulent concealment. The dealers produced no information to support their claim that the

manufacturer undertook any affirmative action to conceal the alleged overcharging. Because there was no basis to toll the statute of limitations, the plaintiffs were allowed to proceed with only those overcharging claims that accrued less than four years before filing the lawsuit.

Jurisdiction

***Ramada Franchise Sys., Inc. v. Patel*, No. 03-3494, 2004 WL 1246566, Bus. Franchise Guide (CCH) ¶ 12,843 (3d Cir. June 8, 2004)**

In *Patel*, the U.S. Court of Appeals for the Third Circuit summarily rejected Ramada franchisees' claim that the district court lacked subject matter jurisdiction over a case because it failed to enter a finding that the parties were diverse and the amount in controversy exceeded \$75,000. The franchisees' answer to the complaint admitted the citizenship of the parties and the amount in controversy as alleged by Ramada. The court therefore found the franchisees' argument to be frivolous and held that the district court had subject matter jurisdiction to enter a default judgment against the franchisees.

***In re New Motor Vehicles Canadian Export Antitrust Litig.*, 307 F. Supp. 2d 145, Bus. Franchise Guide (CCH) ¶ 12,849 (D. Me. Mar. 4, 2004) (*Canadian Motor Vehicles Antitrust II*)**

The first decision in this MDL litigation, *Canadian Motor Vehicles Antitrust Litigation I*, is discussed under the topic heading "Antitrust." In *Canadian Motor Vehicles Antitrust II*, the court considered a motion to dismiss for lack of personal jurisdiction by the Canadian entities named as defendants. These defendants were the Canadian subsidiaries of the American vehicle manufacturers and the Canadian Automotive Dealers Association. The court first addressed a disputed issue among courts of appeal and held that Section 12 of the Clayton Act permits worldwide service on alien antitrust defendants, and grants jurisdiction over such defendants to courts located wherever those defendants transact business. The exercise of this jurisdiction must still be consistent with constitutional restrictions, the court observed. Against alien defendants, however, the relevant inquiry is the defendants' contacts with the United States, not just the forum state.

The court then analyzed the contacts of each alien defendant with the United States. The court declined to exercise general personal jurisdiction over the alien defendants despite the plaintiffs' evidence of: defendants' benefit from NAFTA and other international agreements; the substantial automotive trade that goes on between the U.S. and Canada; the defendants' use of American advertising services; the purchase of American-made parts and vehicles; the defendants' sale of cars that ultimately end up in the American marketplace; and the fact that the defendants were parties to American lawsuits. The court dismissed this evidence as inconsequential, because a particular defendant itself must create the connection with the forum. The court found the remainder of the contacts to be insufficient to sustain general jurisdiction.

Next, the court considered the constitutionality of exercising specific personal jurisdiction over each alien defendant.

The court found that it did have jurisdiction over the Canadian Automotive Dealers Association, largely on the basis of allegations that it had participated in a meeting in New York to discuss “the export sales issue.” This meeting was where an alleged agreement to withhold Canadian vehicles from the American marketplace had been reached. This meeting therefore provided a basis for specific jurisdiction.

The court then found that DaimlerChrysler Canada was subject to specific personal jurisdiction, principally because of evidence—some found on its website—that it manufactured some cars specifically for the American marketplace. The other basis for finding jurisdiction with respect to DaimlerChrysler Canada was that it had entered into express nonexport agreements with its dealers, thus creating the complained-of two-tiered distribution system.

The court declined, however, to exercise jurisdiction over Toyota Canada because it neither manufactured vehicles for, nor sold vehicles in, the American marketplace. The court noted that the existence of Toyota Canada non-export agreements was insufficient, as alien corporations are permitted to avoid jurisdictional contacts with America through just such agreements.

Similarly, BMW and Nissan’s Canadian subsidiaries were dismissed for lack of personal jurisdiction principally because there was no evidence that they sold Canadian-manufactured vehicles in the U.S. Judgment regarding Mercedes-Benz was deferred pending further discovery as to whether MB Canada’s nonexport agreement was sufficiently tied to a two-tier distribution system.

Finally, the court rejected a “conspiracy” theory of jurisdiction wherein the jurisdictional contacts and actions of one conspirator could be imputed to all conspirators as being unsupported by the law.

***Cupp v. Alberto-Culver USA, Inc.*, 308 F. Supp. 2d 873, Bus. Franchise Guide (CCH) ¶ 12,865 (W.D. Tenn. Mar. 17, 2004) (Cupp I)**

A later decision in this case (*Cupp II*) is discussed under the topic heading “Antitrust.”

Jurisdiction over a French cosmetics manufacturer by a Tennessee federal court was at the heart of the motion to dismiss in *Cupp I*. The franchisee brought an antitrust suit against the French manufacturer and other parties. In determining that a Tennessee court had no basis to exercise personal jurisdiction over a French manufacturer, the court noted that the French manufacturer had absolutely no direct contact with the State of Tennessee, or, for that matter, the United States in general. The French manufacturer did not maintain office buildings or bank accounts in the United States. It did not pay any amounts associated with doing business in the United States (for example, taxes and franchise fees). It did not maintain any inventory in the United States. Its shares of stock were not traded publicly in the United States. Rather, they were sold exclusively on the Paris Stock Exchange. It held no meetings in the United States during the period in which the injury was allegedly suffered by the plaintiff. Nor did the French manufacturer sell any of its products in the United States or participate in any direct contact with the plaintiff.

Under Tennessee’s long-arm statute, a court may exercise jurisdiction in a federal question case only where the exercise of jurisdiction over the defendant would not violate due process. Due process dictates that exercise of personal jurisdiction over a defendant is proper only if the defendant has “certain minimum contacts” with the forum state giving rise to either general or specific jurisdiction. The French manufacturer in this case had absolutely no contacts with the United States supporting an exercise of general or specific jurisdiction. The court therefore held that the plaintiff did not meet its burden of demonstrating a prima facie case that the court could exercise jurisdiction over the French manufacturer. Additionally, the potentially defective service of process on the French corporation by the Tennessee plaintiff could prevent the foreign defendant from being forced to litigate the dispute in Tennessee. The plaintiff had been instructed by the court to serve the French manufacturer consistent with Federal Rule of Civil Procedure 4. The plaintiff nevertheless violated the Hague Convention by simply mailing a copy of the summons and complaint to the foreign defendant. The Hague Convention does not provide that service of process abroad is effective when a party simply sends the documents directly to the defendant through United States mail. In light of the foregoing, the court found that service of process abroad by United States mail does not comply with the Hague Convention. The appropriate remedy in such a case, the court held, is to stay the proceedings to allow the plaintiff an opportunity to effect proper service on the foreign defendants.

***Doctor’s Assocs., Inc. v. Duree*, 375 F.3d 618, Bus. Franchise Guide (CCH) ¶ 12,877 (7th Cir. July 15, 2004)²** As discussed under the topic heading “Attorney Fees,” the U.S. Court of Appeals for the Seventh Circuit in *Doctor’s Assocs., Inc. v. Duree* concluded that it lacked appellate jurisdiction to review the trial court’s dismissal without prejudice. Because a dismissal without prejudice is not a final order, the court held that it is not entitled to appellate review.

***Sookhoo v. Becton Dickinson & Co.*, 104 Fed. Appx. 825, Bus. Franchise Guide (CCH) ¶ 12,883 (3d Cir. July 28, 2004)**

In *Sookhoo*, the U.S. Court of Appeals for the Third Circuit reversed a district court’s finding that it lacked subject matter jurisdiction over a foreign distributor’s claims. On a motion for summary judgment, the district court held that it lacked subject matter jurisdiction because the facts demonstrated that the distribution agreement at issue involved two foreign entities. The court held that, contrary to the plaintiff’s assertions, the plaintiff entered into an agreement with one of the defendant’s foreign subsidiaries—not the defendant itself. A district court is not permitted to consider the merits of the parties’ positions in determining subject matter jurisdiction, the Third Circuit held. Dismissal of the case was therefore not appropriate. The Third Circuit remanded the case to the district court for resolution of an issue of fact whether the plaintiff had actually entered into

an agreement with the defendant, or in the alternative, whether the defendant could be held responsible for its subsidiaries' conduct under an instrumentality theory.

***Goodloe v. Nat'l Wholesale Co., Inc.*, No. 03-C-7176, 2004 U.S. Dist. LEXIS 13630, Bus. Franchise Guide (CCH) ¶ 12,886 (N.D. Ill. July 19, 2004)**

This case is discussed under the topic heading "Antitrust."

Noncompete Agreements

***Tempco Elec. Heater Corp. v. Temperature Eng'g Co.*, No. 02-C-3572, 2004 U.S. Dist. LEXIS 10124, Bus. Franchise Guide (CCH) ¶ 12,845 (N.D. Ill. May 27, 2004)**

***Tempco Elec. Heater Corp. v. Temperature Eng'g Co.*, No. 02-C-3572, 2004 U.S. Dist. LEXIS 10124, Bus. Franchise Guide (CCH) ¶ 12,846 (N.D. Ill. June 29, 2004)**

This case is discussed under the topic heading "Trademark Infringement."

***BDK, Inc. v. Escape Enters., Inc.*, No. 03-35178, 2004 U.S. App. LEXIS 12406, Bus. Franchise Guide (CCH) ¶ 12,888 (9th Cir. June 22, 2004)**

This case is discussed under the topic heading "Statutory Claims."

Oral Agreements

***JGR, Inc. v. Thomasville Furniture Indus., Inc.*, 370 F.3d 519, Bus. Franchise Guide (CCH) ¶ 12,850 (6th Cir. June 3, 2004)**

This case is discussed under the topic heading "Damages."

***Auto-Chlor Sys. of Minn., Inc. v. JohnsonDiversey*, 328 F. Supp. 2d 980, Bus. Franchise Guide (CCH) ¶ 12,861 (D. Minn. July 19, 2004)**

This case is discussed under the topic headings "Good Faith and Fair Dealing," "Statutory Claims," "Tortious Interference," and "Unfair Competition/Unfair and Deceptive Practices."

***Sookhoo v. Becton Dickinson & Co.*, 104 Fed. Appx. 825, Bus. Franchise Guide (CCH) ¶ 12,883 (3d Cir. July 28, 2004)**

Reversing a district court's dismissal for lack of subject matter jurisdiction, the U.S. Court of Appeals for the Third Circuit held that a Trinidad distributor established a genuine issue of fact as to the existence of his agreement with Becton Dickinson in *Sookhoo*, as discussed under the topic heading "Contract Issues." Although the parties produced no written agreement, the court considered evidence that the parties had a long-standing distribution relationship as sufficient to overcome the defendant's motion for summary judgment and challenge to subject matter jurisdiction.

State Disclosure/Registration Laws

***American Top English, Inc. v. Lexicon Mktg. (USA), Inc.*, No. 03-C-7021, 2004 WL 1403695, Bus. Franchise Guide (CCH) ¶ 12,856 (N.D. Ill. June 21, 2004)**

In *American Top English*, the U.S. District Court for the Northern District of Illinois denied the plaintiff's effort to recover damages under the Illinois Franchise Disclosure Act (the IFDA) for termination of distribution agreements

covering sales in Wisconsin and Indiana. The court found that the plaintiff's claims under the IFDA relied solely on its status as an Illinois corporation with an Illinois principal place of business. It therefore dismissed the plaintiff's IFDA franchise termination claims, following the well-settled principle that the IFDA does not apply to sales made to consumers outside Illinois.

Statute of Limitations

***Federal Trade Comm'n v. Nat'l Bus. Consultants, Inc.*, 376 F.3d 317, Bus. Franchise Guide (CCH) ¶ 12,853 (5th Cir. June 25, 2004)**

In *National Business Consultants*, as discussed under the topic heading "FTC Franchising Rule," the U.S. Court of Appeals of the Fifth Circuit reviewed a district court's order amending an FTC judgment to include entities that received fraudulent transfers from the judgment debtors. The Fifth Circuit held that the FTC's claim to enforce the judgment under the Federal Debt Collection Procedure Act (the FDCPA) was not time-barred by the FDCPA's statute of limitations. The appellants failed to show that the FTC knew of the fraudulent transfers more than two years before it filed suit or that the transfers occurred more than six years before the action. The court affirmed the lower court's decision to amend the judgment to include the additional debtors.

***American Top English, Inc. v. Lexicon Mktg. (USA), Inc.*, No. 03-C-7021, 2004 WL 1403695, Bus. Franchise Guide (CCH) ¶ 12,856 (N.D. Ill. June 21, 2004)**

The plaintiff in *American Top English* claimed that a franchisor violated the Illinois Franchise Disclosure Act (the IFDA) in 1990, 1994, and 1997 by selling unregistered franchises without providing required disclosures. The fact that the plaintiff did not file its complaint until 2003, however, meant that it faced an irrefutable statute of limitations defense. The IFDA bars claims raised more than three years after the alleged violation. Because the plaintiff filed its complaint in 2003, the court concluded that the statute of limitations for pre-sale registration and disclosure violations on all three distribution agreements had run.

In opposing the supplier's motion to dismiss, however, the plaintiff attempted to amend its claims to include post-sale registration and disclosure violations. As a procedural matter, the court rejected the plaintiff's attempt to amend its complaint in response to a motion to dismiss. The court further indicated that the amendment would not save the plaintiff's claims because—as an unregistered franchisor—the defendant was not subject to the IFDA's post-sale registration and disclosure requirements, which apply only to registered franchisors. (This case is also discussed under the topic heading "State Disclosure/Registration Laws.")

***Auto-Chlor Sys. of Minn., Inc. v. JohnsonDiversey*, 328 F. Supp. 2d 980, Bus. Franchise Guide (CCH) ¶ 12,861 (D. Minn. July 19, 2004)**

The statute of limitations implications of this case are discussed under the topic heading "Good Faith and Fair Dealing." This case is also discussed under the topic head-

ings “Statutory Claims,” “Tortious Interference,” and “Unfair Competition/Unfair and Deceptive Practices.”

***Goodloe v. Nat’l Wholesale Co., Inc.*, No. 03-C-7176, 2004 U.S. Dist. LEXIS 13630, Bus. Franchise Guide (CCH) ¶ 12,886 (N.D. Ill. July 19, 2004)**

This case is discussed under the topic heading “Antitrust.”

***BDK, Inc. v. Escape Enters., Inc.*, No. 03-35178, 2004 U.S. App. LEXIS 12406, Bus. Franchise Guide (CCH) ¶ 12,888 (9th Cir. June 22, 2004)**

This case is discussed under the topic heading “Statutory Claims.”

***Enervations, Inc. v. Minn. Mining & Mfg. Co.*, No. 03-3260, Bus. Franchise Guide (CCH) ¶ 12,893 (8th Cir. August 23, 2004)**

The *Enervations* case presents a tough lesson in contractual limitations periods. Enervations sued 3M for various breaches of the parties’ agreement. All of the alleged breaches occurred between 1999 and 2001. Enervations also claimed that 3M’s January 2002 notice terminating its exclusive distribution agreement was wrongful. The distribution agreement contained a one-year limitation on actions for breach. The limitations period began on the date of the breach or, in the alternative, the date on which the nonbreaching party should have become aware of the breach. Under Minnesota law, an action is commenced upon service of the summons. By failing to serve the summons until March 2003, Enervations failed to bring its claim for breaches that had allegedly occurred between 1999 and 2001 within the contractual limitations period. Dismissal of the distributor’s breach of contract claims was therefore affirmed on appeal.

The U.S. Court of Appeals for the Eighth Circuit also held that Enervations’s wrongful termination claim was barred by the contractual limitations period. Although the termination occurred in January 2002, Enervations did not serve the summons on 3M until fourteen months later. Enervations introduced evidence suggesting that the parties agreed to maintain the status quo until April 2002. Based on that evidence, Enervations argued that it complied with the one-year contractual limitations period. Notwithstanding this evidence, the Eighth Circuit found that the termination claims were time-barred for at least two reasons. First, the district court had previously granted Enervations’s counsel leave to amend the complaint, with specific instructions to allege a termination date of “April 2002,” but its counsel failed to do so. Second, correspondence between the parties unambiguously reflected that they agreed to maintain the status quo “without prejudice to the Parties’ respective rights . . . including but not limited to 3M’s claim that it *has terminated the agreement*. . . .” (emphasis supplied). The Eighth Circuit viewed the status quo agreement as completely distinct from the January 2002 termination. It therefore refused to find that the January 2002 termination was extended to a later date. Enervations’s renewed request to amend its complaint to reference an “April 2002” termination date was therefore denied. The Eighth Circuit held that the proposed amendment would be futile as the termination claim would still be time-barred.

Statutory Claims

***Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp.*, 374 F.3d 701, Bus. Franchise Guide (CCH) ¶ 12,852 (8th Cir. July 12, 2004)**

In *Reeder-Simco*, Volvo Truck appealed from an adverse jury verdict and judgment from the federal court in Arkansas. The district court judgment was based on a finding that Volvo Truck violated the Arkansas Franchise Practices Act (the AFPA) by failing to deal with its dealer in good faith and in a commercially reasonable manner. Volvo appealed. On appeal, the U.S. Court of Appeals for the Eighth Circuit rejected Volvo Truck’s contention that the district court lacked subject matter jurisdiction over the truck dealer’s AFPA claim. Volvo Truck argued that the dealer’s claims should be governed by the Arkansas Motor Vehicle Commission Act (the AMVCA) because the AMVCA is more specific to motor vehicle dealerships than the AFPA. Volvo Truck also argued that the dealer failed to exhaust its administrative remedies before the Arkansas Motor Vehicle Commission before filing its lawsuit and that the dealer failed to prove a “willful violation” under the AMVCA.

In its opinion, the Eighth Circuit expressed doubts about which statute—the AFPA or the AMVCA—is more specific to the dealer. It concluded, however, that both statutory schemes related to franchise relationships between motor vehicle dealers and manufacturers. Therefore, under established principles of statutory construction, both statutes should be read “in a harmonious manner if possible” as a single system, the Eighth Circuit held. Applying these principles of construction, the Eighth Circuit found that both statutory schemes provided injured parties the right to sue in court. The Eighth Circuit also found that at least one purpose of the overall system was to protect parties like the dealer from entities like Volvo Truck. The court found no conflict between the two Arkansas statutes. If there were such a conflict, the AFPA would control, the court found. As the Eighth Circuit observed, the AFPA was enacted two years after the AMVCA. Therefore, the Arkansas legislature would have expressly indicated if it intended motor vehicle franchises to be limited to the remedies available under the AMVCA.

***American Top English, Inc. v. Lexicon Mktg. (USA), Inc.*, No. 03-C-7021, 2004 WL 1403695, Bus. Franchise Guide (CCH) ¶ 12,856 (N.D. Ill. June 21, 2004)**

The plaintiff in *American Top English*, a videocassette distributor, claimed that its supplier violated the Illinois Consumer Fraud Act (the ICFA) by misrepresenting material facts and engaging in price discrimination among distributors. The court first concluded that plaintiff failed to allege its ICFA misrepresentation claims with the required particularity and dismissed them without prejudice.

On a more substantive matter, the court held that price discrimination was not actionable under the ICFA. Because Illinois courts previously held that price discrimination and antitrust claims could not be maintained under the ICFA, the court dismissed with prejudice the plaintiff’s ICFA claims based on price discrimination.

***Auto-Chlor Sys. of Minn., Inc. v. JohnsonDiversey*, 328 F. Supp. 2d 980, Bus. Franchise Guide (CCH) ¶ 12,861 (D. Minn. July 19, 2004)**

In a somewhat backwards display of reason, a Minnesota federal court held that the Minnesota Franchise Act (MFA) did not apply to a dispute between a commercial dishwashing dealer and its manufacturer because, as the court noted, there were no “unfair or inequitable practices” of which to complain. The dealer sought summary judgment on the issue of whether it qualified as a “franchisee” under the MFA. The court refused to entertain the request on the basis that, in its view, the finding of a “franchise” was rendered moot by the failure of the dealer’s MFA claims. The *Auto-Chlor* court, however, did not conduct a separate analysis of the facts to determine whether any “unfair or inequitable practices” in violation of the MFA had occurred. Instead, the court adopted certain factual findings related to the dealers’ other claims. Notably, the court failed to hold that these same allegations would support a claim for an “unfair” or “inequitable practice” under the MFA.

As discussed under the topic heading “Good Faith and Fair Dealing,” *Auto-Chlor*’s claim that certain overcharges violated the implied covenant of good faith and fair dealing had survived summary judgment. This case is also discussed under the topic headings “Statutory Claims,” “Tortious Interference,” and “Unfair Competition/Unfair and Deceptive Practices.”

***Sharif v. Wellness Int’l Network, Ltd.*, Bus. Franchise Guide (CCH) ¶ 12,872 (7th Cir. July 21, 2004)**

This case is discussed under the topic heading “Arbitration.”

***Goodloe v. Nat’l Wholesale Co., Inc.*, No. 03-C-7176, 2004 U.S. Dist. LEXIS 13630, Bus. Franchise Guide (CCH) ¶ 12,886 (N.D. Ill. July 19, 2004)**

This case is discussed under the topic heading “Antitrust.”

***BDK, Inc. v. Escape Enters., Inc.*, No. 03-35178, 2004 U.S. App. LEXIS 12406, Bus. Franchise Guide (CCH) ¶ 12,888 (9th Cir. June 22, 2004)**

In *BDK*, a franchisee of the Steak Escape concept agreed with its franchisor to arbitrate claims related to only two of several franchises that were central to the parties’ dispute. The parties’ dispute started over royalty payments. Ultimately, *BDK* sued its franchisor in Washington state court alleging violations of Washington’s Franchise Investment Protection Act (FIPA) and Washington’s Consumer Protection Act. These statutory claims were submitted to arbitration. After a hearing on the merits, the arbitrator found in favor of the franchisor on *BDK*’s breach of contract and Washington statutory claims. The arbitrator also found in favor of Steak Escape on its counterclaims. In subsequent federal court proceedings to confirm the arbitration award, the franchisee sought to overturn the arbitrator’s award on the grounds that the arbitrator had not been impartial and had manifestly disregarded the law.

Based on the facts presented at the hearing, the district court found insufficient grounds to vacate or modify the

arbitrator’s award. The arbitrator’s ruling was limited to only two specific franchises for which the parties had agreed to arbitrate their claims. On that basis, the franchisee argued that the district court improperly applied the doctrine of collateral estoppel to bar the franchisee’s FIPA claims related to another of its franchises. The district court’s decision to apply collateral estoppel to franchises other than the two addressed by the arbitrator was upheld by the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit observed that the arbitrator had resolved the FIPA claims in favor of the franchisor based on facts that the franchisee itself claimed were “common to all of its franchises.” The franchisee contended on appeal that specific issues of fact required that a trial should be held for the third franchise. The Ninth Circuit refused to grant the franchisee’s request since it had not presented any such evidence to the district court.

The Ninth Circuit made short shrift of the franchisee’s argument that the district court improperly applied the statute of limitations to some of its affirmative defenses. As the Ninth Circuit noted, the affirmative defenses were dismissed on the grounds that they had no merit—not on statute of limitations grounds. Even if the franchisee could have established that the franchisor violated the FIPA, the Ninth Circuit held, its only remedy would have been an award of damages or rescission of the franchise agreement. The franchisee would not be entitled to a determination that certain portions of the franchise agreement were unenforceable. Therefore, the district court had properly dismissed the franchisee’s contention that various post-termination obligations of the third franchise agreement should be deemed unenforceable due to the alleged FIPA violations. The contested noncompetition clause was reasonable as it simply prevented the franchisee from selling a particular type of food product for a discrete period of time. The Ninth Circuit also affirmed the district court’s holding that the franchisee violated the noncompetition clause by operating a steak sandwich shop at the very same location from which it operated its Steak Escape franchise.

***Stadium Chrysler Jeep, L.L.C. v. Daimlerchrysler Motors Co., L.L.C.*, 324 F. Supp. 2d 587, Bus. Franchise Guide (CCH) ¶ 12,889 (D.N.J. July 14, 2004)**

This case is discussed under the topic heading “Termination and Nonrenewal.”

***Amoco Oil Co. v. Gomez*, 379 F.3d 1266, Bus. Franchise Guide (CCH) ¶ 12,890 (11th Cir. Aug. 6, 2004)**

This case is discussed under the topic heading “Termination and Nonrenewal.”

***Jet, Inc. v. Shell Oil Co.*, 381 F.3d 627, Bus. Franchise Guide (CCH) ¶ 12,891 (7th Cir. Aug. 24, 2004)**

This case is discussed under the topic heading “Termination and Nonrenewal.”

***Tempco Elec. Heater Corp. v. Temperature Eng’g Co.*, No. 02-C-3572, 2004 U.S. Dist. LEXIS 12130, Bus. Franchise Guide (CCH) ¶ 12,845 (N.D. Ill. May 27, 2004)**

***Tempco Elec. Heater Corp. v. Temperature Eng'g Co.*, No. 02-C-3572, 2004 U.S. Dist. LEXIS 12130, Bus. Franchise Guide (CCH) ¶ 12,846 (N.D. Ill. June 29, 2004)**

This case is discussed under the topic heading “Trademark Infringement.”

***International Truck & Engine Corp. v. Bray*, 372 F.3d 717, Bus. Franchise Guide (CCH) ¶ 12,847 (5th Cir. June 3, 2004)**

The plaintiff in this case challenged a Texas law that prohibits automobile manufacturers from owning or controlling dealerships of any kind in the State of Texas, claiming that the statute violated the dormant Commerce Clause.

The U.S. Court of Appeals for the Fifth Circuit rejected the plaintiff’s challenge. First, the court concluded that the statute applied to manufacturers that wished to operate dealerships for either “new” or “used” vehicles. The court then held that the statute at issue did not violate the dormant Commerce Clause. According to the *International Truck* court, a statute comports with the dormant Commerce Clause unless “the statute impermissibly discriminates against interstate commerce” or unless the statute imposes a burden on interstate commerce that is “clearly excessive in relation to the putative local benefits.” Applying this test, the court found that the statute in question did not “discriminate [] among similarly situated in-state and out-of-state interests,” despite International Truck’s argument that the practical effect of that statute falls primarily on out-of-state companies. The court explained: “that all or most affected businesses are located out-of-state does not tend to prove that a statute is discriminatory.” Likewise, the court found that the statute did not create an “excessive burden” on interstate commerce.

***Auto-Chlor Sys. of Minn., Inc. v. JohnsonDiversey*, 328 F. Supp. 2d 980, Bus. Franchise Guide (CCH) ¶ 12,861 (D. Minn. July 19, 2004)**

This case is discussed under the topic headings “Good Faith and Fair Dealing,” “Statutory Claims,” “Tortious Interference,” and “Unfair Competition/Unfair and Deceptive Practices.”

***International Brands USA, Inc. v. Old St. Andrews Ltd.*, No. 3:02CV333(MRK), 2004 U.S. Dist. LEXIS 11159, Bus. Franchise Guide (CCH) ¶ 12,867 (D. Conn. June 15, 2004)**

On a motion for default judgment, a Connecticut federal court in *International Brands* entered judgment in favor of a whiskey distributor for the supplier’s wrongful termination of an exclusive distributorship. The distributor, International Brands, had entered into an exclusive distributorship agreement with Old St. Andrews (OSA) to distribute scotch whiskey. After a dispute between the parties over a credit owed to the distributor, OSA terminated the distributorship agreement and International Brands sued. During the course of the litigation, OSA commenced voluntary liquidation proceedings in the United Kingdom. After warning OSA that it must appear or risk default, the court entered a default judgment against OSA for breach of contract, breach of the implied covenant, and wrongful termination. These claims were based on International Brands’ allegation that OSA terminated the

exclusive distributorship because International Brands demanded a proper credit from OSA.

Notwithstanding OSA’s default, the court refused to impose liability under the Connecticut Unfair Trade Practices Act (CUTPA). A CUTPA plaintiff cannot merely rely on an admission of breach of contract as a basis for a CUTPA claim, the *International Brands* court held: “simple contract breach is not sufficient to establish a violation of CUTPA, particularly where the count alleging CUTPA simply incorporates by reference the breach of contract claim.”

This case is discussed under the topic heading “Damages.”

***Amoco Oil Co. v. Gomez*, 379 F.3d 1266, Bus. Franchise Guide (CCH) ¶ 12,890 (11th Cir. Aug. 6, 2004)**

The defendant in *Amoco Oil*, Carolyn Gomez, had purchased the inventory and goodwill of an existing Amoco service station in 1997 for \$220,000. In connection with that purchase, she had entered into a one-year Trial Franchise Lease with Amoco. Shortly after entering into the Trial Franchise Lease, Gomez learned about substantial environmental problems at the station from the state environmental agency. Amoco had apparently been aware of the environmental defect and agreed to take corrective action by installing a vapor system at the station. After Amoco installed the new system, however, Gomez experienced repeated problems with the pumping equipment. These problems ultimately caused her to lose customers and revenue.

Before the end of the Trial Franchise Lease and despite the continuing equipment malfunctions, Gomez entered into a three-year Franchise Lease and Dealer Supplier Agreement with Amoco (the PMPA Franchise Agreement). The PMPA Franchise Agreement was governed by the Petroleum Marketing Practices Act and superseded the Trial Franchise Lease. When problems at the station persisted, an Amoco representative suggested that the parties cancel the PMPA Franchise Agreement and enter into two separate agreements. Under this proposal, Amoco—instead of selling the gasoline to Gomez—would itself maintain ownership of the gasoline and establish its price. In return, Gomez would receive a commission on gasoline sales and her rent would be substantially reduced. Amoco also agreed that if Gomez canceled the PMPA Franchise Agreement and entered into the new agreements, it would approve her to operate a second, more profitable station under the same commission agreements. Gomez accepted the offer and signed an agreement canceling the PMPA Franchise Agreement. This cancellation agreement included a summary of the PMPA rights available to a franchisee but not to a commission marketer, which Gomez became under the new agreements.

Because of continuing poor sales, Gomez eventually abandoned the first station. Amoco later sued her to recover the proceeds of gasoline sales that Gomez failed to remit to Amoco and unpaid rent.

Gomez asserted three counterclaims. First, she alleged that Amoco fraudulently induced her to enter into the 1997

Trial Franchise Lease by failing to advise her of the environmental problems and required remedial measures. Second, she alleged that Amoco breached its fiduciary duty to inform her of the environmental problems at the station. Third, she alleged that Amoco breached the Trial Franchise Lease, the PMPA Franchise Agreement, and the subsequent marketing agreements by failing to maintain the gasoline pumps in working order. Gomez also asserted an affirmative defense that Amoco violated the PMPA by failing to satisfy the statutory notice requirements when the parties entered into the commission agreements. The court granted summary judgment in favor of Amoco on all claims under the Trial Franchise Lease and the PMPA Franchise Agreement. The court based its ruling on a finding that the commission agreements constituted a novation of the Trial Franchise Lease and the PMPA Franchise Agreement.

After trial on liability, both parties sought judgment as a matter of law. Reviewing these motions, the court ruled that Gomez breached the commission agreements by abandoning the station and by failing to pay Amoco amounts due for gasoline sales. The court did not, however, enter judgment on Amoco's breach of contract claims. It held that the jury should decide Gomez's affirmative defense that her performance under the commission agreements was excused by Amoco's failure to maintain the fuel pumps and by Amoco's misrepresentations about fixing the fuel pump problems.

The court also struck Gomez's affirmative defense under the PMPA, holding that the statutory notice provisions could be used as a "sword," but not as a "shield." In other words, the court held that the PMPA notice requirements did not provide any affirmative defense to franchisees in termination disputes. Based on this ruling, Gomez moved to amend her counterclaim to add the PMPA claim pursuant to Fed. R. Civ. P. 8(c). Amoco objected on the grounds that it could not prepare to defend the counterclaim while the trial was under way. The court denied Gomez's motion, holding that the parties had mutually canceled the agreement—rendering the PMPA's notice provision inapplicable. In summary fashion, the U.S. Court of Appeals for the Eleventh Circuit held that the district court did not abuse its discretion in refusing Gomez's request to amend her counterclaim after the liability phase of the trial had closed.

***Jet, Inc. v. Shell Oil Co.*, 381 F.3d 627, Bus. Franchise Guide (CCH) ¶ 12,891 (7th Cir. Aug. 24, 2004)**

Following its own holding in *Dersch Energies, Inc. v. Shell Oil Co.*, 314 F.3d 846 (7th Cir. 2002), the U.S. Court of Appeals for the Seventh Circuit in *Jet, Inc. v. Shell Oil Co.* affirmed the district court's dismissal of Shell franchisees' claims under the Petroleum Marketing Practices Act. In both *Dersch* and *Jet*, Shell presented its franchisees with new nonnegotiable agreements that imposed additional requirements and contained terms that the franchisees claimed were unconscionable. After receiving notice from Shell that it would not renew the franchise relationship if the franchisees failed to sign the agreements, the franchisees signed "under protest." As the

court held in *Dersch*, a PMPA claim is available to a franchisee only if its franchise agreement was not renewed or otherwise terminated. Like the franchisees in *Dersch*, the franchisees in *Jet* signed new franchise agreements. Therefore, they could not bring claims under the PMPA. The *Jet* court stressed that a franchisee, upon receiving a notice of nonrenewal from its franchisor, could elect one of two remedies. The franchisee could seek injunctive relief under the PMPA to prevent the franchisor from failing to renew or the franchisee could later seek damages under the PMPA for nonrenewal. After signing a new agreement, however, a franchisee cannot assert a PMPA claim based on a theory of constructive nonrenewal.

***Enervations, Inc. v. Minn. Mining & Mfg. Co.*, 380 F.3d 1066, Bus. Franchise Guide (CCH) ¶ 12,893 (8th Cir. Aug. 23, 2004)**

This case is discussed under the topic heading "Statute of Limitations."

Termination and Nonrenewal

***Birmingham News Co. v. Horn*, Nos. 1020552, 1020553, 1020554, 1020555, 1020556, 1010557, 2004 WL 1293993, Bus. Franchise Guide (CCH) ¶ 12,857 (Ala. June 11, 2004)**

Former newspaper franchisees of the *Birmingham News* filed suit against the franchisor for wrongful termination and nonrenewal of their franchises. The case was later submitted to arbitration. A panel of arbitrators determined that the *News* unlawfully failed to renew the franchise agreements even though the written agreement purported to allow nonrenewal. The arbitrators based their determination on the parties' course of dealing and the supplier's representations that the agreement would be renewed absent good cause for nonrenewal. The arbitration panel further determined that the supplier's conduct was grounded in fraud. Specifically, the arbitrators found that the supplier had knowingly made false statements to the dealers that their franchises would be renewed unless there was good cause for nonrenewal. The arbitrators therefore properly found the *News* liable for promissory fraud, the Alabama Supreme Court held. (This case is also discussed under the topic heading "Arbitration.")

***Zeidler v. A&W Rests., Inc.*, No. 03-C-5063, 2004 WL 1166635, Bus. Franchise Guide (CCH) ¶ 12,839 (N.D. Ill. May 24, 2004)**

The court in *Zeidler* was faced with concurrent motions to dismiss. *Zeidler*, a former A&W franchisee, sued A&W as well as its in-house counsel, Karen Long, for wrongful termination. *Zeidler* claimed that A&W's conduct in issuing a termination letter in May 2001, signed by its in-house counsel, violated the Illinois Franchise Disclosure Act (IFDA) as well as the parties' agreement. *Zeidler* argued that under the IFDA, he was entitled to sue individual officers of a franchisor such as Long. Besides defending these claims, A&W asserted a number of counterclaims. These included a request for declaratory judgment that *Zeidler* was obligated to comply with the post-termination obligations in the license agreement. After initial pleadings were

filed, Zeidler asked the court to dismiss A&W's counterclaim on the basis that he did not receive proper notice of termination and that he had already complied with post-termination obligations. A&W's in-house counsel, Karen Long, moved to dismiss Zeidler's complaint against her personally on jurisdictional grounds.

In support of his motion to dismiss, Zeidler attempted to introduce photographs demonstrating that he complied with the post-termination obligations. The court refused to consider materials outside the pleadings. It therefore allowed A&W's counterclaim to proceed with respect to post-termination obligations. The court also noted, without much analysis, that A&W's failure to exercise its right to remove the trademarked items itself from Zeidler's restaurant did not result in a forfeiture of its right to later demand Zeidler's compliance with that requirement, including a full deidentification of the premises. The court found that A&W sufficiently alleged in its counterclaim that Zeidler had been terminated properly. The court therefore denied Zeidler's motion to dismiss on the basis that he did not receive proper notice of the termination.

In considering Long's motion to dismiss, the court acknowledged that the IFDA may provide franchisees with the right to sue individual officers of a franchisor. The court cautioned, however, that any such right is tempered by jurisdictional limits and the fiduciary shield doctrine. After identifying the various contacts that Long had with Zeidler in the State of Illinois, the court held that such contacts were insufficient to establish that Long's conduct put her on notice that she should reasonably anticipate being sued in Illinois. For example, the telephone conversations cited by Zeidler in support of his claims against Long were all initiated from within the state *by the franchisee*. Similarly, Long's letters to Zeidler were sent to Zeidler in Illinois only in response to information requests made by him. In deciding that the foregoing contacts were insufficient to establish jurisdiction over Long, the court noted that the contacts simply did not establish that Long *voluntarily* sought the benefits and protections of Illinois. However, the court held that even if Long's contacts were sufficient to support an exercise of jurisdiction over her, Zeidler could not establish the requisite causal connection between his claims and the letter and phone calls. These contacts therefore did not give rise to the cause of action as was required under Illinois' long-arm statute.

As final support for its decision to dismiss Zeidler's complaint against Long, the court cited Illinois' fiduciary shield doctrine. The doctrine protects a nonresident's contacts with the State of Illinois that are made pursuant to a fiduciary relationship. Such contacts—including, as here, contacts made by a nonresident on behalf of its employer—simply do not subject the nonresident to jurisdiction of Illinois courts.

Tortious Interference

***Auto-Chlor Sys. of Minn., Inc. v. JohnsonDiversey*, 328 F. Supp. 2d 980, Bus. Franchise Guide (CCH) ¶ 12,861 (D. Minn. July 19, 2004)**

Multiple tortious interference claims were asserted against a dishwasher manufacturer in *Auto-Chlor*. All of these claims were ultimately dismissed on summary judgment, however, for a number of reasons. First, and perhaps most importantly, the court determined that the dealers insufficiently supported their claims of tortious interference when the manufacturer presented challenges to each of the ninety-eight instances of tortious conduct cited by the dealers in their pleadings. The dealers failed to respond fully to each of the challenges. Instead, the dealers simply advised that they would provide additional support for their claims at trial. Finding this position insufficient to show the court dismissed the dealers' tortious interference claims on summary judgment. However, even if the dealers had adequately responded to the manufacturer's challenges, the manufacturer's conduct in simply offering better prices for the product—without more—does not rise to the level of being "tortious," as the dealers claimed.

Similarly, the manufacturer's acquisition of a competitor, and its conduct in allowing that competitor to distribute products to the plaintiffs' customer base, would not constitute tortious interference with performance of contract because the written agreement did not prohibit the manufacturer's affiliates from competing with the dealers.

Finally, although the dealers alleged that the manufacturer demanded that they refuse to deal with certain customers, the plaintiff dealers could not point to any harm allegedly suffered as a result of such threats. More specifically, the dealers' claims for tortious interference with prospective contractual relations failed because they could not show that the manufacturer's conduct prevented them from acquiring or continuing any prospective relations. (This case is also discussed under the topic headings "Good Faith and Fair Dealing," "Statutory Claims," and "Unfair Competition/Unfair and Deceptive Practices.")

***Franklin Tractor Sales v. New Holland N. Am., Inc.*, No. 03-3520, 2004 U.S. App. LEXIS 16333, Bus. Franchise Guide (CCH) ¶ 12,887 (6th Cir. Aug. 5, 2004)** This case is discussed under the topic heading "Encroachment."

Trade Secrets

***Tempco Elec. Heater Corp. v. Temperature Eng'g Co.*, No. 02-C-3572, 2004 U.S. Dist. LEXIS 12130, Bus. Franchise Guide (CCH) ¶ 12,845 (N.D. Ill. May 27, 2004)**

***Tempco Elec. Heater Corp. v. Temperature Eng'g Co.*, No. 02-C-3572, 2004 U.S. Dist. LEXIS 12130, Bus. Franchise Guide (CCH) ¶ 12,846 (N.D. Ill. June 29, 2004)**

This case is discussed under the topic heading "Trademark Infringement."

Trademark Infringement

***Tempco Elec. Heater Corp. v. Temperature Eng'g Co.*, No. 02-C-3572, 2004 U.S. Dist. LEXIS 10124, Bus. Franchise Guide (CCH) ¶ 12,845 (N.D. Ill. May 27, 2004)**

***Tempco Elec. Heater Corp. v. Temperature Eng'g Co.*, No. 02-C-3572, 2004 U.S. Dist. LEXIS 12130, Bus. Franchise Guide (CCH) ¶ 12,846 (N.D. Ill. June 29, 2004)**

Plaintiff Tempco brought suit against Prime, a former distributor, for trademark infringement, breach of contract, and misappropriation of trade secrets. Plaintiff alleged that Prime had engaged in "reverse passing-off" by removing Tempco's name from Tempco products sold by Prime; that Prime had misused proprietary software licensed to it by Tempco to undercut Tempco's pricing in order to sell products of Tempco's competitors, both during and after Prime's tenure as a Tempco distributor; and that Prime had sold goods that competed with Tempco's products during the term of the distribution agreement in violation of its terms. Prime moved for summary judgment as to the reverse passing-off claim, a liquidated damages provision in the allegedly breached contract, the geographic scope of the distribution agreement's requirement not to sell competing products, and the trade secrets claim. The court first declined to grant summary judgment on the reverse passing-off claim, despite the fact that Tempco's only evidence of the indispensable element of likelihood of consumer confusion was the fact that reverse passing-off had occurred, that such misbranding was intentional, and that the products were identical in both their appearance and use, regardless of the brand affixed to them. The court found that a jury could reasonably decide the issue of likelihood of confusion for either party, thus rendering summary judgment inappropriate. The court next upheld the liquidated damages provision of the software licensing agreement, noting that it served as a valid check to ensure that a licensee of the software ceases to use it when the license is revoked.

The court initially ruled in favor of Prime on the plaintiff's claims of misappropriation of trade secrets based on the alleged misuse and retention of proprietary software, holding that Tempco had not presented sufficient evidence to withstand summary judgment. However, in a decision issued June 29, 2004, on motion for reconsideration by the plaintiff, the court reversed its decision on the reverse passing-off claim and allowed that claim to proceed. The court based its reversal on testimony that the software remained on the defendant's computer system after the revocation of the license and additional circumstantial evidence suggesting post-revocation misuse of that software.

Finally, the court ruled that the provision of the distribution agreement that governed the geographic scope of Prime's authorized market, in the absence of an express provision to the contrary, also governed the geographic scope of Tempco's rights. Thus, any non-Tempco products sold by Prime outside of its authorized area could not constitute a breach of the distribution agreement.

***Auto-Chlor Sys. of Minn., Inc. v. JohnsonDiversey*, 328 F. Supp. 2d 980, Bus. Franchise Guide (CCH) ¶ 12,861 (D. Minn. July 19, 2004)**

This case is discussed under the topic headings "Good Faith and Fair Dealing," "Statutory Claims," "Tortious

Interference," and "Unfair Competition/Unfair and Deceptive Practices."

Unfair Competition/Unfair and Deceptive Practices

***Tempco Elec. Heater Corp. v. Temperature Eng'g Co.*, No. 02-C-3572, 2004 U.S. Dist. LEXIS 12130, Bus. Franchise Guide (CCH) ¶ 12,845 (N.D. Ill. May 27, 2004)**

***Tempco Elec. Heater Corp. v. Temperature Eng'g Co.*, No. 02-C-3572, 2004 U.S. Dist. LEXIS 12130, Bus. Franchise Guide (CCH) ¶ 12,846 (N.D. Ill. June 29, 2004)**

This case is discussed under the topic heading "Trademark Infringement."

***American Top English, Inc. v. Lexicon Mktg. (USA), Inc.*, No. 03-C-7021, 2004 WL 1403695, Bus. Franchise Guide (CCH) ¶ 12,856 (N.D. Ill. June 21, 2004)**

This case is discussed under the topic heading "Statutory Claims."

***Auto-Chlor Sys. of Minn., Inc. v. JohnsonDiversey*, 328 F. Supp. 2d 980, Bus. Franchise Guide (CCH) ¶ 12,861 (D. Minn. July 19, 2004)**

The *Auto-Chlor* case involved allegations of Lanham Act violations as well as state Deceptive Trade Practice Act violations. The dealers' Lanham Act claims for false designation of origin and false advertising were dismissed for two reasons. First, because the manufacturer owned the marks in dispute, there could be no likelihood of confusion to support the dealers' false designation claim. Second, the manufacturer's allegedly false advertising was disseminated to a group of approximately three people. The dealers' false advertising claim fell far short of the "wide dissemination" requirement under the Lanham Act. Citing the foregoing facts, the court held that the manufacturer did not engage in any unfair or inequitable conduct prohibited by the Lanham Act. Applying a similar analysis, the court also dismissed the plaintiffs' state law unfair trade practices claims. As the court noted, it summarily dismissed the plaintiffs' claims under the New Mexico Unfair Trade Practices Act and the Colorado Unfair Trade Practices Act because the dealers "offered no argument as to why these claims should not share the [same unfortunate] fate of their Lanham Act claims." (This case is also discussed under the topic headings "Good Faith and Fair Dealing," "Statutory Claims," and "Tortious Interference.")

***Sharif v. Wellness Int'l Network, Ltd.*, Bus. Franchise Guide (CCH) ¶ 12,872 (7th Cir. July 21, 2004)**

This case is discussed under the topic heading "Arbitration."

Endnotes

1. The encroachment implications of this case are discussed under the topic heading "Good Faith and Fair Dealing." See also the discussion under the topic heading "Unfair Competition/Unfair and Deceptive Practices."

2. The law firm of Wiggin and Dana LLP represented Doctor's Associates, Inc. in this matter. Ms. Toomey, the author of this summary, was not involved in the case.