Franchising (& Distribution) Currents

Bethany L. Appleby, Christopher P. Bussert, Allan P. Hillman, and Robert M. Einhorn

ANTITRUST

***Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204 (3d Cir. 2008)**

Plaintiff competed against other authorized Mack Truck dealers and aggressively pursued a low-price sales strategy throughout the country. Mack terminated the dealer agreement, and plaintiff, now a former dealer, alleged that Mack had done so in furtherance of an unlawful conspiracy with its authorized dealers to keep prices on Mack products artificially high. Plaintiff argued that there was a combination of horizontal collusion among other Mack dealers to eliminate territorial and price competition among themselves and vertical collusion between the manufacturer and those dealers to enforce that agreement, all in violation of § 1 of the Sherman Act. Plaintiff also alleged violation of the Robinson-Patman Act (RPA). The district court granted summary judgment for the manufacturer on the RPA claim and, although permitting trial on the Sherman Act claim, did not allow that claim to go to the jury after plaintiff presented its evidence. On appeal, the Third Circuit affirmed as to the RPA claim. However, the court concluded that plaintiff had presented sufficient evidence of an illegal agreement between the manufacturer and its other dealers for a jury to find for plaintiff and thus remanded for a new trial.

Bethany L. Appleby

Allan P. Hillman

Christopher P. Bussert

Robert M. Einhorn

Plaintiff presented evidence that other dealers had long agreed not to compete with each other and that Mack issued a policy statement reflecting its concurrence and its negative attitude toward Mack dealers competing with each other. The Third Circuit recognized that restraints imposed by a manufacturer or supplier (vertical restraints) are governed by the rule of reason, which requires that the supplier have power in the overall market for its goods (the interbrand market), not just power over its own dealers (the intrabrand market). Here, there was expert evidence that with respect to certain products, Mack had interbrand market power, so the legality of the vertical restraints on Mack dealer competition should have been submitted to the jury. Moreover, where the source of a vertical restraint is not the supplier but a dealer agreement, i.e., an agreement among competitors (horizontal restraint), the rule of per se (automatic) illegality may apply if the supplier imposes the restraint as a result of dealer cartel pressure.

With respect to the RPA allegations, the court held, citing its own 1993 precedent and the Supreme Court's philosophy enunciated in *Volvo Trucks N.A., Inc. v. Reeder Simco GMC Inc.*, 546 U.S. 164 (2006), that the RPA requirement that there be two sales was not met in a bidding situation where dealers sought to be the sole designated Mack truck bidder for a sale to a third party and where Mack sold the products only to the winning dealer.

***Cottman Transmission Sys. LLC v. Kershner*, 536 F. Supp. 2d 543, Bus. Franchise Guide (CCH) ¶ 13,847 (E.D. Pa. 2008)**

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

***Sheridan v. Marathon Petroleum Co. LLC*, 530 F.3d 590 (7th Cir. 2008)**

In an opinion written by Judge Posner, the Seventh Circuit affirmed dismissal of Sherman Act tying claims "purport[ing] to be on behalf of all Marathon and Speedway dealers . . . before a motion to certify the suit as a class action was filed."

Plaintiffs' Sherman Act tying claims were based on the alleged "tying the processing of credit card sales to the . . . franchise and also with conspiring with banks to fix the price of the processing service." The court noted that no Speedway franchisees were actually involved in the lawsuit and that "Marathon does of course have a 'monopoly' of Marathon franchises. But 'Marathon' is not a market; it is a trademark; and a trademark does not confer a monopoly." There was no allegation that Marathon was "colluding with the other oil companies to raise the price of credit card processing." Moreover, there was no tying because all Marathon had done was "require its franchisees to honor Marathon credit cards and to process sales with them through the system designated by Marathon so that customers of Marathon who use its card have the same purchasing experience no matter which Marathon gas station they buy from." In addition, when a customer pays by Marathon credit card,

Bethany L. Appleby is a partner in the New Haven office of Wiggin and Dana LLP. Christopher P. Bussert is a partner in the Atlanta office of Kilpatrick Stockton LLP. Allan P. Hillman is a partner in the Hartford office of Shipman & Goodwin LLP. Robert M. Einhorn is a partner in the Miami office of Zarco Einhorn Salkowski & Brito, PA.

Published in *Franchise Law Journal*, Volume 28, Number 2, Fall 2008.

the purchase price is used to offset the amounts that the dealer owes Marathon for gasoline. Plaintiffs did

> not challenge Marathon's right to offer this [credit card processing] service. But once it is in place the dealer has a powerful incentive to route *all* his credit card transactions through the Marathon system as otherwise he would have to duplicate the processing equipment that Marathon supplies and lose the benefit of being able to use his retail sales revenue to offset what he owes Marathon.

Judge Posner pointed out that

> [t]he additional cost of using multiple card processing systems is not a penalty imposed by Marathon to force the use of its system, but an economy that flows directly from Marathon's offering its own credit card and credit card processing service. To call this tying would be like saying that a manufacturer of automobiles who sells tires with his cars is engaged in tying because, although the buyer is free to buy tires from someone else, he is unlikely to do so, having paid for the tires supplied by the car's manufacturer.

The court also rejected plaintiffs' unsubstantiated kickback theory of antitrust liability as implausible and because "the complaint gives no hint of the role that Marathon might be hired to play in a conspiracy of the [credit] card companies."

ARBITRATION

***Preston v. Ferrer*, 128 S. Ct. 978, Bus. Franchise Guide (CCH) ¶ 13,870 (2008)**

The U.S. Supreme Court (Ginsburg, J.) held that where parties agree to arbitrate all their disputes arising under a contract, the Federal Arbitration Act (FAA) supersedes state laws that require primary jurisdiction in a nonarbitral forum (whether judicial or administrative). The Court, ruling on an almost sui generis set of facts, held that there was not an inherent conflict between the California Talent Agencies Act (TAA) and the FAA but that to invoke arbitration under the TAA plaintiff attorney would have had to concede he was a talent agent, "a point fatal to his claim for compensation." Moreover, although the TAA permitted arbitration, it imposed requirements that contravened the FAA, i.e., it required the California labor commissioner "to decide an issue that the parties [had] agreed to arbitrate," and it "impose[d] prerequisites [for] enforcement of [the] arbitration agreement that [were] not applicable to contracts" in general.

***Hall St. Assocs. LLC v. Mattel, Inc.*, 128 S. Ct. 1396, Bus. Franchise Guide (CCH) ¶ 13,871 (2008)**

Justice Souter affirmed for the Court the Ninth Circuit's holding that in light of the FAA's exclusive grounds for vacatur and modification of arbitration awards, the terms in an arbitration agreement between a landlord and tenant that established a method of judicial review different from the FAA's procedures could not be enforced.

***Choice Hotels Int'l, Inc. v. Patel*, Bus. Franchise Guide (CCH) ¶ 13,837 (4th Cir. Feb. 28, 2008)**

The Fourth Circuit affirmed the decision to vacate a hotel franchisor's arbitration award against franchisees for lack of notice and to decline the franchisees' request for attorney fees and costs.

The franchisor, Choice Hotels International, Inc., knew that the hotel's general manager was the franchisees' contractual designated representative for notice purposes. Choice eventually terminated the franchise agreement for cause and then filed a diversity action seeking unpaid royalties and liquidated damages for early termination. The franchisees moved to dismiss the lawsuit because of an arbitration provision in the parties' franchise agreement. The court did not dismiss but rather compelled the parties to arbitrate their dispute and stayed the lawsuit pending arbitration. Choice then filed an arbitration demand with the American Arbitration Association in accordance with the applicable arbitration provision but did not serve the demand or hearing notices on the franchisees' designated representative. The arbitration proceeded on the merits without the franchisees' participation, and an award entered in Choice's favor. Choice then moved to reopen the stayed lawsuit to confirm the arbitration award, and the franchisees moved to vacate the award and for attorney fees and costs. The court denied Choice's motion to confirm and vacated the award because it was "made without notification of the initiation of arbitration proceedings" in the manner required by the parties' franchise agreement, and the franchisees did not otherwise receive notice of the proceedings. The court also declined as premature the franchisees' request for attorney fees and costs pursuant to the franchise agreement's prevailing party clause because there was no final determination on the merits of the parties' dispute.

***Smith v. Paul Green Sch. of Rock Music Franchising, LLC*, Bus. Franchise Guide (CCH) ¶ 13,888 (C.D. Cal. May 5, 2008)**

The U.S. District Court for the Central District of California denied a California franchisee's motion to compel arbitration of a dispute with a Pennsylvania franchisor in California. See case note on page 91 of this issue of the *Journal*.

***Volvo Trucks N. Am., Inc. v. Crescent Ford Truck Sales, Inc.*, Bus. Franchise Guide (CCH) ¶ 13,831 (E.D. La. Feb. 21, 2008)**

A motor vehicle dealer moved to dismiss a federal court complaint filed by Volvo Trucks North America, Inc. (Volvo) seeking to compel arbitration of the parties' renewal dispute and requesting "a declaratory judgment that various provisions of the Automobile Dealer's Day in Court Act (ADDCA), 15 U.S.C. §§ 1221–1226, were applicable to the rights of the parties." Volvo filed the lawsuit after the dealership filed an emergency petition with the Louisiana Motor Vehicle Commission (LMVC) to prevent Volvo from, among other things, refusing to renew the parties' dealership agreement and after the LMVC "issued an interlocutory cease and desist order against Volvo" and "denied arbitration." The U.S. District Court for the Eastern District of Louisiana granted the dealership's motion to dismiss in part and denied it in part, ultimately concluding

that a provision in the ADDCA conferred jurisdiction for the purpose of compelling arbitration.

Following a fairly detailed discussion, the court rejected Volvo's contention that the Federal Arbitration Act (FAA) independently conferred federal court jurisdiction (Volvo apparently had not alleged diversity jurisdiction). The court further held that it did not have jurisdiction over Volvo's claim that the ADDCA's "definition of 'good faith' applies to the dispute . . . and that, under these provisions, [Volvo] was acting in good faith and had a legitimate right to terminate the" parties' dealership agreement. The court concluded that it lacked jurisdiction over this claim because it involved the merits of the dispute, which was for an arbitrator, not the court, to decide. Finally, although Volvo had clearly not sought to establish federal jurisdiction this way, the court concluded that it could consider compelling arbitration pursuant to 15 U.S.C. § 1226, which "states that arbitration may be used to settle a controversy involving a motor vehicle franchise [entered into or amended after 2002] 'only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy.'" The court also rejected the dealership's arguments that Volvo failed to exhaust its administrative remedies and that the *Burford* and *Younger* abstention doctrines made it inappropriate for the court to decide Volvo's complaint.

***World Rentals & Sales, LLC v. Volvo Constr. Equip. Rentals, Inc.*, 517 F.3d 1240 (11th Cir. 2008)**

The issue in this case was whether plaintiff franchisee could compel defendant finance company to arbitrate under an agreement signed only by the finance company's corporate affiliate, defendant franchisor.

The franchisor sold and leased Volvo construction equipment through franchisees. The franchisee entered into a development agreement and two franchise agreements with the franchisor. The franchise agreements provided that "all disputes, claims, controversies or causes of action arising between Franchisee and Franchisor shall be finally resolved by arbitration pursuant to the then-prevailing Commercial Rules of the American Arbitration Association ('AAA')." The franchisee obtained financing for its franchise through defendant finance company, which was an affiliate of the franchisor. The financing arrangements between the franchisee and the finance company were embodied in fifteen documents (loan documents). The loan documents did not contain an arbitration clause. However, two of the loan documents contained the following incorporation provision: "All schedules, exhibits, and other documents attached to or referred [sic] in this Agreement . . . are hereby incorporated in this Agreement by this reference in their entirety as if fully stated in this Agreement."

Plaintiff's business failed, and it ceased making principal payments to defendant finance company. Soon thereafter, the franchisee filed suit against both the franchisor and the finance company, alleging that defendants made fraudulent representations in order to induce plaintiff to sign the franchisee agreements and the loan documents. The finance company countersued for default and breach of the loan documents. The finance company's counterclaims did not rely on any provision of the franchise agreements. Plaintiff moved to compel arbitration of the entire dispute, including the finance company's counterclaims, pursuant to the arbitration provision in the franchise agreements. The court granted plaintiff's motion to compel arbitration as to the franchisor but denied it as to the finance company, concluding that the finance company could not be compelled to arbitrate.

On appeal, plaintiff argued that the finance company could be compelled to arbitrate because the incorporation provisions in the loan documents incorporated the arbitration provisions in the franchise agreements. The Eleventh Circuit agreed that the plain language of the loan documents clearly incorporated the franchise agreements in their entirety, including the arbitration provisions in those agreements. The court added "that an arbitration clause can be incorporated [into another contract] even if the relevant incorporation language does not specifically refer to it." However, in the case before it, the Eleventh Circuit found that although the arbitration clause from the franchise agreements was incorporated into the loan documents, the disputes between plaintiff and the finance company did not fall within the terms of those arbitration provisions. The arbitration clause only contemplated "all disputes, claims, controversies or causes of action arising between Franchisee and *Franchisor*" (emphasis in original). The franchise agreements specifically defined the term *franchisor* as not including the franchisor's parent or affiliate companies. Reading the two contract provisions together, the Eleventh Circuit concluded that the franchise agreements' arbitration provision plainly and expressly excluded any disputes between the franchisee and the finance company. Accordingly, the court affirmed the district court's holding that the finance company could not be compelled to arbitrate its disputes with plaintiff.

Plaintiff also argued that the finance company should be bound by the franchise agreements' arbitration provision on theories of agency, veil piercing, and estoppel. The Eleventh Circuit found the theories of agency and veil piercing to be without merit as plaintiff presented no evidence to the district court that the franchisor acted as the agent or alter ego of the finance company. The court noted that estoppel may bar a nonsignatory from avoiding arbitration if the nonsignatory relies on a contract containing an arbitration clause. However, because the finance company was not relying on the franchise agreements to make out its counterclaims against plaintiff, the court found that the estoppel theory did not apply to the instant case.

ATTORNEY FEES

***Dunn v. Nat'l Beverage Corp.*, 745 N.W.2d 549, Bus. Franchise Guide (CCH) ¶ 13,843 (Minn. 2008)**

Dunn sued National Beverage Corporation "alleging, among other things, a violation of the Minnesota Franchise Act . . . and breach of contract. The jury found that National Beverage [had] breached the franchise agreement . . . and awarded $288,000 in damages for the breach." In addition, the jury found that National Beverage had violated the Minnesota Franchise Act; however, it awarded no damages. Dunn "filed a post-trial motion for attorney fees under Minn. Stat. § 80C.17," but the district and appellate courts denied the motion, "concluding that [§] 80C.17 . . . bar[red] an award of attorney fees to a

plaintiff who [had] receive[d] no relief under the franchise act." Dunn then appealed to the Minnesota Supreme Court.

The Minnesota Supreme Court noted that

> the general rule in Minnesota [was] that "attorney fees are not recoverable in litigation unless there is a specific contract permitting or a statute authorizing such recovery." *Barr/Nelson, Inc. v. Tonto's Inc.*, 336 N.W.2d 46, 56 (Minn. 1983). Because there [was] no specific language in the [franchise agreement] permitting the recovery of attorney fees,

the court observed that Dunn could "recover attorney fees only if permitted by statute." The court held that an attorney fees award under § 80C.17 required that Dunn recover some relief under the franchise act. Because the jury awarded Dunn no relief as a result of National Beverage's violation of the franchise act, the court declined to award attorney fees. The court also rejected Dunn's argument that the jury's verdict should be construed as awarding relief to Dunn for a violation of the franchise act. In reaching that conclusion, the Minnesota Supreme Court analyzed the jury's answers on a special verdict form and reasoned that those answers supported a finding that the jury intended to award damages for the breach of contract violation but not for violation of the Minnesota Franchise Act.

BANKRUPTCY

***In re Strack*, 524 F.3d 493, Bus. Franchise Guide (CCH) ¶ 13,855 (4th Cir. 2008)**

It is almost hornbook law that there is no fiduciary relationship between a franchisor and franchisee, e.g., *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998), and the same is generally true regarding manufacturer-dealer relationships. Nevertheless, it is also true that the parties may constitute their relationship as a fiduciary one if they desire to do so and if their agreement so indicates. In this case, the Fourth Circuit held that a farm equipment dealer owed a fiduciary duty to its tractor manufacturer/supplier and that such fiduciary duty was fatal to the effort of the dealership's bankrupt guarantor to discharge a debt to the manufacturer.

The language of the dealer agreement expressly provided that the dealer hold the proceeds of sales of the manufacturer's tractors in a separate account and "in trust" for the manufacturer, creating a fiduciary obligation to the manufacturer. The dealership failed, and the manufacturer sued the personal guarantor for $124,000 in dealership debts. The guarantor filed bankruptcy and sought to discharge the debt. But the manufacturer established the existence of the trust, a fiduciary obligation under Virginia law, and that the debt was nondischargeable under 11 U.S.C. § 523(a)(4) because it was a "defalcation while acting in a fiduciary capacity."

***Emerging Vision, Inc. v. Sundstrom*, 2008 WL 509530 (E.D. Wis. Mar. 11, 2008)**

The district court concluded that the bankruptcy court did not depart from the essential requirements of law when it found that a debtor did not transfer or conceal her property with an intent to hinder, delay, or defraud her creditors.

Sundstrom was a franchisee of Sterling Optical, a retail optical company owned by Emerging Vision. Through a series of transactions, Sundstrom entered into a ten-year franchise agreement with Sterling Optical, signed a promissory note in favor of Emerging Vision, and agreed to pay the $155,049 balance owed on the purchase of her franchise. Shortly thereafter, Sundstrom ceased making royalty payments and advertising contributions for her franchise. After a failed attempt to work out a compromise with Sundstrom, Emerging Vision sued her to recover the outstanding balance on the promissory note. Sundstrom did not contest the suit, and the court entered a judgment against her for the $105,957.42 balance due on the note.

After receiving notice of the judgment, Sundstrom consulted with both bankruptcy and corporate counsel. On the advice of both counsel, Sundstrom incorporated Stellar Vision, a corporation wholly owned and controlled by Sundstrom. After incorporating, Sundstrom transferred the assets of her Sterling Optical franchise to Stellar Vision. Stellar Vision did not absorb the liabilities of Sterling Optical. As consideration for the transfer, Sundstrom received 100 shares of Stellar Vision stock at a stated value of $1,000. Following the transfer, Sundstrom obtained a loan from First National Bank Fox Valley in order to purchase a lens cutter. As a result of the instant depreciation of the equipment, the bank took a security interest in all of Stellar Vision's assets.

Upon learning of Sundstrom's actions, Emerging Vision filed suit in the Supreme Court of New York for Nassau County, seeking payment of outstanding royalty and advertising fees and an injunction barring Sundstrom's operation of Stellar Vision as a result of her violation of a noncompete provision. Sundstrom and her husband then filed for Chapter 7 bankruptcy protection, listing their liabilities to Emerging Vision as $304,026 but not listing the asset transfer from Sterling Optical to Stellar Vision in their statement of financial affairs. In June 2006, Emerging Vision filed an adversary complaint objecting to Sundstrom's bankruptcy discharge and alleging that the Sundstroms transferred the assets of the Sterling Optical franchise with the intent to hinder, delay, or defraud Emerging Vision in violation of Bankruptcy Code § 727(a)(2)(A). The Sundstroms, although admitting that they transferred the property, argued that they never acted with the intent to hinder, delay, or defraud a creditor, and actually converted exempt assets into nonexempt assets by the transfer, thereby creating assets for their creditors.

On August 30, 2007, the bankruptcy judge issued an order dismissing the adversary proceeding. The court granted both Mr. and Mrs. Sundstrom a discharge, specifically finding that Mrs. Sundstrom did not act with the necessary intent to hinder, delay, or defraud her creditors that § 727(a)(2)(A) required in order to deny a discharge. In reaching its decision, the bankruptcy court found that Sundstrom's belief that her actions did not constitute a transfer was reasonable and that her belief that the franchise agreement had been terminated was reasonable. The bankruptcy court also noted that the fact that Sundstrom's transactions resulted in increasing the assets of the bankruptcy estate by making nonexempt assets exempt was further proof of Sundstrom's lack of intent to defraud her creditors.

Emerging Vision appealed the decision of the bankruptcy

court to the district court on the narrow issue of whether Sundstrom transferred the assets of the Sterling Optical franchise with the requisite intent to hinder, delay, or defraud Emerging Vision, noting that a creditor need not have been harmed by a debtor's actions to prevail on an objection to discharge. In reaching its decision that the bankruptcy court did not depart from the essential requirements of law, the district court found that Sundstrom had reasonably but erroneously believed that her actions did not constitute a transfer. Specifically, the district court found that the bankruptcy court's holding did not create an "ignorance of the law defense"; rather, the bankruptcy court drew the logical conclusion that if Sundstrom did not believe she was actually transferring her assets to a third party, it was unlikely that she was acting with the intent to defraud, hinder, or delay their recovery by Emerging Vision. The court further found that Sundstrom's lack of wrongful intent was supported by the bankruptcy court's determination that the assets subject to recovery were actually increased by Sundstrom's transfer and remained available to creditors of the estate. As such, the court affirmed the decision of the bankruptcy court.

CHOICE OF FORUM

***Braman v. Quiznos Franchise Co.*, 2008 WL 611607, Bus. Franchise Guide (CCH) ¶ 13,830 (N.D. Ohio Feb. 20, 2008)**

The franchisees filed this action asserting that the franchisor made fraudulent misrepresentations to induce them to enter into a franchise agreement and that the franchisor denied their attempt to secure locations for their stores. The franchisor moved to dismiss due to lack of proper venue, asserting that the parties' franchise agreement included a forum selection clause providing that the exclusive venue for disputes "shall be in the District Court for the City & County of Denver, Colorado, or the United States District Court for the District of Colorado."

At the outset, the franchisees argued that Quiznos waived any objection to venue as a result of its counsel's filing of motions for admission pro hac vice, a stipulated motion for extension of time, and a motion for a leave to allow its client representative to attend a case management conference. The court observed that although a party could waive a venue challenge by failing to include the venue argument in a responsive pleading, motions for extension of time or to excuse physical attendance at a court conference or pro hac vice admissions were not responsive pleadings. Therefore, plaintiffs' waiver argument was without merit.

Plaintiffs then argued that the forum selection clause should be disregarded because their complaint included a claim for fraud in the inducement. The court noted that plaintiffs' argument would be viable only if they were able to demonstrate that the alleged fraud or misrepresentation induced a party opposing the forum selection clause to agree to the inclusion of that specific clause. It added that there was no evidence of that kind of specific fraud in this case. Plaintiffs then argued that enforcement of the forum selection clause was unreasonable because they did not possess the financial resources to litigate in Colorado. The court rejected this argument as well, observing that the franchisees had failed to provide any evidence of their alleged hardship.

After holding the forum selection clause valid, the court also considered the convenience of the parties and witnesses, the interest of justice, and public interest and concluded that the action should be transferred to the federal court in Colorado. In so ruling, the court was influenced by plaintiffs' admission that they would likely rely on the testimony of Quiznos representatives who Quiznos claimed resided in Colorado. The court found that the remaining factors were essentially neutral and that, on balance, the franchisees had failed to sustain their burden of showing that enforcement of the forum selection clause would be unreasonable or fundamentally unfair.

***Best W. Int'l, Inc. v. Patel*, 2008 U.S. Dist. LEXIS 19797, Bus. Franchise Guide (CCH) ¶ 13,840 (D. Ariz. Mar. 3, 2008)**

Best Western International (BWI) operates a membership organization consisting of individually owned and operated hotels. BWI entered a membership agreement with Manuben Patel, who operated a motel located in Santa Cruz, California. BWI later terminated the agreement due to Patel's failure to comply with BWI's design standards.

BWI brought suit against Patel in Arizona. Two weeks later Patel sued BWI in California, claiming not to have any knowledge of the Arizona action. BWI filed a motion in the Arizona court to dismiss the California action in accordance with the first-to-file rule. Alternatively, BWI requested that the court stay the California action. Notably, BWI previously filed a motion to dismiss or, alternatively, to transfer the California action that was denied by the California court.

At the outset, the Arizona court noted that the first-to-file rule was applicable in this case because the California and Arizona actions involved essentially the same subject matter and parties. The court also noted that individualized considerations of convenience and fairness did not weigh in favor of the California action. The court reasoned that if the Arizona action were the second-filed action, the Arizona court would have the discretion under the first-to-file rule to transfer, stay, or dismiss the Arizona action. On the other hand, the Arizona court concluded that as the court in which the first action had been filed, it did not have the same broad discretion to dismiss the second-filed California action. The Arizona court further denied BWI's alternative request for a stay of the California action, finding that such a stay at this juncture was improper because of "considerations of comity." The court added, however, that its denial of the stay was without prejudice, and it ordered that the parties attend a Rule 16 case management conference to discuss the Arizona court's concerns about proceeding with parallel litigation that could lead to inconsistent results.

CHOICE OF LAW

***Cottman Transmission Sys. LLC v. Kershner*, 536 F. Supp. 2d 543, Bus. Franchise Guide (CCH) ¶ 13,847 (E.D. Pa. 2008)**

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

CONTRACT ISSUES

***TES Franchising LLC v. Richard Feldman*, 943 A.2d 406, Bus. Franchise Guide (CCH) ¶ 13,861 (Conn. 2008)**

In a unique twist on application of a liquidated damages clause, the Connecticut Supreme Court enforced a settlement agreement

provision that awarded substantial liquidated damages ($49,000 for each offense) to a franchise consulting business franchisor. The settlement between the franchisor and former franchisee provided that if the ex-franchisee disparaged the franchisor or disclosed the franchisor's confidential information, the liquidated damages clause was applicable. The franchisee did both, a total of five times. The court sustained the trial court's award of $245,000, as a prejudgment remedy under the Connecticut statute, after reviewing Connecticut law pertaining to liquidated damage provisions.

***Jackson Hewitt, Inc. v. Childress*, 2008 WL 199539, Bus. Franchise Guide (CCH) ¶ 13,845 (D.N.J. Jan. 22, 2008)**

The court granted summary judgment to a franchisor, ruling that an integration clause in a franchise agreement precluded a franchisee's claim of fraud in the inducement of the contract. This case is fully discussed under the topic heading "Noncompete Agreements."

***Dunkin' Donuts Franchised Rests., LLC v. Mr. Omar, Inc.*, 2008 WL 660012, Bus. Franchise Guide (CCH) ¶ 13,856 (E.D. Mich. Mar. 10, 2008)**

This action arose from Mr. Omar Inc.'s alleged breach of a franchise agreement with Dunkin' Donuts. Dunkin' Donuts asserted that Mr. Omar breached the franchise agreement and several related agreements by failing to refurbish the franchised location in accordance with Dunkin' Donuts' refurbishment standards and by failing to pay advertising and franchise fees. Dunkin' Donuts also asserted that defendant Wael Elhajomar breached his personal guarantees of the franchise agreement by failing to cure Mr. Omar's defaults under the franchise agreement. Dunkin' Donuts moved for summary judgment on its contract claims.

Defendants did not dispute the alleged breaches of the franchise agreement or personal guarantees. Rather, they argued that they were not bound by the franchise agreement or personal guarantees because defendant Elhajomar lacked the mental capacity to enter into these agreements at the time the agreements were signed; and Dunkin' Donuts falsely represented to him that he passed a franchise examination, thereby fraudulently inducing him to enter into the franchise agreement. In support of the former argument, defendant Elhajomar contended that as a result of a previous head trauma, he suffered from a mental defect and was of unsound mind at the time of signing the personal guarantees.

The court rejected defendants' arguments and held that the franchise agreement and the personal guarantees were enforceable against defendants. According to the court, Elhajomar's affidavit consisted primarily of conclusory statements that were insufficient to withstand Dunkin' Donuts' properly supported motion for partial summary judgment. The court was also unpersuaded by defendant's lack of mental capacity argument, observing that Elhajomar could not take the position that he was capable of reading Dunkin' Donuts' motion and reciting the alleged facts that were inaccurate on the one hand but that he was of unsound mind or suffering a mental incapacity on the other.

Dunkin' Donuts also moved for summary judgment as to the amount of fees owed by defendants. Although the court found that defendants' evidence was equally deficient on this subject as it was again based on conclusory statements, the court expressed reluctance to accept the amounts requested because Dunkin' Donuts had failed to indicate how the amounts were calculated. As a result, the court ordered Dunkin' Donuts to submit a detailed and accurate accounting of the damages it claimed were owed by defendants.

DAMAGES

***TES Franchising LLC v. Richard Feldman*, 943 A.2d 406, Bus. Franchise Guide (CCH) ¶ 13,861 (Conn. 2008)**

This case, involving liquidated damages, is discussed under the topic heading "Contract Issues."

DEFINITION OF FRANCHISE

***Otto Dental Supply, Inc. v. Kerr Corp.*, Bus. Franchise Guide (CCH) ¶ 13,825 (E.D. Ark. Feb. 13, 2008)**

Plaintiff filed this action seeking the recovery of damages as a result of defendant's alleged wrongful termination of the parties' relationship under the Arkansas Franchise Practices Act (AFPA). Both parties filed motions for partial summary judgment on the issue of whether plaintiff is a franchisee that receives the protections afforded franchisees under the AFPA. Plaintiff argued that it was entitled to protection under the AFPA because it was operating pursuant to a verbal agreement between the parties that contained all of the indicia of a franchise relationship. The alleged agreement permitted plaintiff to market and sell defendant's products using defendant's trade names and trademarks for an indefinite period of time. Defendant argued that there was no agreement and that plaintiff was merely a distributor of defendant's products and purchased such products at wholesale prices and sold them at retail prices. Defendant also argued that it was entitled to summary judgment because there was no territorial limitation or geographic requirement as required under the AFPA. Plaintiff countered that it was subject to a geographic restriction because it was precluded from selling defendant's products to customers in foreign countries. Ultimately, the court denied both parties' motions, holding that there were disputes of material fact that related to whether plaintiff was entitled to protection under the AFPA. The parties' disagreement regarding whether there was an agreement between them, as well as whether there was a territorial limitation or geographic requirement in the parties' agreement, precluded summary judgment.

Defendant also argued that plaintiff's claim was barred by the statute of frauds. Plaintiff argued, however, that it was not seeking a recovery for breach of contract, but rather for defendant's violation of the AFPA. In light of the statute's express language that a franchise is "a written or oral agreement for a definite or indefinite period," the court held that the statute of frauds did not bar recovery and thus denied that portion of defendant's motion for summary judgment as well.

FRAUD

***Cottman Transmission Sys. LLC v. Kershner*, 536 F. Supp. 2d 543, Bus. Franchise Guide (CCH) ¶ 13,847 (E.D. Pa. 2008)**

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

***Siemer v. Quiznos Franchise Co.*, Bus. Franchise Guide (CCH) ¶ 13,869 (N.D. Ill. Mar. 31, 2008)**
This case is discussed under the topic heading "Statutory Claims."

***Westerfield v. Quiznos Franchise Co., LLC*, Bus. Franchise Guide (CCH) ¶ 13,887 (E.D. Wis. Apr. 16, 2008)**
This case is discussed under the topic heading "Statutory Claims."

FTC FRANCHISING RULE

***FTC v. Holiday Ctrs., Inc.*, 2008 WL 953358, Bus. Franchise Guide (CCH) ¶ 13,823 (N.D. Ga. Feb. 5, 2008)**
In a case that involved business opportunity law concerns, the district court held that three corporations and their individual officers/directors or owners violated the FTC Rule by knowingly making false material representations to consumers in connection with the sale of their ink cartridge display rack business opportunities and by failing to make disclosures and to substantiate earnings claims in connection with these sales. The court granted summary judgment to the Federal Trade Commission (FTC), characterizing the business opportunities offered as "franchises" subject to the disclosure requirements of the Rule. In particular, defendants, including the individuals charged, advised consumers falsely about the income potential of the display racks, the locations to be provided, and their references from allegedly successful purchasers of the opportunities. Defendants also failed to disclose or falsely represented the business experience of the officers and directors of the companies, their litigation history (which involved substantial fraud), and the prior purchasers of the opportunity. The individuals charged were liable because they either had made the misrepresentations or had authority coupled with (a) knowledge that the deceptive representations had been made or (b) reckless indifference to their truth with knowledge of the high probability of fraud. To grant relief, the court also pierced the veil, reaching assets that defendants had improperly transferred to another corporation in order to secure and protect the assets.

GOOD FAITH AND FAIR DEALING

***Cottman Transmission Sys. LLC v. Kershner*, 536 F. Supp. 2d 543, Bus. Franchise Guide (CCH) ¶ 13,847 (E.D. Pa. 2008)**
This case is discussed under the topic heading "Statutory Claims."

***Bonanno v. Quiznos Franchise Co., LLC*, 2008 WL 638367, Bus. Franchise Guide ¶ 13,846 (D. Colo. Mar. 5, 2008)**
This case is discussed under the topic heading "Statutory Claims."

INJUNCTIVE RELIEF

***Doldro Bros., Inc. v. Finger Lakes Bottling Co.*, 2008 WL 6572252, Bus. Franchise Guide (CCH) ¶ 13,857 (N.D.N.Y. Mar. 7, 2008)**
Two terminated beer wholesalers sought preliminary injunctions to restrain Molson from carrying out their terminations. They argued they did not have to show irreparable harm to obtain the injunctions, contrary to the normal common law requirement. But the district court distinguished between other New York statutes, which expressly allowed injunctions without a showing of irreparable harm, and the New York beer law in question, which contained no such exception. Plaintiffs, whose sales of Molson were only a small percentage of their total sales and profits and whose viability was not threatened by the termination, failed to show irreparable harm, and their motions for injunctions were denied. Their contention that loss of goodwill can be irreparable harm was correct, but the court ruled one must do more than merely allege a loss of goodwill; it must be established.

***Jackson Hewitt, Inc. v. Childress*, 2008 WL 199539, Bus. Franchise Guide (CCH) ¶ 13,845 (D.N.J. Jan. 22, 2008)**
This case is discussed under the topic heading "Noncompete Agreements."

JURISDICTION

***Volvo Trucks N. Am., Inc. v. Crescent Ford Truck Sales, Inc.*, Bus. Franchise Guide (CCH) ¶ 13,831 (E.D. La. Feb. 21, 2008)**
This case is discussed under the topic heading "Arbitration."

***B. Fernandez & Hnos, Inc. v. Kellogg USA, Inc.*, Bus. Franchise Guide (CCH) ¶ 13,824 (1st Cir. Feb. 14, 2008)**
Plaintiffs, a distributor of Kellogg's cereal products and its affiliate responsible for the distributor's logistical and warehousing services, sought injunctive relief against Kellogg USA. Plaintiffs' suit was dismissed because they failed to join an indispensable party, whose joinder would serve to destroy the action's complete diversity.

Kellogg USA, which executed an exclusive distributorship agreement with plaintiff distributor, assigned its rights in the agreement to Kellogg Caribbean. In 2004, Kellogg Caribbean and plaintiff distributor signed an agreement confirming and verifying Kellogg USA's previous exclusive distributorship agreement but failing to set any expiration date on the distributorship arrangement. Thereafter, Kellogg Caribbean notified plaintiffs that it intended to distribute certain products directly to retailers in plaintiffs' exclusive territory. Plaintiffs sued Kellogg USA, alleging that Kellogg's decision to distribute in Puerto Rico constituted a termination of a distribution agreement without cause, in violation of Puerto Rico Law 75.

The court enjoined Kellogg USA and ordered it to specifically perform its agreements with plaintiffs. On appeal, the First Circuit vacated the injunction and instructed the district court to determine whether Kellogg Caribbean was an indispensable party. Plaintiffs modified their complaint to remove the request for injunctive relief in an effort to render Kellogg Caribbean dispensable. Nevertheless, following the remand, the district court dismissed the suit, holding that Kellogg Caribbean was, in fact, indispensable and that its joinder would destroy complete diversity. Applying the four factors of Federal Rule of Civil Procedure 19 that guide the indispensability inquiry, the First Circuit concluded that any disposition of the suit between

plaintiff distributor and Kellogg USA would prejudice Kellogg Caribbean in any subsequent litigation over its 2004 agreement with plaintiff distributor. Moreover, the allegations of the complaint made it clear that Kellogg Caribbean played a central role in the dispute and was "perhaps even the primary actor" in the alleged breach. Based upon these factors, the First Circuit concluded that Kellogg Caribbean was indispensable and affirmed the district court's dismissal of the action.

***R&K Lombard Pharm. Corp. v. Med. Shoppe Int'l, Inc.*, 2008 U.S. Dist. LEXIS 17032, Bus. Franchise Guide (CCH) ¶ 13,849 (E.D. Mo. Mar. 5, 2008)**

Plaintiffs were twenty-five franchisees of Medicine Shoppe International (MSI), a wholly owned subsidiary of Cardinal Health. They brought an action against MSI and Cardinal Health asserting various tort and antitrust claims in district court. Cardinal Health moved to dismiss due to lack of personal jurisdiction.

Plaintiffs advanced several arguments for why jurisdiction over Cardinal Health was appropriate. First, they claimed that personal jurisdiction over Cardinal Health was appropriate because of the activities of MSI in the state of Missouri. The court rejected plaintiffs' claim, noting that there was insufficient evidence that Cardinal Health so controlled and dominated the affairs of MSI that MSI could be viewed as Cardinal Health's alter ego. Plaintiffs also claimed that Cardinal Health had significant meaningful contacts with the state of Missouri, including with a nuclear pharmacy in Springfield, Missouri, and a manufacturing plant in Moberly, Missouri. Plaintiffs also pointed to business cards used by MSI employees indicating that MSI was a "Cardinal Health company" and listings for jobs with "Cardinal Health" in Missouri that were posted on Cardinal Health's website.

Cardinal Health responded by presenting evidence that the pharmacy and manufacturing facilities were owned by subsidiaries of Cardinal Health that maintained separate corporate status from Cardinal Health. With respect to the job postings, Cardinal Health presented evidence that they did not indicate that they were for employment specifically with Cardinal Health (as opposed to one of its subsidiaries). Because plaintiffs submitted no contrary evidence, the court held that the job posting information was insufficient to establish jurisdiction over Cardinal Health. The court also concluded that the reference to Cardinal Health on business cards and in employment listings was insufficient to establish that Cardinal Health dominated and controlled the daily operations of its subsidiaries to the extent that their corporate existence should be disregarded.

Finally, plaintiffs alleged that Cardinal Health had committed tortious activity in Missouri "[e]ither through its assertion of influence as the parent corporation to MSI or through express agreements with MSI" to interfere with plaintiffs' relationship with MSI, leading MSI to breach the franchise agreements.

Although the court observed that a single tortious act could theoretically support personal jurisdiction consistent with due process standards, in this case the mere allegation of an alleged extraterritorial act without more was insufficient. For all these reasons, the court granted Cardinal Health's motion to dismiss.

NONCOMPETE AGREEMENTS

***Jackson Hewitt, Inc. v. Childress*, 2008 WL 199539, Bus. Franchise Guide (CCH) ¶ 13,845 (D.N.J. Jan. 22, 2008)**

This is more than the usual noncompete case. The routine portion of the decision is that an ex-franchisee terminated its New Jersey tax preparation franchise and opened a competing business in violation of a two-year, ten-mile post-termination noncompete; and the franchisor obtained injunctive relief to enforce the noncompete, to require return of the franchise telephone numbers, and to prevent use of the franchisor's trade secrets and proprietary information.

The case is unusual because the franchisee filed a Chapter 7 bankruptcy as soon as the franchisor sued to enforce the post-termination obligations and to collect damages. The franchisor's action was stayed. When the franchisee obtained a discharge later, the franchisor's damage claims were discharged. Therefore, the court allowed the two-year noncompete period to commence at the date it granted the injunction, not when the franchisee terminated the franchise. The court held that to have done the latter would have been to deny the franchisor all relief because its damage claim had been discharged.

The district court did not address the harder question, addressed by many courts in contrary fashions, i.e., whether a noncompete can properly run from the latter of the date of the termination or the date of judicial relief, even where the party seeking enforcement retains its right to damages.

Another wrinkle in this case is that in granting the injunction, the district court relied in part upon the fact that the franchisee agreed in boilerplate in the franchise agreement that a failure to protect the franchisor's confidential information would cause irreparable harm and that enforcement of the covenant not to compete would not cause the franchisee undue harm. This is a good case to cite for the principle that such phrases have some teeth and are enforceable.

Finally, the court stated that New Jersey had not squarely analyzed covenants not to compete in the franchise context, a statement arguably at odds with the New Jersey chapter (pages 297–392) of *Covenants Not to Compete in Franchising* (*Second*) (ABA 2003) (analyzing federal franchise cases applying New Jersey covenant principles).

STATUTORY CLAIMS

***Bonanno v. Quiznos Franchise Co., LLC*, 2008 WL 638367, Bus. Franchise Guide ¶ 13,846 (D. Colo. Mar. 5, 2008)**

Bonanno involved a class action brought by a group of Quiznos franchisees that alleged that Quiznos operated an illegal business scheme by fraudulently inducing plaintiffs to purchase franchises for between $20,000 and $25,000 per franchise "when it knew that the franchisees would never receive anything in return for their franchise fees." Additionally, plaintiffs alleged that "Quiznos took the franchise fee from more than 3,000 franchisees and failed to provide a store for them." Plaintiffs further alleged that in a fraudulent effort to convert the franchise fees, Quiznos blamed the franchisees for failure to open their stores and, citing a breach of the franchise agreement, refused to return the fees.

The amended complaint included allegations that Quiznos

failed to disclose the franchise opportunity as required by law, resold trade areas, and intentionally concealed the fact that a large majority of franchises sold to franchisees would never be open for business. Plaintiffs further alleged that Quiznos collected approximately $75 million in franchise fees while providing nothing to franchisees in return. Once Quiznos collected the franchise fee, plaintiffs asserted, Quiznos refused to return any portion despite a franchisee's inability to secure a franchise location within twelve months of signing the franchise agreement.

Quiznos filed a motion to dismiss the amended complaint, which the court denied in its entirety. In doing so, the court employed the standard for reviewing a motion to dismiss adopted by the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). Specifically, the court determined that the new inquiry to use in reviewing a dismissal is whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." *See Twombly*, 127 S. Ct. at 1969. Applying this standard, the court analyzed each of the claims asserted in the amended complaint.

Plaintiffs first alleged that Quiznos violated the Colorado Consumer Protection Act (CCPA). In response, Quiznos sought to dismiss plaintiffs' allegations on the basis that (1) plaintiffs lacked standing to sue under the CCPA because they were not Colorado citizens, (2) plaintiffs' allegations did not sufficiently allege conduct establishing that Quiznos engaged in unfair or deceptive trade practices, and (3) the challenged conduct did not allege an injury to the public at large such that the alleged injuries were compensable under the remedial scheme as set forth in the CCPA.

The court rejected Quiznos' standing argument, finding that although plaintiffs resided outside of Colorado, the allegations of the fraudulent scheme involved Quiznos' conduct in the state of Colorado. Because Quiznos' principal place of business was in Colorado, the court noted that it was reasonable to conclude that many, if not all, of the corporate decisions and activities, including the creation of the franchise agreement, creation of the advertising of franchise opportunities, and the drafting of franchise documents, would occur in Colorado.

Relying on the holding in *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142 (Colo. 2003), the court also held that the complaint set forth sufficiently detailed allegations of misrepresentations or false representations that induced plaintiffs to act. Moreover, the court found that plaintiffs included sufficiently detailed allegations with respect to each named plaintiff as to how he or she was induced to purchase a Quiznos franchise based on false representations by Quiznos.

Next, relying on the holding in *Martinez v. Lewis*, 969 P.2d 213 (Colo. 1998), the court observed that plaintiffs had alleged sufficient public injury in that they claimed there were over 3,000 consumers affected by the challenged conduct, disparate bargaining power and sophistication between the parties, and that the challenged conduct impacted and would continue to impact large numbers of consumers who might consider purchasing a Quiznos franchise. As such, the court determined that plaintiffs had alleged sufficient facts to satisfy the requirements set forth in the CCPA.

Applying the standard set forth in *Twombly*, the court also held that plaintiffs' breach of contract, breach of implied covenant of good faith and fair dealing, unjust enrichment, economic duress, and declaratory judgment (of unconscionability) claims alleged sufficiently plausible facts to survive Quiznos' motion to dismiss.

***Cottman Transmission Sys. LLC v. Kershner*, 536 F. Supp. 2d 543, Bus. Franchise Guide (CCH) ¶ 13,847 (E.D. Pa. 2008)**

Former auto repair shop franchisees sued Cottman and its designated advertising agency, Ross, alleging that Cottman took their fees but made no good faith effort to establish a successful franchise system, misrepresented their prospects for success, failed to train and support them, and then bought their stores "for a song" when they were in financial difficulty. They claimed further that Cottman required an advertising fee that was to be used by Ross to advertise the system but that they were charged improper commissions. They alleged that Cottman paid improper kickbacks to designated exclusive equipment vendors of the franchisees (commercial bribery), that this violated the Robinson-Patman Act, and that they had a right to recover damages resulting from paying "rebates" to Cottman that it paid over as kickbacks to the vendors. Finally, they alleged violation of various state consumer protection and franchise laws. Cottman moved to dismiss all claims.

The franchise agreement contained a Pennsylvania choice of law clause, and the district court noted that it had previously found that Pennsylvania had a substantial relationship to the parties and transaction in the case. The court therefore examined whether, as to each out-of-state claim, enforcement of the choice of law agreement and application of Pennsylvania law would be contrary to the policy of the other state and whether that other state had a materially greater interest in the determination of a particular issue than Pennsylvania. Viewed under this lens, the court held, the franchisees' claims based on the California Unfair Competition statute (as opposed to California's franchise statutes) and the Florida Franchise Law were barred, but their claim based on the Virginia Retail Franchise Act survived. In so holding, the court noted that the Virginia Retail Franchise Act was a fundamental public policy of the state and that it contained an antiwaiver clause barring Virginia franchisees from waiving its protection, even by a choice of law clause.

The court next barred the franchisees' claims for intentional misrepresentation and for negligent misrepresentation in their Uniform Franchise Offering Circular (UFOC) because of integration (merger) clauses in the franchise agreements. But it ruled that claims for breach of good faith survived under Pennsylvania law because the allegations that Cottman had "churned" the system, failing in its obligations, forcing franchisees into financial distress, and then buying their stores back at a severe discount, could amount to an "indirect termination." The court held that even if Cottman were correct that Pennsylvania law imposed a duty of good faith and fair dealing only upon termination (an issue the court did not decide), the franchisees' good faith claims survived.

Finally, citing prior precedent directly on point, the court held that the franchisees that paid a surcharge (inflated prices) to vendors, without more, did not establish standing to sue for damages for violation of Robinson-Patman Act § 2(c), 15 U.S.C. § 13(c), the commercial bribery section.

***FTC v. Holiday Ctrs., Inc.*, 2008 WL 953358, Bus. Franchise Guide (CCH) ¶ 13,823 (N.D. Ga. Feb. 5, 2008)**
This case is discussed under the topic heading "FTC Franchising Rule."

***Doldro Bros., Inc. v. Finger Lakes Bottling Co.*, 2008 WL 6572252, Bus. Franchise Guide (CCH) ¶ 13,857 (N.D.N.Y. Mar. 7, 2008)**
This case, involving the New York Alcoholic Beverage Control Law, is discussed under the topic heading "Injunctive Relief."

***Westerfield v. Quiznos Franchise Co., LLC*, Bus. Franchise Guide (CCH) ¶ 13,887 (E.D. Wis. Apr. 16, 2008)**
The federal district court granted franchisees' motion to alter judgment under Rule 59(e) of the Federal Rules of Civil Procedure, thereby vacating and reversing its own earlier decision dismissing the fraud and Racketeer Influenced and Corrupt Organizations Act (RICO) claims asserted by a group of twelve Quiznos franchisees against Quiznos. Specifically, plaintiffs alleged that Quiznos fraudulently induced them to execute franchise agreements through its intentional misrepresentations and fraudulent failure to disclose the fact that Quiznos directly or indirectly benefited from markups on the supplies and services that plaintiffs were required to purchase. Plaintiffs contended further that Quiznos required kickbacks from approved vendors and knowingly overcharged franchisees for required products despite the language in the UFOC providing that "[w]e and our affiliates negotiate purchase agreements with suppliers for the benefit of Franchisees."

The court found that it had erred in its original decision by concluding that Quiznos' disclaimers and nonreliance clauses, contained in its UFOC and its franchise agreements signed by plaintiffs, fatally undermined plaintiffs' RICO and fraud claims as a matter of law. In reaching its earlier ruling, the court had relied upon three Seventh Circuit decisions: *Hardee's of Maumelle, Ark., Inc. v. Hardee's Food Sys., Inc.*, 31 F.3d 573 (7th Cir. 1994); *Rissman v. Rissman*, 213 F.2d 381 (7th Cir. 2000); and *Associates in Adolescent Psychiatry, S.C. v. Home Life Insurance Co.*, 941 F.2d 561 (7th Cir. 1991). Upon reconsideration, the court concluded that its prior reliance upon these three Seventh Circuit decisions was "manifest error." The court noted that "[u]pon closer examination, none of [these cases] support that conclusion, and Wisconsin law is clearly to the contrary." The Seventh Circuit cases did not, in fact, hold that the contract language precluded any possibility of a claim of fraud regardless of the facts alleged. Instead, they suggested that more was needed than contract language to defeat a fraud claim. Thus, the court concluded that this determination "must be left for trial, or at least a more complete development of the record," and vacated its previously entered judgment, thereby reinstating the franchisees' claims for RICO and fraud.

The court, however, rejected plaintiffs' arguments based upon alleged newly discovered evidence and the court's alleged misapplication of Wisconsin law in resolving whether the subject franchise agreements were unconscionable.

***Siemer v. Quiznos Franchise Co.*, Bus. Franchise Guide (CCH) ¶ 13,869 (N.D. Ill. Mar. 31, 2008)**
In a class action brought by Quiznos franchisees, the U.S. District Court for the Northern District of Illinois dismissed federal RICO, Sherman Act, and state common law fraud and antitrust claims brought against the Quiznos franchisor, related entities, officers, and employees. In doing so, the court cited with approval the predecessor decision in *Westerfield v. Quiznos Franchise Co.*, 527 F. Supp. 2d 840 (E.D. Wis. 2007), which, as discussed above, had been recently withdrawn.

As in *Westerfield,* the franchisees alleged that Quiznos made them pay inflated prices for required products, services, and materials. In dismissing the franchisees' fraud-based RICO and state fraud claims, the court noted that information about required purchases (and the fact that Quiznos might benefit from them) was clearly disclosed in the UFOC and that, in light of the "disclaimers and non-reliance clauses that are repetitive and easily seen by any party who takes the time to read them," the franchisees "cannot have reasonably relied upon any oral statements concerning likely profits and expenses in deciding whether to invest in a Quiznos franchise." As for the franchisees' Sherman Act and state antitrust claims, the court agreed with the Wisconsin court that the franchisees' proposed relevant market definition for their tying claim of "ownership interests in 'Quick Service Toasted Sandwich Restaurant Franchises'" was "patently absurd." Unless resolved by settlement, it seems that the Seventh Circuit is destined to sort out the conflicting decisions with respect to RICO and fraud claims in *Westerfield* and *Siemer.*

***Wagner & Wagner Auto Sales, Inc. v. Land Rover N. Am., Inc.*, Bus. Franchise Guide (CCH) ¶ 13,867 (D. Mass. Mar. 19, 2008)**
This case is discussed under the topic heading "Termination and Nonrenewal."

***Volvo Trucks N. Am., Inc. v. Crescent Ford Truck Sales, Inc.*, Bus. Franchise Guide (CCH) ¶ 13,831 (E.D. La. Feb. 21, 2008)**
This case is discussed under the topic heading "Arbitration."

TERMINATION AND NONRENEWAL

***Volvo Trucks N. Am., Inc. v. Crescent Ford Truck Sales, Inc.*, Bus. Franchise Guide (CCH) ¶ 13,831 (E.D. La. Feb. 21, 2008)**
This case is discussed under the topic heading "Arbitration."

***Wagner & Wagner Auto Sales, Inc. v. Land Rover N. Am., Inc.*, Bus. Franchise Guide (CCH) ¶ 13,867 (D. Mass. Mar. 19, 2008)**
The district court of Massachusetts granted summary judgment in favor of Land Rover North America, Inc. on a dealer's wrongful termination claim, rejecting plaintiff dealer's arguments that Land Rover violated the Massachusetts unfair competition law protecting motor vehicle dealers and the good faith requirements of the Automobile Dealers' Day in Court

Act (ADDCA), 15 U.S.C. § 1222.

After the dealer failed to construct and open its dealership within the time frame established in the parties' Temporary Land Rover Dealer Agreement (TDA), Land Rover sent a termination notice citing the dealer's failure to perform. After reviewing the undisputed facts, the court concluded that Land Rover had good cause to terminate the TDA and had given the dealer the opportunity to cure and therefore did not violate the Massachusetts unfair competition law's motor vehicle dealer protections. The court further found that the dealer could not establish that Land Rover had violated the good faith requirements of the ADDCA, noting that "the First Circuit 'has read the requirements of the ADDCA very narrowly to require actual or threatened coercion or intimidation'" and that "'[l]ack of good faith does not simply mean malicious conduct or even unfairness'" and "'the mere fact that a dealer may have felt it had been coerced or intimidated is not sufficient.'"

***Doldro Bros., Inc. v. Finger Lakes Bottling Co.*, 2008 WL 6572252, Bus. Franchise Guide (CCH) ¶ 13,857 (N.D.N.Y. Mar. 7, 2008)**

This case is discussed under the topic heading "Injunctive Relief."

TRADEMARK INFRINGEMENT

***ITC Ltd. v. Punchgini, Inc.*, 518 F.3d 159, Bus. Franchise Guide (CCH) ¶ 13,832 (2d Cir. 2008)**

An Indian company owned a U.S. and a foreign trademark for the word *Bukhara* for its restaurant franchises. But it left the U.S. market in 1997 and abandoned its U.S. trademark rights. Years later, it sued defendant, owner of the new, unrelated Bukhara Grill restaurants in New York. After certain questions were certified by the Second Circuit to, and answered by, the New York Court of Appeals, the Second Circuit affirmed the district court's holding that there could be no common law trademark infringement absent "secondary meaning" and that plaintiff had failed to show its mark *Bukhara* had achieved secondary meaning in the New York market. In determining whether *Bukhara* had achieved such secondary meaning, i.e., whether the public associated the mark with plaintiff's goods or services, the court properly considered "(1) advertising expenditures, (2) consumer studies linking the mark to a source, (3) unsolicited media coverage of the product, (4) sales success, (5) attempts to plagiarize the mark, and (6) length and exclusivity of the mark's use." *ITC Ltd. v. Punchgini, Inc.*, 373 F. Supp. 2d 275, 290 (S.D.N.Y. 2005) (quoting *Genesee Brewing Co. v. Stroh Brewing Co.*, 124 F.3d 137, 143 (2d Cir. 1997)).

UNFAIR COMPETITION / UNFAIR AND DECEPTIVE TRADE PRACTICES

***Schlotzsky's, Ltd. v. Sterling Purchasing & Nat'l Distrib. Co., Inc.*, 520 F.3d 393 (5th Cir. 2008)**

The original franchisor hired Sterling as its nonexclusive supply chain manager. However, "Sterling began to hold itself out to manufacturers and distributors as the exclusive representative for purchasing and distribution of all goods and services within the [franchisor's] system." The original franchisor filed for bankruptcy in 2004, and Schlotzsky's, Ltd. acquired rights to the system in a bankruptcy sale in January 2005. Subsequently, Schlotzsky's contracted with two other supply chain distributors and terminated Sterling effective June 30, 2005. Nevertheless, Schlotzsky's grew "increasingly troubled with Sterling's actions" and filed suit in March 2005 under the Lanham Act.

"In March 2006, a jury found that Sterling willfully committed false designation of affiliation, sponsorship, or approval with respect to Schlotzsky's commercial activities." In addition,

> [t]he jury found that Sterling wrongfully obtained $350,000 in profits. Sterling's antitrust and tortious interference counterclaims were dismissed [as a matter of law] under Federal Rule of Civil Procedure 50. The district court set aside the jury's damage award, finding it to be inequitable to award damages for loss of profits to [plaintiff] because damages were not proved with the required specificity. Instead, the court awarded extensive injunctive relief"

and awarded 75 percent of the attorney fees requested by Schlotzsky's. Sterling timely appealed.

On appeal, Sterling divided its Lanham Act challenges into three parts, arguing that

> (1) the Act [was] inapplicable; (2) even if the Act [were] applicable, there [was] no evidentiary support for either an injunction or attorney fees; and (3) issuing the injunction was error as a matter of law. Sterling also allege[d] that it was error to dismiss its claims under state tort law and federal antitrust law.

Sterling argued that § 43(a) of the Lanham Act applies only to trademarks and not to all commercial activities. Because its actions did not involve misuse of the Schlotzsky's trademark, Sterling argued that the Lanham Act did not apply and the district court erred in assigning liability thereunder. The Fifth Circuit found Sterling's arguments to be without merit, holding that § 43(a) is "'a remedial statute that should be broadly construed'" (internal citation omitted) to extend beyond merely protecting trademarks. The evidence reflected that Sterling had made misrepresentations about its relationship with Schlotzsky's, confusing food manufacturers and franchisees. The court found that these actions violated § 43(a)'s prohibition against representations of fact that are "likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another." 15 U.S.C. § 1125(a)(1).

Sterling next argued that even if the act were applicable, there was no evidentiary support for either the injunction or attorney fees awarded by the lower court. Specifically, "Sterling argue[d] that failure to prove an amount of actual damages [was] fatal to Schlotzsky's" entire claim. The appeals court disagreed, finding that under 15 U.S.C. § 1117, plaintiff was entitled to recover "any damages" that plaintiff suffered, plus costs. Pursuant to the statute, the court held that plaintiff could satisfy the injury requirement under § 43(a) even if it failed to establish a specific amount of actual loss. It was only necessary for plaintiff to establish that it had been or was likely to be injured as a result

of defendant's Lanham Act violations. In this case, there was sufficient evidence to show that Schlotzsky's had been damaged by Sterling's misrepresentations, and thus the district court did not err in granting injunctive relief and attorney fees. The appeals court further rejected Sterling's challenge to the award of injunctive relief on the grounds that Schlotzsky's had failed to show irreparable harm. Sterling's misrepresentations were found to have been made in deliberate bad faith; and although Sterling was no longer in business, its principal was currently operating a new franchise supply chain business. The injunctive relief was tailored to cover the specific concern that Schlotzsky's may suffer harm from a renewal of Sterling's or its principal's misrepresentations.

Regarding Sterling's claims against Schlotzsky's, the appeals court affirmed the district court's judgment as a matter of law in favor of Schlotzsky's. As to Sterling's tortious interference claims, the court affirmed that Schlotzsky's, as franchisor, was within its contractual rights to insist that its franchisees abandon arrangements with Sterling and begin exclusively dealing with the newly hired distributor for their region. The court also rejected Sterling's argument that product-purchasing contracts for franchisees should be recognized as illegal tying arrangements under the Sherman Act. The court found no antitrust violation, both because the franchise agreement gave Schlotzsky's the contractual right to insist on the single-source distribution and because the Schlotzsky's actions did not implicate the requisite economic power in the marketplace that more readily may be classified as leading to an illegal tying arrangement. Accordingly, the Fifth Circuit affirmed the district court's judgment in all respects.