

FRANCHISING (& DISTRIBUTION) CURRENTS

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ANTITRUST

Flash Elecs., Inc. v. Universal Music & Video Distrib. Corp., 312 F. Supp. 2d 379, Bus. Franchise Guide (CCH) ¶ 12,799 (E.D.N.Y. Mar. 31, 2004)

In *Flash Electronics*, which was primarily an antitrust case, the court granted the defendant's motion to dismiss an antitrust claim under Section 2 of the Sherman Act. The *Flash Electronics* court held, however, that the plaintiffs properly alleged a Rule of Reason group boycott violation under Section 1 of the Sherman Act (although not a per se violation). The court also declined to dismiss common law claims for fraud and breach of contract, and one of two tortious interference claims.

The plaintiffs in *Flash Electronics* were two of the six major wholesale distributors of movie videos and DVDs in the United States. The defendant Universal was one of the six major motion picture production studios in the country. Universal allegedly conspired with two competing distributors to terminate the plaintiffs' rights to distribute Universal's movie videos and DVDs and instead to grant exclusive rights to these two competitors of the plaintiffs. Before termination of the plaintiffs' distribution rights, Universal allegedly told the plaintiffs that it needed to obtain confidential customer information from them to better understand their business and to support the plaintiffs in the future. According to the plaintiffs' allegations, Universal had obtained these data under false pretenses, then passed the information on to the plaintiffs' competitors for two improper purposes: (1) to facilitate their forthcoming exclusive rights and (2) to enable them to contact the plaintiffs' retail customers, thereby impairing the plaintiffs' ability to compete.

These allegations, according to the plaintiffs, constituted a per se illegal group boycott. The resultant effect on resale prices and rental prices, the plaintiffs alleged, also constituted per se illegal price fixing. Further, the plaintiffs alleged that the acts were designed to eliminate competition in the distribution of movie videos. Following the termination of the plaintiffs' distribution rights, their two competitors allegedly enjoyed a combined market share of 75 percent (50 percent in the case of one competitor and 25 percent in the case of the other). The relevant market for antitrust purposes was, according to the plaintiffs, the wholesale distribution of "sell through" (sales at retail) and the rental of movies and DVDs in the United States.

The *Flash Electronics* court's discussion of whether the

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plaintiffs had sufficiently alleged a group boycott in per se violation of Section 1 was comprehensive. It first stated that this was a hybrid conspiracy because the alleged conspirators operated at different levels, both horizontal (in the case of Universal) and vertical (in the case of the competitors). In contrast, a purely horizontal conspiracy would have raised per se concerns.

Second, the plaintiffs did not plead that the termination of their distribution rights involved a specific "agreement on price or price levels" by the conspirators, another means by which to achieve per se treatment. *See Bus. Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717 (1988).

Third, per se illegality was not established by the fact that Universal was a "dual distributor." Not only was Universal a supplier to wholesale distributors, it also was a horizontal competitor of the distributors because it also sold videos to retailers. Citing decades of authority, the court held that the "dual" function did not transform a vertical conspiracy into a horizontal one.

Fourth, the *Flash Electronics* court pointed out that "exclusive" appointments as were made by Universal have long been virtually "presumptively legal."

Fifth, the *Flash Electronics* court stated that—other than boycotts involving price fixing—group boycotts are illegal per se only when they involve horizontal agreements among direct competitors and originate among the horizontal competitors. For purposes of the defendant's motion to dismiss, the plaintiffs' allegations were to be viewed in a light most favorable to the plaintiffs. Under that relatively lenient standard, the plaintiffs might be found to have alleged a conspiracy originating among the horizontal competitors (the competing distributors). The court therefore determined that per se treatment might be proper on that basis. Nevertheless, it dismissed the per se claim on another, superseding ground: the plaintiffs had an obligation in a group boycott case to show that the challenged activity "is likely to have a predominately anticompetitive effect."

The court observed that the plaintiffs themselves alleged that there was a procompetitive justification for the exclusive appointments. As a condition of the grant of exclusive rights, the competitors agreed to give more favorable treatment to Universal than to other studios, to dedicate a special sales force to Universal, and to pay for certain promotions and advertising usually paid for by Universal.

In view of the foregoing facts, and the fact that the plaintiffs did not allege that they had been terminated for price cutting pursuant to an agreement on specific prices or price levels, the court dismissed the per se theory of liability, as well as the charge of price fixing.

The group boycott allegations survived under the Rule of Reason, however. With respect to the relevant market defini-

tion, the court rejected the plaintiffs' allegation that one supplier's product alone (absent a monopoly) could constitute its own relevant market, or that each movie or DVD was unique, and that therefore there was no "cross-elasticity of demand" among the movies.

In support of their antitrust claims, the plaintiffs alleged only harm to intrabrand competition (i.e., competition among distributors of Universal products). Citing *Cont'l TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), the *Flash Electronics* court observed that harm merely to intrabrand competition normally is insufficient to state a claim under the Rule of Reason. In this case, however, the competitors' market share of distribution of all studios' products (the interbrand market) amounted to an alleged 75 percent. Under these circumstances, the *Flash Electronics* court concluded that harm to the intrabrand market might well cause harm to interbrand market competition among Universal and its competitors. As a result, the plaintiffs' Section 1 claim survived on a Rule of Reason theory.

The *Flash Electronics* court refused to adopt, however, a "shared monopoly" theory in assessing the Section 2 monopolization and attempted monopolization claims. It therefore found the plaintiffs' allegations of market share (often a surrogate for market power) insufficient to state a claim under Section 2. Apparently, the plaintiffs did not allege that the competitor with a 50 percent share, standing alone, had sufficient market power to state a claim for an "attempt to monopolize" (although there is case law supporting such a theory).

The plaintiffs also alleged that Universal sold products of like grade and quality to their competitors at lower prices than it sold them to the plaintiffs in violation of Section 2(a) of the Robinson-Patman Act. The plaintiffs also alleged that Universal granted advertising and promotional allowances and rebates to their competitors in violation of Sections 2(d) and (e) of the Act.

The *Flash Electronics* court also declined to dismiss the plaintiffs' ancillary common law claims. The plaintiffs' allegations of fraud—that Universal induced the plaintiffs to disclose their confidential customer information to Universal—were sufficient, the court held.

Turning to the plaintiffs' tortious interference claims, the court observed that any allegations that Universal interfered with its own contracts with the plaintiffs would not be actionable as a matter of law. However, the plaintiffs' allegations that the competing distributors unlawfully interfered with the plaintiffs' relationship with Universal were not subject to dismissal, the court held. The *Flash Electronics* court so held even though the plaintiffs' contracts with Universal were terminable at will. Because the defendant distributors allegedly used "improper means" (antitrust violations) to interfere, they could have engaged in unlawful interference with the contracts.

Finally, the plaintiffs in *Flash Electronics* sufficiently alleged that Universal committed a breach of contract by not providing them the required ten days' notice of termination.

***J.L. Terrel's & Terrel's Pro Finishes, Inc. v. Sherwin-Williams Auto. Finishes*, No. 02-CV-2645, 2004 U.S. Dist.**

LEXIS 6411, Bus. Franchise Guide (CCH) ¶ 12,813 (E.D. Pa. Mar. 30, 2004)

The U.S. District Court for the Eastern District of Pennsylvania gave short shrift to the plaintiff's antitrust claims in *Sherwin-Williams Automotive Finishes*. The antitrust violations attributed to the defendant suppliers consisted of alleged breach and later termination of an exclusive distributor agreement with the plaintiff. The plaintiff had purchased supplies from competitors of Sherwin-Williams in violation of the exclusive contract. There was no allegation that Sherwin-Williams possessed or misused market power sufficient to state a claim under Section 1 or Section 2 of the Sherman Act. To the contrary, the plaintiff's allegations demonstrated that there was "sufficient competition" in the sale of automotive refinishing paint in the geographic area in which the plaintiff competed. Like so many franchise termination cases, the plaintiff's remedy—if any—was held to be in common law.

***Innomed Labs, LLC v. Alza Corp.*, 368 F.3d 148, Bus. Franchise Guide (CCH) ¶ 12,824 (2d Cir. May 14, 2004) (*Innomed I*)**

In *Innomed I*, the U.S. Court of Appeals for the Second Circuit affirmed a verdict and judgment for the defendant. In the process, the appellate court engaged in a lengthy discussion in which it reached the unsurprising conclusion that commodities (in this case, patented pharmaceutical products) sold to an exclusive distributor for distribution are covered by the Robinson-Patman Act—just as commodities sold to a nonexclusive distributor are also covered.

The court also held that damages under the Robinson-Patman Act may be proven in several ways. One way of proving damages was to show that the plaintiff had to charge higher prices to its customers than those charged by the favored distributor-competitors (which had received lower prices from the supplier), thus causing the plaintiff to lose customers and profits. Because the distributor had lost the Robinson-Patman case on liability, not on damages, the fact that the district court's jury instruction on damages were erroneous was harmless error, the Second Circuit held.

A subsequent decision of the Second Circuit in the same proceeding (*Innomed II*) is discussed under the topic heading "Good Faith and Fair Dealing."

***G&R Moojestic Treats, Inc. v. Lisi*, No. 03 Civ. 10027 (RWS), 2004 U.S. Dist. LEXIS 8806, Bus. Franchise Guide (CCH) ¶ 12,826 (S.D.N.Y. May 19, 2004) (*Maggie Moo's International*)**

Standing was the sole antitrust issue presented in *Maggie Moo's International*. The dispute related to Maggie Moo's alleged failure to allow the franchisees to locate their franchised store where they desired. Instead, the franchisor approved an alternate site in an allegedly deficient location—while allowing another franchisee to locate where the plaintiffs had desired to be.

U.S. District Judge Sweet of the Southern District of New York held that the brother of the franchisees, who had loaned them money for the franchise, lacked standing to sue Maggie

Moo's for antitrust violations. The basis for the court's holding was that the franchisees' brother was not directly affected by or in the "target area" of the alleged antitrust violations.

Also see the discussion of *Maggie Moo's International* under the topic headings "Choice of Forum" and "Fraud."

***Euromodas, Inc. v. Zanella, Ltd.*, 368 F.3d 11, Bus. Franchise Guide (CCH) ¶ 12,830 (1st Cir. May 17, 2004)**

In *Euromodas*, the U.S. Court of Appeals for the First Circuit restated principles relating to the antitrust laws and dealer terminations that have controlled since the U.S. Supreme Court decided *Monsanto Co. v. Spray-Rite Service Co.*, 465 U.S. 752 (1984) and *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988). The First Circuit held that the decision by a supplier to terminate a dealer, even after receiving complaints by a competing dealer, was a vertical intrabrand restraint and was not per se illegal "without more." "More" was not alleged in this case. Even if the plaintiff was a price cutter, its termination was not per se illegal unless the termination was part of an overall conspiracy to establish a price or price levels, which was not alleged. That was the required "more" under the U.S. Supreme Court's decision in *Sharp*, the First Circuit held.

It may be true that *Monsanto* and especially *Sharp* have rendered it nearly impossible for discounter-plaintiffs to win termination cases under the antitrust laws. Regardless of whether one views that as a positive or a negative development, the law cannot be changed absent a reversal of precedent by the U.S. Supreme Court or action by Congress.

***Woodley Rd. Joint Venture v. ITT Sheraton Corp.*, 369 F.3d 732, Bus. Franchise Guide (CCH) ¶ 12,836 (3d Cir. May 25, 2004)**

The decision of the U.S. Court of Appeals for the Third Circuit in *ITT Sheraton* is one of the rare cases that addresses Robinson-Patman Act Section 2(c). Section 2(c) prohibits payments or consideration furnished to or received by a person in connection with the sale or purchase of goods except for bona fide services rendered. The hotel owners' payments of inflated purchase prices were made pursuant to a program whereby the managing corporation negotiated large-volume discounts with vendors supplying its hotels. Pursuant to this program, vendors were required to add a surcharge that was neither itemized nor disclosed on bills or invoices. Rather, the surcharge was remitted directly to the managing corporation in the form of a rebate. Section 2(c) is applicable to garden-variety commercial bribery. The *ITT Sheraton* court held that simply paying inflated prices to vendors, standing alone, is not a conspiracy of the type that the antitrust laws were intended to prevent. To the extent that the plaintiffs had any remedy, the court held, they were limited to claims for breach of contract or corruption of the principal-agent relationship.

Additional factors that weighed against granting antitrust standing included the fact that excluded vendors were more direct victims and proper plaintiffs. Moreover, the actual plaintiffs' antitrust theory was inextricably intertwined with their claims for breach of contract and fiduciary duty.

***Blue Tree Hotels, Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc.*, 369 F.3d 212, Bus. Franchise Guide (CCH) ¶ 12,837 (2d Cir. May 20, 2004)**

This decision involving claims of commercial bribery under the Robinson-Patman Act will be the subject of an upcoming "Case Comment."

***Dagher v. Saudi Refining, Inc.*, 369 F.3d 1108, Bus. Franchise Guide (CCH) ¶ 12,838 (9th Cir. June 1, 2004)**

Gasoline service station owners brought a class action antitrust suit against various oil companies alleging price fixing in *Dagher*. Before trial, the district court had granted summary judgment in favor of all defendants. The U.S. Court of Appeals for the Ninth Circuit, however, affirmed in part and reversed in part. It held that the owners lacked standing to sue one of the defendants. Summary judgment was inappropriate as to all of the other defendants, the Ninth Circuit held, because a factual issue existed as to whether the Sherman Act's per se rule against price fixing was applicable to the complex economic arrangements in the joint venture among the defendants.

The court held that the crucial issue of fact was whether the competitor oil companies' alleged price fixing was a naked restraint of trade, justifying per se treatment, or was only ancillary to the joint venture. If it was merely ancillary, the alleged price fixing arguably should be judged under the Rule of Reason if the defendants could show that there was a sufficient reason for the price fixing in furtherance of the legitimate needs of the joint venture. As the U.S. Supreme Court has held, a legitimate joint venture can be considered akin to a partnership, or a lawful pooling of resources, risk of loss, and pricing decisions.

In reversing summary judgment for the defendants, the Ninth Circuit expressed skepticism as to the defendants' justification for the price arrangement. The question is not whether a joint venture **may** price its products, the Ninth Circuit held. Rather, the issue is whether former (and potentially future) competitors may create a joint venture in which they unify the pricing and thereby fix the prices of their distinct product brands. This was not a "research and development" joint venture or one in which the venturers were merging their lines into one brand. Most significantly, the court held, thus far the defendants had not produced sufficient evidence that their price fixing was ancillary and "important to accomplishing the legitimate aims of the joint venture."

ARBITRATION

***TES Franchising, LLC v. Loveman*, No. 3:04cv219, 2004 U.S. Dist. LEXIS 7101, Bus. Franchise Guide (CCH) ¶ 12,802 (D. Conn. Apr. 20, 2004)**

The decision of the federal district court in Connecticut in *TES Franchising* is noteworthy in one important respect. Ordinarily the determination of arbitrability is left to the court—absent a clear and unmistakable intent by the parties to allow the arbitrator to decide that. The franchise

agreement at issue in *TES Franchising* contained no such recital. The agreement did, however, specifically incorporate the AAA Commercial Arbitration Rules. The AAA Rules specifically state that the arbitrator is granted “the power to rule on his or her jurisdiction, including with respect to the existence, the scope and the validity of the arbitration agreement” (AAA Rule 7(a)). In view of the foregoing provision of the AAR Rules, the court is barred from ruling on these questions, the *TES Franchising* court held.

Further, the court stated that it would not engage in piecemeal review of interim decisions made during an arbitration, such as the choice of an arbitrator. Rather, it would only review the entire matter upon issuance of the final arbitration award.

***Success Sys., Inc. v. Maddy Petroleum Equip., Inc.*, 316 F. Supp. 2d 93, Bus. Franchise Guide (CCH) ¶ 12,816 (D. Conn. May 3, 2004)**

An arbitrator did not manifestly disregard the law by refusing to award attorney fees in *Success Systems*, according to the U.S. District Court for the District of Connecticut. The *Success Systems* case involved numerous claims and counterclaims arising from the parties’ distribution agreement. The arbitrator rejected all claims asserted by each party except one. Both parties sought attorney fees. The arbitrator ruled, however, that “[e]ach party is to bear their [sic] own Attorney fees.” *Success Systems* moved to vacate or modify the arbitrator’s decision not to award it attorney fees on the grounds of manifest disregard of the law and evidence. The *Success Systems* court rejected “manifest disregard of the evidence” as a basis to overrule an arbitrator’s decision. The court observed that if this were an available ground for vacatur, courts would be forced to retry the entire arbitration.

Courts in the Second Circuit do recognize manifest disregard of the law as a basis for vacating an arbitrator’s decision. No such manifest disregard of the law occurred in this case, the *Success Systems* court held. To demonstrate manifest disregard of the law, a party must show that the arbitrator knew and understood the law and consciously chose to defy it. *Success Systems* was able to cite Connecticut law that prohibits a court from disregarding a contractual attorney fee provision. The court found, however, that *Success Systems* did not prove that this clearly applied to the facts. There were a number of plausible reasons for the arbitrator’s decision not to award fees, the court held. The contractual provisions with respect to attorney fees were limited to court proceedings. Moreover, *Success Systems* had prevailed on just one of its claims. Last but not least, *Success Systems* had submitted an unallocated attorney fee request that did not explain which fees were attributable to the one claim on which it did prevail.

***Cycle Sport, LLC v. Dinli L.P.*, No. 03–3000, 2004 U.S. Dist. LEXIS 7550, Bus. Franchise Guide (CCH) ¶ 12,817 (E.D. La. Apr. 29, 2004)**

The parties were headed to arbitration in *Cycle Sport* after the U.S. District Court for the Eastern District of Louisiana ordered the parties to arbitrate and stayed court proceedings. *Cycle Sport* argued unsuccessfully that its claims for

statutory unfair trade practices and consumer protection law violations were not arbitrable. The contract clause at issue in *Cycle Sport* required arbitration of “[a]ny claim, dispute or controversy arising out of or in connection with or relating to this Agreement or the breach or alleged breach thereof. . . .” According to *Cycle Sport*, these claims did not arise out of the contract. In making its determination, the court focused on the factual allegations in the complaint rather than the legal labels attached to the causes of action. The plaintiff’s claims could not be maintained without reference to the contract and thus arose directly from the dealer agreement and were arbitrable. The defendant had not waived arbitration by participating in a related state administrative hearing, or by its minimal participation in these court proceedings.

***Sino Swearingen Aircraft Corp. v. Bell Aviation, Inc.*, No. 05–03–01618-CV, 2004 Tex. App. LEXIS 4878, Bus. Franchise Guide (CCH) ¶ 12,829 (Tex. App. June 1, 2004)**

The decision of the Texas Court of Appeals in *Bell Aviation* demonstrates, among other things, the need for coordination among various agreements to ensure efficient, economical dispute resolution. *Sino Swearingen* and *Bell Aviation* entered into two related agreements. The first was a distributorship agreement for the marketing, sale, and distribution of jet aircraft. The second contract was an aircraft purchase agreement. The distributorship agreement required arbitration of any dispute arising out of the agreement. The aircraft purchase agreement did not contain an arbitration provision. Each of the agreements had a merger clause that indicated that it was to be viewed as a stand-alone agreement.

When disputes arose between the parties, *Sino Swearingen* moved to compel arbitration of proceedings relating to both agreements. The trial court denied the motion, and *Sino Swearingen* sought reversal by way of an interlocutory appeal. In affirming the decision of the trial court, the Texas Court of Appeals concluded that the determination to submit disputes to arbitration was a contractual matter between the parties. The court noted that all language related to the arbitration provision in the distributorship agreement referred specifically to that agreement. The court reasoned that, because the arbitration clause was limited to disputes arising out of the distributorship agreement, disputes under the aircraft purchase agreement were not subject to arbitration.

***Lanham Ford, Inc. v. Ford Motor Co.*, No. 03–1840, 2004 U.S. App. LEXIS 11225, Bus. Franchise Guide (CCH) ¶ 12,831 (4th Cir. June 8, 2004)**

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

ATTORNEY FEES

***Success Sys., Inc. v. Maddy Petroleum Equip., Inc.*, 316 F. Supp. 2d 93, Bus. Franchise Guide (CCH) ¶ 12,816 (D. Conn. May 3, 2004)**

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

***G&R Moojestic Treats, Inc. v. Lisi*, No. 03 Civ. 10027 (RWS), 2004 U.S. Dist. LEXIS 8806, Bus. Franchise Guide (CCH) ¶ 12,826 (S.D.N.Y. May 19, 2004) (*Maggie Moo's International*)**

This case is discussed under the topic headings “Antitrust,” “Choice of Forum,” and “Fraud.”

BANKRUPTCY

***In Re: Twin City Power Equip., Inc., Debtor*, 308 B.R. 898, Bus. Franchise Guide (CCH) ¶ 12,807 (Bankr. C.D. Ill. Apr. 7, 2004)**

In *Twin City Power Equipment*, the federal bankruptcy court in Illinois granted John Deere Co. relief from the automatic stay provisions of the Bankruptcy Code. As a result, a Deere dealer, a Chapter 11 debtor, was barred from assuming a “sign agreement.” The *Twin City Power Equipment* court found that Deere’s agreement to finance the dealer’s acquisition of sufficient inventory of Deere products to operate as an authorized dealer was integral rather than merely incidental to the dealer agreement. As such, the dealer agreement was considered “a financial accommodation” agreement that is not assumable by the trustee or the debtor-in-possession. See 11 U.S.C. § 365(c)(2). The sign agreement, which allowed the dealer to use the Deere trademark, automatically terminated with the dealer agreement. As a result, the dealer was statutorily barred from assuming the sign agreement as well.

The dealer was well in arrears to Deere, which provided Deere cause to modify the stay and to allow it to exercise its rights and remedies, including the termination of the agreements, the court held.

CHOICE OF FORUM

***Cycle Sport, LLC v. Dinli L.P.*, No. 03–3000, 2004 U.S. Dist. LEXIS 7550, Bus. Franchise Guide (CCH) ¶ 12,817 (E.D. La. Apr. 29, 2004)**

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

***G&R Moojestic Treats, Inc. v. Lisi*, No. 03 Civ. 10027 (RWS), 2004 U.S. Dist. LEXIS 8806, Bus. Franchise Guide (CCH) ¶ 12,826 (S.D.N.Y. May 19, 2004) (*Maggie Moo's International*)**

In *Maggie Moo's International*, the U.S. District Court for the Southern District of New York transferred the case to Maryland for mediation, based upon a mandatory choice-of-forum clause. The forum selection clause recited that “all controversies, disputes and claims arising out of or related to this Agreement (including any claim that the Agreement or any of its provisions is invalid, illegal or otherwise avoidable or void. . . shall first be subject to non-binding mediation).” The court, citing New York law, found a strong public policy in favor of forum selection clauses. The clause was therefore valid unless the clause itself had been procured by fraud or overreaching, or if the selected forum—as a practical matter—deprived a party of his or her day in court due to the grave unfairness or inconvenience of the selected forum (or if some fundamental unfairness deprived the plaintiff of a remedy, or if the

clause contravened a strong public policy of the forum state). None of these arguments applied to the case.

Further, the court held that a “take it or leave it” form contract is not an illegal contract of adhesion, and that all claims of any nature between the parties were embraced by the broad language of the forum selection clause.

See the discussion of *Maggie Moo's International* under the topic headings “Antitrust” and “Fraud.”

CHOICE OF LAW

***Century Pac., Inc. v. Hilton Hotels Corp.*, No. 02-Civ. 8258, 2004 U.S. Dist. LEXIS 6904, Bus. Franchise Guide (CCH) ¶ 12,800 (S.D.N.Y. Apr. 21, 2004)**

Of the various claims asserted by the plaintiffs in *Century Pacific*, the only one that the court dismissed on the defendants’ Rule 12(b)(6) motion was a claim for violation of the New York Franchise Sales Act. The plaintiffs contended that the New York choice-of-law provision of their franchise agreements (which also contained a New York forum selection clause) made the agreements subject to the New York franchise statute.

In addressing this contention, the U.S. District Court for the Southern District of New York cited authority for the proposition that a New York choice-of-law provision may—in certain cases—result in extraterritorial application of the New York Franchise Sales Act. The franchise agreements at issue in *Century Pacific*, however, contained an express “carve-out” provision. The carve-out provision stated: “nothing in this [choice-of-law] section is intended to invoke the application of any franchise [law] . . . of the State of New York . . . which would not otherwise apply. . . .” Because the New York Franchise Sales Act does not otherwise apply to transactions outside New York, the *Century Pacific* court dismissed this claim as a matter of law.

The defendants were perhaps fortunate that their attorneys had the foresight to expressly disclaim application of the New York Franchise Sales Act in the provisions of the franchise agreements that otherwise required the application of New York law. Otherwise, the *Century Pacific* defendants might well have faced viable claims for violation of the New York Franchise Sales Act, given the court’s refusal to dismiss the plaintiffs’ fraud and other claims. See the discussion of *Century Pacific* under the topic heading “Fraud.”

***It's Just Lunch Int'l, LLC v. Polar Bear, Inc.*, Bus. Franchise Guide (CCH) ¶ 12,819 (S.D. Cal. Apr. 29, 2004)**

The U.S. District Court for the Southern District of California refused to apply a franchise agreement’s Nevada choice-of-law provision on a motion to dismiss in *It's Just Lunch*. California law provides that a choice-of-law provision should not be given effect where the validity of the agreement containing the provision has been challenged. In considering the Rule 12(b)(6) motion, the court accepted as true the counterclaimants’ allegations concerning the invalidity of the franchise agreement. The court thus declined to apply the agreement’s choice-of-law clause.

The court also ruled that the counterclaimants’ claims for fraud in the inducement of the franchise agreement were not

barred by the agreement's integration clause. California law permits parol evidence to prove fraud in the inducement even where the contract recites that all conditions and representations are embodied in the contract. *See Greenspan Volkswagen, Inc. v. Ford Motor Land Dev. Corp.*, 32 Cal. App. 4th 985, 995 (Ct. App. 1995).

The counterclaimants' California Franchise and Investment Law claim also survived the motion to dismiss. The *It's Just Lunch* court concluded that nonresident franchisees are entitled to sue under the Act, so long as the sale or offer to sell was made in California. The counterclaimants' Maryland Franchise Sales Act claim was dismissed, however. That claim could be brought only in a Maryland court pursuant to language in the franchise agreement rider.

The court also denied the motion to dismiss as to counterclaimants' California unfair trade practices claim, finding that the counterclaimants had properly limited their claim to injunctive relief pursuant to sections 17200 and 17500 of the California Business and Professions Code.

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Standing was the sole antitrust issue presented in *Maggie Moo's International*. The dispute related to Maggie Moo's alleged failure to allow the franchisees to locate their franchised store where they desired. Instead, the franchisor approved an alternate site in an allegedly deficient location—while allowing another franchisee to locate where the plaintiffs had desired to be.

U.S. District Judge Sweet of the Southern District of New York held that the brother of the franchisees, who had loaned them money for the franchise, lacked standing to sue Maggie Moo's for antitrust violations. The basis for the court's holding was that the franchisees' brother was not directly affected by or in the target area of the alleged antitrust violations.

Also see the discussion of *Maggie Moo's International* under the topic headings "Choice of Forum" and "Fraud."

CLASS ACTIONS

***Callahan v. Sunoco, Inc.*, No. 03-4461, 2004 U.S. Dist. LEXIS 9114, Bus. Franchise Guide (CCH) ¶ 12,828 (E.D. Pa. May 19, 2004)**

The U.S. District Court for the Eastern District of Pennsylvania denied certification of a class of 249 dealers that sought to sue Sunoco for breach of contract. The dealers alleged that Sunoco's dealer tank wagon (DTW) prices for gasoline had not been set in good faith and that Sunoco had therefore breached their dealer franchise agreements. Specifically, the dealers alleged that Sunoco set the DTW prices with "an apparent goal of . . . eliminating Dealers . . . from their marketing operations throughout the United States, so as to take over and operate, or eliminate the Dealers' service stations."

The 249 Sunoco dealers comprising the putative class operated in seventy-seven price zones in which (1) Sunoco's

average DTW price was half a penny more than the average benchmark price and (2) competitors of the Sunoco dealers supplied more than 50 percent of the gasoline.

Not surprisingly, the court first addressed the threshold issue of whether the putative class satisfied the fair prerequisites of Federal Rule of Civil Procedure 23(a): (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. Sunoco did not dispute that a 249-member class was so numerous as to make joinder impracticable, so that the first prerequisite for class certification was satisfied.

The court denied class certification, however, because it found that the second prerequisite—commonality—was not present. The commonality prerequisite of Federal Rule 23(a) requires a showing that "there are questions of law or fact common to the class." The court found that the commonality prerequisite was not satisfied even though "the complaint appears to raise the common question of whether Sunoco made DTW pricing decisions in bad faith . . ." In support of its finding, the court cited the following evidence:

Sunoco has shown that it made separate pricing decisions for each price zone after considering the zone's local competitive conditions, historical sales volumes, market trends, and other factors.[] Even after setting a DTW price for each zone, Sunoco considered its decision every day as it received updated data. [] Because plaintiffs have not come forward with any evidence that all of these thousands of individual pricing decisions were part of a common plan, we cannot find that there are questions of law or fact common to the class. (citations omitted).

Because the court found no common questions of law or fact, it was not necessary for the court to address the third and fourth prerequisites of Federal Rule 23(a): typicality and adequacy of representation. The court nevertheless proceeded to address these other prerequisites for the stated purpose of "round[ing] out the record." For the same reasons that the court found no common questions of fact or law, the court found that the claims or defenses of the representative parties were not "typical of the claims or defenses of the class" as required by Federal Rule 23(a). The court found no bar to class certification, however, based on adequacy of representation.

***Dagher v. Saudi Refining, Inc.*, 369 F.3d 1108, Bus. Franchise Guide (CCH) ¶ 12,838 (9th Cir. June 1, 2004)**

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

CONTRACT ISSUES

***Rich Food Servs., Inc. v. Rich Plan Corp.*, No. 03-1198, 2004 U.S. App. LEXIS 8638, Bus. Franchise Guide (CCH) ¶ 12,798 (4th Cir. May 3, 2004)**

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

***Flash Elecs., Inc. v. Universal Music & Video Distrib. Corp.*, 312 F. Supp. 2d 379, Bus. Franchise Guide (CCH) ¶ 12,799 (E.D.N.Y. Mar. 31, 2004)**

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

***Innomed Labs, LLC v. Alza Corp.*, No. 02-9491, 2004 U.S. App. LEXIS 9452, Bus. Franchise Guide (CCH) ¶ 12,825 (2d Cir. May 14, 2004) (*Innomed II*)**

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

***Boyle v. Douglas Dynamics, LLC*, No. 03–2430, 2004 U.S. App. LEXIS 10226, Bus. Franchise Guide (CCH) ¶ 12,832 (1st Cir. May 25, 2004)**

This case is discussed under the topic heading “Oral Agreements.”

DAMAGES

***Fred Lavery Co. v. Nissan N.A., Inc.*, No. 03–1005, 2004 U.S. App. LEXIS 8950, Bus. Franchise Guide (CCH) ¶ 12,814 (6th Cir. May 4, 2004)**

In an unpublished opinion, the U.S. Court of Appeals for the Sixth Circuit affirmed the district court’s dismissal of a terminated Infiniti dealer’s claims for compensatory and punitive damages. The decision is discussed under the topic heading “Statutory Claims.”

***Team Tires Plus, Ltd. v. Heartlein*, Bus. Franchise Guide (CCH) ¶ 12,820 (D. Minn. Mar. 17, 2004)**

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

***Guzman v. Jan-Pro Cleaning Sys., Inc.*, No. P96–4703, 2004 R.I. Super. LEXIS 94, Bus. Franchise Guide (CCH) ¶ 12,834 (May 19, 2004)**

This Rhode Island state court decision presents an interesting analysis of the measure of future damages to be awarded as a result of a breach of a franchise agreement. In *Guzman*, the trial court determined that Jan-Pro breached its contract with and defrauded Guzman and awarded Guzman \$120,000 plus attorney fees of \$7,500. The Rhode Island Supreme Court affirmed the defendant’s liability for fraud and upheld the award of attorney fees. The Rhode Island Supreme Court reversed the damage award, however, because it failed to reflect expenses that the plaintiff would have incurred in the operation of the business. The Rhode Island Supreme Court remanded the case to the superior court to establish the appropriate measure of damages. In a trial spanning three days, each party had its experts testify about damages. The plaintiff’s expert sought to establish that the plaintiff’s future lost profits discounted to their present value were approximately \$105,000. The expert relied on generally accepted accounting principles, but did not include labor, payroll taxes, or mileage in the operating costs of plaintiff’s business. The plaintiff’s expert found that the plaintiff’s profit margin would have been in excess of 81 percent for the first three years of the contract and in excess of 75 percent for years four through ten of the contract, for a total of slightly more than \$76,000. He then added the costs of the plaintiff’s personal income taxes to the calculation to reach a total lost profit of in excess of \$104,000.

The defendant’s experts, on the other hand, testified that the typical costs of a cleaning franchise’s percentage of revenue were 55 percent for labor, 8 percent for a franchise fee, 5 percent for a management fee, 5.5 percent for insurance, 7 percent for payroll taxes, 1.5 percent for supplies, 2

percent for repairs and maintenance, and approximately 7 percent for mileage. Applying those figures to the franchisee’s weekly gross revenue, he found a profit margin of 8.2 percent for years four through ten of the contract and a margin of 11.2 percent for the first three years of the contract. The defendant’s expert calculated the lost profits at approximately \$13,000.

The court noted that the expert testimony was conflicting but found the defendant’s experts to be far more credible because of their experience. The court found the defendant’s profit margin determination to be far more reasonable than that of the plaintiff’s expert. Accordingly, the court awarded the plaintiff \$13,000 plus attorney fees in the amount of \$7,500.

***Eden Elec., Ltd. v. Amana Co.*, 370 F.3d 824, Bus. Franchise Guide (CCH) ¶ 12,835 (8th Cir. May 28, 2004)**

This decision of the U.S. Court of Appeals for the Eighth Circuit serves as a reminder of the adverse consequences for manufacturers that defraud their distributors. In this case, the appellate court upheld a damage award against Amana of \$12.1 million, including \$10 million in punitive damages. Eden was the owner of twenty-five appliance stores throughout Israel, some of which sold Amana products that Eden purchased from Amana’s Israeli distributor. When the Israeli distributor encountered financial difficulties, Amana sought a new distributor for Israel and approached Eden to become its exclusive distributor there. During the negotiations, Amana’s representatives made representations of good faith and expressed an interest in a long-term relationship with Eden. Amana entered into a long-term distributorship contract with Eden, and Eden paid Amana \$1.2 million in cash and issued a letter of credit in the same amount for inventory located in Israel.

After seventy-seven days, Amana terminated the distributorship agreement without explanation. During the period of Amana’s discussions with Eden, the former Israeli distributor had numerous conversations with Amana senior management personnel to the effect that the only purpose of the Eden project was to get rid of \$2.4 million in “junk” inventory. Eden subsequently learned that—notwithstanding the exclusive nature of the relationship—Amana continued selling refrigerators to other entities for the Israeli market and represented to others that it was still looking for a long-term distributor for Israel. Eden filed a lawsuit alleging fraud in the inducement. Following a thirteen-day trial, the jury returned an award of \$2.1 million in compensatory damages and \$17.875 million in punitive damages. The district court reduced the punitive damage award to \$10 million. Amana appealed the decision, claiming that the district court’s jury instructions were improper and that the punitive damage award violated due process of law.

Amana first argued that the fraudulent misrepresentation claim was not supported by the evidence because Amana had never represented that it was acting in good faith. The Eighth Circuit stifled its incredulity at Amana’s argument, noting that one of Amana’s own officers had testified that he told Eden’s

representatives that Amana would deal with Eden in good faith. Amana also argued that the fraud claim was improper because the fraud claim against the individual executives had been dismissed on summary judgment. The Eighth Circuit found, however, that the actions of a corporation as a whole, executed by its agents individually or collectively, are those that satisfy the fraud claim, and it was not necessary that the fraud be perpetrated by a particular individual.

Finally, the Eighth Circuit reviewed the constitutionality of the punitive damage award. The court noted that the punitive damage award, to be overturned, must be so grossly excessive that it violated due process in light of the reprehensibility of the conduct involved, and the disparity between the potential harm suffered by the plaintiff and the punitive damage award. The Eighth Circuit had no trouble agreeing with the district court that it could hardly think of a more reprehensible case of business fraud. The court cited Amana's intentional malice, trickery, and deceit. The Eighth Circuit found the ratio of punitive damages to compensatory damages of slightly more than 4.5:1 to fall well within the contours of due process.

Woodley Rd. Joint Venture v. ITT Sheraton Corp., 369 F.3d 732, **Bus. Franchise Guide (CCH) ¶ 12,836 (3d Cir. May 25, 2004)**

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

DEFINITION OF FRANCHISE

C.F. Schwartz Motor Co. v. Int'l Truck & Engine Corp., No. 03C-05-011 HDR, 2004 Del. Super. LEXIS 103, **Bus. Franchise Guide (CCH) ¶ 12,806 (Mar. 26, 2004)**

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

G&R Moojestic Treats, Inc. v. Lisi, No. 03 Civ. 10027 (RWS), 2004 U.S. Dist. LEXIS 8806, **Bus. Franchise Guide (CCH) ¶ 12,826 (S.D.N.Y. May 19, 2004) (Maggie Moo's International)**

This case is discussed under the topic headings "Antitrust," "Choice of Forum," and "Fraud."

EARNINGS CLAIMS

Federal Trade Comm'n v. Ameritel Payphone Distributions, Inc., **Bus. Franchise Guide (CCH) ¶ 12,810 (S.D. Fla. Oct. 15, 2003)**

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

Federal Trade Comm'n v. Ameritel Payphone Distributions, Inc., **Bus. Franchise Guide (CCH) ¶ 12,811 (S.D. Fla. Apr. 9, 2004)**

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

Team Tires Plus, Ltd. v. Heartlein, **Bus. Franchise Guide (CCH) ¶ 12,820 (D. Minn. Mar. 17, 2004)**; **Team Tires Plus, Ltd. v. Heartlein**, **Bus. Franchise Guide (CCH) ¶ 12,821 (D. Minn. Apr. 19, 2004)**

The two opinions in the heavily litigated matter of *Team Tires Plus* are instructive with respect to a franchisor's

dealings with "prospective" franchisees who have signed a franchise agreement. Logically, one might assume that a person who has signed a franchise agreement with a franchisor is no longer a "prospective" franchisee but has become a franchisee. If, however, the prospective franchisee signs a franchise agreement that it may cancel during a cancellation period, the signing franchisee may still be deemed a prospective franchisee.

Team Tires Plus, Ltd., was a franchisor of centers that sell automotive parts and supply automotive services. Heartlein purchased a Tires Plus franchise for Galesburg, Illinois in 1997 and a second franchise for Burlington, Iowa in 1999. In each case, Tires Plus, a Minnesota company, provided Heartlein, an Illinois resident, with a Minnesota and Illinois uniform franchise offering circular (UFOC).

In its preliminary information form, Tires Plus outlined three approval stages. These entailed a personal interview (Stage I), a review of the applicant's personal and financial background (Stage II), and a review of the applicant's proposed site (Stage III). Following these three stages of approval, the franchisee had to successfully complete the Tires Plus training program (Stage IV). After Heartlein received Stage I and Stage II approval, he signed a franchise agreement in June 1997 for the Galesburg franchise. Among other things, the UFOC stated:

You have the right to cancel your Franchise Agreement for any reason before signing documents that legally obligate you to develop the property for the Franchised Service Center. If you exercise this right to cancel, Tires Plus will retain \$3,500 for its administrative and out-of-pocket expenses, and will refund the balance of the Initial Fee to you.

Heartlein signed a lease for the Galesburg franchise location on August 26, 1997. On the same day, Tires Plus provided him with a detailed three-year pro forma with costs, sales, and earnings information for the Galesburg market. The pro forma did not contain any disclaimers or admonitions. The pro forma contained demographic information about the Galesburg area and noted that it was prepared by Equifax. In the three-year pro forma, however, Tires Plus also added a multiplier factor that increased projected sales volume by 25 percent for the Galesburg franchise above that presented in the pro forma by Equifax. Tires Plus had included the multiplier to bring the projected sales results for the new store in line with the actual results of existing Tires Plus stores. On September 12, 1997, Tires Plus informed Heartlein that he was approved through Stage III for the Galesburg store. The parties followed similar procedures with respect to the Burlington store, although the Burlington pro forma used a 47 percent multiplier.

Both of Heartlein's franchises operated at a loss throughout the years 1999 and 2000. In December 2000, Tires Plus notified Heartlein that it would terminate both franchises. Tires Plus in fact terminated Heartlein's franchises in April 2001. In July 2001, Tires Plus sued Heartlein for his financial default under their franchise agreements. Heartlein counterclaimed, alleging, among other things, common law fraud and violations of the Illinois Franchise Disclosure

Act. The parties agreed that Minnesota law would govern all counts and claims in the proceeding other than those brought under the Illinois Franchise Disclosure Act.

In the initial action, Heartlein sought to amend his counterclaims for fraud and violation of the Illinois Franchise Disclosure Act to include claims for punitive damages under Minnesota law, and Tires Plus opposed the motion. The court essentially agreed with Heartlein and issued an order allowing claims for punitive damages.

To assert claims for punitive damages, the court noted, a party must produce "clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others." Under Minnesota law, a party may not include punitive damage claims in its initial pleadings. Rather, Minnesota law requires a party to later amend to claim punitive damages if and only if it can make a prima facie showing of entitlement to punitive damages. The court analyzed the punitive damage claims under Minnesota common law principles and under the Illinois Franchise Disclosure Act. In addressing the Minnesota common law fraud claims, the court determined that Tires Plus knew that the documents were not generated wholly by Equifax and knew that the representations in the documents that contained the multipliers were false. Because Heartlein had the right to rescind the franchise agreement at the time of receiving the pro formas, he may reasonably have relied on the reports in choosing to forego his right to cancel his franchise agreement before Tires Plus formally approved the lease space. The court did not indicate any concern over the fact that Tires Plus provided Heartlein the pro forma on the same day that he signed his leases for the centers.

Similarly, the court found a prima facie case for punitive damages under the Illinois Franchise Disclosure Act. The court determined that Heartlein was still a prospective franchisee until he could no longer cancel his franchise agreement. As a result, the court held, Heartlein was a prospective franchisee at the time he received the pro forma financial projections. Accordingly, the court granted Heartlein's motion to amend his counterclaims to include punitive damages on those two counts.

Approximately a month after granting Heartlein leave to amend his counterclaims to include punitive damages, the court heard Tires Plus's motion for summary judgment with respect to the counterclaims. The court denied in significant part Tires Plus's motion for summary judgment. First, the court addressed the counterclaims for Minnesota common law fraud. Heartlein claimed that Tires Plus misrepresented material aspects of the franchise relationship. Tires Plus argued, however, that the integration clause of the franchise agreement barred such claims. The court found that pre-contractual representations by the franchisor were contradicted by the franchise agreement. As a result, the court held, the jury needed to resolve the ambiguity. Similarly, the court found that the issue of reasonable reliance on the altered Equifax pro formas and of damages attributable to the misrepresentations would be questions of fact for the jury to decide. Finally, the court did grant Tires Plus's summary judgment motion with respect to a claim by Heartlein that

Tires Plus failed to disclose rebates received from third-party suppliers. The court noted that purchases from the third-party suppliers were not required and that Heartlein offered no evidence of detrimental reliance or damages based on whether the vendor payments resulted in any price differential to franchisees.

In addressing Heartlein's claims under the Illinois Franchise Disclosure Act, the court engaged in a similar analysis to its review of Heartlein's motion to amend his complaint to include punitive damages. The court found that the information that Tires Plus had omitted from the pro formas made them misleading. In addition, the court found that the pro formas would qualify as earnings claims under the Illinois Franchise Disclosure Act. As such, the pro formas should have included a description of the factual basis and material assumptions underlying their preparation and presentation. In addition, the pro formas should have carried a conspicuous admonition that the new franchisee's individual financial results were likely to differ from those stated in the earnings claim. The court was not persuaded by the Tires Plus argument that the antifraud provision of the Illinois statute relates to earnings claims made in the offer or sale of a franchise, not to post-sale activity, because franchisees were not bound to the franchise agreement until after Stage III approval.

The *Tires Plus* action should raise a red flag for franchisors whose franchise agreements can be canceled by the franchisee and cause them to reevaluate their pre- and post-sale procedures. Franchisors often have their prospective franchisees sign a franchise agreement and come to training. Franchisors often provide their new franchisees with instruction in financial management of their franchises. If that instruction includes pro forma financial statements, under the teaching of *Tires Plus*, arguably, those franchisors may be violating either state registration and disclosure laws or the common laws of the franchisee's state. The unfortunate result may be that those franchisors either will make their franchise agreement noncancelable after signing or may not include adequate financial instruction for their new franchisees.

FRAUD

***Rich Food Servs., Inc. v. Rich Plan Corp.*, No. 03-1198, 2004 U.S. App. LEXIS 8638, Bus. Franchise Guide (CCH) ¶ 12,798 (4th Cir. May 3, 2004)**

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

***Flash Elecs., Inc. v. Universal Music & Video Distrib. Corp.*, 312 F. Supp. 2d 379, Bus. Franchise Guide (CCH) ¶ 12,799 (E.D.N.Y. Mar. 31, 2004)**

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

***Century Pac., Inc. v. Hilton Hotels Corp.*, No. 02-Civ. 8258, 2004 U.S. Dist. LEXIS 6904, Bus. Franchise Guide (CCH) ¶ 12,800 (S.D.N.Y. Apr. 21, 2004)**

The plaintiffs in *Century Pacific* were franchisees of Red Lion Hotels who had signed franchise agreements with defendant Red Lion Hotels, Inc. At the time the plaintiffs became fran-

chisees, Red Lion was owned by defendant Hilton Hotels Corp. Hilton was also the parent of defendant Doubletree Corp., which formerly owned Doubletree before its acquisition by Hilton.

For purposes of the defendants' Rule 12(b)(6) motion to dismiss, the U.S. District Court for the Southern District of New York considered the plaintiffs' factual allegations to be true. These allegations, the court held, were sufficient to state claims for fraud, negligent misrepresentation, and fraudulent omission.

Following their acquisition of Red Lion, defendants Hilton and Doubletree initially intended to eliminate the Red Lion brand. For a period of time after the acquisition, Hilton/Doubletree closed a number of Red Lion hotels and converted Red Lion hotels to other brands.

By the time the plaintiffs signed franchise agreements with Red Lion, Hilton/Doubletree had changed its plans for the Red Lion franchise systems. Hilton/Doubletree's publicly stated plans for the Red Lion franchise system were—according to the plaintiffs—inconsistent with a plan that was not publicly disclosed at the time. The *Century Pacific* court summarized the allegations regarding the inconsistency between the secret plan and the public statements of Hilton/Doubletree as follows:

Sometime in 2000, Hilton/Doubletree secretly decided instead to actively market the Red Lion brand, build up its value, and then sell it within a very short time frame. [] Publicly, however, Hilton/Doubletree represented that they were working to reinvigorate and expand the Red Lion brand; Hilton/Doubletree converted several of their hotels to Red Lions and aggressively campaigned to sell Red Lion franchises to other existing hotels. Their strategy was apparently to lock in as many long-term franchise agreements as possible in order to increase the purchase price of Red Lion. (citations omitted)

The plaintiffs' fraud and related claims were not based solely on defendants' public statements. Rather, the plaintiffs alleged that they had relied to their detriment on specific representations made by the defendants. The plaintiffs alleged that they had been induced to become Red Lion franchisees by the defendants' statements regarding the value of the Hilton name and the benefits of being part of the Hilton family of brands, including access to Hilton's worldwide reservation and group sales systems, cross-selling with sister brands, participation in Hilton's group purchasing program, and future participation in the Hilton HHonors program.

To support their fraud and other claims, the plaintiffs in *Century Pacific* cited specific statements by Hilton/Doubletree employees that were inconsistent with the clandestine plan that Hilton/Doubletree had allegedly developed:

Officers and employees of Hilton/Doubletree and Red Lion, including Tom Murray and Manfred Gerling, repeatedly assured plaintiffs that Red Lion was an important and growing part of the Hilton group. These officers and employees specifically told plaintiffs that Hilton/Doubletree had long-term plans to own and grow Red Lion. Murray represented to plaintiffs that he was given "repeated assurances from his seniors that Red Lion is an important part of the Hilton family." Plaintiffs also received express assurances from Gerling that "we told you before [Red Lion] is not for sale" and that "Red Lion would have 200 franchises within five years." None of the defendants' sales and marketing materials, oral statements, or correspondence conveyed to plaintiffs that Hilton/Doubletree had a current

intent or desire to sell the Red Lion brand. Instead, those statements and materials all indicated that the Hilton connection was the most important attraction to prospective franchisees. (citations omitted)

After the plaintiffs became Red Lion franchisees, Hilton sold Red Lion to WestCoast Hospitality Corp. WestCoast was a regional hotel chain with fewer than ten hotels in five states. The plaintiffs claimed that WestCoast did not offer the kind of benefits and resources to Red Lion franchisees that Hilton had offered. Hilton's sale of Red Lion to WestCoast, the plaintiffs alleged, caused them to suffer harm. This alleged harm included decreased bookings, loss of walk-ins and regular clientele, and an overall lower value of their franchise hotels because of the brand and name change.

The foregoing factual allegations were sufficient, the court held, to state a claim for fraud. In so holding, the *Century Pacific* court rejected three contentions made by the defendants in support of their motion to dismiss.

First, the court rejected the contention that the defendants' oral statements were contradicted by express provisions of the franchise agreements granting defendants the right to transfer Red Lion. The court found no contradiction: "Plaintiffs could have reasonably relied on defendants' statements that Hilton/Doubletree had no existing plans to transfer Red Lion while also agreeing to and appreciating defendants' right to transfer Red Lion at any time."

Second, the court rejected the defendants' claim that the merger and integration clauses of the franchise agreements barred admission of the oral statements upon which the plaintiffs based their fraud claims. As a matter of New York law, a general merger clause will not bar either an action for fraud in the inducement or parol evidence concerning fraudulent representations.

Finally, the court rejected the defendants' contention that the allegedly fraudulent statements were not actionable because they were mere puffing. The court rejected this contention because New York law recognizes a cause of action for fraud where the defendants made oral promises without an intention to perform them.

Consistent with its rulings with respect to the plaintiffs' fraud claims, the court denied the defendants' motion to dismiss the plaintiffs' negligent misrepresentation and fraudulent omission claims. The *Century Pacific* court did, however, dismiss the plaintiffs' claims for violation of the New York Franchise Sales Act, as discussed under the topic heading "Choice of Law."

***United States v. Parker*, 364 F.3d 934, Bus. Franchise Guide (CCH) ¶ 12,803 (8th Cir. Apr. 20, 2004)**

The decision of the U.S. Court of Appeals for the Eighth Circuit in *Parker* relates to the admission of expert testimony (that of a Federal Trade Commission (FTC) official) in a case in which the FTC Franchising Rule was held to be relevant.

The defendant was charged with mail fraud and money laundering, not with violation of the FTC Rule. He was convicted, and was required to serve fifty-one months in prison and to pay restitution of \$704,720 as a result of the fraudulent sale of "exclusive distributorships" to market his company FCI's automotive parts on a consignment basis.

The “distributors” were actually investors who paid FCI for inventory that they used to stock garages. The distributors were induced by fraudulent representations to invest in FCI distributorships. These false representations concerned the quality of FCI automotive parts, the quality of the garage accounts, FCI’s business history, FCI’s professional assistance, and earnings claims.

One of the issues in the case was whether the defendant Parker had violated the FTC Franchising Rule and, if so, whether he had done so knowingly. The court rejected a challenge to the testimony of the FTC’s franchise program coordinator, who testified as to the scope and substance of the FTC disclosure requirements. He did not opine whether FCI was a franchise. The court sustained introduction of the testimony since it did not include an impermissible legal conclusion and was relevant to show the defendant’s intent to deceive if he knowingly violated the FTC Rule, assuming that independent evidence proved that FCI was a franchise. The court noted with approval a cautionary instruction given to the jury that the FTC official’s testimony was not proof that FCI was a franchise, and an instruction that the case itself was not one brought for violation of the FTC Franchising Rule.

***Dedvukaj v. Equilon Enters., L.L.C.*, 301 F. Supp. 2d 664, Bus. Franchise Guide (CCH) ¶ 12,809 (E.D. Mich. Jan. 27, 2004)**

As discussed under the topic heading “Statutory Claims,” the integration clause in a service station’s dealer’s agreement prevented a franchisee from successfully challenging termination in *Dedvukaj*. The court relied on Michigan law to hold that a contractual merger and integration clause barred evidence of promises of continuation of an incentive program. The end of the incentive program, the franchise alleged, caused the franchisee’s financial failure and termination. The contract containing the merger clause and integration clause was signed after the representations at issue were made. It was therefore enforceable, absent a showing that the clause itself or the entire contract containing the clause had been obtained by fraud.

California Dep’t of Corps., Desist & Refrain Order (for Violations of Sections 31110 & 31201 of the Corps. Code) & Stop Order Denying Effectiveness of Franchise Registration (Corps. Code Section 31115), Bus. Franchise Guide (CCH) ¶ 12,812 (Mar. 30, 2004; Apr. 2, 2004) (Cash Now)

This case is discussed under the topic heading “Injunctive Relief.”

***It’s Just Lunch Int’l, LLC v. Polar Bear, Inc.*, Bus. Franchise Guide (CCH) ¶ 12,819 (S.D. Cal. Apr. 29, 2004)**

This case is discussed under the topic heading “Choice of Law.”

***Team Tires Plus, Ltd. v. Heartlein*, Bus. Franchise Guide (CCH) ¶ 12,820 (D. Minn. Mar. 17, 2004)**

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

***Team Tires Plus, Ltd. v. Heartlein*, Bus. Franchise Guide (CCH) ¶ 12,821 (D. Minn. Apr. 19, 2004)**

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

***G&R Moojestic Treats, Inc. v. Lisi*, No. 03 Civ. 10027 (RWS), 2004 U.S. Dist. LEXIS 8806, Bus. Franchise Guide (CCH) ¶ 12,826 (S.D.N.Y. May 19, 2004) (*Maggie Moo’s International*)**

A brother who loaned money to a franchisee had no standing to sue a franchisor for antitrust violations, violations of franchise statutes, breach of contract, or breach of the implied covenant of good faith and fair dealing. He did, however, have standing to sue for fraud. In *Maggie Moo’s International*, a brother, a creditor of the franchisees, had no direct relationship with Maggie Moo’s. The complaint alleged that Maggie Moo’s made inaccurate representations concerning construction and equipment costs. These statements had been made to the franchisees. The brother nevertheless had standing to sue because Maggie Moo’s knew that he was going to finance the franchises and knew that he would receive this information and would rely on these representations. He did so, allegedly to his detriment.

Also see the discussion of *Maggie Moo’s International* under the topic headings “Antitrust” and “Choice of Forum.”

***Boyle v. Douglas Dynamics, LLC*, No. 03–2430, 2004 U.S. App. LEXIS 10226, Bus. Franchise Guide (CCH) ¶ 12,832 (1st Cir. May 25, 2004)**

This case is discussed under the topic heading “Oral Agreements.”

***Boyle v. Int’l Truck & Engine Corp.*, 369 F.3d 9, Bus. Franchise Guide (CCH) ¶ 12,833 (1st Cir. May 21, 2004)**

This case is discussed under the topic heading “Oral Agreements.”

***Eden Elec., Ltd. v. Amana Co.*, 370 F.3d 824, Bus. Franchise Guide (CCH) ¶ 12,835 (8th Cir. May 28, 2004)**

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

FTC FRANCHISING RULE

***Rich Food Servs., Inc. v. Rich Plan Corp.*, No. 03–1198, 2004 U.S. App. LEXIS 8638, Bus. Franchise Guide (CCH) ¶ 12,798 (4th Cir. May 3, 2004)**

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

***Federal Trade Comm’n v. Ameritel Payphone Distributions, Inc.*, Bus. Franchise Guide (CCH) ¶ 12,810 (S.D. Fla. Oct. 15, 2003)**

This case is discussed under the topic heading “Injunctive Relief.”

***Federal Trade Comm’n v. Ameritel Payphone Distributions, Inc.*, Bus. Franchise Guide (CCH) ¶ 12,811 (S.D. Fla. Apr. 9, 2004)**

This case is discussed under the topic heading “Injunctive Relief.”

***G&R Moojestic Treats, Inc. v. Lisi*, No. 03 Civ. 10027 (RWS), 2004 U.S. Dist. LEXIS 8806, Bus. Franchise Guide (CCH) ¶ 12,826 (S.D.N.Y. May 19, 2004) (*Maggie Moo's International*)**

This case is discussed under the topic headings "Antitrust," "Choice of Forum," and "Fraud."

GOOD FAITH AND FAIR DEALING

***Rich Food Servs., Inc. v. Rich Plan Corp.*, No. 03-1198, 2004 U.S. App. LEXIS 8638, Bus. Franchise Guide (CCH) ¶ 12,798 (4th Cir. May 3, 2004)**

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

***Fred Lavery Co. v. Nissan N.A., Inc.*, No. 03-1005, 2004 U.S. App. LEXIS 8950, Bus. Franchise Guide (CCH) ¶ 12,814 (6th Cir. May 4, 2004)**

The case resulted from the claims of a terminated Infiniti dealer that its termination violated the Michigan Dealer Act. The Michigan Dealer Act imposes a "good faith" requirement. The decision of the U.S. Court of Appeals for the Sixth Circuit is discussed under the topic heading "Statutory Claims."

***Colortyme, Inc. v. Are Not, Inc.*, No. 03-C-0404-C, 2004 U.S. Dist. LEXIS 6822, Bus. Franchise Guide (CCH) ¶ 12,818 (W.D. Wis. Apr. 13, 2004)**

The U.S. District Court for the Western District of Wisconsin granted summary judgment for the plaintiff franchisor on the defendant franchisee's good faith and fair dealing counterclaim in *Colortyme*. The defendant franchisee, Are Not, Inc., claimed that Colortyme had violated the implied duty of good faith and fair dealing by "forcing" the franchisee's financing company to restructure its debt on unfavorable terms and to reduce its line of credit. The franchisee also claimed that Colortyme's decision to discontinue business in Wisconsin breached the duty of good faith. Texas law applied to the franchise agreement. The *Colortyme* court concluded that Texas law recognized a duty of good faith and fair dealing only in motor vehicle franchise agreements and that no such duty arose from the Colortyme franchise agreement. The court also found these same facts insufficient to support the defendant's affirmative defense of duress under Wisconsin law because the defendant failed to establish that Colortyme's conduct was unlawful, the first element in a claim for duress.

***Innomed Labs, LLC v. Alza Corp.*, No. 02-9491, 2004 U.S. App. LEXIS 9452, Bus. Franchise Guide (CCH) ¶ 12,825 (2d Cir. May 14, 2004) (*Innomed II*)**

Franchisees and distributors may not always be able to rely on breach by the franchisor or manufacturer to excuse their own performance (or lack thereof). The defendant in *Innomed II* terminated its distribution agreement with Innomed because Innomed defaulted on its contractual payment obligations. Thereafter, Innomed sued Alza, claiming that Alza breached an agreement extending a cure period

for the default and by refusing to allow Innomed to assign its rights to a competitor of Alza's acquiring company, Johnson & Johnson. Innomed later amended its complaint to include a Robinson-Patman Act claim. Innomed's Robinson-Patman Act claim was based on the assertion that Alza charged another distributor significantly lower prices than it charged Innomed for the right to distribute one of Alza's products. The trial court dismissed Innomed's claims in response to Alza's motion for summary judgment.

The basis of Innomed's claims for breach of contract and breach of the implied covenant of good faith and fair dealing was that Alza failed to provide Innomed with adequate time to cure its financial default under the distribution agreement. The distribution agreement provided that there would be a sixty-day cure period for a breach. If the breach could not be cured within sixty days despite the parties' diligent efforts, the party would be entitled to a longer period as reasonably necessary to cure such breach. The district court found as a matter of law that the extended cure provision was not available for breaches involving nonpayment because nonpayment can always be cured within the sixty-day period. The U.S. Court of Appeals for the Second Circuit agreed with the district court.

Innomed and Alza had entered into a standstill agreement four days before the end of the cure period. As a result, Innomed argued that the cure period for its financial breach should be extended by four days beyond the termination of the standstill agreement. The court determined, however, that the standstill agreement merely postponed the date for termination of the distribution agreement rather than extending the cure period.

Finally, Innomed argued that its performance was excused by virtue of Alza's price discrimination. In an earlier proceeding, however, the court determined that no price discrimination had occurred. (This earlier proceeding, *Innomed I*, the subject of another Second Circuit decision, is addressed under the topic heading "Antitrust.") As a result, Innomed's claim of excuse for its breach could not prevail.

***G&R Moojestic Treats, Inc. v. Lisi*, No. 03 Civ. 10027 (RWS), 2004 U.S. Dist. LEXIS 8806, Bus. Franchise Guide (CCH) ¶ 12,826 (S.D.N.Y. May 19, 2004) (*Maggie Moo's International*)**

This case is discussed under the topic headings "Antitrust," "Choice of Forum," and "Fraud."

***Callahan v. Sunoco, Inc.*, No. 03-4461, 2004 U.S. Dist. LEXIS 9114, Bus. Franchise Guide (CCH) ¶ 12,828 (E.D. Pa. May 19, 2004)**

This case is discussed under the topic heading "Class Actions."

***Lanham Ford, Inc. v. Ford Motor Co.*, No. 03-1840, 2004 U.S. App. LEXIS 11225, Bus. Franchise Guide (CCH) ¶ 12,831 (4th Cir. June 8, 2004)**

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

Boyle v. Douglas Dynamics, LLC, No. 03-2430, 2004 U.S. App. LEXIS 10226, Bus. Franchise Guide (CCH) ¶ 12,832 (1st Cir. May 25, 2004)

This case is discussed under the topic heading "Oral Agreements."

Boyle v. Int'l Truck & Engine Corp., 369 F.3d 9, Bus. Franchise Guide (CCH) ¶ 12,833 (1st Cir. May 21, 2004)

This case is discussed under the topic heading "Oral Agreements."

INJUNCTIVE RELIEF

TES Franchising, LLC v. Loveman, No. 3:04cv219, 2004 U.S. Dist. LEXIS 7101, Bus. Franchise Guide (CCH) ¶ 12,802 (D. Conn. Apr. 20, 2004)

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

Federal Trade Comm'n v. Ameritel Payphone Distributions, Inc., Bus. Franchise Guide (CCH) ¶ 12,810 (S.D. Fla. Oct. 15, 2003); Federal Trade Comm'n v. Ameritel Payphone Distributions, Inc., Bus. Franchise Guide (CCH) ¶ 12,811 (S.D. Fla. Apr. 9, 2004); California Dep't of Corps., Desist & Refrain Order (for Violations of Sections 31110 & 31201 of the Corps. Code) & Stop Order Denying Effectiveness of Franchise Registration (Corps. Code Section 31115), Bus. Franchise Guide (CCH) ¶ 12,812 (Mar. 30, 2004; Apr. 2, 2004) (Cash Now)

Typically, orders of civil contempt for violation of permanent injunctions and cease and desist orders are not grist for the mill in which scintillating facts are ground into brilliant legal analyses. The orders of the Federal Trade Commission (FTC) in the *Ameritel* cases and of the California Department of Corporations in the *Cash Now* case are no exception. In the *Ameritel* cases, the district court entered a contempt order against Ameritel and Goodman for violating a permanent injunction. The court had issued a permanent injunction enjoining Ameritel, Goodman, and their employees from using false or misleading statements in the sale of pay phones, violating the FTC Franchising Rule, and mandating monitoring compliance. Ameritel, Goodman, and their employees had sold pay phones to consumers and represented that pay phone locations averaged between \$200 and \$300 per pay phone per month in coin deposits alone.

Following the issuance of the injunction, Ameritel and Goodman continued to sell pay phones. More importantly, they also continued to make false and misleading statements regarding profits, the competitiveness of locations they provided, consumer assistance, and third-party references. Ameritel made earnings claims without a reasonable basis in violation of the FTC Franchising Rule and in violation of the permanent injunction. In addition, Goodman had been ordered to monitor compliance of his employees with the permanent injunction and to submit reports notifying the FTC of the name and address of each business with which he was affiliated or with which he was employed, and to notify the FTC of any change in the structure of

Ameritel. In furtherance of their scheme, Goodman and his employees discontinued Ameritel's operations and established a company by the name of "American Pay Phone Distributors, LLC." Goodman did not notify the FTC, however, of his affiliation with American Pay Phone. Goodman also changed the name of Ameritel to "Public Telephone Corporation," again without notifying the FTC.

The civil contempt remedies awarded by the court included appointment of a temporary receiver. The receiver was directed to review financial records of all of the defendants, including bank records and computer records, and to determine the amount of income they received or generated from the sale of business ventures and franchises. The court ordered consumer redress for amounts received from defrauded consumers.

In the second *Ameritel* action brought by the FTC, the district court issued an order imposing final civil contempt remedies for which the court found the defendants jointly and severally liable in an amount in excess of \$6.4 million. The determination was based on the receiver's analysis of the amounts that each defendant received in furtherance of the scheme to defraud customers. The court was not persuaded by the defendants' argument that some of the monies received should be allocated to business expenses. The court found "no evidence that the Respondents conducted any legitimate business that was not prohibited by the Permanent Injunction." The court ordered the receiver to wind up the affairs of the receivership estates as quickly as possible.

In the *Cash Now* action, the California Department of Corporations was as vigilant as the FTC had been in policing violations of the California Franchise Investment Law. Nor was the California Department of Corporations any less succinct analytically than the district court in *Ameritel* in issuing a cease and desist order against a check cashing and payday loan franchisor (*Cash Now*). The cease and desist order prohibited *Cash Now* from selling payday loan and check-cashing franchises. It also denied registration of the *Cash Now* franchise offering. In support of its decision, the Department of Corporations found that *Cash Now* had offered and sold five unregistered franchises in California. In connection with those sales, the Department of Corporations found, *Cash Now* had failed to comply with its disclosure obligations in a number of important respects. Specifically, *Cash Now* misrepresented the number of franchises that the company had sold in California; omitted information about administrative orders that had been issued against the company in Washington, Illinois, and Wisconsin; and failed to disclose that the franchises being offered had not been registered in accordance with California law. After making these unlawful sales, *Cash Now* sought to register its franchise offering in California. In light of *Cash Now*'s activities in California in violation of the California Franchise Investment Law, the Department of Corporations issued its cease and desist order and denied registration of the franchise offering.

It's Just Lunch Int'l, LLC v. Polar Bear, Inc., Bus. Franchise Guide (CCH) ¶ 12,819 (S.D. Cal. Apr. 29, 2004)

This case is discussed under the topic heading "Choice of Law."

JURISDICTION

Holiday Hospitality Franchising, Inc. v. Grant, 865 So. 2d 257, Bus. Franchise Guide (CCH) ¶ 12,759 (La. Ct. App. June 24, 2003)¹

In a case involving the application of the Uniform Enforcement of Foreign Judgments Act, the Louisiana Court of Appeal held that one appellant, who had negotiated and performed a franchise agreement with a national hotel chain headquartered in Georgia, had established sufficient minimum contacts with Georgia to justify the enforcement of a default judgment rendered against him in Georgia. The court held, however, that a default judgment as to the other appellant, an individual guarantor of the agreement who had no contact with Georgia other than in the capacity of guarantor, should be reversed.

The plaintiff in *Holiday Hospitality Franchising* had obtained a default judgment in the State of Georgia against the defendants, Joe Bailey Grant and Gail Grant. Thereafter, the plaintiff instituted action in state court in Louisiana to enforce the judgment. The Grants challenged the enforcement of the judgment in Louisiana on the grounds that the Georgia court lacked personal jurisdiction over them. The contract underlying the dispute was a franchise agreement that Mr. Grant executed with Holiday Inns Franchising, Inc. Mrs. Grant was guarantor of Mr. Grant's obligations under the franchise agreement. The trial court found that both of the Grants had the requisite minimum contacts with Georgia, and the Grants appealed.

The Louisiana Court of Appeal affirmed the judgment as to Mr. Grant but reversed as to Mrs. Grant. Mr. Grant had negotiated the franchise agreement and had a lengthy course of dealing with the franchisor. The franchise agreement that Mr. Grant had negotiated, and personally guaranteed, provided that it "shall be deemed made and entered into in the State of Georgia, and shall be governed and construed under and in accordance with the laws of the State of Georgia." The foregoing facts, the court held, demonstrated that Mr. Grant purposefully established minimum contacts with the State of Georgia sufficient to establish long-arm jurisdiction even though he had never traveled to Georgia to conduct business with the franchisor.

On the other hand, the court found that the judgment as to Mrs. Grant should be reversed. Her execution of a guarantee in connection with the franchise agreement containing a forum selection clause designating Georgia as the forum state was, without more, insufficient to support Georgia's exercise of long-arm jurisdiction, the court held. The Georgia default judgment against her was therefore not entitled to full faith and credit in Louisiana.

TES Franchising, LLC v. Loveman, No. 3:04cv219, 2004 U.S. Dist. LEXIS 7101, Bus. Franchise Guide (CCH) ¶ 12,802 (D. Conn. Apr. 20, 2004)

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

Paradise Motors, Inc. v. Toyota de Puerto Rico, Corp., 314 F. Supp. 2d 495, Bus. Franchise Guide (CCH) ¶ 12,804 (D.V.I. Apr. 15, 2004)

This case for breach of contract and wrongful termination of a franchise was brought by a terminated automobile dealer against its franchisor, Toyota de Puerto Rico, Corp. Toyota Puerto Rico, an automobile distributor, was, at the time of the termination, a subsidiary of the manufacturer, Toyota Motor Corp. of Japan. Toyota Motor later sold its stock in Toyota Puerto Rico to its export arm, Toyota Motor Sales, U.S.A., Inc., a California corporation.

Originally, the case was pending in the Virgin Islands Territorial Court. It was removed to federal court, however, after the dealer joined Toyota Motor and Toyota Sales as defendants. This decision of the U.S. District Court for the District of the Virgin Islands resulted from Toyota Motor's motion to dismiss for lack of personal jurisdiction.

In denying Toyota Motor's motion, the court found that Toyota Motor's activities in the territory were sufficient to satisfy both the minimum contacts required by due process and the transaction-business prong of the Virgin Islands long-arm statute. The evidence upon which the court based its determination included the following activities of Toyota Motor:

- (1) shipping vehicles purchased by Toyota PR directly to [the dealer] to avoid paying import taxes in both Puerto Rico and the Virgin Islands,
- (2) shipping product literature written in English because Toyota PR only offered such literature in Spanish,
- (3) sending sales representatives to the Virgin Islands to visit [the dealer's] business to ensure that vehicles were not being shipped to United States for resale in violation of territorial sales agreements, and
- (4) receiving a profit share of the \$2,[]000,[]000 average annual sales of Toyota vehicles in the Virgin Islands.

In denying Toyota Motor's motion to dismiss, the court did not decide the merits of the dealer's claim that both Toyota Motor and Toyota Sales had direct franchise relationships with the plaintiff.

Roberts v. Home Americair, No. G031238, 2004 Cal. App. Unpub. LEXIS 3217, Bus. Franchise Guide (CCH) ¶ 12,815 (Cal. Ct. App. Apr. 7, 2004)

A California Court of Appeal reversed a lower court's order enforcing a settlement agreement in *Roberts*. Some of the parties in this multiparty action settled and dismissed their respective claims. In the settlement agreement, the parties agreed that the trial court would retain "jurisdiction to enforce the terms and conditions of the Agreement." The parties filed the settlement agreement, but never asked the court to retain jurisdiction. The appellate court determined that the language in the agreement was insufficient, by itself, to effect retention of jurisdiction under Section 664.6 of the California Code of Civil Procedure. The California Code provides that a court may retain jurisdiction at the request of the parties. Because the lower court never exercised its discretion to retain

jurisdiction before the parties were dismissed, the court lacked jurisdiction when it later entered the order purporting to enforce the settlement agreement.

***It's Just Lunch Int'l, LLC v. Polar Bear, Inc.*, Bus. Franchise Guide (CCH) ¶ 12,819 (S.D. Cal. Apr. 29, 2004)**

This case is discussed under the topic heading "Choice of Law."

***Carlini v. Larson*, No. A03-1474, 2004 Minn. App. LEXIS 502, Bus. Franchise Guide (CCH) ¶ 12,823 (May 11, 2004)**

In *Carlini*, the Minnesota Court of Appeals held that Miss Universe L.P., LLLP, a Delaware limited liability partnership with its principal place of business in New York, was subject to personal jurisdiction in Minnesota for claims brought by disgruntled Minnesota beauty pageant contestants. Miss Universe licenses others to run Miss USA and Miss Teen USA beauty pageants in each of the fifty states. Pursuant to its franchise agreements, Miss Universe has the right to conduct operational and financial audits of its franchisees, and it sets specific standards for franchisees to follow in operating the state pageants. The franchisees, in turn, enter into contracts with pageant contestants. Miss Universe is not a party to the franchisees' contracts with contestants. Those agreements state, however, that Miss Universe is a third-party beneficiary that "will enjoy the fruits of this Agreement and will be entitled to enforce the terms of this Agreement."

In *Carlini*, certain Minnesota contestants filed suit against the pageant operators for fraud and various consumer violations. The contestants also claimed that Miss Universe was vicariously liable for the actions of its franchisees, the pageant operators. The trial court denied Miss Universe's motion to dismiss for lack of jurisdiction. The Minnesota Court of Appeals upheld this decision, applying the basic due process minimum contacts test.

According to the court, Miss Universe targeted Minnesota residents and businesses (as well as the residents and businesses in the other forty-nine states) by virtue of the fact that it ran a pageant consisting of finalists from all states. "Minnesota" was an integral part of the franchisor's marketing in the state, which promoted the name "Miss Minnesota." The *Carlini* court distinguished this situation from franchise systems, such as many fast-food restaurant chains, in which the franchisee's state is not significant to and targeted by the franchisor. The court concluded that Miss Universe's activities in Minnesota were purposeful and directed toward the goal of ensuring that it had a contestant from Minnesota for the national pageant. Thus, there was specific jurisdiction over Miss Universe for claims relating to operation of the Minnesota pageant.

***Lanham Ford, Inc. v. Ford Motor Co.*, No. 03-1840, 2004 U.S. App. LEXIS 11225, Bus. Franchise Guide (CCH) ¶ 12,831 (4th Cir. June 8, 2004)**

Lanham Ford sought relief from the Ford Policy Board after Ford sought to terminate Lanham Ford's dealership on the basis of poor sales performance. When the Ford Policy Board denied the requested relief, Lanham Ford filed an

action in state court seeking declaratory and injunctive relief to compel Ford to grant Lanham Ford a new hearing before the Ford Policy Board and to enjoin termination of the dealership agreement. Ford removed the case to federal district court on the basis of diversity jurisdiction, and Lanham Ford filed a motion for remand to state court. In response, Ford opposed the remand and also filed a motion to dismiss the action. The trial court refused to remand the action to state court and granted Ford's motion to dismiss. Lanham Ford appealed the trial court's decision.

The U.S. Court of Appeals for the Fourth Circuit affirmed the trial court's decision. Diversity jurisdiction was present, the Fourth Circuit held, because the amount in controversy exceeded \$75,000. In a cursory analysis of the underlying dispute, the court summarily determined that the trial court had not erred in ordering dismissal of the lawsuit.

ORAL AGREEMENTS

***Dedvukaj v. Equilon Enters., L.L.C.*, 301 F. Supp. 2d 664, Bus. Franchise Guide (CCH) ¶ 12,809 (E.D. Mich. Jan. 27, 2004)**

This case is discussed under the topic headings "Fraud" and "Statutory Claims."

***It's Just Lunch Int'l, LLC v. Polar Bear, Inc.*, Bus. Franchise Guide (CCH) ¶ 12,819 (S.D. Cal. Apr. 29, 2004)**

This case is discussed under the topic heading "Choice of Law."

***Innomed Labs, LLC v. Alza Corp.*, No. 02-9491, 2004 U.S. App. LEXIS 9452, Bus. Franchise Guide (CCH) ¶ 12,825 (2d Cir. May 14, 2004) (*Innomed II*)**

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

***Boyle v. Int'l Truck & Engine Corp.*, 369 F.3d 9, Bus. Franchise Guide (CCH) ¶ 12,833 (1st Cir. May 21, 2004)**

The plaintiffs-appellants in this case are, by any objective measure, certainly no strangers to litigation. In fact, as discussed under this same topic heading, Oral Agreements, four days after the date of this opinion, the U.S. Court of Appeals for the First Circuit issued another opinion deciding claims brought by these same plaintiffs-appellants against other suppliers.

In this case, plaintiff-appellant Boyle had contracted to purchase a truck dealership in Massachusetts, Tuck's Trucks. Tuck's Trucks sold and serviced both GMC and Navistar vehicles. Neither the GMC nor the Navistar dealership agreement held by Tuck's Trucks was assignable, however. Boyle's contract to purchase Tuck's Trucks was therefore contingent upon obtaining dealership agreements from both GMC and Navistar. The GMC dealership represented more than 80 percent of the business of Tuck's Trucks. Once GMC's approval was secured, Boyle closed his purchase of Tuck's Trucks without obtaining written approval from Navistar for the transfer.

Before the transaction closed, Navistar had written the seller to remind him that the dealership was not assignable and to request that Boyle should submit an application.

However, even before the proposed sale to Boyle, Navistar had advised the seller of deficiencies with the location of his Navistar dealership and proposing termination of the franchise due to low business volume.

After Boyle purchased Tuck's Trucks, Navistar sent the seller a termination notice based on the fact that Boyle had never applied for the dealership. Thereafter, Boyle submitted a written application for the Navistar dealership. Both before and after the closing, however, Boyle had spoken with several people at Navistar about his dealership prospects. During those conversations, various individuals had expressed a "hope" that they could reach a deal, that the approval "would be a formality," and that "in light of his approval by GMC, he could not see any reason why Boyle wouldn't be able to continue dealing for Navistar."

On the foregoing record, the First Circuit had no trouble finding that the alleged oral agreement was unenforceable. Indeed, Boyle admitted that there had been no "meeting of the minds" with respect to various material terms. These included the length of the agreement, grounds for termination, pricing, and the geographic area.

Boyle also sought to avail himself of the protections of the Massachusetts motor vehicle dealer statute. Before the transfer, Boyle had performed work for Navistar under the seller's dealership contract. That fact was not, in the view of the First Circuit, sufficient to give Boyle standing to sue under the statute.

Last but not least, the First Circuit had no trouble affirming the district court's grant of Navistar's motion for summary judgment with respect to Boyle's fraud claim. Specifically, the court found that Boyle's reliance on oral statements attributed to various Navistar employees was unreasonable in view of the written communications from Navistar as to what he needed to do—and when—to possibly become a Navistar dealer.

***Boyle v. Douglas Dynamics, LLC*, No. 03–2430, 2004 U.S. App. LEXIS 10226, Bus. Franchise Guide (CCH) ¶ 12,832 (1st Cir. May 25, 2004)**

The U.S. Court of Appeals for the First Circuit found no cause of action based on the appointment by Douglas Dynamics' Fisher Division of additional distributors in proximity to the truck dealership operated by the plaintiff-appellant, Boyle. Fisher manufactured snow plow equipment. Boyle's company, Tuck's Trucks, Inc., which became a Fisher distributor in Massachusetts, claimed that it had an oral agreement that Fisher would appoint additional distributors only after providing notice to existing distributors and only for valid business reasons.

Tuck's Trucks had acquired TT Sales, a Fisher distributor. The TT Sales distributorship agreement as written did not limit Fisher's prerogative to appoint other distributors. However, it was TT Sales' understanding, as conveyed to Tuck's Trucks, that Fisher would not appoint other distributors without having valid business reasons for doing so and without first providing notice.

Upon acquiring TT Sales, Tuck's Trucks understood that TT Sales' distributorship agreement was not assignable and it

would have to negotiate with Fisher to obtain its own distributorship. In its discussions with Fisher, Tuck's Trucks learned that TT Sales did not have a written agreement with Fisher that restricted Fisher's ability to appoint other distributors. Accordingly, Tuck's Trucks sought an offset agreement with TT Sales to compensate it if Fisher appointed another distributor in certain towns in proximity to Tuck's Trucks. Tuck's Trucks later learned that Fisher promoted another distributor, Madigan, to be a full distributor of its products. Madigan was located in Massachusetts near Tuck's Trucks. During its discussions with Tuck's Trucks about becoming a distributor, however, Fisher made statements that its relationship with Tuck's Trucks would remain the same as it had been with TT Sales.

Tuck's Trucks sued Fisher and made several claims. First, it claimed that Fisher's statements formed the factual basis for an agreement that Fisher would not change its distributor system without notice and then only for valid business reasons. At trial, the magistrate judge determined, and on appeal the First Circuit agreed, that the oral statements did not establish an agreement that would limit Fisher's ability to appoint additional distributors.

Tuck's Trucks then asserted that Fisher's appointment of Madigan violated the implied covenant of good faith and fair dealing. The First Circuit agreed with the magistrate that the implied covenant of good faith and fair dealing could not be invoked to create rights and duties not otherwise provided for in the contracts between the parties. Tuck's Trucks next sought to establish an implied obligation to supply reasonable notice of appointing a new distributor in its distributorship agreement. The First Circuit found that Tuck's Trucks had provided no rationale or authority for such a proposition.

The First Circuit also rejected Tuck's Trucks' claims for tortious interference with a prospective business advantage. These claims were not actionable, the court held, because Tuck's Trucks could not establish that Fisher acted with improper motive by waiting to appoint Madigan until TT Sales was no longer its distributor. The court noted that improper motive cannot be established when a party acts in pursuit of a legitimate business interest.

Similarly, Tuck's Trucks' fraud claims were unavailing because Fisher's statements during its discussions with Tuck's Trucks were too general to justify reliance.

STATE DISCLOSURE/REGISTRATION LAWS

California Dep't of Corps., Desist & Refrain Order (for Violations of Sections 31110 & 31201 of the Corps. Code) & Stop Order Denying Effectiveness of Franchise Registration (Corps. Code Section 31115), Bus. Franchise Guide (CCH) ¶ 12,812 (Mar. 30, 2004; Apr. 2, 2004)

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

***It's Just Lunch Int'l, LLC v. Polar Bear, Inc.*, Bus. Franchise Guide (CCH) ¶ 12,819 (S.D. Cal. Apr. 29, 2004)**

This case is discussed under the topic heading "Choice of Law."

Team Tires Plus, Ltd. v. Heartlein, Bus. Franchise Guide (CCH) ¶ 12,820 (D. Minn. Mar. 17, 2004)

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

Team Tires Plus, Ltd. v. Heartlein, Bus. Franchise Guide (CCH) ¶ 12,821 (D. Minn. Apr. 19, 2004)

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

STATUTE OF LIMITATIONS

Rich Food Servs., Inc. v. Rich Plan Corp., No. 03-1198, 2004 U.S. App. LEXIS 8638, Bus. Franchise Guide (CCH) ¶ 12,798 (4th Cir. May 3, 2004)

It is hornbook law that franchisee claims for improper disclosure by the franchisor may be barred by the applicable statute of limitations if not asserted in a timely manner. A recent decision of the U.S. Court of Appeals of the Fourth Circuit, however, stands for a related but less unremarkable proposition: time-barred claims based on improper disclosure may not be rejuvenated merely because the franchisor and franchisee renew the franchise relationship. The plaintiffs, Rich Food Services and its principals, were franchisees of Rich Plan Corp. The franchisees sold food systems, including frozen food, freezers, and cooking equipment. Along with the food systems, they sold comprehensive service agreements, called full service agreements. The plaintiffs entered into their initial franchise agreement in 1992 and signed a renewal in 1996. A North Carolina court later determined that the full service agreements were insurance contracts under North Carolina law and that the plaintiffs had failed to comply with North Carolina insurance law requirements.

As a result, the franchisees entered into a consent decree with the State of North Carolina. Thereafter, the franchisees sued Rich Plan and a number of individual defendants. The franchisees claimed that the defendants should have disclosed that the full service agreements might be insurance contracts under North Carolina law. After a jury trial, the district court granted judgment for the defendants as a matter of law on all counts. The trial court determined that some of the claims were time barred and that Rich Plan otherwise had no obligation to help Rich Food with its legal problems. Rich Food appealed.

The Fourth Circuit affirmed the judgment of the trial court. Principally, the franchisees challenged the determination that their claims were barred by the applicable statutes of limitation. The franchisees claimed that Rich Plan had an obligation to make certain franchise disclosures under federal and New York law. The Fourth Circuit noted, however, that under both federal and state law, a franchisor is not required to make any disclosures when the franchisor and franchisee merely renew or extend an existing franchise agreement. Because the parties entered their relationship in 1992, and the claims were not raised until more than three years later, the claims were time barred. The court reasoned that the agreement that the parties

signed on renewal was a renewal of the franchise and not a materially different agreement.

In addition to their claims of franchise disclosure violations, the franchisees complained that Rich Plan had breached the express terms of the franchise agreement and the implied covenant of good faith and faith dealing. The court noted, however, that the franchise agreement obligated the franchisees—not the franchisor—to comply with all applicable laws and regulations. The court further determined that there could be no breach of the implied covenant of good faith and fair dealing because the covenant that the franchisees sought to establish conflicted with the express terms of the contract. Again, the franchise agreement placed the burden on the franchisees to comply with all applicable laws.

The franchisees also claimed that Rich Plan engaged in fraud and intentional misrepresentation. The Fourth Circuit found, however, that vague statements made by the franchisor that its marketing plan was “unique” and “distinctive” were too vague to support a claim for misrepresentation. Similarly, the court found that the franchisor had not fraudulently concealed the prospect that the full service agreements would violate North Carolina insurance law because the franchisor had no knowledge of the law.

STATUTORY CLAIMS

Subaru of Am., Inc. v. State Bd. of Vehicle Mfrs., Dealers & Salespersons, 842 A.2d 1003, Bus. Franchise Guide (CCH) ¶ 12,797 (Pa. Commw. Feb. 19, 2004)

In *Subaru of America*, the Pennsylvania Commonwealth Court upheld a decision of the state’s Board of Vehicle Manufacturers against the manufacturer, Subaru of America, Inc. Subaru had terminated its dealer, Colonial Volkswagen-Subaru, Inc., for failing to meet the annual vehicle sales quota required by the performance addendum of its franchise agreement. The franchise agreement required Colonial to sell 506 vehicles in twelve months. During the twelve months in question, however, Colonial sold only 368 vehicles. Colonial filed a protest with the board challenging Subaru’s decision. The board ruled in favor of Colonial, finding that the attempted termination was unfair, without due regard to the equities of Colonial, and without just cause. On appeal, Subaru challenged the board’s ruling on the grounds that the tribunal was biased and had improperly denied certain of Subaru’s motions. Subaru also argued that the evidence did not support the board’s conclusions with respect to termination.

In support of its claim of bias, Subaru argued that bias could be inferred from the fact that the board members were new vehicle dealers. The court held that Subaru had not met its burden of demonstrating bias. To constitute impermissible bias, the interest of the adjudicator in the outcome of the case must be direct and substantial. In this case, there was no evidence to contravene the assumption that the board members “acted in good conscience and with intellectual discipline in judging the controversy before

them.” The mere fact that the board members were new vehicle dealers was insufficient to meet Subaru’s burden of demonstrating bias, the court held.

One of the board’s rulings to which Subaru took exception had limited Subaru’s document requests to items relevant to “formation and termination of the Subaru franchise of Colonial.” The court held, however, that the board had not abused its discretion in doing so. The court also concluded that the board had properly allowed expert testimony on the reasonableness of the vehicle sales quota, and properly limited Subaru’s cross-examination concerning financial documents of Colonial’s predecessor franchisee.

Subaru’s most substantive challenge to the board’s findings was also unavailing. The court held that the evidence supported the board’s conclusion that the termination was unfair under the Pennsylvania motor vehicle franchise statute for a number of reasons. First, Subaru did not allocate sufficient vehicles to Colonial for the dealer to meet its quota. Second, Subaru did not put Colonial on notice of the alleged breach until fourteen months after Colonial had failed to sell enough vehicles. As a result, Colonial had no opportunity to cure as required by Pennsylvania law. Subaru failed to demonstrate that Colonial lacked the commitment to sell Subaru vehicles. Subaru also acted unfairly, the court held, by permitting Colonial to renovate its showroom to meet Subaru’s standards while at the same time terminating its dealership. Last but not least, the court found a statutory violation based upon Subaru’s threat to terminate Colonial if it did not move its dealership to a different location.

Ford Motor Co. v. Ark. Motor Vehicle Comm’n, No. 03–496, 2004 Ark. LEXIS 250, Bus. Franchise Guide (CCH) ¶ 12,801 (Apr. 29, 2004)

Unlike the manufacturer that was before the Pennsylvania court in *Subaru of America*, the manufacturer in *Ford Motor Company* was able to obtain reversal of an adverse decision at the administrative level. On appeal, the Arkansas Supreme Court reversed a decision of the Arkansas Motor Vehicle Commission against the manufacturer. The manufacturer, Ford Motor Co., refused to approve the sale of a Ford dealership to Crain Automotive Holdings, LLC, on the grounds that the proposed purchaser did not meet Ford’s criteria for new dealers. Crain already operated a number of Ford dealerships. Crain’s dealerships had been accused of warranty fraud, had below-average market share performance, and were rated below average in customer satisfaction. When Ford refused to approve the sale to Crain, Crain complained to the commission. The commission concluded that Ford’s refusal to approve the sale was unreasonable.

In reversing the commission’s decision against Ford, the court found that the commission had acted arbitrarily and capriciously by substituting its judgment for Ford’s when analyzing the transfer approval process. For example, the commission acted arbitrarily in deciding that Fords’ had wrongfully characterized another dealership operated by Crain as a “single-point” operation and had unfairly skewed its market share perfor-

mance ratings. The evidence showed, however, that Ford had always categorized the Crain operation as a “single-point” dealership for all purposes in the ordinary course of business.

The court also found that the commission had acted arbitrarily when it decided that Ford was comparing Crain to the wrong group of dealers in evaluating customer satisfaction ratings. The group of dealers that Ford used for the transfer approval process was the same group in which Ford had always categorized Crain in the ordinary course of business. The commission also erred, the court held, by prohibiting Ford from cross-examining Crain about written admissions that Crain had made regarding warranty fraud at its other dealerships.

The court declined to find error, however, in the commission’s denial of Ford’s motion to recuse. Consistent with the Pennsylvania court’s holding in *Subaru of America*, the Arkansas Supreme Court held in *Ford Motor Company* that bias could not be inferred from the mere fact that some commission members were motor vehicle dealers.

Bob Zimmerman Ford, Inc. v. Midwest Auto. I, L.L.C., 679 N.W.2d 606, Bus. Franchise Guide (CCH) ¶ 12,822 (Iowa May 12, 2004)

Like *Ford Motor Company*, the case of *Bob Zimmerman Ford* involved a dealer’s right to transfer. Deciding an appeal of summary judgment in favor of the dealer, the Iowa Supreme Court held in *Bob Zimmerman Ford* that the state’s Motor Vehicle Dealer Law overrode the franchisor’s contractual right of first refusal. The statutory provision at issue in *Bob Zimmerman Ford* provided as follows:

in the event of the sale or transfer of ownership of the franchisee’s dealership by sale or transfer of the business or by stock transfer or in the event of change in the executive management of the franchisee’s dealership the franchiser shall give effect to such a change in the franchise unless the transfer of the franchisee’s license under chapter 322 is denied or the new owner is unable to obtain a license under that chapter, as the case may be.

Iowa Code § 322A.12 (1997).

According to the Iowa Supreme Court, the foregoing provision of the statute listed the only permissible grounds for a manufacturer’s refusal to approve a transfer. These permissible grounds did not include a franchisor’s right of first refusal, the court held. The manufacturer, BMW North America, Inc., argued that a subsequent amendment to the statute belied the high court’s reading of the code:

Notwithstanding the terms, provisions, or conditions of an agreement or franchise, the sale or transfer, or the proposed sale or transfer, of a franchisee’s dealership, or the change or proposed change in the executive management of a franchisee’s dealership shall not make applicable any right of first refusal of the franchiser.

2002 Iowa Acts ch. 1063, § 39 (emphasis supplied).

BMW contended that, by adding this language, the legislature had demonstrated that the original statute did not override the franchisor’s contractual right of first refusal. The Iowa Supreme Court disagreed, holding that the amendment had been drafted merely to clarify the meaning of the original provision.

***Chevron USA, Inc. v. Lingle*, 363 F.3d 846, Bus. Franchise Guide (CCH) ¶ 12,805 (9th Cir. Apr. 1, 2004)**

In *Chevron USA*, the U.S. Court of Appeals for the Ninth Circuit determined that Hawaii's cap on the rent that oil companies could charge lessee-dealers was unconstitutional. Hawaii enacted Section 3(c) of Act 257 in an effort to lower the cost of gasoline to consumers in Hawaii. Act 257, among other things, regulated the maximum rent that an oil company could charge dealers that lease service stations. Chevron challenged the law as an unconstitutional regulatory taking on the grounds that it failed to "substantially advance a legitimate state interest." The Ninth Circuit upheld the district court's conclusion that Act 257 would not substantially advance a reduction in the retail price of gasoline because oil companies would offset decreased rents by increased wholesale prices, which in turn would cause an increase in retail prices. In addition, the court concluded that the reduced rent mandated by the Act would not flow to consumers in the form of reduced retail prices, but would instead allow dealers to capture a premium on their leaseholds.

***C.F. Schwartz Motor Co. v. Int'l Truck & Engine Corp.*, No. 03C-05-011 HDR, 2004 Del. Super. LEXIS 103, Bus. Franchise Guide (CCH) ¶ 12,806 (Mar. 26, 2004)**

At issue in *International Truck* was whether the plaintiff was a "new motor vehicle dealer" within the meaning of the Delaware Motor Vehicle Franchising Practices Act. Actually, the issue was whether the plaintiff is a motor vehicle franchisee within the meaning of Delaware law. The parties did not dispute that the plaintiff was, or had previously been, a franchisee under the Delaware statute.

The plaintiff (Schwartz) sold and serviced various makes of new motor vehicles, including trucks manufactured by the defendant (International). Schwartz and International had been parties to a franchise agreement pursuant to which Schwartz sold International's new trucks and provided warranty service. By mutual agreement, the parties terminated Schwartz's sales franchise in 1997. Thereafter, Schwartz continued to sell and service other manufacturers' motor vehicles. Pursuant to a warranty-parts agreement, Schwartz also continued, from 1997 through the end of 2002, to sell International parts and perform warranty service for new trucks manufactured by International. This dispute arose after International sent Schwartz notice of termination effective December 31, 2002.

In deciding International's motion to dismiss under the Delaware equivalent of Federal Rule 12(b)(6), the Delaware state court considered whether Schwartz satisfied either of two alternative statutory definitions of "new motor vehicle dealer." The parties did not dispute that the franchise agreement authorized Schwartz only to repair—not to sell—trucks manufactured by International. It was therefore undisputed that Schwartz did not satisfy the retail-sale prong of the Delaware statute. This first prong of the Delaware statute defines "new motor vehicle dealer" as:

... any person or entity engaged in the business of selling, offering to sell, soliciting or advertising the sale of new motor vehicles and who holds ... a valid sales and service agreement, franchise, or contract granted by the manufacturer or distributor for the retail sale of said manufacturer's or distributor's new motor vehicles.

DEL. CODE § 4902(3) (emphasis supplied).

The legal issue before the court in *International Truck* was whether the warranty-parts franchise agreement satisfied the second prong of the statutory definitions, under which the term "new motor vehicle dealer" includes:

... any person who engages exclusively in the repair of motor vehicles, except motor homes, if such repairs are performed pursuant to the terms of a franchise or other agreement with a franchiser or such repairs are performed as part of a manufacturer's or franchiser's warranty.

Id. (emphasis supplied).

In an effort to avoid application of the Delaware franchise statute, International argued that Schwartz was not engaged "exclusively" in the repair of motor vehicles because it also sold other manufacturers' vehicles. In response, Schwartz cited the legislative history of the statute, which supposedly reflected an intent not to limit the statutory protections to single-line motor vehicle dealers. According to Schwartz, the word "exclusively" relates only to the relationship between a manufacturer and a franchisee, not to the entire scope of the franchisee's business. In other words, the fact that Schwartz sold other manufacturers' vehicles did not change the fact that, vis-à-vis International, Schwartz was engaged "exclusively in the repair of motor vehicles pursuant to the terms of a franchise or other agreement with a franchiser" or "as part of a manufacturer's or franchiser's warranty." Citing basic principles of statutory construction and the legislative history of the Delaware statute, the *International Truck* court agreed with Schwartz.

***Dedvukaj v. Equilon Enters., L.L.C.*, 301 F. Supp. 2d 664, Bus. Franchise Guide (CCH) ¶ 12,809 (E.D. Mich. Jan. 27, 2004)**

The Petroleum Marketing Practices Act (PMPA) did not protect a terminated franchisee in *Dedvukaj*. The U.S. District Court for the Eastern District of Michigan held that a franchisee's failure to pay rent and failure to operate his franchise for seven consecutive days were independent reasons justifying termination under the PMPA. The court so held even though the franchisee alleged that his financial crisis was caused by onerous terms in a new lease agreement and by the ending of an incentive program. The franchisee's allegations were insufficient to invalidate the termination as a matter of law, the court held, because the franchisee was required to show bad faith or actions outside the normal course of business by the franchisor.

The failure of the franchisor to furnish the statutorily required ninety days' notice of termination was permissible under the notice provision of the PMPA, 15 U.S.C. § 2804, since the franchisor had justification (continued monetary losses) to terminate earlier.

Also see the discussion under the topic heading "Fraud."

***Fred Lavery Co. v. Nissan N.A., Inc.*, No. 03-1005, 2004 U.S. App. LEXIS 8950, Bus. Franchise Guide (CCH) ¶ 12,814 (6th Cir. May 4, 2004)**

In an unpublished opinion, the U.S. Court of Appeals for the Sixth Circuit affirmed the district court's dismissal of wrongful termination claims brought by an Infiniti dealer in the Detroit

area. Some of the dealer's claims had been dismissed on a motion for summary judgment filed by the manufacturer, Nissan. The remaining claims had been the subject of a twenty-eight-page opinion in favor of the manufacturer that followed a six-day bench trial. On appeal, the dealer challenged the district court's rulings only with respect to the four claims that went to trial: (1) violation of the Automobile Dealers' Day in Court Act; (2) violation of the Michigan Dealer Act; (3) breach of contract; and (4) breach of the implied duty of good faith and fair dealing.

For at least four years before the manufacturer issued the notice of termination at issue, the dealer's performance had been substandard. Indeed, in 1995, the dealer had the lowest sales penetration of any Infiniti dealer in Nissan's Central Region. Nissan's Central Region includes portions of twenty-one states in the Midwest. The dealer also ranked in the Central Region's "Bottom Ten" under Nissan's Consumer Satisfaction Index.

Rather than terminate the dealer for its performance deficiencies, Nissan spent several years making various accommodations. For example, in December 1996, Nissan placed the dealer in its dealer improvement program. As part of that program, Nissan conducted a comprehensive review of the dealer's operations and offered thirty suggested changes. Nissan also assisted the dealer by providing funds for advertising and accepting special requests for vehicle options, models, and colors.

Long before sending the notice of termination, Nissan also "lowered the bar" for the dealer. Specifically, in measuring the dealer's sales penetration, Nissan agreed to eliminate Cadillac, Lincoln, and Oldsmobile from the competitive brands used as a benchmark. For purposes of measuring the dealer's sales penetration, Nissan also agreed to reduce the number of luxury cars imported by domestic manufacturers included in the statistics. As a result, the dealer was measured under an "Adjusted Import Luxury Standard."

Notwithstanding the foregoing accommodations, the dealer's sales penetration and Consumer Satisfaction Index ratings continued to lag. Following a series of notices of default, the dealer's performance failed to improve. Indeed, by the end of 1998, the dealer ranked last in sales performance of the forty-nine dealers in Nissan's Central Region.

The bulk of the Sixth Circuit opinion addressed the dealer's appeal of the district court's adverse ruling on its Michigan Dealer Act claims. On appeal, the dealer alleged that Nissan violated the Michigan statute by failing to terminate the dealer within two years of learning about its sales and service problems. The Sixth Circuit found no basis in the statute itself for the dealer's argument that Nissan was required to terminate within two years of learning about the dealer's sales and service problems. In this regard, the Sixth Circuit seemed influenced by the fact that the dealer's performance deficiencies undoubtedly established "good cause" for termination. The Sixth Circuit also found that the dealer's suggested interpretation of the statute "makes little sense." In the words of the Sixth Circuit: "Were this the correct interpretation of the statute . . . Nissan would have been forced to terminate [the dealer] in 1997 rather than giving the dealer one opportunity after another to improve its performance until 1999."

In addition to requiring "good cause" for termination, the Michigan Dealer Act requires the manufacturer to act in "good faith." In view of the various forms of assistance that Nissan provided, the Sixth Circuit found no basis for overturning the district court's finding that Nissan had in fact acted in good faith. The Sixth Circuit gave short shrift to the dealer's claim that one of the notices of termination was deficient in that it failed to reference the Michigan Dealer Act as required by the statute.

The Sixth Circuit also affirmed the district court's order striking the dealer's claims for compensatory and punitive damages and its demand for a jury trial. With respect to compensatory damages, the plaintiff's damage theory—lost profits and damages to reputation—were "incalculable with any degree of accuracy." No punitive damages were available as a matter of Michigan law for violation of the statute unless the statute itself authorized the recovery of such damages. The Sixth Circuit also held that the dealer had no Seventh Amendment right to a jury trial because the dealer sought only equitable relief whereas the constitutional entitlement to a jury trial applies only to lawsuits involving legal rights.

Last but not least, the Sixth Circuit upheld various findings of fact and conclusions of law related to the dealer's breach-of-contract claim.

***Lanham Ford, Inc. v. Ford Motor Co.*, No. 03-1840, 2004 U.S. App. LEXIS 11225, Bus. Franchise Guide (CCH) ¶ 12,831 (4th Cir. June 8, 2004)**

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

***Boyle v. Int'l Truck & Engine Corp.*, 369 F.3d 9, Bus. Franchise Guide (CCH) ¶ 12,833 (1st Cir. May 21, 2004)**

This case is discussed under the topic heading "Oral Agreements."

***River Valley Truck Ctr., Inc. v. Interstate Companies, Inc.*, 680 N.W.2d 99, Bus. Franchise Guide (CCH) ¶ 12,827 (Minn. Ct. App. May 25, 2004)**

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

TERMINATION AND NONRENEWAL

***Subaru of Am., Inc. v. State Bd. of Vehicle Mfrs., Dealers & Salespersons*, 842 A.2d 1003, Bus. Franchise Guide (CCH) ¶ 12,797 (Pa. Commw. Feb. 19, 2004)**

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

***Rich Food Servs., Inc. v. Rich Plan Corp.*, No. 03-1198, 2004 U.S. App. LEXIS 8638, Bus. Franchise Guide (CCH) 12,798 (4th Cir. May 3, 2004)**

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

***Ford Motor Co. v. Ark. Motor Vehicle Comm'n*, No. 03-496, 2004 Ark. LEXIS 250, Bus. Franchise Guide (CCH) ¶ 12,801 (Apr. 29, 2004)**

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

***Dedvukaj v. Equilon Enters., L.L.C.*, 301 F. Supp. 2d 664, Bus. Franchise Guide (CCH) ¶ 12,809 (E.D. Mich. Jan. 27, 2004)**

This case is discussed under the topic headings “Fraud” and “Statutory Claims.”

***Fred Lavery Co. v. Nissan N.A., Inc.*, No. 03–1005, 2004 U.S. App. LEXIS 8950, Bus. Franchise Guide (CCH) ¶ 12,814 (6th Cir. May 4, 2004)**

The case resulted from the claims of a terminated Infiniti dealer that its termination violated the Michigan Dealer Act and was otherwise wrongful. The decision of the U.S. Court of Appeals for the Sixth Circuit is discussed under the topic heading “Statutory Claims.”

***Bob Zimmerman Ford, Inc. v. Midwest Auto. I, L.L.C.*, 679 N.W.2d 606, Bus. Franchise Guide (CCH) ¶ 12,822 (Iowa May 12, 2004)**

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

***River Valley Truck Ctr., Inc. v. Interstate Companies, Inc.*, 680 N.W.2d 99, Bus. Franchise Guide (CCH) ¶ 12,827 (Minn. Ct. App. May 25, 2004)**

In *River Valley Truck Center*, a decision by an equipment distributor not to renew a dealership agreement withstood scrutiny under Minnesota’s Heavy and Utility Equipment Manufacturers and Dealers Act. The Minnesota Court of Appeals upheld summary judgment in favor of the distributor, Interstate Companies, Inc. The court found that Interstate had good cause under the statute not to renew a Detroit Diesel engine dealer agreement with River Valley Truck Center, Inc..

River Valley was also part of the dealer network for International Truck and Engine Corp., an original equipment manufacturer (OEM). Under its dealer agreement with the engine company, River Valley was obligated to promote the sale and maintain in stock an appropriate number of OEM products equipped with Detroit Diesel engines. At a later point, International decided to no longer offer Detroit Diesel engines as an option in its trucks. As a result of this condition imposed by International, River Valley was unable to meet the requirements of its dealer agreement with Interstate, giving Interstate good cause not to renew.

The court disagreed that “good cause” could not be based on third-party conduct. According to the court, River Valley could have opted to discontinue its relationship with International. Had River Valley done so, it could have again offered trucks with Detroit Diesel engines. Thus, the conditions giving rise to “good cause” were within River Valley’s control.

***Lanham Ford, Inc. v. Ford Motor Co.*, No. 03–1840, 2004 U.S. App. LEXIS 11225, Bus. Franchise Guide (CCH) ¶ 12,831 (4th Cir. June 8, 2004)**

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

***Boyle v. Douglas Dynamics, LLC*, No. 03–2430, 2004 U.S. App. LEXIS 10226, Bus. Franchise Guide (CCH) ¶ 12,832 (1st Cir. May 25, 2004)**

This case is discussed under the topic heading “Oral Agreements.”

***Boyle v. Int’l Truck & Engine Corp.*, 369 F.3d 9, Bus. Franchise Guide (CCH) ¶ 12,833 (1st Cir. May 21, 2004)**

This case is discussed under the topic heading “Oral Agreements.”

TORTIOUS INTERFERENCE

***Flash Elecs., Inc. v. Universal Music & Video Distrib. Corp.*, 312 F. Supp. 2d 379, Bus. Franchise Guide (CCH) ¶ 12,799 (E.D.N.Y. Mar. 31, 2004)**

As discussed under the topic heading “Antitrust,” a party cannot tortiously interfere with its own contract. Third-party competitors can interfere even with a terminable at-will contract, however, if they use “improper means,” such as antitrust violations.

***Boyle v. Douglas Dynamics, LLC*, No. 03–2430, 2004 U.S. App. LEXIS 10226, Bus. Franchise Guide (CCH) ¶ 12,832 (1st Cir. May 25, 2004)**

This case is discussed under the topic heading “Oral Agreements.”

TRANSFERS

***Boyle v. Int’l Truck & Engine Corp.*, 369 F.3d 9, Bus. Franchise Guide (CCH) ¶ 12,833 (1st Cir. May 21, 2004)**

This case is discussed under the topic heading “Oral Agreements.”

***Ford Motor Co. v. Ark. Motor Vehicle Comm’n*, No. 03–496, 2004 Ark. LEXIS 250, Bus. Franchise Guide (CCH) ¶ 12,801 (Apr. 29, 2004)**

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

***Bob Zimmerman Ford, Inc. v. Midwest Auto. I, L.L.C.*, 679 N.W.2d 606, Bus. Franchise Guide (CCH) ¶ 12,822 (Iowa May 12, 2004)**

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

UNFAIR COMPETITION/UNFAIR AND DECEPTIVE PRACTICES

***Mario Valente Collezioni, Ltd. v. AAK Ltd.*, No. 02 Civ. 0099, 2004 U.S. Dist. LEXIS 5049, Bus. Franchise Guide (CCH) ¶ 12,808 (S.D.N.Y. Mar. 26, 2004)**

The defendant distributor AAK Limited and its principal Maurice Ian Kindler were collaterally estopped from contesting liability for unfair competition under the Lanham Act in *Mario Valente Collezioni*, decided by the U.S. District Court for the Southern District of New York. The plaintiff, Mario Valente Collezioni, Ltd., had an exclusive distributor agreement with Italian coat manufacturer Confezioni Semeraro Paula, S.R.L. to distribute Semeraro’s coats in the United States. Semeraro allegedly conspired with AAK Limited, its exclusive distributor in the United Kingdom, to replace Collezioni with AAK as Semeraro’s distributor in the United States. Collezioni sued Semeraro for breach of contract, trademark infringement, and unfair competition and obtained a default judgment. Semeraro later moved to set aside the default judgment on the grounds that the court lacked personal jurisdiction. The

court held an evidentiary hearing on the jurisdictional challenge in which both Semeraro and AAK appeared and presented testimony. The judge concluded that Semeraro and AAK were guilty of unfair competition and that commission of this tort in New York was a sufficient basis for jurisdiction over Semeraro. Semeraro never paid Collezioni a penny on its judgment. Collezioni then sued AAK for the same misdeeds. The trial court granted summary judgment on Collezioni's unfair competition claim against AAK on the basis of offensive collateral estoppel arising from the prior judgment that Collezioni had obtained against Semeraro on the identical claim.

On AAK's motion for reconsideration, the court reanalyzed its original ruling, applying New York law rather than federal law on collateral estoppel. The court upheld the judgment against AAK, finding that the judge in the jurisdictional proceeding had made findings as to all of the elements necessary to establish a violation of the Lanham Act. In addition, those findings were necessary to the outcome of that proceeding, because the commission of the tort was the basis for jurisdiction over the Italian defendant. Finally, the court concluded that AAK had a full and fair opportunity to litigate the claim of unfair competition because it was in privity with Semeraro as its agent and indemnitee at the hearing on jurisdiction.

***It's Just Lunch Int'l, LLC v. Polar Bear, Inc.*, Bus. Franchise Guide (CCH) ¶ 12,819 (S.D. Cal. Apr. 29, 2004)**

This case is discussed under the topic heading "Choice of Law."

***Team Tires Plus, Ltd. v. Heartlein*, Bus. Franchise Guide (CCH) ¶ 12,821 (D. Minn. Apr. 19, 2004)**

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

***Boyle v. Douglas Dynamics, LLC*, No. 03-2430, 2004 U.S. App. LEXIS 10226, Bus. Franchise Guide (CCH) ¶ 12,832 (1st Cir. May 25, 2004)**

This case is discussed under the topic heading "Oral Agreements."

***Boyle v. Int'l Truck & Engine Corp.*, 369 F.3d 9, Bus. Franchise Guide (CCH) ¶ 12,833 (1st Cir. May 21, 2004)**

This case is discussed under the topic heading "Oral Agreements."

Endnotes

1. Christopher P. Bussert, a partner in the law firm of Kilpatrick Stockton LLP in Atlanta, wrote this section, which was published in the Summer 2004 "Franchising (& Distribution) Currents." The last two paragraphs were inadvertently omitted, however, from the final publication. It is therefore being republished with the previously missing text included. The editors regret the error.