2018 IFA LEGAL SYMPOSIUM

May 6-8 | Washington, DC

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Michael Joblove

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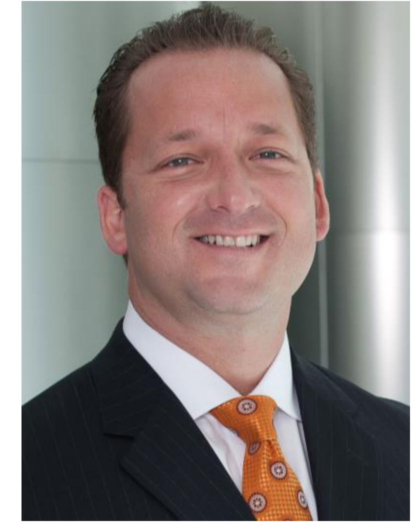
Genovese Joblove
& Battista, P.A.

Joseph Goode

Founder & Managing Partner
Laffey, Leitner & Goode, LLC

Jess Dance

Shareholder
Polsinelli



Alejandro Brito

Partner
Zarco, Einhorn, Salkowski & Brito, P.A.

C. Griffith Towle

Principal
Bartko, Zankel, Bunzel & Miller

Rupert Barkoff

Chair of the Franchise Team
Kilpatrick Townsend & Stockton LLP

STATE LAWS

Joseph Goode

Founder & Managing Partner
Laffey, Leitner & Goode, LLC

Andy Mohr Truck Center
Case Summary

- Volvo Trucks filed suit to terminate dealer agreement based on fraudulent representation about building new facility in the future ("New Facility Claim")

- Andy Mohr countered that Volvo violated the Indiana Franchise Disclosure Act ("IFDA") and the Indiana Deceptive Franchise Practices Act ("IDFPA")

  – By fraudulently inducing it to sign dealer agreement through a promise of obtaining in the future a Mack Truck franchise (the "Mack Claim")

  – By "discriminating unfairly" in relation to Volvo's Retail Sales Assistance ("RSA") program (the "Discrimination Claim")

    - 13 pricing concession transactions compared
    - Transactions analyzed from various dealers in multiple states but involved similar trucks and order sizes
    - Efforts made to use comparable transactions and dealerships
    - Alleged "cherry-picking"

Andy Mohr Truck Center
District Court Proceedings

- District Court:
  - Granted summary judgment **for dealer** on New Facility Claim asserted by Volvo based on integration clause in dealer agreement
  - Granted summary judgment **for manufacturer** on the Mack Claim based on the same integration clause
- Andy Mohr's Discrimination Claim proceeded to trial and jury awarded $6.5 million to the dealer

Andy Mohr Truck Center
Seventh Circuit on Integration Clauses

- Mere existence of an integration clause does not control whether a writing was intended to be completely integrated
- Sophistication of the parties looked at to determine effect of the integration clause
- The Seventh Circuit determined that the manufacturer **and** dealer were sophisticated parties
- Sophisticated parties would appreciate need to have all material terms (e.g., New Facility and Mack Claims) included in agreement so integration clause barred the claims
- Court acknowledged that IFDA prohibits fraud and deceit but rejected dealer's assertion that use of the merger clause would "eviscerate" the statutory protection due to dealer's sophistication and nature of promise (e.g., one about a future event)

Andy Mohr Truck Center
Seventh Circuit on Unfair Discrimination

- Seventh Circuit reversed jury verdict because the evidence on the 13 RSA concessions did not support an inference of **unfair** discrimination
- Case is about what it takes to “discriminate unfairly” under the IDFPA
  - Every instance of arbitrary and less favorable treatment should be considered unfairly discriminatory (Andy Mohr argument)
  - Only time manufacturer can unfairly discriminate is where evidence shows that manufacturer provided different price concessions based on precisely the same customer specifications (Volvo argument)
  - No guidance from Indiana Supreme Court so Seventh Circuit ventures an “Erie Guess”

Andy Mohr Truck Center
Seventh Circuit on Unfair Discrimination

- Evidence at best showed that Volvo offered no reasoned explanation for giving Andy Mohr a relatively worse concession than it gave to a sample set of other franchisees on similar transactions
- Lack of explanation from Volvo not enough to brand treatment “unfair”
- Discrimination must be in relation to agreement and agreement provided for Volvo’s discretion
- Andy Mohr received the better concession and sometimes a competitor did = not enough to show **unfair** discrimination

859 Boutique Fitness
Case Summary

- Franchisee filed suit regarding indoor-cycle fitness studio franchise
- Plaintiff thought it had reached a deal with franchisor and learned two days later (after wiring franchise and training fees to the franchisor) that franchisor decided to award franchise to another party
- Claims asserted under the Kentucky Consumer Protection Act ("KCPA") and for intentional and negligent misrepresentation
- Action centered on the two days between time franchisor represented on Closing Call that deal was done and its message indicating that it had chosen to award the franchise to someone else
- $59,500 in fees returned to franchisee

859 Boutique Fitness
District Court Proceedings

- District Court granted franchisor's motion to dismiss:
  - No claim under the KCPA because it only provides a private right of action to a purchaser of goods and services used for personal, family, or household purposes
  - Common law claims failed to **allege** a causal relationship between the alleged misrepresentations and any injury with the particularity required by Fed. R. Civ. P. 9(b)
- Franchisee allowed to amend its complaint and franchisor again successfully moved to dismiss

859 Boutique Fitness
Sixth Circuit

- Sixth Circuit affirmed the District Court's dismissal, concluding:
  - That the franchisee failed to allege that it was a purchaser or lessee for personal, family or household purposes as required by the KCPA
  - That Rule 9(b) applied to both intentional and negligent misrepresentation claims
  - That franchisee had a duty to prove the alleged fraud by clear and convincing evidence and show (among other things) reasonable reliance and how the misrepresentation caused injury
  - That franchisee could have prevailed on defeating the motion had it alleged that the misrepresentation claims spanned the entirety of its dealings with franchisor (rather than the two-day period)
  - That the franchisee failed to plead **with particularity** any injury resulting from the limited misrepresentation claim

Winebow
Historical Recap of WFDL

- Wisconsin Fair Dealership Law ("WFDL") historically restricted franchisors (called "grantors" under the statute) from terminating franchisees (called "dealers" under the statute) without notice and good cause

- The WFDL does not regulate all distributor relationships; franchisee historically has had to demonstrate a "community of interest" (e.g., a continuing financial interest between the parties in either the operation of the dealership or the marketing of goods and services)

Winebow
1999 Broadening of the WFDL

- Legislature:
  - Created Wis. Stat. § 135.066 providing for **per se** statutory protection of dealerships selling ”intoxicating liquor”
  - Incorporated definition of “intoxicating liquor” from Wis. Stat. § 125.02(8), which definition **includes** wine
- Governor Thompson:
  - Exercised partial veto and altered the proposed definition of “intoxicating liquor” with the phrase “minus wine” (veto message expressly says he does not believe wine is on same level as other liquor)
  - Failed to clarify whether his change to the definition of “intoxicating liquor” in the newly-created statute applied to the whole chapter or just the new section

Winebow
Case Summary

- Winebow terminated two of its Wisconsin distributors (the "Distributors") for performance reasons
- Winebow filed a declaratory judgment action seeking a determination that the terminations were legally sustainable under the WFDL
- Distributors asserted that WFDL protected them under both the "community of interest" definition and the per se "intoxicating liquor" definition (they later dropped the "community of interest" argument)
- District Court concluded that definition of "intoxicating liquors" does not include wine and that Distributors were thus not protected by the statute
- Sole question before the Seventh Circuit was whether the definition of "intoxicating liquor" dealerships includes those selling wine

Winebow
The Problem

- Ambiguity as to whether Governor Thompson's change in Wis. Stat. § 135.066(2) applies just to that subsection of the WFDL or to the entire WFDL

- Wis. Stat. § 135.02(3)(b) defines "dealership" as an entity granted the right to sell "intoxicating liquor"—thus confusion!

- Question before the Seventh Circuit was what definition of "intoxicating liquor" is applicable: the broader one incorporated originally by the Legislature and not qualified by Governor Thompson in Wis. Stat. § 135.02(3)(b) or the narrower one modified by the Governor in Wis. Stat. § 135.066(2)?

Winebow
Arguments Favoring Supplier

- The presence of Governor Thompson's "minus wine" language is the only **definition** of "intoxicating liquor" found in the WFDL (the phrase is used in Wis. Stat. § 135.02(3)(b) but not defined)

- Saying that the WFDL protects wine dealerships risks making the language in Wis. Stat. § 135.066(2) meaningless

- Wisconsin courts assume consistent interpretations of the same term when used in a statutory scheme

Winebow
Arguments Favoring Distributors

- Just as the “minus wine” provision could be applied consistently in interpreting the statute, the reference does not expressly extend to the entire chapter

- The “minus wine” definition is not in the “Definitions” section of the chapter and thus requires the reviewing court to decide on what the placement in Wis. Stat. § 135.066(2) means in the overall structure of the WFDL and the definition of “dealership” changed by the Legislature in 1999

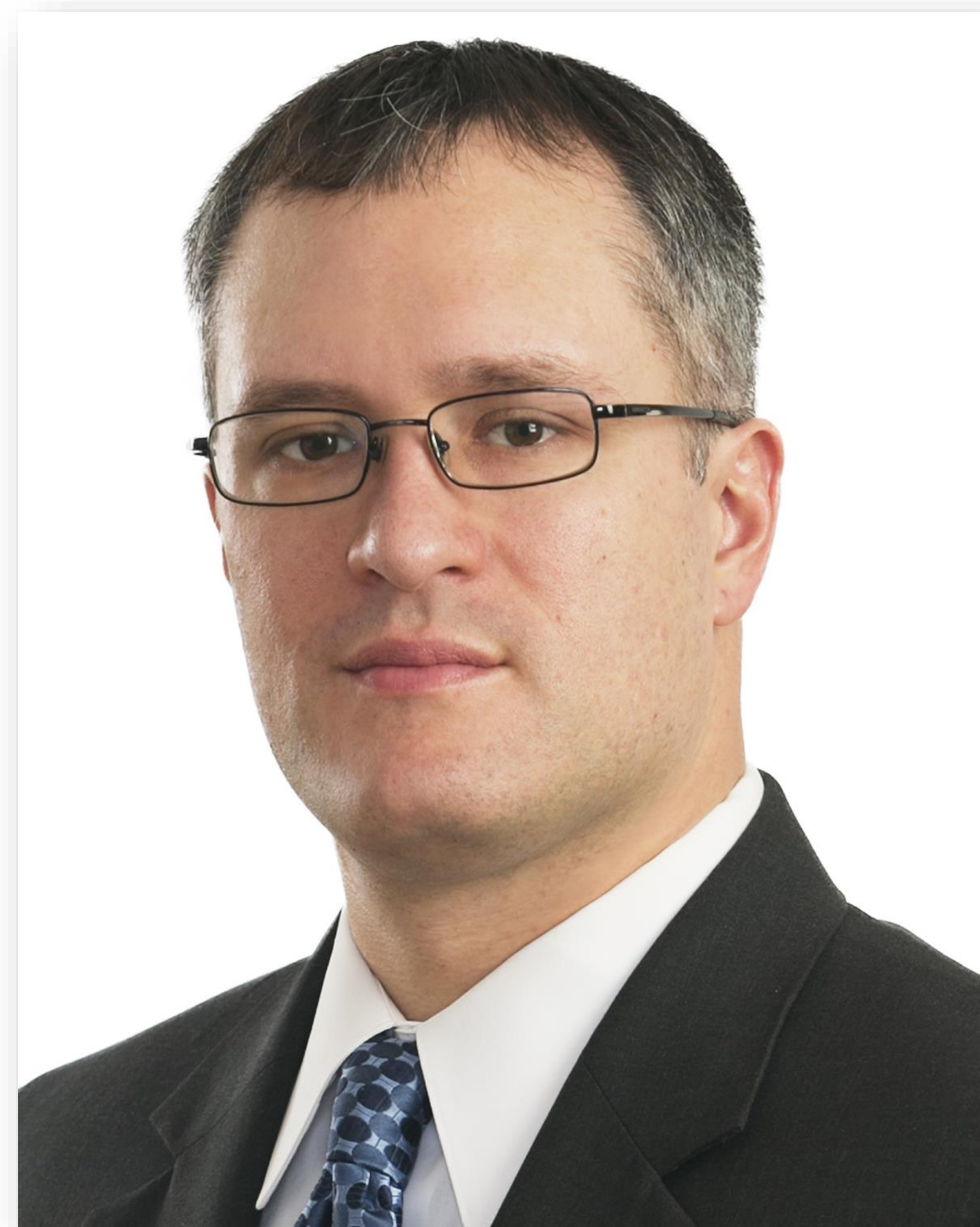
Winebow
Stay Tuned

- Does the definition of "dealership" contained in Wis. Stat. § 135.02(3)(b) include wine grantor-dealer relationships?
- Case certified to the Wisconsin Supreme Court
- Oral argument occurred on February 19, 2018 and decision is expected at the end of the term
- Stay tuned

EMPLOYMENT

Jess Dance

Shareholder, Global Franchise and Supply Network Practice
Polsinelli PC



NLRB

Browning-Ferris Industries of California, 362 NLRB No. 186 (2015)

- Quick Recap
  - NLRB overturned over 30 years of precedent requiring "direct and immediate" control for joint employment.
  - New, expansive standard:
    - Reserved right to control, even if unexercised.
    - Indirect control.
- Pending on appeal to D.C. Circuit. Argued March 9, 2017.

Hy-Brand Industrial Contractors, Ltd., 365 NLRB No. 156 (2017)

Browning-Ferris is Dead!

No, It's Not!

But Maybe?

McDonald's USA, LLC, NLRB Case No. 02-CA-093893

- In 2014 and 2015, NLRB General Counsel initiated actions claiming McDonald's USA is a "joint employer" liable for franchisees' alleged labor violations.
- Testimony taken throughout 2016-2017.
- March 19, 2018: Settlement announced.
  - Franchisees pay full backpay and post notices.
  - McDonald's and franchisees are <u>not</u> joint employers.
- Settlement pending ALJ approval.

JOINT EMPLOYMENT

Parrott v. Marriott International, Inc., 2017 WL 3891805 (E.D. Mich. Sept. 6, 2017)

- FLSA collective action case.
- Two Food & Beverage Managers employed at Courtyard by Marriott hotels claimed they were denied overtime by being misclassified as “exempt” managers.
- Instead of suing the franchisees they worked for, they sued Marriott on joint employment theory.

Parrott v. Marriott International

- Court denied Marriott's motion to dismiss, finding sufficient allegations of control for joint employment:
  - Food Managers get discounted room rates worldwide.
  - Plaintiffs were told they work for Marriott "first and foremost."
  - Marriott audits financial records and advises regarding labor costs.
  - Marriott inspects hotels for compliance with system standards.
  - Marriott selects uniform décor, trade dress, menus, and vendors.
  - Marriott requires mandatory training for Food Managers.
- Court largely focused on control incident to brand standards.

MISCLASSIFICATION

Haitayan v. 7-Eleven, Inc., 2018 WL 1626248 (C.D. Cal. Mar. 14, 2018)

- Putative class action under FLSA and California law.
- Plaintiff franchisees claimed they were misclassified by 7-Eleven as independent contractors.
- Plaintiffs sued 7-Eleven for overtime and recovery of business expenses.

Haitayan v. 7-Eleven, Inc.

- Court granted 7-Eleven's motion to dismiss.
- Unlike *Parrott* case, court distinguished between control necessary to protect franchisor's mark and goodwill versus control over wages, hours, or working conditions.
- Alleged control over initial training and store operations (e.g., temperature, products) was related to brand standards.
- Franchisees could terminate for convenience on 72 hours' notice. Franchisor could only terminate for cause.

LEGISLATIVE RESPONSES

Proposed Federal Legislation

- Save Local Business Act, H.R. 3441.
- Would amend NLRA and FLSA to require “direct, actual, and immediate” control for joint employment.
- Passed House on November 7, 2017.
- No action yet in Senate.

State Legislation

18 states have passed laws to clarify when a franchisor can be a joint employer.

Alabama	Arizona	Arkansas	Georgia	Indiana	Kentucky
Louisiana	Michigan	New Hampshire	North Carolina	North Dakota	Oklahoma
South Dakota	Tennessee	Texas	Utah	Wisconsin	Wyoming

Similar bills are pending in other states.

CLASS OR "MASS" ACTIONS

Alejandro Brito

Partner

Zarco, Einhorn, Salkowski & Brito, P.A.

Class Action Obstacles Beyond Certification

- Pre-Certification Dismissal
  - Standing
  - Legal Deficiencies

- Post-Certification Review
  - Inequitable Settlements

- Mass Actions

Pre-Certification Dismissal

- ***Estler v. Dunkin' Brands. Inc.*, 691 F. App'x 3 (2d Cir. 2017)**
  - Consumers filed class action based on unlawful sales tax on exempt products.
    - District Court dismissed finding: under New York law, consumers seeking a return of sales taxes that were erroneously paid must first comply with state-law administrative remedy and apply for a refund to the state tax commission. N.Y. Tax Law § 1139(a).
    - Plaintiffs appealed arguing:
      - (1) the state's exclusive administrative procedures are not mandated in this case; and
      - (2) they may independently pursue a claim under N.Y. Gen. Bus. Law § 349 if defendants' collection of sales tax rose to the level of an unfair and deceptive practice.

Estler v. Dunkin' Brands. Inc., 691 F. App'x 3 (2d Cir. 2017) Cont'd

- Second Circuit Court of Appeals rejected each of Plaintiffs' arguments finding:
  - The complained-of fee was described as a sales tax assessed at the 8.875% combined state and municipal sales tax rate in New York City. Thus, the plaintiffs could not avoid the administrative remedy mandated under New York state law; and
  - These forms of administrative review not only extend to clerical miscalculations of sales tax but also in the determination of which products are statutorily exempt.

Estler v. Dunkin' Brands. Inc., 691 F. App'x 3 (2d Cir. 2017) Cont'd

- In sum:
  - The plaintiffs argued that they sought a return of an unlawful surcharge, rather than a sales tax refund. However, the Court was not persuaded because the complaint conceded that the complained-of fee was described as a sales tax and assessed at the 8.875% sales tax rate in New York City.

Pre-Certification Dismissal

- ***Abrantes v. Fitness 19 LLC*, No. 16-cv-00903, 2017 WL 4075576 (E.D. Cal. Sept. 14, 2017)**

  - Customers brought class action against individual franchisees and franchisor for violations of the Electronic Funds Transfer Act (“EFTA”) based upon automatically debited monthly membership fees.

  - Plaintiffs sought to hold the franchisor liable for the actions of its franchisees.

Abrantes v. Fitness 19 LLC, No. 16-cv-00903, 2017 WL 4075576 (E.D. Cal. Sept. 14, 2017) Cont'd

- Franchisor moved to dismiss the class action on the grounds that:
  - Plaintiffs failed to allege, and could not prove, that the franchisor had any direct relationship with the Plaintiffs; and
  - The allegations of the Complaint failed to raise a reasonable inference that Franchisor deducted any funds from Plaintiffs' accounts.

Abrantes v. Fitness 19 LLC, No. 16-cv-00903, 2017 WL 4075576 (E.D. Cal. Sept. 14, 2017) Cont'd

- Plaintiffs' sought to have the Court embrace an expansive view of the EFTA, which would impose liability on the Franchisor regardless of whether it actually initiated the transfers.

- Ultimately, the Court rejected Plaintiffs' argument and dismissed the case, finding that indirect involvement in the unlawful deductions was insufficient to state a claim for violations of the EFTA.

Pre-Certification Dismissal

- ***Haywood v. Massage Envy Franchising, LLC*, No. 16-cv-01087, 2017 WL 2546568 (S.D. Ill. June 12, 2017), *aff'd* 2018 WL 1725229 (7th Cir. Apr. 10, 2018)**
  - Consumers filed class action against Franchisor alleging deceptive and unfair trade practices for failing to inform customers that a "one hour massage" includes preparation and consultation time.
  - Plaintiffs contended that they were not informed that the actual length of the massage was less than one hour by any employee or any signage on the premises of Massage Envy locations.

Haywood v. Massage Envy Franchising, LLC, No. 16-cv-01087, 2017 WL 2546568 (S.D. Ill. June 12, 2017) Cont'd

- In response, the Franchisor contended that the Massage Envy locations visited by Plaintiffs were independently owned and operated by various franchisees.
  - Franchisor moved to dismiss on this basis, arguing that Plaintiffs lacked standing under Article III.
  - While the Court found that Plaintiffs' allegations were sufficient to overcome a standing challenge, the Court ultimately decided that the Franchisor did not exhibit sufficient control over the independent franchisees to be liable for their actions.

Pre-Certification Dismissal

- ***Borenkoff v. Buffalo Wild Wings, Inc.*, No. 16-cv-8532, 2018 WL 502680 (S.D.N.Y. Jan. 19, 2018)**
  - Consumers brought class action for unjust enrichment and unfair and deceptive trade practices against a Franchisor for alleged failure of the Franchisor to disclose the use of beef-based products to fry non-meat menu items.
  - Specifically, Plaintiffs argued that the failure to disclose the use of these products constituted a material misrepresentation or omission and Plaintiffs would not have purchased these food items but for the misrepresentation or omission.

Borenkoff v. Buffalo Wild Wings, Inc., No. 16-cv-8532, 2018 WL 502680 (S.D.N.Y. Jan. 19, 2018) Cont'd

- Franchisor moved to dismiss based on lack of Article III standing, however, the Court found that Plaintiffs satisfied this low threshold.

- In so finding, however, the Court expressed concern with whether Plaintiffs could prove that they suffered "actual injury"

  - Specifically, the Court found that Plaintiffs failed to allege how the use of the beef product affected the value of the food items they received. Therefore, their claims were deficient as a matter of law.

Post-Certification Review

- ***In re Subway Footlong Sandwich Mktg. & Sales Practices Litig.*, 869 F. 3d 551 (7th Cir. 2017)**
  - The underlying consumer class action was brought on behalf of consumers who alleged Subway's owner engaged in deceptive marketing and sales practices by advertising sandwiches as "footlongs" when some sandwiches were slightly shorter than twelve inches.
  - The Court initially found that the Plaintiff class failed to identify a compensable injury, which led Plaintiffs' counsel to change strategy and seek primarily injunctive relief.

In re Subway Footlong Sandwich Mktg. & Sales Practices Litig., 869 F. 3d 551 (7th Cir. 2017) Cont'd

- Ultimately, the parties reached a settlement whereby Subway agreed to implement a number of practices designed to ensure (to the extent practicable) that its sandwich rolls were at least twelve inches long for a period of four years:
  - franchisees would "use a tool" for measuring sandwich rolls;
  - corporate quality-control inspectors would measure a sampling of baked bread during each regularly scheduled compliance inspection;
  - the inspectors would check bread ovens during each compliance inspection 'to ensure that they are in proper working order and within operating specifications'; and
  - Subway's website and each franchised restaurant would post a notice explaining that the natural variability in the bread-baking process will sometimes result in sandwich rolls that are shorter than the advertised length.

In re Subway Footlong Sandwich Mktg. & Sales Practices Litig., 869 F. 3d 551 (7th Cir. 2017) Cont'd

- The settlement also explicitly acknowledged that 'because of the inherent variability in food production and the bread baking process, Subway could not guarantee that each sandwich roll will "always be exactly 12 inches or greater in length after baking."

- In addition to these policies and procedures, Subway agreed to pay:
  - Plaintiffs' attorney's fees in the amount of $525,000; and
  - Incentive awards of $1,000 for each named Plaintiff.

In re Subway Footlong Sandwich Mktg. & Sales Practices Litig., 869 F. 3d 551 (7th Cir. 2017) Cont'd

- The settlement was preliminarily approved but a fairness hearing was scheduled on the terms thereof.

- Ultimately, the Court found that the amount of attorneys' fees compared with the "incentive" payment to the lead Plaintiffs suffered from far to great a disparity to be fair.
  - Thus, the Seventh Circuit reversed, holding that the settlement only awarded fees for class counsel while providing "zero benefits for the class."

Post-Certification Review

- ***Cunningham v. Suds Pizza, Inc.*, No. 15-cv-6462, 2017 WL 6000616 (W.D.N.Y. Dec. 1, 2017)**
  - Plaintiffs brought a class action against former employers alleging violations of the Fair Labor Standards Act ("FLSA").
  - The key issue was whether the franchisee-employer and the franchisor could be considered "joint-employers" under the FLSA.

Cunningham v. Suds Pizza, Inc., No. 15-cv-6462, 2017 WL 6000616 (W.D.N.Y. Dec. 1, 2017) Cont'd

- The parties eventually reached a settlement whereby Plaintiffs' counsel would receive $566,667 in attorneys' fees—which represented one-third of the total settlement amount.

  - Based upon the number of claims filed by class members, the Court calculated the "true value" of the settlement to be approximately $339,000 to the Plaintiffs.

  - In so finding, the Court expressed significant concern with the benefits to the class compared with the benefits to Plaintiffs' counsel.

Cunningham v. Suds Pizza, Inc., No. 15-cv-6462, 2017 WL 6000616 (W.D.N.Y. Dec. 1, 2017) Cont'd

- At the Court's direction, the parties revised the settlement so that Plaintiffs would receive $587,000 and its counsel would receive $318,000.

- Although the Court still considered this ratio to be high in favor of Plaintiffs' counsel, it ultimately approved the settlement finding that Plaintiffs' counsel's assumption of risk in taking this case on a contingency fee basis afforded Plaintiffs' counsel the return of higher attorneys' fees through the settlement agreement.

Mass Actions

- ***Association of Independent BR Franchise Owners v. Baskin-Robbins Franchising, LLC*, No. 15-10963-WGY, 2017 WL 4314607 (D. Mass Sept. 27, 2017)**
  - Franchisees sought declaratory relief against Franchisor alleging that the franchisor impermissibly charged its franchisees a “Commercial Factor Fee” that was not disclosed in the various franchise agreements.
  - In reviewing the claims, the Court noted several facts regarding the changes of the franchise agreements over the two prior decades.

Association of Independent BR Franchise Owners v. Baskin-Robbins Franchising, LLC, No. 15-10963-WGY, 2017 WL 4314607 (D. Mass Sept. 27, 2017) Cont'd

- Specifically, the Court noted the following:

  - Prior to 1998, Baskin franchisees either paid no royalty fees or a small percentage of "Continuing Franchise Fees" and purchased the vast majority of their ice cream products from Baskin or an affiliate. Consequently, Baskin derived its primary revenue from the sale of ice cream products.

  - In 1998, Baskin offered its franchisees a "Royalty Conversion Program" that: (1) either raised or imposed for the first time a Continuing Franchisee Fee of 4.9%; (2) raised the advertising fee to be paid by franchisees to 5%; (3) lowered the costs for ice cream products and other goods; and (4) charged a "Commercial Factor" on ice cream and other products. The majority of the then-existing franchisees accepted the terms of those agreements. Currently, there are almost no franchisees left that

  - In 2000, new and renewing franchisees entered into a franchise agreement that did not contain the terms "Commercial Factor" or "Commercial Factor Fee." Baskin also ceased production of ice cream and outsourced the manufacture and wholesale distribution of its proprietary products to Dean Foods. The Current Franchise Agreements provided that franchisees must purchase all of their ice cream and related products from Dean Foods. Dean Foods in turn pays Baskin based upon its volume of sales attributed to Baskin franchisees. This arrangement had been in effect for approximately sixteen years.

Association of Independent BR Franchise Owners v. Baskin-Robbins Franchising, LLC, No. 15-10963-WGY, 2017 WL 4314607 (D. Mass Sept. 27, 2017) Cont'd

- The Court ultimately found that the "Commercial Factor Fee" was a proper franchise fee imposed by the franchisor for the right to sell third-party products under the franchisor's trade name.

  - Despite no mention of such fee in the franchise agreements, the Court found that the agreements included a provision which obligated the franchisees to pay the price charged by the third-party vendor which included the complained-of fee.

    - "Accordingly, a plain reading of the contract supports the interpretation that Baskin was entitled to derive revenue from franchisees by charging a franchise fee to Dean Foods, which Dean Foods then passes on to its purchasers."

ARBITRATION/FORUM SELECTION

C. Griffith Towle

Principal
Bartko, Zankel, Bunzel & Miller

The Highlights

- Courts will generally enforce balanced and mutual arbitration provisions
- Although disfavored, waiver happens
- Petitions to vacate arbitration awards are rarely granted
- Mixed results re enforcing forum selection clauses

Petitions to Compel Arbitration

Stockade Cos. v. Kelly Rest. Group, LLC

2017 WL 1968328 (W.D. Tex. May 11, 2017)

- "Any "Any and all ***controversies, claims and disputes*** between them arising out of or related to this Agreement . . . shall be finally resolved by submitting such matter to [AAA] . . . for binding arbitration under the AAA's Commercial Arbitration Rules . . ."

Stockade Cos. v. Kelly Rest. Group

- "Franchisor may, at its sole option, institute an ***action . . . for*** **temporary or preliminary injunctive relief** or seeking any other temporary or equitable relief against Franchisee that may be ***necessary to protect its Proprietary Marks or other rights or property*** . . ."

Stockade Cos. v. Kelly Rest. Group

- Who decides?
  - Gateway issue for the court to decide unless clear and unmistakable evidence otherwise
- AAA's Commercial Rules incorporated, including Rule 7 (Jurisdiction)
- Incorporation of AAA Rules constitutes clear and unmistakable evidence, but *not* when the agreement includes an express exclusion to arbitration

Stockade Cos. v. Kelly Rest. Group

- Claims included within the Carve-Out Clause?
  - Stockade's claims were actions
  - Covenant not to compete is an "other right"
  - Clause does not limit right to seek injunctive relief
- Motion denied

WAIVER

Money Mailer, LLC v. Brewer

2017 WL 3017539 (W.D. Wash. July 7, 2017)

- Money Mailer Franchise Corp. (MMF) and Money Mailer, LLC (MMLLC)
- FDD
  - Arbitration provision in MMF franchise agreement
  - Franchisee would need to enter into a separate agreement with MMLLC
- No arbitration provision in MMLLC agreement

Money Mailer v. Brewer

- Whether MMF had waived its right to arbitration based on litigation conduct
- MMLLC's lawsuit constituted acts by MMF inconsistent with MMF's right to arbitration
  - MMLLC "effectively" filed suit on behalf of MMF
  - Intermingled accounting = MMLLC seeking to recover $$$ owed to both MM entities
- Prejudice = having to defend claims to recover $$$ owed to MMF in court while being forced to arbitrate other disputes

Motions to Vacate

System4, LLC v. Ribeiro

275 F. Supp. 3d 297 (D. Mass. 2017)

- Putative class action claiming unit franchisees were employees
- MA Supreme Judicial Court ordered individual arbitrations
- Ribeiro filed demand for arbitration with AAA

System4 v. Ribeiro

- Key Rulings
  - Initial determination that AAA's Employment Rules applied and, therefore, System4 would bear the costs of the arbitration
  - Ribeiro's claims not barred by statute of limitations
  - Ribeiro should have been classified as an employee

System4 v. Ribeiro

- Evident Partiality by Arbitrator
  - "Independent investigation" into state court procedural history = OK
  - Ruling against System4 on SOL defense ≠ evidence of impartiality because Ribeiro opposed the issue
  - No independent investigation into one of System4's motions ≠ bias

System4 v. Ribeiro

- Arbitrator Exceeded Powers
  - Did not adhere to terms of the franchise agreement
    - Arbitrator did not apply AAA Employment Rules
    - Arbitrator rejected System4's arguments re contractual confidentiality and fees/costs
  - Manifestly disregarded the law
    - Arbitrator considered and rejected System4's arguments re SOL and misclassification issues
- Motion denied

Zounds Hearing Franchising, LLC v. Bower

2017 WL 4399487 (D. Ariz. Sept. 15, 2017)

- AZ choice of law, arbitration and mediation provisions

  vs.

  Ohio Business Opportunity Purchasers Protection Act
- Franchisees filed suit in Ohio
  - Court granted Zounds' § 1404 motion to transfer
- Zounds filed declaratory relief actions in AZ

Zounds Hearing Franchising, LLC v. Bower

- 3-Step Conflict of Law Analysis
  - State with the most significant relationship to the transaction/parties governs
  - Parties can agree that the law of another state governs
  - ***Unless*** such law is contrary to the fundamental public policy of state with the most significant relationship and that state has a materially greater interest in the outcome of the issues

Zounds Hearing Franchising v. Bower

- Choice of Law and Venue Provisions
  - “The state where the franchise is located and the franchisee is domiciled will always have the most significant relationship to the transaction and the parties if that state’s investor protection laws are stronger and there is a conflict between that law and the law of the chosen state”
  - “The Ohio franchise regulation statutes and those in similar states always reflect fundamental policy of the state, and a contractual choice of the law of a less protective state cannot defeat the state’s protection for an in-state franchise and franchisee”
- AZ choice of law and venue provisions invalid under OH statute
- Franchisees’ suit transferred back to OH

Zounds Hearing Franchising v. Bower

- Pre-Suit AZ Mediation Provision
  - "Intimately bound up" with franchisees' right to sue
  - "Integral" to any litigation
  - Prohibited by OH statute which voids *any* provision in an agreement restricting venue to a forum outside of OH
- Motion denied

Zounds Hearing Franchising v. Bower

- AZ Dec. Relief Actions — Judgment against Zounds
- Attorneys' fees/costs
  - One-way attorneys' fee provision = "odious"
  - "Indeed, it should be a presumptive abuse of discretion not to award attorney fees against an unsuccessful party who used its superior bargaining power to impose such a term"

OTHER CASES OF IMPORTANCE

Rupert Barkoff

Chair of the Franchise Team
Kilpatrick Townsend & Stockton LLP

Non-Competes and Trademark Infringements

***Cajun Global. LLC* v. Swati Enters., Inc., 283 F. Supp. 3d 1325, (N.D. Ga. 2017), Bus. Franchise Guide (CCH) ¶16, 118.**

Initial franchisee sold restaurant and successor ran the franchise until the term expired. Franchisor never objected to the transfer. When agreement ended, successor rebranded it. Never signed franchise agreement. Court found him liable for trademark infringement for continuing to use similar marks. Franchisee bound by 25 mile, two year non-compete.

***H&R Block Tax Servs. LLC v. Frias*, No. 4:18-00053-CV-RK, 2018 WL 576858 (W.D. Mo. Jan. 26, 2018), *vacated in part*, 2018 WL 934901 (W.D. Mo. Feb. 16, 2018), Bus. Franchise Guide (CCH) ¶16,127.**

Former franchisee opened competing business after agreement terminated. 25 miles, two-year non-compete enforced. Spouse's tax preparation business not enjoined because she was not a signatory.

Homewatch Int'l, Inc. v. Navin, No. 16-CV-02143-KLM, 2017 WL 4163358 (D. Colo. Sept. 20, 2017), Bus. Franchise Guide (CCH) ¶16,051.

Former franchisee started competing business. Claimed not to be bound to the non-compete because she was not a party to the franchise agreement. Court said she was wrong. She had signed a guaranty.

Dickey's Barbecue Pit, Inc. v. Celebrated Affairs Catering, Inc., No. 4:17-CV-00127, 2017 WL 1079431 (E.D. Tex. Mar. 22, 2017), Bus. Franchise Guide (CCH) ¶15,975.

Trademark infringement after termination of franchise agreement. Marks used by former franchisee were identical to franchisor's marks.

QFA Royalties, LLC v. ZT Investments, LLC, No. 17-cv-0507-WJM-MJW, 2017 WL 5517408 (D. Colo. Nov. 17, 2017), Bus. Franchise Guide (CCH) ¶16,087.

Franchisor claimed trademark infringement by the terminated franchisee. Permanent injunction denied because no evidence that non-compete enforcement (2 years; five miles from restaurant or any other restaurant in the chain) led to irreparable harm. Also, no showing that restraint reasonable.

Fraud

***Broward Motorsports of Palm Beach, LLC v. Polaris Sales, Inc.*, No. 17-cv-81100-BLOOM/Hopkins, 2018 WL 1072211 (S.D. Fla. Feb. 27, 2018), Bus. Franchise Guide (CCH) ¶16,142.**

Franchisor terminated one of six lines of motor vehicles. Franchisee alleged fraud because franchisor deceived them into thinking the “Victory” line of motor vehicles would be available after the franchise agreement signed. No duty on franchisor to disclose its intent not to renew franchise agreement. Arrangement did not create a “special relationship” between the parties. Statement by franchisor that it hoped for a “long and profitable relationship” had been made after agreement was executed.

***Lomeli v. Jackson Hewitt, Inc.*, No. 2:17–CV–02899–ODW (KSx), 2018 WL 1010268 (C.D. Cal. Feb. 20, 2018), Bus. Franchise Guide (CCH) ¶16,147.**

Defendant reviewed tax returns and approved them and defendant sent wrong return to IRS but indicated otherwise to the plantiff franchisee. Facts sufficiently pleaded. Franchisor knew or should have known of fraudulent scheme. Also, claim of vicarious liability survived motion to dismiss.

Renewals

***Howell v. Advantage Payroll Servs., Inc.*, No. 2:16-CV-438-NT, 2017 WL 6327832 (D. Me. Dec. 11, 2017), Bus. Franchise Guide (CCH) ¶16,100.**

Contractual rights to renew. 10-year agreement. Only right to renew agreements only once was unambiguous.

Dalwadi v. Holiday Hosp. Franchising, Inc., No. H-16-2588, 2017 WL 4479962 (S.D. Tex. July 5, 2017), Bus. Franchise Guide (CCH) ¶16,017.

Assurance by franchisor that almost all agreements were renewed. Franchisee claimed breach of implied covenant of good faith and fair dealing. Agreement expressly provided that the license was not renewable.

Contract Provisions

***Lokhandwala v. KFC Corp.*, No. 17-cv-5394, 2018 WL 509959 (N.D. Ill. Jan. 23, 2018), Bus. Franchise Guide (CCH) ¶16,130.**

Plaintiff claimed that franchisor breached the agreement by unreasonable attempting to block him from telling customers that his chicken met the standards of Halah. Franchise Agreement gave franchisor the absolute right to prohibit any advertising regarding KFC products. No ambiguous language. Failure by franchisor to enforce on one occasion was not a waiver of franchisor to enforce the provision on another occasion. "Reasonableness" not provided for in franchise agreement.

***Jos A. Bank Clothiers v. J.A.B.-Columbia, Inc.*, No. ELH-15-3075, 2017 WL 6406805 (D. Md. Dec. 15, 2017), Bus. Franchise Guide (CCH) ¶16,106.**

Franchisor had granted many franchisees the right for a second renewal term. Rolling renewals were not a universal practice. Issue was what was the form of agreement for renewal. Extrinsic evidence did not resolve the ambiguity. Motions for summary judgments by both parties were denied.