Understanding Franchise Agreement Relationship & Termination Laws

BASED ON THE A SUMMARY OF FEDERAL AND STATE FRANCHISE RELATIONSHIP AND TERMINATION LAWS.

“This is a quick summary of the Relationship and Termination provisions of federal and state requirements. For an in-depth analysis of the specific requirements applicable to you, please contact Mohajerian Law Corp. at www.mohajerianlaw.com. This newsletter is not intended to be legal advice and is for informational purposes only.”

Franchise relationship and termination laws deal directly with conduct in the context of an existing franchise agreement. Generally agreed upon is the concern by legislatures regarding franchises being wrongfully terminated or dominated unfairly by large franchisors and distributors. The conduct of concern has been discrimination, franchisor competition, market encroachment, and dilution.

What do Termination, Cancellation, and Nonrenewal Really Mean?

The act of ending a franchise relationship is deemed a “termination,” “cancellation,” or “nonrenewal.” While “termination” and “cancellation” generally refer to ending a relationship during its intended term, “nonrenewal” generally means the end of a franchise agreement at expiration. Often times, the franchise agreement will outline the grounds for termination or cancellation. As well, the basis for renewal a signified in the franchise agreement.

Regardless of the terms set forth, the franchise relationship and termination laws set standards that franchisors must follow to avoid successful legal action on the part of a franchisee. It is important that careful consideration by franchisors be made to comply with law of their applicable jurisdiction.
How is Alteration Different?

In addition to termination, cancellation, and nonrenewal some franchise relationship and termination laws govern changes to franchise agreements otherwise known as alterations. For example, under Section 1 of the Indiana Deceptive Franchise Practices Law, it is unlawful for a franchise agreement to provide for or allow substantial modification of the franchise agreement by the franchisor without written consent of the franchisees. However, the change may have to be proven to be “substantial.” In Wright-Moore Corp. v. Ricoch Corp. a photocopier manufacturer’s unilateral change in credit terms for the sale of copiers to a distributor, as authorized by the distributorship agreements, was held not to be a substantial change due to the lack of resulting harm to the distributorship’s business.

Are There Standards of Conduct for Franchisors?

Under the franchise relationship and termination laws, a common requirement of conduct specifies that franchisors must act “fairly,” “justly,” or with “good cause.” These standards apply variously in attempts by franchisors at termination, cancellation, nonrenewal, alterations, and sometimes changes in competitive circumstances. For example, the “good cause” standard, in most states, applies to termination, cancellation, and nonrenewal. However, under Section 20 of the Illinois Franchise Disclosure Act of 1987, the “good cause” standard does not apply to nonrenewal. In other cases, the “good cause” is defined precisely, as with the Iowa Code, Title XX, Section 523H.7 which defines “good cause” to be:

“The failure of the franchisee to comply with a lawful requirement of the franchise agreement, provided that the termination by the franchisor is not arbitrary or capricious when compared to the actions of the franchisor in other similar circumstances. In addition, the burden of proof rests with the franchisee.”

What is a Change of Competitive Circumstances?

As noted the conduct of franchisors towards franchisees requires some level of “good cause” in connection with termination, cancellation, and nonrenewal. Some states require “good cause” for what is termed a “change in competitive circumstances.” For example, Wisconsin’s Fair Dealership Law makes this requirement.

However, the question of what constitutes a “change in competitive circumstances” has been the subject of considerable litigation. A variety of activities have been found to fall under the definition. These have included, for example, inadequate advertising, imposition of a discount for case program, change of distributorship to a non-exclusive basis, ineffective managements, installation of other distributorships in territory, bans on mail order sales, and withdrawal from the market.
Still in some cases, fairly substantial changes imposed by a franchisor have been held not to have substantially changed the franchisee’s competitive circumstances. In Bresler’s 33Flavors Franchising Corp. v. Wokosin, an ice cream franchisor’s imposition of a new standard agreement on a Wisconsin franchisee – requiring remodeling, advertising, and increased franchise fee – did not substantially change the franchisee’s competitive circumstances.

**General Recommendations**

Understanding and complying with the complex nature of franchise relationship and termination laws can be quite a challenge for most franchisors. The best advice you can receive is to make sure you fully understand and comply with all applicable laws regarding your business. In most cases, review and counseling from an experienced franchise lawyer is the best way to ensure your compliance.

Mohajerian Law Corp. encourages you to contact our firm with questions or concerns regarding the franchise relationship and termination laws that are applicable to you. We proudly serve franchisors and franchisees in their quest for sound, prudent legal counseling.

| | | Case Law Review | |

**Franchisor Had “Good Cause” For Termination Under Act:**

**Maple Shade Motor Corp. v. Kia Motors of America, Inc., DC N.J.**

A motor vehicle franchisor had “good cause” under the meaning of the New Jersey Franchise Practices Act to terminate a franchisee for failing to construct a separate showroom for the franchisor’s brand of vehicles, a federal district court in Camden, New Jersey, has held. By failing to construct the showroom as required by the parties’ agreement, the franchisee “failed to substantially comply with those requirements imposed on him by the franchisor,” thereby satisfying the Act's definitional requirement for good cause.

An addendum to the parties’ agreement specifically provided that the construction of the separate showroom was a material term of the agreement and that failure to construct the showroom was grounds for nonrenewal, the court noted. The construction provision had been separately negotiated by the parties and appeared to have been an important factor in the franchisor’s decision to grant the franchise, the court observed. The addendum required the franchisee to submit plans for the showroom to the franchisor by July 1, 1997, acquire the necessary permits by October 1, 1997, and complete construction by November 1, 1998. The franchisee’s contention that the agreement to build the separate showroom was *void ab initio* because the first two dates in the timetable had already passed when it signed the agreement on October 13, 1997, was without merit. At the heart of the
addendum was the obligation to construct a separate showroom, which was not impossible in any sense of the word at the time it was signed. The fact that the franchisee did not execute and return the agreement until after the first two deadlines had passed did not undermine the basic understanding that it would construct a showroom, the court determined.


Insurance Agent Was “Franchise” Under Connecticut Act:


A jury's findings that an independent insurance agent's relationship with an insurance company was a "franchise" under the meaning of the Connecticut Franchise Act and that the company violated the Act by terminating the agent without "good cause" were supported by substantial evidence, according to a federal district court in Hartford, Connecticut. In addition, substantial evidence supported the jury's determination that the termination violated the Connecticut “little FTC Act” and its award of $2.3 million in compensatory damages to the agent. However, the insurance company was entitled to judgment as a matter of law on the jury's finding that the termination breached the implied covenant of good faith and fair dealing in the parties' agreements, the court ruled.

What is a Franchise?

The Connecticut legislature did not intend to preclude insurance agents from invoking the protection of the Connecticut Franchise Act, the court decided. The decisions from other jurisdictions cited by the insurance company to support its contention that the legislature could not have intended for the Franchise Act's “good cause” requirement to apply to insurance agents concerned factual settings and legislative schemes different from the Connecticut statutes and regulations. Moreover, the company’s catalogue of failed legislative attempts to impose a good cause termination requirement for insurance agents in Connecticut showed no clear indication that the legislature intended preemption of the Franchise Act by the insurance statutes and regulations.

There was substantial evidence supporting the jury’s finding that the agent was “granted the right to engage in the business of offering, selling, or distributing [goods or] services under a marketing plan or system prescribed in substantial part by” the insurance company, thereby satisfying the first element of the Connecticut Franchise Act’s definition of a “franchise,” the court ruled.

The company disputed whether the agent had the ability to bind it to a policy of insurance, and therefore could actually “sell” its policies. However, there was no dispute as to the agent’s ability to “offer” the company’s policies to customers and to execute initial, non-binding contracts with customers. Moreover, the agent testified that he did have the ability to bind the company to insurance policies on the basis of his prior success as an agent. There was considerable testimony from the agent, as well as employees of the insurance company, that supported the jury’s finding that the agent operated pursuant to a marketing plan or system prescribed in substantial part by the company. A company representative testified that the company employed managers to ensure that agents met its standards, provided agents with sample advertisements, and had to approve any use of the company’s
logo in local advertisements. Additionally, a company manager assigned to the agent’s franchise testified that he would “sit down with [the agents] and go through what they had in plans as far as advertising, marketing,” and other aspects of the business, the court observed. The company did not challenge the jury’s finding that the agent’s business was substantially associated with the company’s trademark.

“Good Cause”

Substantial evidence supported the jury’s finding that the company did not have “good cause” within the meaning of the Franchise Act to terminate the agent, the court decided. The company contended that the agent violated the Connecticut Insurance Code by paying for the policies of at least two individuals. The company alleged that the agent’s actions in paying for the policies constituted illegal rebating under the insurance law. However, at no time during the trial did the company introduce the appropriate provisions of the Insurance Code into evidence or elicit testimony from any witnesses stating that the reasons underlying the termination of the franchise were violations of state insurance law. Moreover, the jury could have found that the evidence submitted by the company on the issue was not persuasive, the court determined. Although the company could be correct in its assertion that the evidence was enough for the jury to determine that it had good cause to terminate the agent, the jury also had enough evidentiary support to find to the contrary. For example, the termination letter sent by the company failed to mention the alleged rebating incidents, and other agents testified that they had engaged in similar actions when selling the company’s policies.

“Little FTC Act”

The finding that the insurance company violated the Franchise Act provided the jury with a sufficient basis for its determination that the company also violated the Connecticut “little FTC Act,” the court ruled. Connecticut courts read the “little FTC Act” broadly, and the Connecticut Supreme Court had rejected an argument that claims under the statute could be brought only by a consumer, and not a business, according to the court. Moreover, in *Hartford Electric Supply Co. v. Allen-Bradley Co.* the Connecticut Supreme Court held that a defendant violated the “little FTC Act” through its conduct in attempting to terminate a franchise without good cause.

Good Faith/Fair Dealing

The company was entitled to judgment as a matter of law on the agent’s claim that it breached the implied covenant of good faith and fair dealing in their contracts by the termination and the jury’s finding on that claim was reversed. Under Connecticut law, the implied covenant of good faith and fair dealing could not be used to achieve a result contrary to the clearly expressed terms of a contract. The parties’ contracts expressly provided that they were terminable at any time after written notice. The agent contended that there was sufficient evidentiary support for a jury to find that despite the language of the contracts, they contained an implied promise that they would only be terminated for cause. However, none of the evidence submitted by the agent concerning the lack of prior terminations by the company without cause, language in the insurance company’s handbook, or the company’s internal appeal process served to modify the termination language in the contracts, the court held.

Maine Warranty Reimbursement Provision Constitutional:

Alliance of Automobile Manufacturers v. Gwadosky, CA-1

A provision of the Maine motor vehicle dealer law that a manufacturer “may not otherwise recover its costs for reimbursing a [dealer] for parts and labor” pursuant to the law's warranty reimbursement section was not unconstitutional in violation of the Commerce and Contracts Clauses, the U.S. Court of Appeals in Boston has decided. An order denying a request from an association of vehicle manufacturers for an injunction prohibiting the enforcement of the provision was affirmed.

The Maine legislature added the challenged provision to its dealer law in 2003, effectively prohibiting manufacturers from attempting to recover their costs associated with the law’s mandatory retail-rate of reimbursement for warranty work. A manufacturer had reacted to the dealer law's retail-rate provision by adding a “warranty parity surcharge” to the wholesale price of vehicles it sold in Maine. The challenged provision was enacted at the urging of the Maine Auto Dealers Association to prevent such surcharges in the future, according to the court.

Commerce Clause

The challenged provision did not have a discriminatory purpose, discriminatory effect, or extraterritorial reach violative of the Commerce Clause, the court decided. The overriding legislative objective behind the dealer law’s regulation of warranty work reimbursement was to prevent an unfair price differential between warranty and non-warranty repair work —a differential that the Maine legislature reasonably viewed as detrimental to consumers and motor vehicle dealers alike. The challenged provision was closely tailored to achieve the legislative purpose by plugging the loophole that the manufacturer was exploiting with its “warranty parity surcharge” with perfect precision and ensuring that manufacturers, not dealers or consumers, would bear the true cost of retail-rate warranty work reimbursement. To support its assertion that the challenged provision’s recoupment bar had an advantage-stripping effect on dealers in Maine’s border state of New Hampshire, the association relied primarily on a stipulation that there was competition between Maine dealers and dealers in other states. That stipulation bore only a tangential relation to the theories of discriminatory effect, and there was no evidence of the provision’s supposed interference with the competitive process. The association’s contention that the provision had the impermissible “practical effect of tying the wholesale price of motor vehicles in Maine to the wholesale price of identical motor vehicles outside of Maine” by making “the wholesale price of motor vehicles in Maine the minimum wholesale price in the 49 other states” was rejected. The challenged provision did not transform Maine prices into national minimum prices because automobile manufacturers retained the ability to adjust those prices for any reason save one —to recover their costs for warranty work reimbursement, the court reasoned.

Contracts Clause
The association's argument that the provision trespassed on the manufacturers’ franchise agreements by eliminating components of the manufacturers’ pricing discretion was without merit, the court held. Therefore, the provision did not substantially impair the reasonable expectations of the manufacturers in their contracts with dealers in violation of the Contracts Clause. Maine had heavily regulated the motor vehicle manufacturer-dealer franchise relationship, including warranty work reimbursement rates, since 1975, the court noted. Therefore, the provision’s recoupment bar was a foreseeable addition to that regulatory regime. It was, therefore, permissible under the Contracts Clause at least with respect to those franchise agreements entered into after 1975. The proper inquiry with respect to the six pre-1975 agreements in evidence was whether the challenged provision’s contractual impairment, albeit substantial, was reasonable and necessary to fulfill an important public purpose. The challenged provision’s purpose as a consumer and dealer protection measure was squarely within the category of remedies to generalized social or economic problems that constituted legitimate subjects for legislation, notwithstanding the Contracts Clause, according to the court.


Termination of Farm Equipment Dealer Violated Idaho Law:

Sitco, Inc. v. Agco Corp., DC Ida.

A farm equipment dealer and manufacturer had a “dealer agreement” within the meaning of the Idaho farm equipment dealer law, a federal district court in Boise has determined. Therefore, the manufacturer wrongfully terminated the dealer without “good cause” and proper notice, as required by the law, when it notified the dealer that it was required to sign the manufacturer’s form dealer agreement to continue purchasing its tractors and refused to process any more of the dealer’s orders.

The dealer had a written dealer agreement with the manufacturer’s predecessor-in-interest, which expired on December 31, 2003. In 2004, the manufacturer acquired the predecessor-in-interest and continued to supply dozens of its predecessor-in-interest’s tractors to the dealer for sale. In late 2004, the manufacturer notified the dealer in writing that it was required to sign its form dealer agreement and in February 2005 the manufacturer refused to process any more of the dealer’s orders because the dealer had not signed the form agreement. Subsequently, the dealer brought suit against the manufacturer for damages under the dealer law, alleging that the manufacturer failed to comply with the statutory notice and good cause provisions.

The language of the dealer law clearly rejected common law requirements for the formation of a long-term dealership contract —such as offer and acceptance —as a prerequisite to the statutory protection the law afforded farm equipment dealers, according to the court. Rather, it defined a “dealer agreement” as including either a contract or an agreement, whether express or implied and whether oral or written, as long as there was a “continuing commercial relationship” between the supplier and dealer. The statute’s application was further broadened by defining a “continuing commercial relationship” as “any relationship in which the equipment dealer has been granted the right to sell or service equipment manufactured by the supplier.” The legislature intended that the statute’s protection would extend to informal business relationships, including those established by a
course of conduct rather than a formal agreement satisfying the formalities of contract law, according to the court.

The parties had a dealer agreement under the law for two different reasons, the court held. First, the dozens of completed transactions during 2004 and early 2005 created a dealer agreement. The first element, granting the right to sell or service equipment, was satisfied dozens of times. The second element, a continuing commercial relationship, was satisfied because there were dozens of sales. Second, the parties also had a dealer agreement under the law because the manufacturer was the successor-in-interest to its predecessor, which had a written dealer contract with the dealer. By the terms of the statute, the manufacturer assumed its predecessor’s statutory obligations to the dealer.


Manufacturer Did Not Tortiously Interfere with Agreement:

Crown Equipment Corp. v. Toyota Materials Handling, DC Ohio

A manufacturer of lift trucks (Toyota) did not tortiously interfere with a dealership agreement between a competing manufacturer of lift trucks (Crown) and a dealer by inducing the dealer to enter into a relationship to distribute Toyota trucks in the Tampa, Florida, area without first obtaining the approval of Crown, a federal district court in Akron, Ohio, has ruled. Crown, the complaining manufacturer, could not prove: (1) that Toyota had knowledge of Crown’s agreement with the dealer; (2) Toyota’s intentional procurement of the contract breach; or (3) Toyota’s lack of justification for interference with the contract.

The contract between the dealer and Crown required the dealer to refrain from acting as a dealer or agent for any competitor of Crown without first obtaining Crown’s prior written approval. It was undisputed that the dealer breached its agreement with Crown by entering into the agreement with Toyota for the Tampa area. After Crown notified the dealer of the breach, the dealer chose not to cure the breach, and Crown terminated their agreement. Toyota asserted that, although it presumed the dealer had a contract with Crown because that practice was standard in the industry, it had no specific knowledge of the terms of the agreement or that the dealer would have needed prior approval of Crown to enter into an agreement with Toyota. Such a contractual provision could not have been anticipated, Toyota alleged, because it was not standard in the industry.

Crown failed to prove that Toyota had any more than a general belief that there was probably a dealer agreement between Crown and the dealer and, thus, could not establish the requisite knowledge element of tortious interference, according to the court. In addition, there was no evidence that Toyota had any intention to interfere with Crown’s contract with the dealer. Given that the dealer distributed products for both Crown and Toyota in the Orlando, Florida, area without incident, Toyota had no reason to believe that there would be a problem with a similar arrangement in the Tampa area. Moreover, it was only after the dealer insisted that it wanted to handle both of the manufacturers’ product lines in the Tampa area that Toyota offered the dealer financial assistance in the termination proceedings. Further, because the agreement between the dealer and Crown was terminable at will, a competitor such as Toyota was protected by privilege.
FTC ENFORCEMENT:

FTC v. USA Beverages, DC Fla.

Franchise Rule

Coffee display racks. Two corporations and several of their principals were temporarily restrained and enjoined from violating or assisting others to violate the FTC Franchise Rule and from making any material misrepresentation or assisting others in making any material misrepresentation in violation of Section 5 of the FTC Act in connection with the sale of any business venture, including franchises. In addition, the assets of the defendants were frozen and a receiver was appointed to take exclusive custody and control of the defendants’ assets. The FTC was likely to succeed on the merits of its claims and the issuance of a temporary restraining order (TRO) was in the public interest. Immediate and irreparable injury would result if notice was provided to the defendants before the issuance of the TRO because the defendants appeared to have taken numerous steps to conceal the location of their businesses and even their own identities. There was a very real danger that the defendants would dissipate assets and destroy evidence absent the requested relief. Therefore, the FTC met its burden for issuance of the TRO without notice to the defendants.

The FTC alleged that the defendants operated out of Costa Rica and used Voice over Internet Protocol (VoIP) services, shell corporations, aliases, and shills to con U.S. consumers into investing in bogus coffee display rack franchises. The defendants used classified ads and a Web site to advertise their franchises and claimed that in exchange for payments from $18,000 to $85,000, they would provide customers with what they needed to operate successful businesses, including location assistance. The scam was based in Costa Rica, but the defendants used VoIP services to obscure their location and make it appear as if they were operating from New Mexico. The complaint alleged that the defendants violated the Rule by making false earnings claims and by failing to make required disclosures in their initial disclosure documents and in advertisements. Additionally, the defendants failed to have a reasonable basis for their earnings claims in violation of the Rule, the FTC alleged.

FTC v. Wealth Systems, Inc.

"Project Biz Opp Flop"

“Web broker” packages. Two Internet-based companies and their principals have agreed to refrain from misrepresenting any product or service and to pay approximately $80,000 in refunds to consumers to settle FTC charges that they violated the FTC’s Franchise Rule and the FTC Act. In a complaint filed in February 2005, as part of "Project Biz Opp Flop," a criminal and civil crackdown on promoters of illegal business opportunity and work-at-home schemes, the Commission alleged that the marketers of the Internet-based business opportunities enticed consumers to become what the defendants called "Web brokers." The FTC complaint alleged that the defendants claimed that consumers could earn $20,000 to $50,000 "next year" by purchasing "Web broker packages" priced
from about $300 to $1,400 or more. Consumers received a mailing with testimonials from Web brokers, one of whom claimed to have made "over $300,000 in a little over a year." As alleged in the complaint, few, if any, consumers who purchased the defendants' business opportunity and/or advertising services made any money, and few consumers received refunds. The defendants agreed not to violate the Franchise Rule by failing to: (1) provide a complete and accurate disclosure document, (2) have a reasonable basis for any earnings claim at the time the claim is made, (3) immediately disclose that material constituting a reasonable basis for any earnings claim is available to the consumer, or (4) provide an earnings claim document.


COMMON LAW:

Roger Edwards, LLC v. Fiddes & Son Ltd

Fraud

Relief from judgment. A furniture wax distributor was not entitled to relief from a judgment against him in favor of a wax manufacturer on the asserted grounds of fraud or fraud on the court. The distributor alleged that the manufacturer had breached the terms of their alleged distribution agreement by selling its wax products directly into the distributor’s protected territory or by allowing others to do so. Ultimately, a jury found that there was a distribution agreement between the parties but that the manufacturer had not breached it. The distributor sought to reopen the federal district court’s judgment by invoking Rules 60(b)(3) and 60(b)(6) of the Rules of Federal Civil Procedure by alleging that the manufacturer committed fraud and “any other reason justifying relief,” a catchall sometimes taken to include what was called “fraud on the court.” None of the statements or omissions alleged by the distributor remotely involved an unconscionable scheme or the most egregious conduct designed to corrupt the judicial process sufficient to conclude that the manufacturer had perpetrated a fraud on the court under Rule 60(b)(6). The basis for the distributor’s several 60(b)(3) fraud claims was the manufacturer’s allegedly fraudulent product labeling and certification practices. However, it was fraud perpetrated in the course of litigation which interfered with the process of adjudication that principally concerned Rule 60(b)(3)’s fraud provision, not fraud committed in the course of a commercial transaction. Moreover, there was no reason the distributor could not have unearthed the alleged deficiencies in labeling or certification prior to trial.


DISCLOSURE/REGISTRATION:

Randall v. Lady of America Franchise Corp

Florida Franchise Act

Misrepresentations. Claims against a Florida health club franchisor brought by several health club franchisees alleging violations of the Florida Franchise Misrepresentation Act were not dismissed,
even though the plaintiff-franchisees’ franchises were not located in Florida. The weight of case law seemed to favor the application of the Act to claims where the franchisor — but not the franchise — was located in Florida. The franchisees brought suit against the individual and the franchisor after their franchises failed to flourish as intended. They alleged that many of the franchisor’s representations regarding the franchises were false and that the franchisor failed to fulfill its obligations under their agreements. Specifically, the franchisees alleged violations of the Minnesota Franchise Act, the Florida Franchise Misrepresentation Act, the Florida Sale of Business Opportunities Act, and the Florida “little FTC Act,” in addition to breach of contract and the implied covenant of good faith and fair dealing, unjust enrichment, and fraud.


“LITTLE FTC ACTS”:

Jacobs v. Physicians' Weight Loss Centers of America, Inc

North Carolina

Weight-loss centers. A North Carolina trial court erred by granting partial summary judgment to a franchisor of weight-loss centers and several of its franchisees on the claim by a class of customers of the centers for violation of the North Carolina “little FTC Act.” The class alleged that the franchisor and its franchisees committed an unfair or deceptive act in violation of the statute by prohibiting the doctors at its centers from giving the prescriptions they wrote for weight-loss medicines to the customers themselves. The trial court granted summary judgment dismissing those claims of members of the class who did not specifically request copies of their prescriptions from their doctor at the center. The trial court held that a customer did not suffer an actual injury unless it requested, and a doctor at one of the centers refused to provide, a prescription. However, the trial court’s reasoning assumed that those customers who did not request their prescription knew of their legal entitlement to their prescriptions — a fact that the franchisor and its doctors did not disclose — and waived their right to their prescriptions. There was no evidence to support that assumption. If the customers did not know they were entitled to their prescriptions under the law and would have sought to take their prescriptions to another pharmacy had they known of their entitlement, they suffered actual injury.


CONTRACT LAW:

Livonia Hospitality Corp. v. Boulevard Motel Corp.

Statute of Frauds

Hotels. A hotel franchisee did not breach an alleged agreement with another franchisee by requesting its franchisor to change its hotel from a Quality Inn to a Comfort Inn in 2003 because the alleged agreement was barred by the statute of frauds. The complaining franchisee operated a Comfort Inn
hotel in Livonia, Michigan, and alleged that the defendant franchisee, which operated a nearby Signature Inn in Plymouth, Michigan, agreed not to convert its hotel to a Comfort Inn in 1994. As a result of the alleged 1994 agreement between the two franchisees, and with some concessions made by the franchisor for the defending franchisee’s switch from converting to a Comfort Inn to a Quality Inn, the defending franchisee agreed with the franchisor to convert its hotel to a Quality Inn in 1994. However, in 2003 the defending franchisee entered into an agreement with the franchisor to convert its hotel to a Comfort Inn, and the complaining franchisee brought suit.

The complaining franchisee contended that a 1994 memorandum between the defending franchisee and the franchisor evidenced the alleged agreement between the parties. However, the memorandum only recited the concessions made by the franchisor to the defending franchisee for switching from converting to a Comfort Inn to a Quality Inn and did not evidence the alleged agreement. Further, the alleged agreement could not be performed in less than one year and was therefore barred by the statute of frauds. The complaining franchisee’s contention that the 1994 memorandum, as merged with other documents, evidenced the alleged agreement between the parties thereby satisfying the statute of frauds was rejected.

Sensormatic Electronics Corp. v. First National Bank Pennsylvania

**Florida**

**Substantial performance.** Under Florida law, the doctrine of substantial performance could not be invoked to prevent the forfeiture of a home security business franchisor’s option to repurchase a franchise from a franchisee pursuant to an option in the parties’ Franchise Lease Agreement (FLA). The FLA required the franchisor to provide not less than 90 days written notice to the franchisee of its intent to exercise the repurchase option. However, the franchisor sent the franchisee written notice of its intent to exercise the repurchase option only 47 days before the end of the lease term. Since the repurchase option was the only provision under which the franchisor could claim a right to buy the franchise, failure to properly invoke that option resulted in the loss of the purchase right. The franchisor was a sophisticated entity that was fully aware of the terms of the FLA when that agreement was signed and could not now complain that the result was unfair, especially since the timing of the notice was completely under its control.


**LIQUOR DISTRIBUTORS:**

**Tang v. Jinro America, Inc.**

**Termination**

**Existence of contract.** An importer of Korean alcoholic beverages could not have breached a contract with a wholesaler by terminating the wholesaler’s distribution rights because the wholesaler failed to raise a genuinely disputed issue of fact as to whether a valid contract between the parties existed. In addition, the wholesaler failed to allege or show that the importer made any
misrepresentation of material fact, or that the importer intended that such conduct be acted upon by
the wholesaler sufficient to justify equitably estopping the importer from terminating the distribution
rights. The wholesaler brought suit against the importer after he received a letter from the importer
indicating that their written distribution agreements had expired and that it would cease accepting
orders from the wholesaler. Although the wholesaler produced a translation of an alleged 2001
agreement which the parties had negotiated after the expiration of their previous agreements, neither
party produced the original document in Korean. The translated copy was unsigned and the importer
claimed that it was never executed. Indeed, the wholesaler was inconsistent about whether or not he
actually signed the agreement.


**RACIAL DISCRIMINATION:**

**Hubmann v. McKenna BMW**

*Statutes of Limitations*

**Employee of franchisee.** An automobile salesperson’s claims against a motor vehicle franchisor for
violation of the California Fair Employment and Housing Act (FEHA), several statutory and
constitutional provisions and the public policies embodied in them, and for intentional and negligent
infliction of emotional distress were time-barred by the relevant statutes of limitation, which in each
instance was one year. The salesperson was terminated from his employment at a dealership
franchised by the franchisor after his supervisor allegedly made rude remarks about the salesperson’s
German ancestry. According to the salesperson, the remarks created a hostile, racist, and
discriminatory work environment. The salesperson alleged that the dealership he was employed by
was a franchisee of the franchisor and, as such, was subject to the franchisor’s contracts, policies, and
procedures. Further, the salesperson contended that the franchisor was aware or should have been
aware of its franchisee’s unlawful conduct. However, because the unlawful conduct complained of
took place no later than the salesperson’s termination on October 10, 2000, the complaint, which was
not filed until March 3, 2003, was time-barred.


**STATE REGULATION:**

*Hawaii*

**Filing fees.** Hawaii has lowered its franchise application, amendment, and renewal filing fees by
50%, from $250 to $125, beginning on November 1, 2005, according to the state's Department of
Commerce and Consumer Affairs Business Registration Division. The reductions are effective only
for one year and the fees will automatically readjust to their statutory levels on November 1, 2006.
Due to Hawaii's robust economy, the Department's revenues were expected to exceed expenditures in
2006, prompting the fee cuts.
PRICE DISCRIMINATION:

United Magazine Co. v. Murdoch Magazines

Magazine wholesalers. Several magazine wholesalers could not establish that the national distributors from which they received magazines engaged in “allocation discrimination” or “return policy discrimination” in violation of Sec. 2(a) of the Robinson-Patman Act, according to a federal district court in New York City. The wholesalers failed to come forward with admissible evidence to support their legal theory and failed to demonstrate the existence of a disputed material fact sufficient to defeat summary judgment.

A Robinson-Patman Act claim could have been made if the distributors’ return policies were applied in a discriminatory fashion, such that those policies affected the price paid by the wholesalers for the magazines and caused injury, the court noted. However, the wholesalers argued that they were allocated more magazines to sell than a favored competitor, which meant that the complaining wholesalers had more returns than the favored competitor. The complaining wholesalers contended that, as a result, they incurred expenses not incurred by the favored competitor, but the wholesalers could not establish a violation of the Act based on the fact that they incurred expenses that a competitor did not incur, the court ruled. Such expenses could increase a purchaser's costs, or reduce its profits, but they did not change the price paid by either the purchaser or the competitor to the seller. Additionally, the wholesalers could not state a claim for indirect price discrimination under the Act. It was well established that the forms of indirect price discrimination encompassed by the Act were limited to rebates, discounts, free goods, promotional payments, or similar forms of compensation that were given by the seller to the buyer and that effectively lowered the price. The wholesalers offered no evidence of any labor assistance given to the favored competitor to reduce its handling costs, the court observed.

PREMISES LIABILITY:


Hotels. A hotel franchisor was not directly or vicariously liable for the injuries a hotel guest sustained while showering at one of its hotels, a Colorado trial court has ruled. The guest, who alleged that he was burned while showering at the hotel, contended that the franchisor was a “landowner” for purposes of the Colorado premises liability statute and that it was liable for his injuries under theories of direct negligence or vicarious liability.

There was no agency relationship between the franchisor and the hotel, either actual or apparent, according to the court, because there was insufficient control exercised by the franchisor through the license agreement and its actual practices to establish that the franchisor was a principal in an agency relationship. Each party to the license agreement between the franchisor and franchisee had
independent rights and obligations. Although the guest argued that the nature of the agreement and the franchisor’s system standards demonstrated such control, in reality, the agreement and the actions of the parties established no more than standards to safeguard the uniformity, value, and integrity of the franchise system, the court determined.

The agreement specified that the franchisee was an independent contractor, was not the franchisor’s representative or agent, and had no power to obligate the franchisor for any purpose whatsoever. It did not grant the franchisor a role in managing the day-to-day operations of the hotel. System standards, training, inspection, and the franchisor’s right to terminate the agreement did not alone establish sufficient control to charge the franchisor with liability for injuries sustained by a guest in connection with the hotel’s operation, the court held.

The franchisor was not a landowner under the meaning of the Colorado premises liability statute because it was not “legally responsible for the condition of the real property or for activities conducted or for the circumstances existing on real property,” the court decided. At no time was the franchisor in “possession” of the hotel or have “on-the-ground” control of the hotel essential for a finding of legal responsibility.


INJUNCTIVE RELIEF:

Home Instead, Inc. v. Velez, DC Neb

“Good cause” for termination. A franchisor of companionship and domestic care service businesses for senior citizens was entitled to a preliminary injunction requiring a franchisee to: cease operating its franchised business; cease displaying the franchisor’s trademarks; and comply with the terms of post-termination covenants in the parties’ franchise agreement, a federal district court in Omaha, Nebraska has ruled. The Nebraska franchisor terminated the parties’ agreement after several alleged breaches by the New Jersey franchisee. The evidence appeared to confirm the franchisor’s claim that it had “good cause” under the New Jersey Franchise Practice Act to terminate the relationship, according to the court. The Act defined “good cause” as the failure of the franchisee to substantially comply with the requirements of the franchise agreement and the franchisee clearly breached the agreement by failing to timely pay franchise fees. In addition, there were affidavits from other franchisees stating that the franchisee solicited business in their territories in breach of its agreement. The franchisor would be irreparably harmed by market confusion and loss of reputation if the injunction was not granted. Both the public interest and the balance of the harms also weighed in favor of granting requested relief.

Personal Jurisdiction

The guarantor of the parties' franchise agreement, an individual citizen of New Jersey, was subject to personal jurisdiction in Nebraska, the court determined. The guarantor contended that all of his contacts with Nebraska occurred as the president of the franchisee and that there were insufficient minimum contacts to establish jurisdiction over him in his individual capacity. However, the
guarantor executed his personal guarantee in Nebraska and made personal phone calls to and negotiated with the franchisor to try and purchase a franchise, the court noted. In addition, the individual admitted that he was in Nebraska doing business with the franchisor in 2000, 2002, and 2003. Finally, although not dispositive, the individual admitted that the franchise agreement contained a forum selection clause designating Nebraska as the place for trial in the event of a dispute.