

Franchise & Distribution

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Commentary: Preventing Franchise Termination by Taking the Offensive

From the franchisee's point of view, the best defense against a sudden and unfair termination notice and trademark infringement suit from the franchisor is often a proactive offense, recommends attorney Peter M. Ripin, a partner with Davidoff Malito & Hutcher in New York. **P. 14.**

Commentary: New Opinion Clarifies High Court's Green Tree Decision

Franchise attorneys have been looking for an opinion that clarifies the U.S. Supreme Court's *Green Tree Financial* decision as to when franchisees can claim that arbitration would be too expensive, says Fredric A. Cohen, a partner in the Chicago office of DLA Piper Rudnick Gray Cary US LLP; it just happened to come recently in a case he was litigating. **P. 16.**

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Franchise & Distribution Litigation Reporter

Published since October 2003

Publisher: Mary Ellen Fox

Executive Editor: Jodine Mayberry

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Franchise & Distribution Litigation Reporter

(ISSN pending) is published monthly by Andrews Publications, a West business.

Andrews Publications, 175 Strafford Avenue,
Building 4, Suite 140, Wayne, PA 19087
610-225-0510 in Pennsylvania;
Fax: 610-225-0501; www.andrewsonline.com
Customer Service: 800-328-4880

Subscription Rate (12 issues)

\$588 Print version

For more information, or to subscribe, please call
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ARBITRATION (TRADEMARK USE)

Expense Doesn't Excuse Quiznos Franchisee From Arbitration

Quizno's Master et al. v. Kadriu, No. 04-4771 (N.D. Ill. Apr. 11, 2005).

An ex-Quiznos sandwich shop franchisee cannot use a recent U.S. Supreme Court decision to support her claim that it would be too expensive to arbitrate her dispute with the franchisor over her continued use of its trademarks, a federal judge in Chicago has ruled.

The high court's ruling in *Green Tree Financial v. Randolph*, 531 U.S. 79 (2000), allowed challenges to mandatory arbitration clauses in franchise agreements *if* there were federal statutory rights involved in the plaintiff's claims and *if* arbitration costs would be prohibitive, U.S. District Judge Marvin Aspen wrote. However, that's not the case here, the judge said.

He granted most of the relief Quiznos had asked for in its preliminary injunction request and ordered the franchisee to quickly remove all of the franchisor's trademarks from her vacant shop.

"This opinion is significant because it expressly limits the Supreme Court's holding in *Green Tree Financial v. Randolph* (concerning challenges to arbitration based on prohibitive costs) to situations in which the claims that would be asserted arise under federal law," said Quiznos' attorney, **Fredric A. Cohen** of **Piper Rudnick LLP** in Chicago.

The scope of the standard clause in most franchise contracts requiring arbitration is a hotly debated topic in franchisor-franchisee disputes.

Quiznos filed the complaint in this suit last July after finding that franchisee Shahe Kadriu's shop in Chicago had been closed for more than five days. Under the Quiznos franchisee agreement, the closing constituted an abandonment of the business and grounds for instant termination of the franchise contract, the suit said.

Kadriu counterclaimed to rescind the franchise agreement and sought an award of more than \$500,000 in punitive damages for alleged fraud by the franchisor's agent in the original sale.

The counterclaim asserted an invalid franchise agreement because the Quiznos agent fraudulently induced Kadriu

with "high-pressure sales tactics" and promised the store would bring in \$10,000 per month. Kadriu claimed the agent concealed the fact that two other Quiznos shops had been located "within walking distance" of hers, which cut her revenue dramatically.

Quiznos maintained the franchisee's charges fell under the arbitration clause of the franchise agreement.

Kadriu argued she should not be compelled to arbitrate any of the charges and countercharges in the suit because of the invalid contract, which also affects Quiznos' claims for a preliminary injunction. She also claimed Quiznos waived arbitration by bringing this action in federal court, and the mandatory arbitration clause would make resolution of the dispute prohibitively expensive.

The court rebuffed the franchisee's argument about the validity of the contract because it "flatly ignores the mandatory nature of arbitration."

"We need not rule on the validity of the contract in order to grant Quiznos' preliminary injunction," Judge Aspen wrote.

Additionally, he said Quiznos did not render the arbitration clause meaningless simply by bringing this action, because the arbitration clause allows litigation where the security of the franchisor's trademarks are at issue.

As to the possibility that arbitrating will be too expensive, the judge said the party seeking to invalidate the agreement bears the burden of proving that it will be too costly.

"There must be a showing both of individualized evidence that prohibitive costs from arbitration are likely and that the moving part cannot financially meet those costs," the judge said.

He granted Quiznos' motion for preliminary injunction because "the association of an abandoned franchise with the Quiznos name could hurt the company's reputation in ways that are difficult to ascertain economically."

 **See Document Section A for the opinion, reply in support of preliminary injunction and complaint.**

EMPLOYEE ISSUES

EEOC Didn't Show Pattern of Sexual Harassment in Burger King Case

***Equal Employment Opportunity Commission v. Carrols Corp.*, No. 98-1772 (N.D.N.Y. Apr. 20, 2005).**

A federal judge in upstate New York has barred the Equal Employment Opportunity Commission from pressing a pattern-and-practice claim alleging a sexually hostile workplace throughout the 350 restaurants of one the largest Burger King franchisees in the country.

The ruling makes it difficult for the EEOC to bring the equivalent of a class-action suit on behalf of all 511 women who have claimed to have been directly harassed or subjected to a hostile work environment during an eight-year period at restaurants owned by franchisee Carrols Corp. in 13 states.

The decision also undercuts the potential for a large class-action suit by the workers themselves but allows the EEOC to proceed with claims raised by individual women who worked at Burger Kings operated by franchisee Carrols Corp.

Chief U.S. District Judge Frederick Scullin Jr. of the Northern District of New York noted that the EEOC says 511 female ex-employees complained about a hostile workplace, harassment, retaliation for their complaints and being forced to quit their jobs between 1993 and 2001. However, he found that only 333 qualified for the pattern-and-practice claims group.

Compared to the total of 90,835 women who worked for the franchisee during that period, the group of 333 individuals is not big enough to demonstrate systemic, company-wide discrimination, the judge said.

The EEOC's suit sought:

- A permanent injunction barring the franchisee and its employees from discrimination on the basis of gender;
- An order requiring the defendant to create remedial programs; and
- A ruling forcing the franchisee to furnish back pay, compensatory and punitive damages, and the costs of this action.

The EEOC argued that a strictly statistical approach to its claim is not appropriate because victims systematically under-report sexual harassment.

However, the judge said most of the women who worked for the franchisee between 1993 and 2001 are no longer there because of the high turnover in the fast-food industry and said he was not convinced that harassment was the cause.


"Since any potential retaliation or intimidation that these women might face from defendant is relatively minor, there is no basis to conclude that the number of plaintiff's submissions reflects a systemic under-reporting of sexual harassment in defendant's restaurants," Chief Judge Scullin wrote. "Furthermore, plaintiff has failed to produce any evidence that would establish the number of alleged harassers whom defendant still employs."

While the judge could not articulate a specific threshold for the number of claims necessary to establish a "pattern or practice" of sexual harassment, the EEOC's allegations here "fall well short of what is required," he said.

Therefore, Chief Judge Scullin granted the defendant's motion for summary judgment after finding no material issue of fact regarding a pattern or practice of sexual harassment at the franchisee's restaurants.

The EEOC is represented by regional attorney Katherine Bissell, senior trial attorney Judy Keenan, supervisory trial attorney Lisa Sirkin, and trial attorneys Monique Roberts and Sunu Chandy of New York.

Defendant is represented by Michael Delikat and John Giansello of Orrick, Herrington & Sutcliffe in New York.

 **See Document Section B for the opinion, the defendant's reply in support of summary judgment and the EEOC's opposition memo.**

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ERISA ACTION

Krispy Kreme Employees Ask N.C. Judge to Appoint Lead ERISA Counsel

***Smith v. Krispy Kreme Doughnuts Inc. et al.*, No. 05-0187, memorandum filed (M.D.N.C. Mar. 28, 2005).**

Disgruntled workers of embattled franchisor Krispy Kreme Doughnut Corp. have asked a federal judge in North Carolina to appoint a top-gun law firm to manage a growing list of lawsuits that accuse officers of keeping employee retirement savings in the company's sinking stock.

In a memorandum in support of an order to consolidate all suits alleging breach of fiduciary duty under the Employee Retirement Income Security Act, the employees ask the court to appoint nationally prominent ERISA specialty firm Keller Rohrback LLP of Seattle as lead counsel.

Plaintiff Paul Smith, who in March filed the first suit on behalf of employees who own stock in Krispy Kreme's retirement stock ownership plans, says he expects more ERISA suits to be transferred to North Carolina and consolidated with his.

Smith's suit claims that since the stock ownership plan fiduciaries were also corporate officers, they knew as early as January 2003 that Krispy Kreme stock was an unsuitable investment for the company's 401(k) plans. He says those officers breached their ERISA duty as administrators when they failed to diversify the retirement investments.

Krispy Kreme stock, which had traded at nearly \$50 a share, plummeted to \$6 in May 2004 when allegations surfaced of padded sales, "channel-stuffing," wasteful purchases of franchisee assets and improper accounting.

In the instant motion Smith claims Keller Rohrback "offers unparalleled experience and ... has the resources necessary to efficiently litigate this class action against the Krispy Kreme fiduciaries." He says the Keller firm has served as lead counsel or co-lead counsel in multidistrict litigation against Enron Corp., WorldCom Inc., Global Crossing Inc. and Lucent Technologies, and in nearly every other major ERISA action in the post-Enron era.

Smith asks the court to appoint local counsel Lewis & Roberts of Charlotte, N.C., as co-lead counsel.

Regarding the motion to consolidate, Smith contends the ERISA duty actions such as his should be consolidated with each other, but not with actions that are based on alleged violations of federal securities laws.

"While there naturally will be some overlap of the underlying facts regarding defendants' alleged illegal business practices presented in the federal securities law and ERISA actions, the two types of cases advance very different legal theories, ... involve different plaintiffs, many different defendants, different and opposing theories of class certification as well as different measures of relief, damage calculations and pleading standards," Smith notes.

He contends that in every similar major case, the court has kept the two varieties of actions on separate tracks.

Smith is represented by Gary Mauley of Lewis & Roberts in Charlotte, N.C.; James Roberts III of Raleigh, N.C.; and Lynn Lincoln Sarko and T. David Copley of Keller Rohrback LLP in Seattle.



See Document Section C for the memorandum.

SUBFRANCHISEES

Md. App. Ct. Keeps Budget Rent-A-Car Subfranchisee Alive

***DMF Leasing Inc. v. Budget Rent-A-Car of Maryland Inc. et al.*, No. 1842, 2005 WL 742924 (Md. Ct. Spec. App. Apr. 4, 2005).**

A Maryland appellate court saved the corporate life of a Baltimore-area Budget Rent-A-Car subfranchisee when it stopped the national franchisor from terminating the subfranchisee's licenses after buying out franchisee Budget Rent-A-Car of Maryland.

The appeals court decision, which reverses a lower court denial of the subfranchisee's motion for a preliminary injunction, should give heart to a group that operates on the fringe of the franchise world. Subfranchisees generally exist only as long as the franchisees from whom they derive their sublicenses to operate.

In this case, however, the Maryland Court of Special Appeals said national franchisor Budget Rent-A-Car Systems Inc. should not be allowed to terminate subfranchisee DMF Leasing Inc. until a lower court considers whether the

franchisor is required to honor a five-year agreement between DMF and franchisee Budget Rent-A-Car of Maryland.

Although they worked closely together, the national franchisor did not own the Maryland operation but it wanted to acquire it to directly control car rental franchising in the lucrative Baltimore-Washington, D.C., area.

When DMF learned that the national franchisor wanted to acquire the Maryland franchisee — the franchisee that had the exclusive right to site franchises and designate subfranchisees in the state — it sought an agreement that would guarantee that DMF would retain a license for five years no matter what entity controlled the right to name franchisees in Maryland.

After the national franchisor acquired the Maryland franchisee, DMF found that it was not as secure as it thought. The national franchisor took the position that it was not obligated to honor the agreement with DMF and took steps to shut down DMF and take over its operations.

A Maryland trial court judge turned down DMF's request for an injunction to stop the national franchisor, whose corporate parent is now Cendant Car Rental Group Inc.

The Court of Special Appeals found that DMF "raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for litigation and thus for more deliberate investigation."

After reviewing a barrage of briefing on the validity of the expert witnesses presented by both parties, the appellate court rejected the lower court's determination that money damages would suffice if DMF ultimately won its case.

"Commentary and case law, however, are generally in accord that the loss of a business is an irreparable loss," the panel wrote. "Even assuming, as the trial judge concluded here, that damages were readily ascertainable, we hold that the loss of the movant's business constitutes irreparable injury under our injunctive relief analysis."

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INSPECTIONS

Checkers Franchisee Asks Fla. Judge to Put Hold On Shut-Down Order

Checkers Drive-in Restaurants Inc. v. Vocisano et al., No. 05-352, answer filed (M.D. Fla. Apr. 18, 2005).

In opposing a motion for a preliminary injunction that will shut it down, a Checkers Drive-In Restaurants Inc. franchisee in Naples, Fla., claims the franchisor's inspector played a game of "gotcha" to set up the restaurant for failure.

Checkers, a fast-food franchisor with 408 restaurants nationwide, is seeking an injunction to enforce termination of a franchise agreement with Robert Vocisano and his partners. Checkers claims it properly canceled the franchise agreement after Vocisano's employees repeatedly refused to allow a Checkers inspector to tour the Naples restaurant.

The franchisor alleges Vocisano and his partners continue to operate the restaurant despite valid termination notices, thereby infringing on Checkers' valuable trademarks.

In its memorandum in support of its motion for a preliminary injunction, Checkers says the franchise agreement clearly allows the franchisor's inspectors full access to the franchisee's business at any "reasonable time."

However, Checkers asserts, Vocisano wrongly interprets the "reasonable time" provision to mean that inspections should not take place unless one of the owners of the restaurant is available to accompany the inspector on a tour of the business.

The franchisor says that after three thwarted inspections in the space of little more than a month, it terminated the franchise and is entitled to the injunction because the defendants continue to operate the restaurant.

Vocisano, in his memorandum in opposition, contends Checkers inspectors repeatedly told him one thing and then did another. He claims the inspectors sat outside the restaurant and waited for the owner to leave before springing the inspection.

He also claims the franchisor violated an agreement he made with the inspectors to provide him enough time to come into the restaurant and be present for the inspection. Instead, the inspectors allegedly timed their visits when

they knew he and his partners were not available and before the owners had sufficient time to cure deficiencies noted in the previous inspection, as provided for in the franchise agreement.


"In doing so, plaintiff has play a game of 'gotcha' in which it picks and chooses what provisions of the franchise agreement are best for it to follow," the franchisee argues.

If the franchisor is free to conduct inspections when an owner is not available, the inspections are inconsistent with how the provision was applied before January 2005 and violate the elements of good faith and fair dealing implied in the franchise agreement, Vocisano contends.

He says Checkers violated the franchise agreement and the franchisee should recover damages in addition to all costs and expenses of the litigation.

Checkers is represented by Paul Watson and R.J. Haughey of Tampa, Fla.

Defendants are represented by J. Michael Coleman and Damian Taylor of Coleman, Hazzard & Taylor in Naples, Fla.

 **See Document Section D for Checkers' memorandum in support of a preliminary injunction, Vocisano's opposition, and his answer and affirmative defenses.**

NON-COMPETE AGREEMENT

USA Baby Says Franchisee Cannot Wriggle Out Of Agreement

USA Baby Inc. v. TBR LLC et al., No. 05-0662, reply filed (N.D. Ill. Mar. 8, 2005).

A Chicago USA Baby Inc. franchisee cannot wriggle out of the restrictions of a franchise agreement just because three silent partners of the franchisee failed to sign non-compete agreements when the franchise renewed, the franchisor argues in federal court.

Plaintiff franchisor USA Baby Inc. (formerly Baby's Room USA Inc.) has asked the court for a temporary restraining order to shut down the eight Chicago-area Baby's Room specialty stores run by TBR LLC, a limited liability company headed by Robert Geisheker. It also asks the judge to bar

Geisheker and his partners from running any similar businesses at or near the same locations.

According to the suit filed in the U.S. District Court for the Northern District of Illinois, TBR, Geisheker and his partners are trying to convert the former Baby's Room franchise outlets into stores selling the same line of infant clothes and accessories under another name.

In opposing the injunction, the defendants say there is no franchise agreement to enforce because it expired eight months ago when Geisheker's "silent partners" failed to sign the non-compete and confidentiality agreements that the franchisor required as part of the franchise renewal.

The silent partners the plaintiff refers to appear to be financial backers of TBR who are not actively involved in the running of Geisheker's business.

In its memorandum in support of the TRO, USA Baby says that when the franchise was renewed and Geisheker and his "passive investors" took over the eight franchise operations from a previous owner, Geisheker signed all the agreements required but his three partners did not.

Although Geisheker said the signatures of the partners on the non-compete and confidentiality agreements were necessary to renew the franchise, the franchisor did not immediately press the issue when the partners declined.

However, USA Baby argues, the lack of those signatures does not void the franchise agreement.

"The defendants cannot take advantage of their non-performance to terminate a contract that they have been operating under for eight months," the franchisor argues.

In all other respects the parties have acted as though there was a franchise — by paying royalties, using trademarks, and accepting the other conditions and benefits of franchise operation, USA Baby maintains.

USA Baby is represented by Gregory Ellis of Gregory Ellis & Associates in Schaumburg, Ill.

The defendants are represented by Eugene Joseph Kelley Jr. of Arnstein & Lehr in Chicago.

 **See Document Section E for the reply.**

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UNFAIR TRADE PRACTICES

Arbitration Not Unfair Trade Practice, La. Court Says

***Glod v. Baker et al.*, Nos. 04-1483, 04-1484, 04-1485 and 04-1486, 2005 WL 665226 (La. Ct. App., 3d Cir. Mar. 23, 2005).**

The franchisee of two restaurants in Louisiana and Florida cannot claim the franchisor engaged in unfair trade practices when it went to arbitration to repossess the eateries, a Louisiana appeals court has ruled.

W. Gregory Baker entered into a franchise agreement with Copeland's of New Orleans to open a Copeland's restaurant in Lafayette La. in 1994. Through a series of transactions, Baker transferred his interest in the restaurant to a corporation he owned, BCM L.L.C. He then recruited other investors, including Louis Viviano and Walter Glod, to purchase interests in BCM.

The restaurant opened in September 1995. During the grand-opening celebration, franchisors Al and Bill Copeland met Viviano and learned that he was a co-owner. Copeland's subsequently entered into a second franchise agreement with BCM and a company named Nawlins Cajun Foods to open a Copeland's restaurant in Orlando, Fla. That restaurant opened in September 1996.

Viviano also participated in the venture, lending the franchisees \$450,000 for furnishings and fixtures. He also later purchased more than \$1 million in notes on the restaurant. Bill Copeland was aware of Viviano's investment in the Orlando restaurant as well.

In February and March 1997 Copeland's sent default letters to the franchisees, asking them to restore ownership and control of the two restaurants to their original owners.

When BCM and Nawlins refused, the franchisor went to arbitration. The arbitrator terminated both franchise agreements Sept. 30, 1997, but failed to grant Copeland's the right to take over the leases and purchase the furnishings and equipment so it could operate the facilities.

Copeland's then obtained a temporary restraining order allowing it to operate the restaurants. It also filed a petition to modify the arbitration award to allow it to purchase the furniture, equipment and fixtures.

When the court merely confirmed the original arbitration award, Copeland's filed involuntary bankruptcy proceedings against the former franchisees to obtain the restaurants.

BCM and Nawlins filed suit Jan. 29, 1998, against the franchisor for violations of the Louisiana Unfair Trade Practices Act.

The plaintiffs claimed the company had enticed Viviano to invest in the restaurants by leading him to believe, through its silence, that it approved of his participation. Once the restaurants were successful, Copeland's then unfairly sought to appropriate them through the default letters and arbitration, the suit asserted.

Louisiana law provides that unfair-trade-practices claims expire one year from the time of the event that gives rise to the claim. In this case, the event that gave rise to the claim was the default letters in February and March 1997.

Since the plaintiffs did not file suit until Jan. 29, 1998, the trial court held that all events prior to Jan. 29, 1997, were preempted. That included the time period in which the franchisor became aware of Viviano's investment in the restaurants but remained silent.

The plaintiffs argued the one-year period was tolled until the arbitrator terminated the contracts, but the court held the state Legislature did not provide for any tolling of the preemptive period.

The trial court granted summary judgment for Copeland's on all counts, and the plaintiffs appealed to the Louisiana 3d Circuit Court of Appeal, which affirmed the lower court judgment in its entirety in a 2-1 split decision.

The appellate court agreed that all of the events before Jan. 29, 1997, were preempted. All of the events after that date — the default letters, the arbitration, the temporary restraining order, the petition for modification of the arbitration award and the involuntary bankruptcy — were "appropriate resorts to the judicial process" and therefore were not unfair trade practices as a matter of law, the appeals court majority said.

Judge Jimmy C. Peters dissented on the ground that nothing in the Louisiana Unfair Trade Practices Act provides as a matter of law that judicial proceedings cannot be the basis of a LUTPA suit.

"In this matter, we are clearly left with genuine issues of material fact, and Copeland's is not entitled to dismissal of the plaintiffs' LUTPA cause of action as a matter of law," he said.

To retrieve the opinion, visit westlaw.com.

FEAR OF DISEASE

Man Loses \$40K Award For 'Emotional Distress' In Chicken Wing Case

***Denny's Inc. v. Department of Human Rights et al.*, No. 1-03-3158, 2005 WL 525429 (Ill. App. Ct., 1st Dist., 1st Div. Mar. 7, 2005).**

A man who claims he found a half-eaten chicken wing in a pot roast dinner at a Denny's restaurant has lost the \$40,000 award for emotional distress he received from the Illinois Human Rights Commission.

A panel of the Illinois Appellate Court found Nathaniel Washington could not show he was actually exposed to any communicable disease. The only witness with medical knowledge who testified for Washington — his physician — said Washington's fears seemed "a bit exaggerated," the panel said.

The award was made after the commission determined that Denny's defaulted by failing to participate in a fact-finding conference. The appeals panel also reversed the default order, finding the restaurant's failure to appear at the hearing was not deliberate but seemed to be the result of a miscommunication between the company's corporate offices in South Carolina and its local counsel in Chicago.

Washington and his wife ate dinner at a Denny's restaurant in Melrose Park, Ill., Dec. 21, 1998, legal filings say. After eating about half the pot roast dinner he ordered, Washington found what he claimed was a half-eaten chicken wing.

According to papers filed in the case, Washington suffered severe anxiety and emotional trauma due to his fear of contracting AIDS, hepatitis or another communicable disease from the chicken. He also said he experienced a "flu-like" illness within two days after the incident.

Washington filed a charge with the Illinois Human Rights Commission, alleging he was the victim of racial discrimination. According to legal filings, Washington attributed the chicken wing incident to racial bias because he and his wife were the only black patrons in the restaurant when it occurred, and they had to wait to be seated while white customers who arrived after them were seated first.

In addition, Washington said, he learned from his wife about alleged incidents of racial discrimination at other

Denny's establishments against black Secret Service agents traveling with former President Bill Clinton.

After Denny's failed to obtain a continuance in the commission proceeding and a default order was issued, an administrative law judge held a hearing on damages and awarded the \$40,000 for emotional distress along with \$28,816 in attorney fees and \$1,293 in costs.

Denny's appealed, arguing the default order was improper and the award unjustified. After reversing the default order, the appeals panel said there was insufficient evidence to support the emotional-distress award.

Under Illinois law, a claimant cannot recover for fear of contracting AIDS unless he can show he was actually exposed to the virus, the panel said, citing *Majca v. Beekil*, 183 Ill.2d 407 (Ill. 1998).

"Although *Majca* specifically addressed fear of contracting AIDS, we read the opinion to be equally applicable to the other communicable diseases that Washington feared contracting, including syphilis and hepatitis," the panel wrote.

Of the witnesses who testified at the damages proceeding, only Washington's physician had any medical knowledge or training, and his specialty was internal medicine, not infectious diseases, the panel said.

The physician, Dr. Wayne C. Williamson, said it was possible but unlikely for someone to contract a communicable disease by eating the same food someone else ate.

In addition, the panel noted, Washington has kept the remains of the meal, including the chicken wing, in his freezer since the incident but has never had the food tested.

Because the panel reversed the damages award, it also reversed the award for attorney fees and costs.

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FOOD SAFETY (ACRYLAMIDE)

Stay of Acrylamide Case Might Be Lifted Soon

Council for Education & Research on Toxics v. McDonald's Corp. et al., No. BC280980, notice of orders entered (Cal. Super. Ct., Los Angeles County Mar. 23, 2005).

The judge overseeing a lawsuit over the chemical acrylamide in fast-food french fries has said his decision whether to lift the long-running stay in the case depends on the contents of a notice to be published April 8 by a California agency.

Following a March 22 status conference, Judge George Wu said he would lift the stay at a scheduled April 20 status conference if the notice, to be published by California's Office of Environmental Health Hazard Assessment, includes only a "general series of regulatory actions" to address acrylamide, rather than specific draft regulations.

The suit, filed in the Los Angeles County Superior Court two years ago by the Council for Education & Research on Toxics, claims that franchisors McDonald's Corp. and Burger King Corp. "knowingly and intentionally exposed individuals to acrylamide in french fries" without warning them that potatoes cooked at very high temperatures (as are potato chips and fast-food french fries) produce dangerously high levels of the chemical.

The suit says there is good reason to suspect that ingesting acrylamide greatly increases the risk of developing certain types of cancer.

CERT's suit sought relief under the private enforcement provisions of California Health & Safety Code Section 25249.6, otherwise known as Proposition 65.

Proposition 65 prohibits businesses from knowingly discharging listed chemicals into sources of drinking water and requires them to provide a clear and reasonable warning before knowingly and intentionally exposing people to a listed chemical.

The suit seeks civil penalties of up to \$2,500 a day for each violation of Proposition 65's failure-to-warn provision.

Judge Wu decided in July 2003 to stay the suit pending the outcome of an investigation by OEHHA into whether restaurants should be required to affix warning labels to french fry and potato chip containers. The OEHHA

delegated that task to its Carcinogen Identification Committee.

The judge said he would hold status hearings at regular intervals to determine whether the issue in the suit is ripe for adjudication.

In a status report filed early this year, CERT said the stay should be lifted because OEHHA has repeatedly delayed issuing the report, and there is no indication when it might be completed.

The defendants countered that both OEHHA and the Food and Drug Administration continue to make progress in evaluating the potential toxicity of acrylamide. Eight studies on the issue have been published since March 2004 and several suggest acrylamide is not a serious threat to human health, they argued. The stay should remain in place to allow OEHHA and the FDA to continue their efforts, the defendants said.

DISTRIBUTION (RESTRAINT OF TRADE)

Automakers Face Trial on Antitrust Conspiracy Claims

Choiceparts LLC v. General Motors Corp. et al., No. 01 C 0067, 2005 WL 736021 (N.D. Ill., E. Div. Mar. 30, 2005).

A company that claims distributors General Motors Corp., Ford Motor Co. and DaimlerChrysler Corp. conspired to prevent the implementation of a new Internet-based system for locating car parts will have the opportunity to prove its antitrust case at trial.

Plaintiff Choiceparts LLC presented so many disputed issues of fact that U.S. District Judge Joan B. Gottschall said she was unable to even determine the correct standard under which the case should be evaluated — the per se rule or the "rule of reason."

Choiceparts filed suit against the three auto manufacturers, referred to in court filings as "original equipment manufacturers" or OEMs. The complaint also names a fourth defendant, OE Connection LLC, a joint venture of the three OEMs.

Choiceparts was developing an Internet-based parts locator system that would have allowed car dealers and repair shops to search a single database for parts from

OEMs, non-OEMs and sellers of used parts. Currently, the complaint explained, a repair shop or dealer must search numerous, often outdated, parts locator databases.

The complaint alleged the formation of OE Connection was an attempt to foreclose competition in what Choiceparts called the "advanced parts locator" market. Choiceparts obtained licenses to the parts databases of some 250 car dealers, but the APL project was scuttled when the three OEM defendants refused to license their parts data, the complaint alleged.

The defendants filed motions for summary judgment, arguing they cannot be liable for antitrust violations because OE Connection was a legitimate joint venture. Choiceparts countered that each of the OEMs would have likely competed with each other in the APL market if they had not formed the joint venture.

Judge Gottschall said there were too many disputed issues of fact to grant any of the summary judgment motions. Questions remain as to whether the OEM defendants are competitors of Choiceparts, whether the OEMs' parts data is really necessary for Choiceparts to compete and whether the OE Connection joint venture was actually pro-competitive, as the defendants maintain.

The judge said she could not, at this stage, even determine whether the case should be analyzed under the per se rule or whether a more detailed "rule of reason" analysis is necessary. She explained that courts, through experience, have come to condemn certain activities such as price-fixing and market allocation agreements as illegal per se, regardless of the violator's market power or the anti-competitive effects, if any, of the activities.

By contrast, she explained, the rule of reason requires a more detailed analysis of the challenged activity, including its anti-competitive and possible pro-competitive effects.

It is not clear at this stage which analysis is appropriate for this case, the judge said.

Judge Gottschall also denied a separate summary judgment motion filed by DaimlerChrysler, which argued that it cannot be liable for antitrust violations because it offered to license its parts data to Choiceparts. The plaintiff presented sufficient evidence so that a reasonable jury could conclude the license offer was a pretext, the judge said.

Finally, she declined to dismiss Choiceparts' claim under the Illinois Consumer Fraud and Deceptive Business Practices Act, saying the plaintiff has amassed enough evidence to present this claim to a jury as well.

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DISTRIBUTION (PRICE-FIXING)

Truck Dealers Sue DaimlerChrysler Unit for Alleged Price-Fixing Scheme

***Cumberland Truck Equipment Co. et al. v. Detroit Diesel Corp. et al.*, No. 2:05-cv-00616; *Diamond International Trucks Inc. v. Detroit Diesel Corp. et al.*, No. 2:05-cv-00625-BMS, complaints filed (E.D. Pa. Feb. 9, 2005).**

A group of International Truck & Engine Corp. and Volvo Trucks Inc. dealers is suing Detroit Diesel Corp. and 17 of its distributors for allegedly organizing an illegal boycott and price-fixing scheme after it was acquired by DaimlerChrysler AG.

The dealers claim in a pair of class-action suits filed in Philadelphia federal court that Detroit Diesel boycotted Volvo and International dealers who were not affiliated with DaimlerChrysler and refused to honor warranty repair pledges on trucks the plaintiffs had sold before the acquisition.

"[Detroit Diesel] and its distributors entered into a conspiracy to boycott the plaintiffs ... and to raise the prices the distributors charged the plaintiffs ... for Detroit Diesel parts to non-competitive levels so as to eliminate competition by the plaintiffs," the dealers charge.

Detroit Diesel designs and manufactures diesel fuel and alternative fuel engines that are installed in heavy-duty trucks as well as replacement parts for Detroit Diesel engines. Each of the company's distributors is assigned a specific geographic territory by Detroit Diesel within which the distributor is authorized to sell the company's parts and perform repairs on its engines. The distributors, in turn, had long-standing agreements with heavy-duty truck dealers in their respective territories.

According to the suits, the alleged price-fixing scheme began sometime after DaimlerChrysler acquired complete ownership of Detroit Diesel in October 2000. DaimlerChrysler also owned Freightliner LLC, Western Star Trucks and Sterling Trucks, and following the acquisition, Detroit Diesel allegedly provided those companies with "pricing, products and support" that it did not make available to unaffiliated heavy-duty-truck manufacturers like Volvo and International, the plaintiffs allege.

Because Detroit Diesel was now affiliated with three of Volvo's and International's major competitors, the two companies announced that they would no longer install Detroit Diesel engines in the heavy-duty trucks they manufactured, the suits say. The dealers, however, had no control over the decision by the respective manufacturers to stop purchasing and installing Detroit Diesel engines.

The suits add that in retaliation for Volvo and International's decision, Detroit Diesel Corp. and its distributors "entered into a conspiracy" to boycott the plaintiffs.

"An agreement was reached between the distributors and DDC that the distributors would no longer authorize dealers to perform any warranty repairs on Detroit Diesel engines and those dealers were terminated or not renewed," the plaintiffs allege. "An agreement was also reached between the distributors and DDC that certain other dealers, namely the plaintiffs, would be permitted to remain as Detroit Diesel dealers but in a very limited capacity."

The plaintiffs are seeking to recover the overcharges on the parts they have purchased. They are also asking to be compensated for the loss of repair services they would have performed on the engines for the trucks they have sold.

The 10 different dealer plaintiffs involved in the suits are Cumberland Truck Equipment of Ephrata, Pa.; Bowersox Truck Sales & Service of Williamsport, Pa.; Allegheny Trucks of Altoona, Pa.; Landmark International Trucks of Knoxville, Tenn.; Burr Truck & Trailer Sales of Vestal, N.Y.; Southland International of Louisiana of Gray, La.; Diamond International Trucks of North Little Rock, Ark.; Mid-America International Trucks of Memphis, Tenn.; Texas Truck Centers of Houston; and Wheeling Truck Center of Wheeling, W.Va.

To retrieve the complaint in *Diamond International* (2005 WL 658836), visit westlaw.com.

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DISTRIBUTION (WARRANTY)

Lessee Is 'Consumer' Under Magnuson-Moss, N.J. Court Finds

***Ryan v. American Honda Motor Corp.*, No. A2975-02, 2005 WL 710849 (N.J. Super. Ct. App. Div. Mar. 30, 2005).**

A New Jersey appeals court, reversing judgment for distributor American Honda Motor Co., has ruled that a vehicle lessee is a "consumer" with standing to sue the automaker under the federal Magnuson-Moss Warranty Act.

The panel also said plaintiff Christopher Ryan's prior submission of an accident claim to his insurance company for engine repair did not preclude his warranty claims. The trial court should have made findings of fact and conclusions of law before dismissing Ryan's claim for consumer fraud.

Ryan leased a new 1999 Honda Passport from Burns Honda, an authorized dealer and repair facility. The vehicle had a three-year/36,000-mile manufacturer's new vehicle limited warranty, as well as several parts and equipment warranties.

Ryan encountered engine problems after 22,000 miles and 15 months. Burns Honda said the problems were due to external damage or tampering and were not covered by the warranty. Ryan was not told at that time that the warranty did not apply because he had leased rather than purchased the Passport.

According to the plaintiff, Burns told him to file an insurance casualty claim. He did so and his carrier authorized repairs costing \$8,236.

Ryan continued to have problems with the vehicle and claimed that the repairs were not effective.

In July 2001 Ryan filed suit against Honda, which was granted summary judgment on the Magnuson-Moss and New Jersey Consumer Fraud Act claims. The judge said a lessee is not a "consumer" under Magnuson-Moss.

The New Jersey Superior Court Appellate Division, reversing, noted that under the act, a "consumer" is a buyer, a person who receives a product while a warranty is in force, or a person who is entitled to enforce a warranty on the product under its terms or under applicable state law.

The panel said Ryan fit the second and third definitions.

"As a matter of statutory construction," the appeals court observed, "there would be no reason for the act to provide three alternative definitions of 'consumer' if the protection provided by the act was intended to apply only to a new car buyer, and not to one who leases a new car."

The panel also said that "common sense" dictated its ruling.

"It is unlikely that the auto leasing market would have developed as it has if prospective lessees were denied the right to enforce the manufacturers' new car warranties," the opinion says. "Moreover, if a car manufacturer's written warranty does not apply to a lessee, the dealer should not supply its leasing customer with the written warranty at all, and the manufacturer should include a clear disclaimer in the written warranty itself, stating that it is not applicable to a leasing customer."

Finally, the panel noted that Ryan's claim under the Consumer Fraud Act was dismissed without analysis and ordered that on remand, the trial court must provide the parties with findings of fact and conclusions of law with respect to that claim.

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COMMENTARY

Preventing Franchise Termination By Taking the Offensive

By Peter M. Ripin, Esq.*

After investing large amounts of your hard earned cash, time and energy in building your franchise into a successful business, you're served with a notice of termination from your franchisor which you think is unjust and want to fight. What's your best strategy? In almost all cases, you're better off not sitting back and waiting for the inevitable trademark infringement lawsuit to be brought against you. Instead, take the bull by the horns and go on the offensive: sue the franchisor to prevent the termination of your franchise.

There are several advantages to this strategy. First and foremost is that by striking first and immediately moving for a preliminary injunction to prevent termination of your franchise, you may be able to focus the court's attention on your strongest argument, i.e., that without an injunction you will be irreparably injured by losing your business, forfeiting your investment, and having your franchise canceled.

The other major advantage is that a potentially long and costly litigation may be short-circuited since many wrongful termination cases are resolved after the preliminary injunction determination. Although this decision can be "reversed" after a trial on the merits, oftentimes a court's "first" impression is also its "last" impression and, since the losing party may feel that the court has already made up its mind, many cases settle at this point.

The standard which a court applies in deciding whether to grant a preliminary injunction requires that a franchisee demonstrate (a) irreparable injury in the absence of an injunction which is defined as injury which cannot be adequately compensated by money damages, and (b) either (1) a likelihood of success on the merits of your claim or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in your favor.

Fortunately, there is a large body of case law which holds that irreparable harm can generally be assumed where a franchisor is attempting to terminate an exclusive franchise arrangement on short notice. Indeed, in one case where a hotel franchisee sued Holiday Hospitality Franchising,

Inc. to prevent the termination of its franchise, the court stated:

By the nature of the exclusive arrangement, the franchisee's business operation depends upon the economic relationship established by the franchise agreement. The franchise relationship is the lifeline of the franchisee's business; the franchisee's investment of capital, time and effort in promoting the franchisor's goods or services — to the general exclusion of competing goods and services — would be irreparably lost upon termination. Money damages cannot make the franchisee in such situations whole.¹

Similarly, other courts have recognized that even if a franchisee ultimately prevails on the merits of its lawsuit, it may simply be too late — that the loss of customers and goodwill resulting from even a "temporary" shutdown of the franchisee's business is not recoverable and cannot be adequately compensated by money damages.²

In addition to demonstrating irreparable injury, a franchisee must also raise at least a potentially meritorious claim that the franchisor wrongfully terminated the franchise. In many cases, a franchisee will argue that the franchisor violated the agreement's implied covenant of good faith and fair dealing by terminating the franchise based upon a wrongful pretext.

For example, a franchisee may contend that a franchisor has fabricated a "default" as a pretext to get rid of a successful franchisee so that it may acquire its business without paying for it or simply "replace" the existing franchisee with a new franchisee more to the franchisor's liking.

It is important to note, however, that if a franchisor has legitimate reasons to justify termination of the franchise such as a failure to pay franchise fees or royalties, a court may not be swayed by the fact that the franchisor's termination was motivated by an improper pretext.

Finally, the court must "balance the equities" and decide whether the franchisee has presented a sufficiently

compelling case for judicial intervention. Thus, a franchisee should argue that preserving the franchise for a brief period so that the case may be resolved at a trial on the merits is a far more equitable result than compelling the immediate termination of the franchise which may result in the loss of an entire business and numerous jobs.

The moral of the story? Before simply abandoning ship, a franchisee is well advised to consult with counsel to prevent termination of a valuable franchise.

Notes

¹ See *LaGuardia Associates v. Holiday Hospitality Franchising, Inc.*, 92 F. Supp. 2d 119, 130-31 (E.D.N.Y. 2000).

² See *Lepore v. New York News Inc.*, 365 F. Supp. 1387, 1389 (S.D.N.Y. 1973) (court held that franchisees would suffer irreparable injury by having their franchise terminated because "They will have lost their business and their customers and should they eventually succeed on the merits of this case, it may be impossible to reestablish the businesses as going concerns. Such a victory would, indeed, be pyrrhic").

* Peter M. Ripin is a partner with Davidoff Malito & Hutcher LLP in New York, where he practices in the areas of business litigation and dispute resolution. He has represented numerous institutions and individuals in the hotel and hospitality industries, including hotels in connection with disputes concerning Web site domain name piracy and the Anti-Cybersquatting Piracy Act, timeshare developers and managers in disputes arising out of joint ventures, and restaurant franchisees in connection with actions seeking to terminate their franchise agreements. In addition, Mr. Ripin has written, lectured and been interviewed on legal issues affecting the hotel and hospitality industries. He may be reached at (212) 557-7200 and pmr@dmlegal.com. Originally published by Hotel News Resource. © 2005.

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COMMENTARY

New Opinion Clarifies High Court's *Green Tree* Decision

By Fredric A. Cohen, Esq.*

In the wake of the U.S. Supreme Court's decision in *Green Tree Financial Corp.-Alabama v. Randolph*,¹ challenges to the enforceability of arbitration provisions on the ground that arbitration is "prohibitively expensive" have become almost routine. But the rationale of *Green Tree* is very narrow and the decision has very limited, if any, application to most franchise disputes. The recent decision in *Quizno's Master LLC v. Kadriu*² highlights this point.

The action arose out of Quiznos' termination of a franchise agreement based on the franchisee's abandonment of her sandwich shop. After franchisee Shahe Kadriu failed to de-identify the abandoned unit, Quiznos filed suit in federal court, seeking to compel de-identification.

The complaint asserted claims for trademark infringement, unfair competition and specific performance of Kadriu's post-termination obligation to de-identify. Quiznos sought preliminary and permanent injunctive relief enjoining Kadriu's use of its marks and also damages caused by reason of her failure to de-identify.

Along with her answer and affirmative defenses to the complaint, Kadriu filed a counterclaim seeking rescission of the franchise agreement. The counterclaim alleged that Kadriu was not told of other franchised restaurants in proximity to the location she had selected and that the omission constituted fraud in the inducement of the franchise agreement. The counterclaim sought rescission of the franchise agreement, and actual and punitive damages.

Quiznos moved pursuant to Section 3 of the Federal Arbitration Act to stay all proceedings on Kadriu's counterclaims based on a provision in the parties' franchise agreement requiring arbitration of "all controversies, disputes or claims between franchisor ... and franchisee" arising from or relating to the franchise agreement itself, the parties' relationship, the validity of the franchise agreement or any other agreement between the parties, or any standard or specification concerning the franchise. The arbitration agreement excluded from coverage all "controversies, disputes or claims related to or based on franchisee's use of" Quiznos' marks.

Because Kadriu's counterclaims arose from or related to the franchise agreement, they were arbitrable and Section 3 of the FAA required that the action be stayed as to them pending arbitration.

Kadriu opposed Quiznos' motion to stay on several grounds. First, she argued that the issue of the franchise agreement's validity affected Quiznos' pending preliminary injunction motion and that concerns for judicial economy and the potential collateral estoppel effect of rulings on Quiznos' preliminary injunction motion required that her claims be heard in court rather than in a separate arbitration.

Next, Kadriu argued Quiznos was equitably estopped from seeking to stay proceedings on her counterclaims by having filed its complaint for injunctive relief in federal court. Finally, she challenged the enforceability of the franchise agreement's arbitration clause on the grounds that arbitration would be prohibitively expensive.

U.S. District Judge Marvin Aspen granted Quiznos' preliminary injunction motion and rejected each of Kadriu's arguments in opposition to the franchisor's motion to stay. Kadriu's "judicial economy" challenge failed for two reasons. First, it simply ignored "the mandatory nature of arbitration," the court held. Section 3 of the FAA requires a court in which suit has been brought "on any issue referable to arbitration under an agreement in writing for such arbitration, to stay the court action pending arbitration once it is satisfied that the issue is arbitrable under the agreement."³

Thus, a court presented with a stay motion may — and must — address only two questions: Is there an agreement to arbitrate and, if so, does that agreement encompass the claims asserted? If the court answers both with a "yes," Section 3 of the FAA requires that the claims be stayed. Accordingly, "[h]aving determined that Kadriu's counterclaims are within the scope of the arbitration agreement," Judge Aspen ruled, "we find that any concerns about judicial economy are simply irrelevant."

Second, the court also concluded that it was unnecessary to rule on the franchise agreement's validity in order to

grant Quiznos' preliminary injunction motion. Even if the franchise agreement were determined to be invalid, the court observed, Kadriu "will no longer have the right to use Quiznos' trademarks."⁴

Kadriu's estoppel argument fared no better. Judge Aspen noted that Quiznos' trademark infringement and unfair-competition claims fit squarely within the arbitration clause's exclusion of claims relating to company marks and held that a party cannot waive its right to arbitrate by "exercising an exemption specifically included in the [arbitration] clause."

The judge reached the same conclusion with respect to Quiznos' specific-performance claim. Although the franchise agreement's post-termination provisions included obligations unrelated to Quiznos' marks, the franchisor did not pursue those claims in the federal action or include them in its complaint. And Quiznos' complaint only asked for post-termination remedies related to its trademarks.

The court found that the mere filing and pursuit of claims based on post-termination obligations relating to the marks could not support Kadriu's waiver argument simply because the franchise agreement's post-termination provisions included other obligations that were not trademark-related.⁵

The court likewise rejected Kadriu's final challenge to Quiznos' stay motion, based on what she asserted to be the "prohibitive cost" of arbitration. Quoting from decision in *Green Tree*, the court acknowledged that an arbitration agreement might be unenforceable if the recalcitrant party "is 'saddled with prohibitive [arbitration] costs' that could preclude the party 'from effectively vindicating her federal statutory rights in the arbitral forum.'"

But the argument was a theory in search of fact here, where all of Kadriu's counterclaims arose out of state law and no federal statutory claims were asserted. Thus, the court held, the concern underlying *Green Tree* — namely, that the costs of arbitration might vitiate federal statutory rights — was simply inapplicable in this case.

Judge Aspen's opinion on this final point reflects the careful application of an important distinction — indeed, a distinction of constitutional significance — that is often missed not only in the area of arbitration, but in other areas of significance to franchisors as well. In refusing to even consider Kadriu's claims regarding the allegedly "prohibitive" cost of arbitration, Judge Aspen recognized that *Green Tree* applies exclusively where the costs of arbitration might preclude vindication of a *federal* claim, and not where only state law claims are asserted. This is

so because while the FAA's requirement that arbitrable claims be arbitrated as a *matter of federal law* will preempt contrary state law, it will not trump other *federal law*.

A few cases demonstrate the distinction. Courts routinely enforce arbitration agreements "in accordance with" their terms,⁶ including provisions specifying a particular venue, even in the face of state law or public policy purporting to render such out-of-state forum-selection clauses void and unenforceable.

In *KKW Enterprises Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*,⁷ for example, the U.S. Court of Appeals for the 1st Circuit reversed the trial court's refusal to grant a motion by Gloria Jean's to stay pending arbitration. The lower court had reasoned that a provision of Rhode Island's relationship law rendered the Chicago venue selection void and unenforceable. The appeals court ruled that the FAA's directive that arbitration agreements be enforced in accordance with their terms trumped the Rhode Island statute.

*Coddington Enterprises Inc. v. Werries*⁸ demonstrates what happens when enforcement of an arbitration agreement contravenes federal, rather than state, law. In that case, the parties' arbitration agreement, like many standard forms of franchise agreements, imposed limitations on the arbitrator's authority to award punitive damages. The franchisee, whose claims included a claim for treble damages under the federal Racketeer Influenced and Corrupt Organizations Act, argued that enforcement of an agreement to arbitrate containing that limitation would impermissibly deprive him of a (treble damage) remedy under federal law. The court agreed and refused to enforce the arbitration clause.

Not all courts adhere to the distinction between state and federal law. In *Laxmi Investments LLC v. Golf USA*,⁹ for example, the 9th Circuit reversed the lower court's ruling that arbitration take place in Oklahoma, the venue specified in the parties' arbitration agreement. The appeals court determined that certain language contained in the franchisor's uniform franchise offering circular to the effect that the venue provision might not be enforceable under the California Franchise Relations Act meant that the parties' minds never met on the point. The appeals court rejected the franchisor's claim that the Franchise Relations Act's anti-waiver provision was preempted by the FAA.

The question of the role or applicability of state law or policy in important procedural matters governed by federal law is not limited to the enforcement of arbitration agreements. Another area plagued with the

inconsistent application of preemption principles is the area of venue in federal court.

It is not uncommon for a franchisee to initiate litigation in a forum convenient to her notwithstanding a forum-selection clause specifying a venue in the franchisor's backyard. When those actions are brought in federal court or are removed by the franchisor to the federal court, motions to dismiss for improper venue or to transfer venue (which is proper varies by circuit) will be governed by federal law. But the question frequently arises whether state law or public policy, including anti-waiver or forum provisions of state relationship laws, may be considered in ruling on these motions. Although many courts have recognized that they should not be considered,¹⁰ they frequently are nevertheless.¹¹

Judge Aspen's decision in *Quizno's Master v. Kadriu* exemplifies the proper application of the Supreme Court's ruling in *Green Tree*. Only where it is shown that arbitration is prohibitively expensive and enforcement of the arbitration agreement will frustrate the vindication of federal claims may a court properly excuse a party from its obligation to arbitrate. Since it will be the very rare case in which some federal right or remedy is at stake in the franchise relationship, a franchisee seeking to avoid her own obligation to arbitrate should find the "prohibitively expensive" defense unavailable.

Editor's Note: *The Franchise & Distribution LR solicits commentary from attorneys with opposing viewpoints.*

Notes

¹ 531 U.S. 79, 90-91 (2000).

² No. 04 C 4771 (N.D. Ill. Apr. 11, 2005).

³ *Prima Paint Corp. v. Flood & Conklin Mfg. Corp.*, 388 U.S. 395, 400 (1967).

⁴ With respect to Quiznos specific-performance claim, the court said it need only determine whether there is a likelihood of Quiznos prevailing on the issue of the franchise agreement's validity in order to grant the franchisor's motion for preliminary injunction. Such finding on a preliminary basis made for the purpose of ruling on a motion for preliminary injunction would not support application of collateral estoppel. In any event, the court said, in granting the preliminary injunction motion based on the trademark infringement and unfair-competition claims and not on the specific-performance claim, it was not necessary for the court to make any determination, preliminary or otherwise, concerning the validity of the franchise agreement. "The contract's validity and the specific performance claim must be left for the arbitrator to decide."

⁵ The court granted Quiznos' preliminary injunction on the trademark infringement and unfair-competition claims only, finding the specific-performance claim too intertwined with the arbitrable issue of the franchise agreement's validity.

⁶ 9 U.S.C. § 4.

⁷ 184 F.3d 42 (1st Cir. 1999).

⁸ 54 F. Supp. 2d 935 (W.D. Mo. 1999).

⁹ 193 F.3d 1095 (9th Cir. 1999).

¹⁰ See, e.g., *Curtis v. Nettuno & Assocs. Inc.*, 2003 WL 21674465 (E.D. La. July 16, 2003); *Outek Caribbean Distribs. v. Echo Inc.*, 203 F. Supp. 2d 263, 270 (D.P.R. 2002).

¹¹ See, e.g., *Jones v. GNC Franchising Inc.*, 211 F.3d 495 (9th Cir. 2000).

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<i>Choiceparts LLC v. General Motors Corp. et al.</i> , No. 01 C 0067, 2005 WL 736021 (N.D. Ill., E. Div. Mar. 30, 2005)	10	<i>Glod v. Baker et al.</i> , Nos. 04-1483, 04-1484, 04-1485 and 04-1486, 2005 WL 665226 (La. Ct. App., 3d Cir. Mar. 23, 2005)	8
<i>Council for Education & Research on Toxics v. McDonald's Corp. et al.</i> , No. BC280980, notice of orders entered (Cal. Super. Ct., Los Angeles County Mar. 23, 2005)	10	<i>Quizno's Master et al. v. Kadriu</i> , No. 04-4771 (N.D. Ill. Apr. 11, 2005). Document Section A	3
<i>Cumberland Truck Equipment Co. et al. v. Detroit Diesel Corp. et al.</i> , No. 2:05-cv-00616, complaint filed (E.D. Pa. Feb. 9, 2005)	11	<i>Ryan v. American Honda Motor Corp.</i> , No. A2975-02, 2005 WL 710849 (N.J. Super. Ct. App. Div. Mar. 30, 2005)	12
<i>Denny's Inc. v. Department of Human Rights et al.</i> , No. 1-03-3158, 2005 WL 525429 (Ill. App. Ct., 1st Dist., 1st Div. Mar. 7, 2005)	9	<i>Smith v. Krispy Kreme Doughnuts Inc. et al.</i> , No. 05-0187, memorandum filed (M.D.N.C. Mar. 28, 2005). Document Section C	5
<i>DMF Leasing Inc. v. Budget Rent-A-Car of Maryland Inc. et al.</i> , No. 1842, 2005 WL 742924 (Md. Ct. Spec. App. Apr. 4, 2005)	5	<i>USA Baby Inc. v. TBR LLC et al.</i> , No. 05-0662, reply filed (N.D. Ill. Mar. 8, 2005). Document Section E	7