RECENT UPDATES ON FRANCHISE LAW

National Advertising by Franchisors Does Not Automatically Establish Personal Jurisdiction in All States in Which Commercials Are Aired

Hotel franchisors can rest easy knowing that at least for now, national advertising campaigns will not establish personal jurisdiction in every state in which the campaign runs. In *Trei v. AMTX Hotel Corp. (d/b/a Holiday Inn)* (Case No. 33,048 (June 24, 2014)), the New Mexico Court of Appeals reaffirmed that national advertising by a franchisor does not subject that franchisor to personal jurisdiction in every state in which commercials are aired.

In *Trei*, the plaintiff was a New Mexico resident who stayed at a Holiday Inn in Amarillo, Texas. The plaintiff was injured while using exercise equipment, and filed suit against the hotel's operator (AMTX) in New Mexico District Court. AMTX moved to dismiss the action on the grounds that New Mexico lacked personal jurisdiction over AMTX, a New York corporation. The District Court granted the motion to dismiss and Plaintiff appealed.

The Court of Appeals agreed. Relying on a traditional "minimum contacts" analysis, it rejected the plaintiff's argument that AMTX "purposely established contact" with New Mexico by running television commercials promoting the Holiday Inn brand. The commercials were, in fact, sponsored by Intercontinental Hotels Group ("IHG"), which owns the "Holiday Inn" brand. Plaintiff testified that she had seen IHG's commercials prior to staying at the Amarillo Holiday Inn, and that IHG's "purposeful availment" should be attributed to AMTX under agency theories.

The Court of Appeals cited New Mexico law that "the existence of a franchisor-franchisee relationship alone is insufficient to create a principal-agent relationship. (*Campos Enters., Inc. v. Edwin K. Williams & Co.,* 998–NMCA–131, ¶ 18, 125 N.M. 691, 964 P.2d 855.) The Court explained that it could not attribute any contacts of the franchisee to the franchisor, unless there were sufficient allegations of "some level of control" over IHG by AMTX. Finally, the Court acknowledged long-standing law that "national advertisements alone by a nonresident defendant cannot support personal jurisdiction over that nonresident defendant." (*Citing Giangola v. Walt Disney World Co.*, 753 F.supp.148, 155-56 (D.N.J. 1990); *Jacobs v. Walt Disney World, Co.*, 309 N.J. Super. 443, 707 A.2d 477, 485 (N.J. Super. Ct. App. Div. 1998.)

Trei affirms, rather than disrupts, the *status quo* with regard to national franchisors. National or multi-state marketing campaigns will not establish personal jurisdiction for franchisors so long as franchisors remain certain that they do not exercise a level of control over the national advertiser which would create an agency relationship.

The Enforceability of Non-Competition Covenants in a Franchise Agreement is Upheld

In a boon for franchisors, a Minnesota District Court issued a preliminary injunction in favor of a franchisor which precluded its former franchisee from competing against the franchisee, in violation of a non-competition covenant. In *Anytime Fitness, LLC v. Edinburgh Fitness LLC* (Case No. 14-348 (April 11, 2014)), the Minnesota District Court upheld the enforceability of non-competition and confidentiality provisions in a franchise agreement and ordered that Edinburgh Fitness was prevented from competing against its former franchisor, Anytime Fitness.

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Anytime Fitness owns a franchise system which consists of over 1,300 fitness centers. Edinburgh Fitness was the former owner of a Anytime Fitness franchise. In 2013, Edinburgh decided to terminate the franchise agreement. After the agreement's expiration, Edinburgh began to operate a "Fit 12-24 Hour Health & Fitness" club at the same location. It opened a second "Fit 12" club near another Anytime Fitness franchise.

Anytime Fitness sued and argued that Edinburgh breached the franchise agreement by competing against Anytime Fitness within a specified vicinity, using confidential "client lists" in order to solicit former Anytime Fitness patrons, and infringing upon Anytime Fitness' trademarks. The District Court agreed, and held that Minnesota law allowed courts to enforce non-competition agreements which "are for the protection of the legitimate interests of the party in whose favor they are imposed, reasonable as between the parties, and not injurious to the public."

Enforceability of non-competition covenants is notoriously jurisdiction-specific. The same analysis applied by the Minnesota Court would not apply in California, New York or Illinois. That said, franchisors can find solace in the fact that the Minnesota District Court found legitimate reasons to uphold the non-competition covenants in a franchise agreement. Franchisors, wherever they operate, should take great care to ensure that they use "jurisdiction specific" non-competition clauses in order to ensure that in the event a franchise agreement is terminated, the former franchisee will be precluded from competing against the franchisor.

The End of Franchising as We Know It?

In a potential devastating blow to franchisors throughout the country, the National Labor Relations Board General Counsel Richard Griffin announced that the General Counsel's office would name a franchisor as a party in a case involving allegedly unfair labor practices by franchisees. The NLRB General Counsel's office is currently investigating complaints against various McDonald's franchisees and, if a complaint is issued, expressed its intent to name McDonald's, USA, LLC as a joint employer. The subject memorandum was issued in conjunction with the pending litigation *Browning-Ferris Industries of California, Inc., et al., v. Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters*.

This decision threatens to overturn decades of precedent that a legally separate entity will be considered a "joint employer" only when it "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction." (*TLI, Inc.*, 271 NLRB 798, at *1; *Laerco Transportation,* 269 NLRB 324, at *3. "Minimal and routine . . . supervision" is insufficient to confer joint employer status. (*Laerco*, 269 NLRB 324, at *4; *see also TLI*, 271 NLRB 798, at *2 ("limited and routine" supervision insufficient).) Supervision is minimal and routine "where a supervisor's instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work." (*In re AM Property Holding Corp.*, 350 NLRB 998, at *6 (2007).)

Any decision to name McDonald's as a "joint employee" with its franchisees could undermine fatally the standard franchise model. A significant purpose of a franchisor-franchisee relationship is to allow the franchisor to maintain a modicum of control over its system, trademarks, proprietary information and products, while at the same time separating itself from the day-to-day operating of its franchisees' businesses. Franchisors should pay careful attention to General Counsel Griffin's threat to name McDonald's as a joint employer, and the *Browning-Ferris* case. Both signal a potential

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paradigm shift in the traditional business model for franchisors throughout the country.

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