COURT WATCH

CA Court Rules Jury Trial Waiver Was Not Conspicuous

By Cynthia M. Klaus and Meredith Bauer

One of the methods by which franchisors seek to avoid trial by jury is to include a jury trial waiver provision in their franchise agreements, in which the parties agree to go to trial with a judge only. Franchisors include such pre-dispute jury waivers for the same reasons that they include arbitration provisions, which is to avoid the risk of an unpredictable jury. However, similar to arbitration provisions, the enforceability of the jury trial waiver is widely varied among courts.

In *Samica Enterprises, LLC v. Mail Boxes Etc. USA, Inc.*, Bus. Franchise Guide, 13,985 (CCH) (C.D. Cal. 2008), the franchisor moved to strike the franchisee's demand for a jury, citing the fact that the franchise agreement contained such a jury trial waiver. In considering whether the jury trial waiver was enforceable, the U.S. District Court in the Central District of California stated that the right to jury may only be waived "knowingly and voluntarily." In determining whether this test is met when a franchise agreement contains a jury trial waiver provision, four factors must be considered: 1) the relative bargaining power of the parties; 2) the extent to which the party understood the provision; 3) the extent to which the provision was negotiated; and 4) the conspicuousness of the provision.

The court found that even though the jury waiver provision was stated in all capital letters and in a standalone section of the franchise agreement, it was not conspicuous because it was included on page 41 of a 51-page agreement (exclusive of exhibits). This, in combination with the fact that the franchisee did not have an opportunity to negotiate the provision, as it was printed on the franchisor's standardized printed contract form, led the court to find that the franchisee did not knowingly and voluntarily waive its right to a trial by jury and to deny the franchisor's motion. Importantly, the court reached this conclusion even after determining that the franchisee was a sophisticated investor.

In light of this decision, it may be advantageous for franchisors to reconsider the placement of the jury trial waiver provision in their franchise agreements.

Massachusetts Court Decides Court Can Determine Arbitrability

Another method that franchisors use to avoid trial by jury is to include arbitration provisions in their franchise agreements, so that parties are required to submit certain types of disputes to arbitration instead of to the judicial system. An interesting interplay between arbitration and the judicial system can arise, however, when there are questions concerning arbitration procedures and the enforceability of the arbitration provision itself, and whether the arbitrator or the court should decide these issues.

A recent case in the Federal District Court in Massachusetts illustrates this tension. In *Awuah v. Coverall North America, Inc.*, 563 F. Supp. 2d 312 (D. Mass. 2008), three janitorial business franchisees contended that several provisions contained within the arbitration clause in their franchise agreements with Coverall rendered the clause unconscionable and, therefore, unenforceable. The franchisees had filed the case in court, and the franchisor moved to stay for arbitration. In response, the franchisees moved to strike the arbitration clause. Coverall argued that the parties intended that the arbitrator, not the court, should decide the question of arbitrability. Coverall relied on a provision in the franchise agreement that arbitration would be conducted in accordance with the current Rules of the American Arbitration Association, of which Rule 7(a) grants authority to an arbitrator to determine questions of arbitrability.

The court agreed that whether the parties agreed to submit the dispute to arbitration is a matter of contract. But the court stated that the parties must clearly and unmistakably agree to submit the issue of arbitrability to the arbitrator if they want it to be decided by an arbitrator. Otherwise, the question is an issue for judicial determination. The court disagreed with Coverall that it was the parties' intention to submit such questions to an arbitrator. In doing so, the court pointed to several provisions in the franchise agreement evidencing an alternative intent.

Specifically, the court pointed out that in order for the arbitrator to decide questions of arbitrability, he or she must have the power to determine that the disputed provisions are invalid and unenforceable and render them so. The terms of the specific franchise agreements in dispute, however, stated that the arbitrator may not "alter or otherwise reform the terms of the agreement" or award any remedy not provided for or excluded by the agreement. In addition, the severability clause in the franchise agreements stated that if a court of competent jurisdiction determined that any term or provision was invalid, void or unenforceable, the remainder of the provisions would remain in full force and effect. Thus, these franchise agreements indicated that the

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parties intended the judicial system to decide the enforceability of the contract provisions, including the arbitration clause, and did not extend power to the arbitrator to sever unenforceable claims.

In light of this analysis, the court ordered that the parties proceed in court to determine the question of arbitrability. Moreover, the court stated that the arguments the franchisor raised related to the rules of the American Arbitration Association "undoubtedly contributed to the introduction of the currently pending Arbitration Fairness Act of 2007."

Appointment of a Distributor In Another Distributor's Territory Can Constitute A Substantial Change in Competitive Circumstances

Wisconsin's Fair Dealership Law applies to dealerships, which are defined as agreements between two or more persons in which one is granted the right to sell or distribute goods or services, "in which there is a community of interest in the business of offering, selling or distributing goods or services ..." Wis. Stat. § 135.02(3)(a). Much litigation has arisen out of the statute, as the Wisconsin Fair Dealership Law requires that franchisors comply with the strict good cause, notice, and cure procedures outlined in the statute. Section 135.03 of the Wisconsin Fair Dealership Law, the good cause section, prohibits a dealership grantor from, among other things, substantially changing the competitive circumstances of a dealership agreement without good cause. Section 135.04 of the statute requires a dealership grantor to provide a dealer with at least 90 days' prior written notice of a substantial change in competitive circumstances, and 60 days in which to cure the claimed deficiency.

Wisconsin Compressed Air Corporation v. Gardner Denver, Inc., Bus. Franchise Guide 13,993 (CCH) (W.D. Wis. 2008), discusses the circumstances which constitute a "substantial change in competitive circumstances" under the statute. The good cause analysis under § 135.03 has been previously addressed and established by Wisconsin courts, which state that the substantial change in competitive circumstances must relate to the dealership agreement itself, and not just the circumstances of the dealer. However, prior to *Wisconsin Compressed Air Corporation*, Wisconsin courts had not addressed the circumstances that could constitute a "substantial change in competitive circumstances" triggering the notice and cure requirements under § 135.04.

In that case, Wisconsin Compressed Air Corporation, a manufacturer of truck blowers, established a second distributor within an existing distributor's territory. The court determined that the territory was nonexclusive under the contract, and thus the grant did not violate the dealership agreement, and the manufacturer's establishment of this new distributor did not violate the good cause provisions of § 135.03 of the Wisconsin Fair Dealership Law. The distributor also argued, however, that it was entitled to at least 90 days' prior written notice of the establishment of the second distributor, as the grant substantially changed its competitive circumstances under § 135.04.

In its analysis, the court decided that, unlike the good cause section, a manufacturer's actions could constitute a substantial change in the distributor's circumstances under the notice and cure provisions in § 135.04, even though the change did not affect the terms of the dealership agreement itself. Although the territory grant was nonexclusive in the dealership agreement, the distributor was substantially affected due to the "intrabrand" competition likely to have a serious effect on the distributor's ability to continue to compete in the market. Therefore, the court determined that the notice requirement in § 135.04 does apply to situations in which the dealership or manufacturer grants a competing dealer or distributorship within the nonexclusive territory of an existing dealer or distributor.

The court determined, however, that the 60-day cure provision is inapplicable in such circumstances. In the facts presented in *Wisconsin Compressed Air Corporation*, the manufacturer appointed the second distributor because it believed it would be a "better fit" and "sell better" in the territory. The court declined to interpret this as a "deficiency" on the part of the existing dealer that could be cured, because doing so could turn a nonexclusive dealership into an exclusive dealership, even when not contracted for by the parties. For example, each time the manufacturer wished to appoint a new distributor, the existing distributor would have 60 days to cure and to retain its sole dealership status. Thus, the manufacturer did not need to provide an opportunity to cure.

The court then addressed the available remedies for failure to provide 90 days' notice of the substantial change in competitive circumstances. It decided that when a dealer has no right to cure, it also does not have a right to injunctive relief. The only benefit that injunctive relief would provide in such a situation would be to require 90 days' notice, after which the manufacturer could again simply establish the competitive distributor. The court also acknowledged that damages would be difficult to determine, as the analysis may either be: 1) to determine damages based on the concept that the plaintiff would have another 90 days as the sole distributor in the territory; or 2) the premise that the plaintiff would have known about the distributorship 90 days earlier. The court asked for additional briefing on this issue.

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