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Resolving Venue and Jurisdictional Conflicts in Franchise Matters

What happens when the provisions in a franchise agreement conflict with the New Jersey Franchise Practices Act?

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When a franchisee located in New Jersey alleges that his franchisor located outside the state has violated the provisions of the New Jersey Franchise Practices Act (NJFPA) (N.J.S.A. §56:10-1, et seq.), a venue and jurisdictional conflict immediately develops. This is because the NJFPA provides for venue and jurisdiction in the New Jersey Superior Court, but the franchise agreement typically provides for venue and jurisdiction in the franchisor's home state.

In the recent case of *The Business Store v. Mail Boxes Etc*. (D.N.J. 11-3662 Feb. 16, 2012), the New Jersey federal court held that a forum selection clause in a franchise agreement for the state of California would not be given effect based upon the provisions of the NJFPA.

In *Advanced Technologies and Installation Corp. v. Nokia Siemens Networks US,* 2010 U.S. Dist. LEXIS 91370 (D. N.J. 2010), the court stated:

> [A] plaintiff's choice of forum is a "paramount consideration" and should not be "lightly disturbed." *Shutte v. Armco Steel Corp*., 431 F.2d 22, 25 (3d Cir. 1970) (internal quotation marks omitted). Indeed, "a strong presumption of convenience exists in favor of a domestic plaintiff's chosen forum, and this presumption may be overcome only when the balance of the public and private interests clearly favors an alternate forum." *Windt v. Qwest Communications Intern*., Inc., 529 F.3d 183, 190 (3d Cir. 2008). 2010 U.S. Dist. LEXIS 91370 at *17.

In *Traa v. Marriott Corp*., 2006 U.S. Dist. LEXIS 55342 (D. N.J. 2006), the court stated that one factor in deciding the venue of litigation is if one party "is far less financially capable of conducting this litigation outside this district." This is typically the case when the resources of the franchisee are compared with his franchisor.

Of critical and binding importance in franchise cases is the holding of the New Jersey Supreme Court in *Kubis & Persyzky Assocs. v. Sun Microsystems,* 146 N.J. 176, 195 (1996), that "forum selection clauses in franchise agreements are presumptively invalid, and should not be enforced unless the franchisor can satisfy the burden of proving that such a clause was not imposed on the franchisee unfairly on the basis of its superior bargaining position." The New Jersey Federal district court has largely agreed that the presumption set forth in *Kubis* is of substantial importance.

In *Kubis,* the court focused on the fundamental public policy concern that underpins the NJFPA, stating that:

> [T]he strongest single factor weighing against enforcement of forum-selection clauses is the Legislature's avowed purpose ... to level the playing field for New Jersey franchisees and prevent their exploitation by franchisors with superior economic resources. The enforcement of forum-selection clauses in franchise agreements would

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> frustrate the legislative purpose, and substantially circumvent the public policy underlying the Franchise Act.

Citing *Kubis*, the New Jersey federal district court held in *Goldwell of N.J. v. KPSS*, 622 F. Supp. 2d 168 (D.N.J. 2009), that forum selection clauses "are presumptively invalid where they appear in contracts subject to the NJFPA."

The New Jersey Federal district court held in *Mathews v. Rescuecom Corp*., 2006 U.S. Dist. LEXIS 8608 (D. N.J. 2006), "the policies behind and the provisions of the NJFPA affect the enforceability of the forum selection clause and impact any analysis of the appropriateness of transferring venue."

Faced with a lawsuit that it does not want to defend in New Jersey, a franchisor defendant will typically remove the case to the New Jersey federal court and then make a motion to dismiss or transfer the case to his home state. The plaintiff franchisee will respond by citing the NJFPA.

NJFPA §56:10-10 states:

> Any franchisee may bring an action against its franchisor for violation of this act in the Superior Court of the State of New Jersey to recover damages sustained by reason of any violation of this act and, where appropriate, shall be entitled to injunctive relief. Such franchisee, if successful, shall also be entitled to the costs of the action including but not limited to reasonable attorney's fees.

The plaintiff franchisee will then state that, pursuant to the NJFPA, litigation was commenced in the New Jersey Superior Court. The plaintiff will then claim that the case was removed to the New Jersey federal district court by the franchisor defendants for the sole purpose of frustrating the requirements of NJFPA and *Kubis*.

Naturally, this issue is not limited to New Jersey franchisees. Many states have laws regarding franchising. One example is the state of California. For the purpose of this article we will assume the franchisor is located in California and the franchisee in New Jersey.

California would not have any interest in having this case in California since California's franchise laws protect the interests of franchisees, not franchisors. This is demonstrated by the language of the California Franchise Investment Law, which states in part:

> California franchisees have suffered substantial losses where the franchisor or his or her representative has not provided full and complete information regarding the franchisor-franchisee relationship, the details of the contract between franchisor and franchisee, and the prior business experience of the franchisor.
>
> It is the intent of this law to provide each prospective franchisee with the information necessary to make an intelligent decision regarding franchises being offered. [California Corporations Code §31001].

This is also demonstrated by the California Franchise Relations Act, which states in part, "[e]xcept as otherwise provided by this chapter, no franchisor may terminate a franchise prior to the expiration of its term, except for good cause." Calif. Business and Professions Code §20020.

In fact, it is the public policy of California to allow a franchisee to litigate against his franchisor in the franchisee's home state. This is provided by a California law that allows a California franchisee to litigate against his franchisor in California, regardless of any contractual provisions to the contrary. The California Franchise Relations Act states "[a] provision in a franchise agreement restricting venue to a forum outside this state is void with respect to any claim arising under or relating to a franchise agreement involving a franchise business operating within this state." Calif. Business and Professions Code §20040.5.

Therefore, it is the public policy of both New Jersey and California to allow a franchisee to litigate against his franchisor in his home state. The public policy of allowing a franchisee to litigate in his home state is not limited to New Jersey and California. Many other states have this same protection for franchisees.

The franchisor is going to argue that the franchise agreement provides for venue in the franchisor's home state, the franchisee voluntarily agreed to this provision, all the franchisor's records and employees are in the franchisor's home state, the franchisor's witnesses are located in the franchisor's home state, and it is logical for the franchisor to have all litigation in one location.

The franchisee is going to argue that there is uneven bargaining power between him and his franchisor, the franchise agreement is a contract of adhesion, that he never specifically agreed to have to travel to the franchisor's home state for litigation, that his documents are in his home state, as corporate employees the franchisor's witnesses can be expected to travel to defend their employer, the franchisee cannot force nor can his witnesses afford to travel to the franchisor's home state for depositions and trial, and the costs of litigation can be more easily borne by the franchisor.

The issue of where the litigation is located is going to have a significant impact on any possible settlement negotiations. It is unlikely that the case will be settled until the court issues its ruling on the franchisor's motion to dismiss or change venue. Once the court issues its ruling, the chances for settlement increase greatly. While it will be inconvenient for a franchisor to continue to defend itself in the franchisee's state, it will probably have the resources to do so. However, if a franchisee is forced to litigate in a far-off location, the franchisee will have more pressure to settle due to these additional costs.

Based upon the authority cited above, it would appear that for most cases a New Jersey franchisee, a California franchisee and possibly franchisees in other states will be able to litigate their grievances against their franchisor in their home state. ■