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New Contracts in Kansas Can No Longer Contain Commonly Used Liability Indemnity Provisions

By William R. Wood II

The 2008 Kansas Legislature passed a statute that declares void as against Kansas public policy long-standing contract risk-allocation provisions in many commercial contracts — including franchise and dealership contracts. The story begins in 2004, when the legislature enacted a prohibition against liability indemnity provisions in construction contracts. After several years of discussions, lawmakers passed a new statute, which amends K.S.A. §16-121, to prohibit indemnity, additional-insured, choice-of-law and forum-selection provisions in a broad array of Kansas construction, manufacturing, transportation, dealership, and franchise contracts (collectively defined by the statute as "Contracts") entered into after Jan. 1, 2009. As described below, certain aspects of the statute may also apply to contracts entered into before that date.

Common Provisions

Indemnity and insurance provisions are common and accepted terms in many commercial contracts. Indemnification agreements transfer risk and assign future liability arising from the contract performance. They remove doubt about future legal liability and avoid application of the comparative fault rule to marginally involved defendants. The Kansas courts have historically enforced these risk-allocation provisions.

As an alternative or in addition to indemnity, contracting parties can agree to allocate risk among their respective insurance carriers. In response to an identified need in the marketplace, the insurance market developed "additional insured" coverage, under which liability coverage is extended to someone other than the policyholder. For example, a franchisee may for a price name a franchisor as an additional-insured on the franchisee's commercial general liability policy. But no more in Kansas.

Prohibited Contract Terms

The 2008 statute severely hamstrings the ability of private parties to contract around the Kansas comparative-fault rule, under which parties generally bear

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Attorneys' Fees Awards: No License To Pickpocket

By Rupert M. Barkoff

It is generally thought that a contract provision awarding attorneys' fees to a prevailing party will be enforced. The most recent saga in the Domino's system's equipment dispute confirms this principle, but, at the same time, suggests that courts will, when appropriate, restrict the amount of the award. (Background: In *Bores v. Domino's Pizza LLC*, 489 F. Supp. 2d 940 (D. Minn. 2007), the trial court ruled in favor of the franchisee-plaintiffs in a dispute about whether the franchisor could impose certain purchasing restrictions on its franchisees. The decision was reversed by the Eight Circuit, which remanded with direction for the trial court to enter judgment in favor of franchisor Domino's. *Bores v. Domino's Pizza LLC*, 530 F.3d 671 (8th Cir. 2008).) From a counseling standpoint, there are several lessons to be learned from the trial court's ruling, the main lesson being: Don't spend an attorneys' award until the money is in the bank.

If the true objective for awarding attorneys' fees is to reduce the cost of litigation if successful, the first issue for consideration is whether the other party will be able to pay. Usually, this is a problem for the franchisor, and not for the franchisee that prevails, although recent economic downturns might alter

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responsibility for accidents in proportion to their fault for that accident. The new statute generally renders void and unenforceable:

- Contract terms that require indemnification for negligence or intentional acts or omissions of the indemnified party. The definition of "indemnification provision" includes a promise, agreement, clause, or understanding "in connection with, contained in, or collateral to a [C]ontract";
- Contract terms that require the extension of liability coverage to another party by naming them as an additional-insured for liability arising from their own actions; and
- Choice-of-law and forum-selection clauses in covered Contracts. Kansas law will apply to and govern every Contract that is performed in Kansas, and all disputes will be resolved in a Kansas arbitration or court forum.

Contracts Subject to Regulation

The 2004 statute covered only agreements for the design, construction, alteration, renovation, repair, or maintenance of a structure, road (except oil-field road), bridge, waste, sewer, or oil or gas line. The 2008 statute exponentially expands its breadth to include:

- dealership agreements between an equipment manufacturer or service provider and an equipment or service dealer, which provide for the purchase or sale of equipment or services;
- motor carrier transportation contracts covering the storage and transportation of property by a motor carrier and the entrance onto property by the motor carrier for the purpose of loading, unloading, or transporting property. A motor carrier transportation contract does not include a uniform intermodal interchange and facilities access agreement; and
- franchise agreements, which are defined in the 2008 statute as follows:

"Franchise agreement" means any contract or franchise or any other terminology used to describe the contractual relationship between manufacturers, distributors and dealers, by which:

"(A) A right is granted one party to engage in the business of offering, selling or otherwise distributing goods or services under a marketing plan or system prescribed in substantial part by the other party, and in which there is a community of interest in the marketing of goods or services at wholesale or retail, by lease, agreement or otherwise; and

"(B) the operation of the grantee's business pursuant to such agreement is substantially associated with the grantor's trademark, service mark, trade name, logotype, advertising or other commercial symbol designating the grantor or an affiliate of the grantor."

The 2008 statute does not define the terms "manufacturers," "distributors," or "dealers." The remainder of the definition of a "franchise agreement" is quite broad, and because the point of virtually every franchise arrangement from the perspective of the franchisee is to offer, sell, or otherwise distribute goods or services, the 2008 statute arguably covers virtually all franchise arrangements.

The franchise agreements of many franchise systems have historically allocated all risks for any loss or damage relating to the operation of the franchised unit to the franchisee, and required the franchisee to list the franchisor as an additional-insured on the franchisee's liability policies.

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Franchising

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The justification for these provisions from the franchisor's perspective was that the franchisee should bear all costs relating to the operation of the franchised unit, including costs relating to claims from customers who are allegedly injured on the franchised premises. Because the franchisee agreed to indemnify the franchisor from these claims and to list the franchisor as an additional insured, the franchisee and its insurance company, and not the franchisor or its insurance company, are obligated to bear the cost of defending and paying such claims. Except for the limited safe harbors described in this article, the 2008 statute substantially limits these common allocation-of-risk provisions.

Choice of Law and Venue

As noted, the 2008 Kansas Legislature determined that Kansas law will govern all Contracts to be performed in Kansas, and that disputes will be resolved in a Kansas arbitration or court forum. The 2008 statute's choice-of-law and venue requirements are not limited to contractual provisions and disputes relating to indemnification or insurance, but instead appear to cover the entire franchise agreement or other Contract and any dispute arising from the franchise agreement or other Contract. While the 2008 statute's mandates relating to indemnification and additional-insured provisions clearly only apply to provisions entered into after Jan. 1, 2009, the statute's Kansas venue and choice-of-law requirements, as drafted, apply to all Contracts. To the extent a court or arbitration panel is asked to apply the provisions of the statute to existing Contracts, it may also get the opportunity to address related potential constitutional issues.

Limited Safe Harbors

The 2008 statute specifically preserves the most-obvious form of indemnity obligation — the validity of an insurance contract or construction bond issued by an insurer or bonding company. It also preserves the vitality of contract provisions: 1) obligating a contractor or owner to provide general liability insurance or railroad protective insurance; 2) obligating an owner to indemnify a contractor for strict liability under environmental laws; and 3) incorporating an indemnity obligation integral to settlement of a construction contract dispute.

The legislature, in a nod to the freedom of contract, did create two safe harbors for use by sophisticated contracting parties and their counsel in allocating liability risk in their transactions. First, the statute preserves the enforceability of a separately negotiated provision in which the parties agree to a "reasonable allocation of risk," if it is based on industry loss experience and supported by adequate consideration. The legislature did not attempt to define the bounds of reasonableness or specify the criteria for a provision to be "separately negotiated," leaving abundant opportunity for legal challenges to the enforceability of the provision that — by definition — will arise only after the risk has manifested itself. From a practical perspective, in the franchise context, the requirement that the provision be separately negotiated will, at a minimum, encumber the historic franchise sales process with an additional agreement and enhanced disclosures.

Second, the statute enables parties to allocate risk through indemnity underwritten by liability insurance. The indemnity obligation must be limited to the extent of coverage and dollar limits of the insurance. In the case of a unilateral indemnity obligation (under which only one party agrees to indemnify the other without a reciprocal obligation), the coverage must be obtained through a separate liability insurance policy procured at the indemnified party's expense. This final alternative will undoubtedly increase the cost of the transaction, but it will provide the most secure allocation of risk for all but the most catastrophic of accidents. Franchisors will want to review their own insurance coverage and determine whether it is cost-effective to acquire the additional liability coverage allowed by the 2008 statute (at the franchisor's expense) to take advantage of this safe harbor.

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the presumption here. In a large percentage of the cases, the franchisee is gasping for air when proceedings have been commenced. Too many franchisees fail or have issues because they are undercapitalized. Where this is the case, the franchisor, if it prevails, may have problems collecting any judgment granted in its favor. Collecting attorneys' fees will only compound a collectability problem that may already exist.

In analyzing the impact of the *Domino's* case, one needs to step back in the process to the point where the franchisor has won the decision, and then must argue that the attorneys' fees award is appropriate, and as such, what the appropriate amount of the award should be. The court in *Domino's* had little difficulty deciding that, in light of the contractual obligations agreed to by the parties, an award of attorneys' fees would be made in this case. The contract clearly called for an award, and the court found no reasons not to honor the parties' intentions, notwithstanding some creative lawyering by the plaintiff's attorneys. The plaintiffs argued, among other things, the *Noerr-Pennington* doctrine, as well as that Domino's should prevail if the

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Auto Dealer Can Bring 'Bad Faith' Statutory Claim

By Douglas M. Mansfield and J. Todd Kennard

An appellate court recently ruled that an automobile dealership that could not file suit to enjoin an additional dealership under the statute's specific additional "add-point" statute could nevertheless file an administrative proceeding based on a "generic" statute that prohibits conduct by a manufacturer that is "capricious, in bad faith, or unconscionable." See *Parktown Imports, Inc. v. Audi of America*, No. 2008 WL 2651175 (Mo. Ct. App. W.D. July 8, 2008). The Missouri Administrative Hearing Commission dismissed the dealer's application for review, but the court of appeals reversed the dismissal. The appellate decision (which is on further appeal) sets a precedent with potentially serious implications for automobile manufacturers and other franchisors or distributors because it allows actions to block network changes on a mere claim of "bad faith" even when there is no standing to bring suit under a specific provision governing network changes.

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plaintiffs had acted unreasonably in bringing and prosecuting the litigation.

As for the amount of the award, the court was troubled for various reasons by the franchisor's request for $1.2 million.

The first concern of the *Domino's* court was that of hourly rates. In this case, the franchisor had retained as primary counsel a law firm, based in Minneapolis, whose rates were considerably lower than the prevailing rates in larger cities such as Washington, DC, New York, and Los Angeles, and the Minneapolis-based court had no trouble with the rates of Minneapolis firms. However, Domino's had called for assistance from attorneys from cities where the hourly rates of legal counsel were considerably higher. The court did not conclude that it was inappropriate to hire attorneys from other cities, but it questioned whether it was necessary to hire legal counsel from higher-rate jurisdictions when attorneys with appropriate experience might have been available in the local market.

Second, the court considered the staffing issue, noting that there appeared to be too many cooks in the kitchen.

Third, the court looked at the number of hours spent on the case: around 2200. The court examined whether it was necessary for the franchisor to have its attorneys spend this amount of time on a case that the court considered essentially to be nothing more than a contract interpretation dispute. The court was particularly upset by the amount of time spent on discovery issues, most of which, the court concluded, were sideshows to the main issues.

The court also found that some of the items included in the request for attorneys' fees, such as responding to an auditor's response request, were simply inapplicable.

And finally, the court criticized the documentation provided to the court in support of Domino's motion for its attorneys' fee award, as well as the descriptions recorded in counsels' time records. The court found general task descriptions such as "review memos" and "gather information and respond to client's request" to be too vague, and, therefore, not eligible for inclusion in a fee award.

In the end, the court reduced the requested amount of $1.2 million (of which more than $200,000 was costs), to $450,000, which included costs. Interestingly, while the court noted that it had carefully reviewed the time sheets submitted by Domino's counsel, the court did not specifically indicate how it determined how much the award should be.

The lessons to be learned if your client is hoping for a grand slam on an attorneys' fees motion are:

- If the proceeding is brought in a low-rate jurisdiction, hire local talent or talent from other low-cost jurisdictions.
- Instruct counsel to keep detailed and specific time entries.
- Unless there are very persuasive strategic reasons to the contrary, avoid a scorched earth policy in pursuing or attending the litigation. This makes sense even in the absence of an expectation of an attorneys' fees recovery.
- Focus your litigation strategy: As for what is necessary or important, concentrate (as time pressures and workload permit) the work within as few attorneys as makes sense, and don't try to bring irrelevant items into the motion to recover attorneys' fees.

In reading the court's decision, one senses a particular irritation about Domino's request, but keep in mind that the trial court's earlier decision in favor of the franchisees had been reversed by the Eighth Circuit. Thus, the reduction in the attorneys' fees should not have come as a surprise to Domino's.

For Domino's, this case was a major challenge to its rights as a franchisor. Thus, one might conclude that the number of dollars spent on attorneys was clearly secondary to a perceived need by Domino's for a strong precedent establishing its ability to control the point-of-sale systems used in its units. Nevertheless, one must question the efficacy of our judicial system, as well as how decisions regarding litigation strategies are formulated. In the Gilbert and Sullivan operetta *Mikado*, one song works from a base line, "Let the punishment fit the crime." Perhaps, this was the message that the *Domino's* judge was trying to impart upon the parties to this and other litigation. Attorneys' fees award provisions will not serve as a license to pick other people's pockets.

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The protesting dealer, Parktown Imports, Inc. (one of two Audi dealerships in the St. Louis area), filed an application for review contesting Audi's decision to establish a new motor vehicle dealership within 10 miles of Parktown's dealership. The application alleged that Audi engaged in conduct that was capricious, in bad faith, or unconscionable and therefore violated §407.825(1) of the Missouri Revised Code. Parktown further claimed that in 2004, Audi had invited Parktown to submit an application to acquire a new stand-alone dealership west of St. Louis. Parktown responded that it did not want to relocate and that it did not think the market could support three Audi dealerships. Audi then sent a letter explaining that the third dealership location was not a final decision and that it would base its decision on the proposals received from area dealerships. Parktown also asserted that in May 2005 Audi suggested that if Parktown were to replace its current facility with a new stand-alone facility of Audi's design, the manufacturer would not establish the third dealership. At a subsequent meeting, Audi proposed that if Parktown were willing to buy Plaza Motors (the other St. Louis dealership), Audi would grant Parktown a right of first refusal to open a new sales point in the area west of St. Louis. Parktown did not accept the proposal and claimed that in the fall of 2005 Audi told Parktown that it was no longer pursuing a third dealership.

About a year later, Audi attempted to buy Plaza Motors. When Plaza refused Audi's offer, Audi informed Parktown that the third location would be re-opened. Parktown claimed it was told that a third dealership would be operated within 10 miles of Parktown's dealership on the same road, and that the dealership would be established because of Audi's dissatisfaction with Parktown's location and sales capacity. Parktown asserted that the proposed facility would not meet Audi's original specifications for a third dealership for two reasons: It was not in the area originally proposed, and it would not be a stand-alone facility. Parktown claimed that another applicant (that Audi rejected) was willing to open an exclusive dealership in the location Audi had originally designated. Parktown alleged that the decision to open the new dealership was in retaliation for Parktown's rejection of Audi's proposals and that Audi's conduct was capricious, in bad faith, and unconscionable.

Audi moved to dismiss Parktown's administrative proceeding, arguing that the "capricious, in bad faith, or unconscionable standard" in §407.825(1) could not be the basis of a protest because another provision of the statute (§407.817) deals specifically with protests related to proposed additional dealerships. Parktown was too far away under the statute to block the additional dealership under the latter provision. The agency agreed with Audi and dismissed Parktown's administrative action. It concluded that §407.817 was a later-enacted and more specific provision that controlled over the general prohibitions of §407.825(1). Therefore, the agency lacked jurisdiction to hear the application.

Reversal Problematic

In reversing the dismissal, the court of appeals found "[t]here is little doubt" that a dealership could have challenged a manufacturer's conduct in proposing a new dealership "damagingly close" to the existing dealership as conduct that was capricious, in bad faith, or unconscionable before the statute was amended in 2001 to include §407.817, the provision specifically related to protests of new dealerships. The court found that the two sections "do not address the same subject matter." The new provision regulates any plan to add a dealership when existing dealerships are within the relevant market area (with notice and protest provisions). The older provision (§407.825(1)) provides relief only from conduct of a manufacturer that is capricious, in bad faith, or unconscionable and does not require notice to the dealership of proposed additional dealerships.

The court also found that even if there were overlap in the subject matter of the two provisions, this overlap would not establish that §407.817 was the sole means to challenge an additional dealership, even though it deals specifically with additional dealerships. The court concluded that there is no necessary repugnancy between the provisions because the geographical standing and timing requirements of §407.817 do not extend to Parktown the procedural advantages reserved by the statute. That provision remains available only to those dealerships falling within the relevant market area and filing their administrative actions in the allotted time frame. In so ruling, the court explained that it took into account the purpose of the statute, which the court found was to protect dealerships from "the harsh economic inequities inherent in the relationship between dealerships and manufacturers." The court found it "difficult" to reach the conclusion that the legislature intended the addition of §407.817 to limit protections granted to dealerships rather than to expand them. The additional dealership provision was apparently drafted "as a preliminary roadblock to protect dealerships from unnecessary competition in markets that would not support additional sales points." The court found that the section presumes that dealers would be injured unnecessarily by such competition and places the burden of notifying the dealership and showing good cause before acting on the manufacturer:

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COURT WATCH

By Charles G. Miller and C. Griffith Towle

Forum-Selection Clauses Enforced

A few recent decisions have again tackled the question of whether a choice of forum clause will be enforced contrary to arguments that enforcement is prohibited by state franchise protections laws. The fitness industry seems somewhat prone to having such provisions.

In *Luv2Bfit, Inc. v. Curves, International*, CCH Bus. Franchise Guide 13,996 (S.D.N.Y., Sept. 29, 2008), the court was faced with forum-selection clauses in a number of franchise agreements designating either the Western District of Texas or the state or forum where the franchisor's principal place of business was located as the appropriate forum for litigation. The franchisees sued in federal court in New York with the hope of invoking the New York Franchise Sales Act ("NYFSA") to protect their venue selection. The franchisor moved to dismiss for improper venue, or to transfer to Texas based on forum non-conveniens.

The franchisees argued that such a forum-selection provision was unenforceable because it violated the "anti-waiver" provision contained in the NYFSA that voided any provision in a franchise agreement requiring a franchisee to "waive compliance with any provision of this law, or rule promulgated hereunder …" (§687.4, NYFSA). Unfortunately for the franchisees, they pointed to no specific provision in the NYFSA that required litigation to be maintained in New York. The court therefore found the forum-selection clauses to be enforceable because they did not have the effect of contracting out any liability of the franchisor for franchise violations.

Some states have provisions that can be read as requiring litigation involving the relevant franchise act to be maintained in that state and therefore preclude enforcement of forum selection clauses. See, *e.g. Pepe v. GNC Franchising, Inc.*, 750 A.2d 1167 (Conn. Super. Ct. 2000) (applying Connecticut's anti-wavier law, which specified that franchisees could bring suit in Connecticut); California Franchise Relations Act, Cal. Bus & Prof. Code §20040.5). The New York court did not dismiss the case based on the forum-selection clause, but it considered whether it should be transferred on the grounds of forum non-conveniens. It acknowledged that the forum-selection clause should be given great weight but was not determinative. Once the clause was found valid, however, the burden shifted to the franchisees to show why it should not be enforced. The court discounted the franchisees' argument that it would be inconvenient and expensive for them to litigate in Texas, noting that it is just as inconvenient to the other party to litigate in New York. It also discounted any argument that relied on the location of documents, since faxing and scanning neutralize any concerns. The primary factor for the court was the "locus of operative facts," which it also found to be neutral since New York and Texas both had contact with the operative facts.

Interestingly, the court did find that since New York franchise law would apply, it weighed in the franchisee's favor that the case be decided by a New York judge. The defendant was able to offset this by pointing out that other cases pending in Texas would reduce wastefulness of time, energy, and money. When all was said and done, the court ordered transfer to Texas based on the great weight to be given to the forum-selection clause.

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"It would be absurd for this court to hold that, simply because the conduct of a manufacturer is related to the establishment of a new sales point and the dealership is without standing to bring an add-point protest under §407.817, the manufacturer would not be bound by the limitations placed on its conduct by §407.825(1)." The court also rejected Audi's constitutional arguments, including the argument that allowing a complaint under §407.825(1) would essentially create a statewide automatic add point protest right, reasoning that only dealerships with standing under §407.825(1) are those that have been dealt with in a manner designated as unlawful and that have been directly damaged.

The matter is now before the Missouri Supreme Court. The *Parktown* decision should be troubling to automobile manufacturers and other franchisors that deal with statutes that regulate the establishment of additional dealerships or franchise locations. One potential issue, which the *Parktown* court did not address, is what could happen when a dealer that has no standing under the additional dealership statute and was therefore not required to be given notice of the proposed additional dealership (within the 30-day timing requirement for filing a protest) nevertheless tries to block an additional dealership or relocation under the "generic" "bad faith" provision. Because there is apparently no expedited time frame for resolving "generic" claims for claimed capricious, bad faith, or unconscionable conduct, the protesting dealership could tie up the litigation, which could affect the new or relocating dealership's plans. Under *Parktown's* reasoning, the claim would not necessarily be barred as a matter of law, and the manufacturer (and perhaps the new or relocating dealer) could face substantial claims for damages and perhaps injunctive relief to try to shut down the new dealership. Even under the best-case scenario, the manufacturer would potentially have to hire attorneys, endure expensive and burdensome discovery, win on a motion for summary judgment, and defend appeals for several years.

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Meanwhile, in the Northwest, another federal court enforced a forum-selection clause over the objections of the franchisee that relied on the New Jersey Franchise Practices Act ("NJFPA"). In *Anytime Fitness, Inc. v. Reserve Holdings, LLC*, CCH Bus. Franchise Guide 14,012 (D.Minn., Sept. 12, 2008), the franchisor terminated the franchise agreement and sued the franchisee in Minnesota, based on a forum-selection clause, to enforce the post-termination provisions of the franchise agreement. The franchisee moved to dismiss on the ground that the Minnesota forum-selection clause was invalid under the NJFPA as interpreted in *Kubis & Perszyk Assocs., Inc. v. Sun Microsystems, Inc.*, 680 A.2d 618 (N.J. 1996), which held that forum-selection clauses were in violation of the NJFPA. The franchisee was a New Jersey company doing business in New Jersey, and moved to dismiss for improper venue.

It would seem that the franchisee's argument had a chance of succeeding before the Minnesota court based in *Kubis*. Surprisingly, the Minnesota court ruled that the forum-selection clause was enforceable and that *Kubis* did not apply because no claim had been brought by the franchisee under the NJFPA. This holding is somewhat surprising because the franchisee did not bring the case in the first place, and was thus not in a position to bring any claims. In fact, if it had brought any claims as counterclaims based on the NJFPA, it is possible that the court would have ruled that the objections to improper venue had been waived. So, this is a "Catch-22" situation for a franchisee that is found in the position of a defendant in attempting to invalidate a forum-selection clause.

'No-Reliance' Clauses Alive and Well in the Seventh Circuit

So-called "no reliance" clauses are common in franchise and distribution agreements, as well as in many other forms of written agreements. The principal purpose of these provisions is to provide certainty in contracts and to preclude claims that the parties agreed to terms not otherwise contained in the written agreement. Notwithstanding their prevalence, no-reliance provisions are often ignored or disregarded by courts. These provisions, however, are alive and well in the Seventh Circuit, as evidenced by a recent split decision authored by Judge Richard Posner affirming an Illinois District Court's granting of summary judgment to a manufacturer on the basis of such a clause.

The facts in *Extra Equipamentos E Exportacao LTDA v. Case Corporation*, Bus. Franchise Guide (CCH) 13,975 (7th Cir. Sept. 3, 2008) are somewhat convoluted. Case is a U.S.-based manufacturer of farm and construction equipment. Case Brasil & Cia is a wholly owned subsidiary of Case and is based in Brazil. Extra (a Brazilian distributor) entered into an agreement with Case Brasil to distribute Case's products in Brazil. Extra subsequently filed suit against Case Brasil in a Brazilian court alleging that Case Brasil was overcharging Extra. Thereafter, Extra and Case Brasil entered into a "release of claims and settlement of certain obligations" agreement ("the release"). The release was negotiated and signed in Illinois by Extra's president and a vice president of Case on behalf of Case Brasil. No one employed by Case Brasil participated in the negotiations or signed the release.

As part of the release, Case Brasil agreed that it would seek no more than $2 million in past-due payments purportedly owed by Extra. Extra claimed that Case also orally agreed that Case Brasil would retain Extra as a distributor in good standing. In exchange, Extra agreed to, among other things, dismiss its lawsuit against Case Brasil.

Extra performed its obligations as required by the release. However, shortly after the release was signed, Case Brasil terminated Extra as a distributor, claiming that it had not authorized Case to enter into the release on its behalf and was not bound by it. In response, Extra filed another lawsuit against Case Brasil in Brazil. Extra also filed a lawsuit against Case in Illinois District Court claiming that Case (not Case Brasil) fraudulently induced Extra into entering into the release which it had no intention of fulfilling (indeed, could not fulfill, as evidenced by Case Brasil's subsequent termination of Extra as a distributor).

Case filed a motion for summary judgment on the ground that Extra could not establish reliance — a necessary element of a fraud claim — due to the no-reliance clause. The district court granted Case's motion, and Extra appealed to the Seventh Circuit.

In affirming the district court's decision, Posner delved into the complex relationship between basic contract law, (including the application of the parol evidence rule, integration clauses, and issues of contract interpretation) and fraud claims related to or arising out of a written contract. Posner noted that fraud claims are frequently asserted in an effort to circumvent the parol evidence rule and to vary the express terms of a written agreement on the basis of oral statements allegedly made before the agreement was entered into, and that no-reliance clauses are intended to defeat such end runs.

Extra did not claim that it did not understand the no-reliance clause or was somehow defrauded regarding the meaning of this clause. Rather, Extra claimed that the no-reliance clause was not applicable because its fraud claims were based on representations made by Case (not Case Brasil nor any person representing it).

In rejecting Extra's claims, Posner noted the inherent inconsistency in what Extra was alleging and the relief it was seeking. Extra could not claim that the individual who had signed the agreement on behalf of Case Brasil lacked actual or apparent authority in that such an argument would, if successful, render the release unenforceable, and Extra actually wanted to obtain the benefits specifically agreed to in the release (*e.g.*, the $2 million cap on the amounts owed to Case Brasil). Thus, Case Brasil was compelled to argue that the allegedly fraudulent representations were actually made on behalf of Case (not Case Brasil), even though the release was specifically signed on behalf of Case Brasil. Posner was not impressed with Extra's arguments and characterized it as "wordplay." Posner concluded

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Movers & Shakers

Franchisee Associations Show Turnover at Top

Two major franchisee associations have shifted to new leadership recently.

In November 2008, the North American Association of Subway Franchisees ("NAASF") named **Illya Berecz** as the new executive director of the organization, a position she had been holding on an interim basis since March 2008.

NAASF is one of the nation's largest independent franchisee associations, representing about 5,600 franchise owners who operate more than 15,000 Subway restaurants.

Berecz joined the Subway Franchisee Advertising Fund Trust in 1987 and stayed there until joining NAASF as communications director in 2000.

Berecz said that NAASF's legislative priorities for 2009 include opposition to the Employee Free Choice Act, which would make it easier for employees to unionize, and opposition to the Lilly Ledbetter Fair Pay Act, which "would virtually eliminate the statute of limitations on many pay discrimination-based lawsuits and lead to unnecessary lawsuits that would not be admissible under reasonable circumstances."

In December, the Dunkin' Donuts Independent Franchise Owners ("DDIFO") association announced that **Mark Dubinsky** resigned after two years as president and COO, and that **Jim Coen** would serve as acting president and COO, while a long-term replacement is found. Coen is a consultant and adviser to franchisees and franchisee associations, and he is the executive director of the New England Franchisee Association.

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News Briefs

IFA Declares Union Check-Off to Be Primary Legislative Concern

The International Franchise Association ("IFA") has declared defeating the Employee Free Choice Act to be a "top priority" for 2009. The Act, commonly known as "Card Check," would ease union organizing, bring mandatory arbitration quickly into play in labor negotiations, and raise penalties on businesses for violating labor laws.

Defeating the bill will be a major challenge for IFA and the dozens of business groups that have lined up to oppose the legislation. Not only have Democratic leaders in the House and Senate said that they will pass the bill, but President-Elect Barack Obama co-sponsored Card Check legislation when he was in the Senate. Obama said during the presidential campaign that he would sign a Card Check bill, and his position has not changed in the last few weeks, even as business groups have said that Card Check would raise their costs during a recession. For example, Obama told the *Los Angeles Times* on Dec. 9: "When it comes to unions, I have consistently said that I want to strengthen the union movement in this country and put an end to the kinds of barriers and roadblocks that are in the way of workers legitimately coming together in order to form a union and bargain collectively."

Card Check would represent significant changes in labor law. Currently, when a majority of workers in a bargaining unit sign cards indicating that they want to form a union, their employer can either recognize the union or demand a secret ballot; if more than half the affected workers vote for the union, then it is recognized. In practice, employers always demand a secret ballot, and many union-organizing efforts fail at this stage.

The Card Check law would require that employers recognize unions when a majority of workers in a prospective bargaining unit sign union cards.

"This legislation is not labor reform. The legislation is an assault on the rights of employees and employers," the IFA stated in letters that it sent in early December to every member of the House and Senate. "Members of Congress recognize that a secret ballot is a superior method of validating the views of the majority since all congressional leadership elections on both sides of the political aisle are conducted with a secret ballot. Why should employees be exposed to a grossly inferior standard of protection in the workplace?"

IFA believes that the law would intimidate workers into joining a union because they could not register their preferences in a secret ballot. Union advocates say that that the Card Check system would counterbalance intimidation of workers by management.

The proposed legislation also provides for a binding arbitration process if a first contract is not agreed to within 120 days of union recognition. But IFA's letter noted that having the fallback of binding arbitration would be likely to reduce parties' incentives to bargain in good faith.

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Court Watch

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that the no-reliance clause applied and made Extra's claimed reliance on the purported oral misrepresentations unreasonable as a matter of law.

Judge Kenneth F. Ripple concurred in the majority's decision affirming the summary judgment as to Extra's fraud claim, but he dissented as to its holding regarding Extra's promissory fraud claim. Ripple was of the view that a promissory fraud claim in which the underlying promise or representation of future conduct is alleged to be the scheme employed to accomplish the fraud survives a no-reliance clause.

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