

I. HOT LITIGATION TOPICS IN FRANCHISING

by Charles G. Miller

Franchising is a breeding ground for litigation because of the unique relationship between the parties. The purchase of a franchise will often involve a substantial initial investment along with a continuing royalty payment. In return, the franchisee expects to obtain the expertise of the franchisor embodied in a well known trademark and on-going support. A franchisee also expects that he or she will be successful in large part due to the track-record of the franchisor.

When a franchisee is not as successful as expected or when the franchisee perceives that the franchisor is not providing the proper support, the seeds for litigation are planted. In anticipation that litigation may arise, many franchisors have included in the franchise agreements provisions limiting the amount of damages, waiving the right to jury trial, requiring arbitration, and selecting the venue for the action.

The most common litigated issues in franchising involve earnings claims, encroachment, and covenants not to compete. This is not surprising since most people will normally not invest in a business without having some idea of how much it will make, and will usually attempt to extract some promise of exclusivity before making any financial investment. When the investment goes sour or the franchisee perceives it is no longer getting the necessary support, the franchisee will often decide to continue in the business without using the franchisor's trademark.

Franchise litigation will often initially be subsumed in procedural issues about whether the dispute must be arbitrated and where. Resolution of these issues has a profound impact on the resolution of the dispute, since a franchisee may find it cost prohibitive to litigate in a far-away forum or its appetite is dampened when it has to forego a jury trial.

This paper is not intended to be an exhaustive treatment of these issues. Excellent sources for more in depth treatment can be found in the various publications of the American Bar Association Forum on Franchising and the International Franchise Association. The ABA Forum on Franchising publishes a Quarterly Journal and an annual compilation of papers presented at its annual meeting in October. Similarly the IFA publishes a Legal Digest and a compilation of papers presented at its annual Legal Symposium in May. These publications can be obtained

for a fee from these two organizations. The California State Bar Franchise Law Committee also publishes recent case synopses on its website at www.calbar.org/2sections.htm.

II. Earnings Claims

It is difficult for a franchisor to sell a franchise without giving the franchisee information about the earnings potential of the franchise. Many franchisors choose to include "earnings claims" in the disclosure document given to the franchise (known as the Uniform Franchise Offering Circular or UFOC). States like California permit the UFOC format adopted by the North American Securities Administrators Association, Inc. ("NASAA") to be utilized. If a franchisor decides to make an earnings claim, it must follow the NASAA guidelines, which have been approved by the Federal Trade Commission and various state agencies. Those guidelines deal with the type and nature of information which can be relied upon, and many franchisors choose not to make earnings claims in their UFOCs. Nonetheless, there are many cases involving claims by franchisees that earnings claims were in fact made by overzealous salespersons.

Franchisors have for the most part been successful in fending off such claims based on the application of the parol evidence rule and lack of reliance due to the presence of an integration clause. Most franchise agreements contain a standard integration clause to the effect that there are no promises made other than what is contained in the contract and that no salesperson has the authority to make any representations not contained in the UFOC. Most courts have held that promises as to future earnings and the like will be barred by the parol evidence rule where there is an integration clause, and in particular, provisions negating any earnings claims (i.e., "the franchisor makes no promise as to how much you will earn"). See, e.g., *Scott v. Minuteman Press International, Inc.*, Bus. Fran. Guide (CCH) ¶ 10,344 (N.D. Cal. 1993), affirmed 68 F.3d 481 (unpublished) (9th Cir. 1995); *Carlock v. Pillsbury Co.*, 719 F.Supp. 791 (D. Minn. 1989). See also, *Cook v. Little Caesar Enterprises, Inc.*, 210 F.3d 653 (6th Cir. 2000) and *Hobin v. Coldwell Banker Residential Affiliates, Inc.*, Bus. Fran. Guide (CCH) ¶ 11,781 (N.H. Sup. Ct. January 31, 2000), which involved encroachment claims. Cases like *Carlock* and *Little Caesar* hold that there can be no reasonable reliance on a statement made by someone who is known to have no authority to make the statement and in the face of contractual language that warns that no such promises have been made.

The Minuteman Press case is an excellent example of how a court dealt with earnings claims that could be divided between promises and factual representations. Fraudulent promises that were at variance with the terms of the written agreement were barred by the parol evidence rule. However, the fraud exception to the parol evidence rule would permit evidence of factual misrepresentations, notwithstanding the contract language. The difficulty is in separating "promises" from "factual representations," i.e., "you will earn \$10,000 per month" vs. "others have earned \$10,000 per month."

A recent franchise decision involving fraud and misrepresentation claims is *California Bagel Company v. American Bagel Company*, Bus. Fran. Guide (CCH) ¶ 11,880 (C.D. Cal. 2000). This case dealt with a number of issues that are often raised in common law fraud and California Franchise Investment Law ("CFIL"), §§ 31000 et seq., Cal. Corps. Code cases, including: 1) whether the parol evidence rule precludes CFIL claims by virtue of the anti-waiver provision in § 31512 Cal. Corps. Code; and 2) whether justifiable reliance is a necessary element of a CFIL claim.

The court granted the franchisor's motion for summary judgment and held that false representations concerning actual performance of other franchises would not be barred by the parol evidence rule or integration clause, but that false statements as to future earnings would be so barred. However, a standard disclaimer clause to the effect that agents of the franchisor had no authority to make statements about existing franchises or future or actual earnings negated any justifiable reliance on those statements. Moreover, common "acknowledgements" (i.e., "franchisee hereby acknowledges that no representations concerning earnings, etc. were made") executed by the franchisee estopped the franchisee from making any claims to the contrary under sections 622 and 623 of the California Evidence Code.

In its discussion of the parol evidence rule, the court concluded, in line with *Minuteman*, supra, that under California law, "promissory fraud" was not actionable unless the false promise is independent of or consistent with the written agreement. The court found that the statements as to existing store profits were independent and not barred by the parol evidence rule. However, plaintiff's reliance on those representations was unreasonable as a matter of law due to the disclaimers in the offering circular that limited the authority of the agents of the franchisor.

The franchisees argued that applying the parol evidence rule to CFIL claims would run counter to the anti-waiver provision of section 31512, supra, which prohibits clauses in a franchise agreement which require the franchisee to waive any rights under the CFIL. The court rejected that argument, finding that the parol evidence rule was a matter of substantive law and thus not covered by section 31512. In a footnote, the court noted that section 31201 of the CFIL (prohibiting use of false or misleading oral communications) might be read as trumping the above integration/parol evidence rules, but then did not decide that issue (presumably because it held, infra, that a 31201 claim requires justifiable reliance), other than to say: "This suggests that the legislature intended that plaintiffs be able to base their statutory violation claims on statements at odds with the language of the franchise agreement, even though such statements would not support a common law fraud or negligent misrepresentation claim."

There has been some debate in the franchise community as to whether the civil remedies for rescission and damages under the CFIL require a showing of justifiable reliance or whether they impose some form of strict liability. Based in large part on authorities in other jurisdictions, the court held in California Bagel that plaintiffs must prove justifiable reliance for claims made under § 31301 (prohibiting fraudulent misrepresentations or omissions in the sale of franchises) as well as claims made under § 31300 (prohibiting fraudulent misrepresentations or omissions in documents filed with the Commissioner) . This holding was based in part on the fact that § 31301 refers to reliance. Although § 31300 does not contain a reference to reliance, it does require that damage be "caused" by a statement or omission, and the court reasoned that the only way damage could be "caused" is if plaintiff relied on the omission or misrepresentation.

III. Encroachment Claims

Clashes over territorial rights inevitably occur between the franchisor and franchisee due to the need and desire on the part of the franchisor to continue to grow. Markets become saturated and it is inevitable that the franchisor will begin to place new outlets closer and closer to existing ones. Many franchise agreements contain provisions, which permit the franchisor to expand and negate any exclusive territory on the part of the franchisee. Nonetheless, much litigation has ensued. The battle lines are usually formed around the application of the implied covenant of good faith and fair dealing to the situation at hand. Franchisees claim that despite such explicit language in their franchise agreements, the franchisor should not be permitted to take action

which would have the effect of putting them out of business. This argument has met with some success, but the weight of authority seems to go against it.

The territorial encroachment case that has stirred up much controversy in franchise circles is *Scheck v. Burger King*.⁽¹⁾ In the *Scheck* case, the franchisee claimed that because Burger King allowed a Howard-Johnson's restaurant, located 2 miles away from the franchisee's restaurant, to be converted into a Burger King restaurant, there would be an adverse impact on the sales of the existing Burger King restaurant, and thus the conversion constituted a breach of the implied covenant of good faith and fair dealing, which is contained in all contracts. The franchise agreement contained a provision similar to that found in many unit franchise agreements that seemed to negate any exclusivity for the franchisee:

This license is for the described location only and does not in any way grant or imply any area, market or territorial rights proprietary to FRANCHISEE.

Despite this language, the court denied Burger King's motion for summary judgment because a denial of exclusivity to the franchisee was, in the court's view, not the same as granting the franchisor the right to open stores anywhere. To prevail, the Burger King agreement would also have to affirmatively grant it the right to open stores near the plaintiff. The court stated that an "express denial of an exclusive territorial interest to Scheck does not necessarily imply a wholly different right to Burger King the right to open another approximate franchises at will regardless of the effects on the plaintiff's operations."⁽²⁾ Further, the court said: "It is clear that, while Scheck is not entitled to an exclusive territory, he is entitled to expect that Burger King will not actively destroy the right of the franchisee to enjoy the fruits of the contract."⁽³⁾

The court sidestepped the fundamental contract law principal that an implied covenant may not override the express provisions of a contract by claiming it was not overriding any provision of the agreement "because there is no express language in the franchise agreement providing that [the franchisor] can establish restaurants wherever it so pleases."⁽⁴⁾

Scheck spawned several years of encroachment litigation, which created much legal uncertainty. Some of the judges sitting in the same district as the judge in *Scheck* wrote opinions disagreeing with *Scheck*.⁽⁵⁾ Courts in other districts indicated their disapproval of the

Scheck reasoning.⁽⁶⁾ But uncertainty remained because some courts supported the reasoning of Scheck.⁽⁷⁾ For instance, in the Ninth Circuit, in *Vylene Enterprises, Inc. v. Naugles, Inc.*, 90 F.3d 1472 (9th Cir. 1996) the franchisee asserted a claim for breach of the implied covenant of good faith and fair dealing when the franchisor established a new restaurant within 1.5 miles of the plaintiff's restaurant. The franchise agreement was entirely silent on the issue of exclusivity. Since there was no express covenant on the subject, the court had no problem in applying the implied covenant to prohibit the franchisor's encroachment, citing Scheck with approval.

On the heels of *Vylene* came *Chang v. McDonald's Corp.*, 105 F.3d 664 (9th Cir. Cal.) 1996) (unpublished disposition) by the same court of appeals (although a different panel). The McDonald's franchise agreement was reasonably clear in specifying that franchisees were granted no rights to block territorial expansion. The court held that under Illinois law (the applicable law under the contract) an implied covenant could not override the express contract terms. However, an off-hand statement by the court breathed some new life into Scheck when it called its reasoning compelling: "Although the rationale of Scheck is compelling, it conflicts with Illinois law."⁽⁸⁾ Adding to the uncertainty about the fate of the Scheck was the Eleventh Circuit's decision in *Camp Creek Hospitality Inns, Inc. v. Sheraton Franchise Corp.*, *supra*. The franchisee operated a hotel at the Atlanta airport, and subsequently the franchisor acquired an additional hotel to serve the airport, causing the franchisee to suffer reduced sales. The franchise agreement permitted Sheraton to franchise additional hotels nearby, but was silent on whether the franchisor could directly operate hotels in the same market. The court held that due to the silence the implied covenant of good faith and fair dealing would apply and that plaintiff had a claim for its breach citing the *Vylene* case. It called Scheck a "seminal case" at the same time recognizing that Scheck had been "criticized, ignored, and distinguished in a number of subsequent opinions."

Eleven months later, the same Eleventh Circuit landed what many believe to be the final blow to Scheck in *Burger King Corp. v. Weaver*.⁽⁹⁾ One of the franchise agreements involved in *Weaver* granted the franchisee a specific location only and the other was similar to the one in Scheck. Neither agreement reserved a right in Burger King to locate a franchise anywhere it so determined. The absence of such a provision, which was the basis for the Scheck decision, did not trouble the Eleventh Circuit. It determined that Scheck misinterpreted Florida law, which

held that no implied covenant claim could be maintained in the absence of a claim based on breach of an express contract provision and that an implied covenant claim could not be maintained that would vary the terms of the contract. On the later point, the appellate court squarely disagreed with Scheck, which had determined that a negation of exclusivity to the franchisee did not mean that the franchisor had the unfettered right to encroach. The Eleventh Circuit recognized that "right and duty are different sides of the same coin; if one party to a contract has no right to exclusive territory, the other party has no duty to limit licensing of new restaurants."(10)

Whether Scheck is dead or not is a subject of continuing debate in the franchise legal community. The Weaver decision was made by a federal court sitting in diversity jurisdiction, under which it attempts to divine Florida law based on its reading of Florida law. The case made no mention of the Camp Creek decision, presumably because Camp Creek involved Georgia law. It is not as binding as a decision from the Florida appellate courts on the same subject. While the final fate of Scheck would seem to rest with the Florida state courts, a California Superior Court recently adopted its reasoning. *Foodmaker, Inc. v. Adnan Quershi, et al.* Bus. Fran. Guide (CCH) ¶ 11,780 (Sup. Ct., San Diego, December 1, 1999). There, the Jack-in-the-Box franchise agreement provided:

This license is non-exclusive, is for the described location only and does not in any way grant to or confer upon the FRANCHISEE any proprietary rights or goodwill rights to the Marks or any country, province, state, area, market or territory.

The Court denied the franchisor's motion for summary judgment based on the explicit language of that provision. The Court, in language remarkably similar to that used by Scheck, held:

However, the express denial of territorial interest to the franchisee herein does not necessarily imply a right to Foodmaker to open franchises at will regardless of their effect on the operations of franchisees. Though the franchisees herein are not entitled to exclusive territory, they are entitled to expect that Foodmaker will not act to impair or destroy their franchisee interest. *Id.* at 32,721.

Meanwhile, a month later, on the opposite coast, the New Hampshire Supreme Court, applying the same California law as the Foodmaker court, held that Coldwell Banker did not breach the implied covenant of good faith and fair dealing when it allowed a large franchisee to place two franchises in close proximity to the plaintiff's office. *Hobin v. Coldwell Banker Residential Affiliates, Inc.*, supra. Its holding was based on its reading of California law that the implied covenant cannot contradict an express grant of contractual discretion. See, e.g., *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.*, 2 Cal. 4th 342 (1992).

Territorial rights are not the only subjects of encroachment. Battles have also erupted over distribution channels, and this should become more pronounced with the advent of e-commerce. In contrast to traditional territorial encroachment, encroachment can result where customers are lost because the franchisor has developed a distribution system that allows the consumer to obtain the services or product by some other means. A franchisor may, for example, decide to deal directly with certain customers, i.e., national accounts or other large volume purchasers. These accounts may have locations within the franchisee's market area. Or a franchisor may decide to commence INTERNET sales of its products, which will be purchased by customers in the franchisee's market area. A franchisor may purchase a competing chain and utilize the same or other trademark. The franchisor may have anticipated the development of alternate or new distribution channels and reserved its right to do so in the franchise agreement, or at least thought it did. The courts will look first to the franchise agreement and if the challenged activity has been reserved, will in all likelihood rule for the franchisor. Decisions in favor of franchisees usually arise from drafting problems or gaps.

One of the leading cases on distribution channel encroachment is *Carlock v. Pillsbury Co.*,⁽¹¹⁾ which involved Haagen-Dazs' direct distribution of ice-cream products to grocery stores. The franchisees claimed that the mass distribution of Haagen-Dazs via grocery stores breached the franchise agreement and the implied covenant of good faith and fair dealing. Unfortunately for the franchisees, the franchise agreement provided "the Haagen-Dazs trademark owner has the right and may distribute products identified by the Haagen-Dazs trademarks through not only Haagen-Dazs shops but through any other distribution method which may time from time be established."⁽¹²⁾ (Emphasis added.) The court ruled that since the agreement expressly authorized the franchisor's conduct, as a matter of law, the implied covenant "does not create

rights inconsistent with those explicitly set out in the contract."⁽¹³⁾ Accordingly, the franchisor's marketing activities, although harmful to the franchisee, did not violate the franchise agreement or the implied covenant of good faith and fair dealing.

The franchisor won in *Carlock* because the franchise agreement unambiguously reserved for the franchisor the right to distribute the product through other distribution methods. The court found this expressly permitted Haagen-Dazs to distribute direct to supermarkets, i.e., that direct distribution was an "other distribution method." Carvel was not so lucky when it instituted a supermarket program under which it would sell its ice-cream products directly to supermarkets, convenience stores, and other wholesale accounts. In *Carvel Corp. v. Baker*,⁽¹⁴⁾ one of the franchise agreements in issue, like the one in *Carlock*, specifically reserved Carvel's right to sell its products "through the same or different delivery systems or other distribution channels or concepts." The court held that because of such language, the supermarket program did not breach the contract, but there might be breach of an implied covenant because of the fact that Carvel's rights were limited by the exercise of discretion, which had to be exercised in good faith (despite the fact that the discretion was characterized as "absolute and sole.") The other franchise agreement granted the franchisee the right to sell from a specific location but did not clearly reserve Carvel's rights. The court applied the implied covenant there, especially in light of other language in the preamble clause of the franchise agreement which it read as creating a reasonable anticipation that Carvel would be precluded from competing with the franchisee.

When the franchisor competes against the franchisee by virtue of purchasing a competing chain or operating a dual franchise system, the courts will apply the same criteria and look first to the language of the franchise agreement. In *Clark v. America's Favorite Chicken Co.*⁽¹⁵⁾, the franchisor opened a Church's restaurant in the same area as an existing Popeye's franchise. Both restaurant chains are owned by the same company. Popeye's franchisees sued the franchisor on a claim of breach of the implied covenant alleging that the adoption of a dual marketing strategy by the franchisor prevented Popeye's restaurants from competing successfully with the Church's restaurants. The court found that the language of the franchise agreement unambiguously reserved the right of the franchisor to enter the franchisees' area and compete against them for the same, similar, or different products or services as long as it was done under a different set of marks. The court ruled against the franchisees implied covenant

claim because the challenged actions were expressly authorized by the contract. This is an example of careful drafting winning the day.

Franchisees wishing to justify their own INTERNET sales or challenge INTERNET sales of the franchisor will need to review the franchise agreement closely. Many franchise agreements grant the franchisee the right to operate from certain locations only. Will INTERNET sales be deemed to be made from that location or elsewhere? To the extent that use of the INTERNET to make sales is viewed as a form of advertising with sales made from the specific franchised location, the franchisee should be allowed to make those sales (assuming it is not infringing on any advertising restrictions). To the extent the sales are deemed to be made from somewhere other than the franchised location, the franchisee may have a problem. Similarly, for the franchisor, a reservation similar to that in Carlock should permit it to use the INTERNET as another distribution channel.⁽¹⁶⁾ Franchise agreements, however, should now be drafted to cover INTERNET sales to avoid any confusion or court battles.

IV. FORUM SELECTION CLAUSES

Many franchise agreements contain a forum selection clause by which the parties agree to initiate litigation or arbitration in a designated judicial or arbitral forum, most often the state in which the franchisor's home office is located. Franchisee advocates view forum selection clauses as one-sided, designed to give the franchisor an added advantage and to discourage a franchisee from instituting arbitrations because they will be costly and in a forum favorable to the franchisor. Franchisors justify such clauses as promoting uniformity and cost-effectiveness.

In reaction to concerns by franchisees, state legislatures have adopted measures that are designed to make forum selection clauses unenforceable. California adopted such legislation, effective January 1, 1995, as part of the California Franchise Relations Act ("CFRA") contained in sections 20000-20043 of the Business and Professions Code. Section 20040.5 of the California Business and Professions Code provides as follows: "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."

The applicability of section 20040.5, *supra*, to arbitration agreements covered by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, has been the subject of some interesting litigation, which will be discussed in this article.

A well-developed body of law exists favoring enforcement of forum selection clauses in commercial contracts. See, e.g., *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (a forum selection clause is *prima facie* valid unless a party seeking to set it aside can clearly meet the heavy burden of demonstrating that "enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.") *Id.* at 15; *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (a forum selection clause in fine print on the back of a passenger cruise line ticket is enforceable); *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988).

One would think that a forum selection clause in a franchise agreement in California should be enforced according to the same principles set forth above. For example, relying on *Carnival Cruise Lines, supra*, the California Court of Appeal enforced a forum selection clause in a franchise agreement, despite arguments that it was an adhesion contract and unfairly required the franchisee to litigate in an inconvenient forum. *Lu v. Dryclean-U.S.A. of California*, 11 Cal.App.4th 1490 (1992). However, the decision in *Lu* was essentially gutted by a different Court of Appeal in *Wimsatt v. Beverly Hills Weight Etc. Internat., Inc.*, 32 Cal.App.4th 1511 (1995). In *Wimsatt*, it was argued that a forum selection clause should not be enforced because of section 31512 of the California Corporations Code, which prohibited a franchisor from requiring that the franchisee waive any rights under the California Franchise Investment Law ("CFIL"), §§ 31000-31516. A forum selection clause was viewed as a potential waiver of the right to have the CFIL apply in a foreign jurisdiction, which might apply its own law. In order to enforce a forum selection clause, a franchisor had "to show that litigation in the contract forum will not diminish in any way the substantive rights afforded California franchisees under California law." *Id.* at 1522. *Wimsatt* did not directly apply § 20040.5 because the franchise contract in issue was executed before the effective date of the Act. The forum selection clause in *Wimsatt* required litigation to be brought in the designated forum.

In a recent case involving the enforceability of a forum selection clause in a franchise agreement subject to section 20040.5, *supra*, the Ninth Circuit Court of Appeals held that section 20040.5 prohibited enforcement of such a clause. *Jones v. GNC Franchising, Inc.*, 2000 WL 526993 (9th Cir. May 3, 2000). The Court in *Jones*, found that section 20040.5 "expresses a strong public policy of the State of California to protect California franchisees from the expense, inconvenience, and possible prejudice of litigating in a non-California venue." *Id.* at p. 2. The Court relied on language in *Bremen*, *supra*, that rendered a forum selection clause "unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *Bremen v. Zapata Off-Shore Co.*, *supra*, 407 U.S. at 15. The court also refused to indirectly enforce the clause through a transfer based on forum non-conveniens, finding that none of the criteria imposed required transfer to Pennsylvania, and noting that California's public policy enunciated in section 20040.5 was a factor in the mix, but not determinative.

As will be seen below, different considerations apply when the forum selection clause requires arbitration to be brought in a designated forum.

If a forum selection clause is contained as part of an arbitration clause, different legal principles apply, due to the preemptive features of the FAA. The FAA requires the courts to enforce arbitration agreements according to their terms, unless general grounds exist at common law to set them aside, such as fraud, duress, or unconscionability. 9 U.S.C. § 2. The FAA applies to arbitration agreements involving interstate commerce. Since most franchise agreements involve interstate commerce in some fashion or another, the FAA will be applicable in most instances.

The FAA has been held to preempt state legislative and judicial attempts to render arbitration clauses unenforceable. See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Doctor's Assocs. v. Casarotto*, 517 U.S. 681 (1996). In *Keating*, the franchisees argued that the CFIL gave franchisees the right to bring CFIL claims in court and the CFIL's anti-waiver provision (§ 31512, *supra*) prohibited a franchisor from requiring the franchisee to arbitrate CFIL claims, rather than litigate. The United States Supreme Court held that the FAA preempted the anti-waiver provision in the CFIL and the CFIL claims had to be arbitrated. In *Casarotto*, the Court

struck down Montana's requirement that warning language be placed on the first page of all arbitration agreements to make them effective.

As indicated above, there are various state statutes that attempt to render forum selection clauses in franchise agreements void. See, e.g. Cal. Bus. & Prof. Code § 20040.5, *supra*; Mich. Comp. Laws Ann. § 445.1527; Wis. Stat. Ann. § 135.06. There is also case law that attempts to render such clauses unenforceable by virtue of state public policy in protecting franchisees. See, e.g. *Kubis & Perszyk Ass'n., Inc. v. SunMicrosys., Inc.*, 680 A.2d 618, *Bus. Fran. Guide (CCH)* ¶ 10,980 (N.J. 1996); *Wimsatt, supra*. Franchisors have successfully argued that state legislative and judicial decisions that might otherwise render forum selection clauses unenforceable must give way to the FAA, which enunciates a federal policy mandating enforcement of arbitration agreements according to their terms. For instance, in *Doctor's Associates, Inc. v. Hamilton*, 150 F.3d 157 (2d Cir. 1998), the Second Circuit enforced a forum selection clause involving a New Jersey franchisee, notwithstanding the *Kubis* decision, which held that such clauses were unenforceable by virtue of public policy. Relying on the language in the FAA that requires enforcement of arbitration agreements unless a "generally applicable contract defense" renders them unenforceable, the Second Circuit ruled that the FAA preempted the decision in *Kubis*, noting that *Kubis* did not establish generally applicable defenses, but only one geared to a particular type of contract. In *Silka v. Surface Doctor, Inc.*, *Bus. Fran. Guide (CCH)* ¶ 11,314 (C.D. Cal. 1997), the Court ruled that the FAA preempted application of § 20040.5, *supra*, to a forum selection clause contained in an arbitration agreement. See, also, *Alphagraphics Franchising, Inc. v. Whaler Graphics, Inc.*, 840 F.Supp. 708, 710 (D.Ariz. 1993) (holding that the FAA preempted enforcement of Section 27(f) of the Michigan Franchise Law, discussed *infra*); *K K W Enterprises, Inc. v. Gloria Jean's GourmetGourmet Coffee Franchising Corp.*, 184 F.3d 42, 50-52 (1st Cir. 1999) (holding that the FAA preempted enforcement of § 19-28.1-14 of the Rhode Island Franchise Investment Act.).

The FAA preempts conflicting state law that impedes the enforcement of the agreement to arbitrate in accordance with the terms of the arbitration agreement. If the parties have agreed, for instance, to incorporate in their arbitration agreement a conflicting state law provision, then the FAA will not prevent enforcement of that term. A case in point is *Volt Information Sciences,*

Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468 (1989), where the parties agreed that California law would apply, and the court applied a provision in the California Arbitration Act, which otherwise might have been preempted. But see, *Mostrobuono v. Shearson, Lehman Hutton, Inc.*, 514 U.S. 52 (1995) where the agreement also had a choice of state law clause and the Court did not apply state decisional law that precluded an arbitrator from awarding punitive damages.

Following somewhat in the footsteps of *Volt*, supra, a recent decision of the Ninth Circuit Court of Appeals in *Laxmi Investments, LLC v. Golf USA*, 193 F.3d 1095 (9th Cir. 1999) has put the breaks on attempts by franchisors in California to apply the FAA to preempt § 20040.5, supra. *Laxmi* involved a forum selection clause in a franchise agreement with an arbitration clause. The franchisor had moved to compel arbitration in its favored forum. The district court had decided that the FAA preempted the CFRA. The Court of Appeals reversed. It never reached the issue of preemption because it determined that by virtue of certain language that the Commissioner of Corporations required be placed in the Uniform Franchise Offering Circular ("UFOC"), there was no enforceable agreement. Under the applicable California regulations, contained in 110 Cal Code Reg. § 310.114, if the franchise agreement contains provisions inconsistent with section 20040.5 of the Business and Professions Code (the choice of forum provision), the UFOC is required to state: "The franchise agreement requires binding arbitration. The arbitration will occur at (indicate sites) with the costs being borne by (explanation). This provision may not be enforceable under California law."

Following this regulation, the Golf Pro UFOC provided, after a general reference to the CFRA:

The Franchise Agreement also requires binding arbitration. The arbitration will occur in Oklahoma County, State of Oklahoma This provision may not be enforceable under California law.

The 9th Ninth Circuit held that, as a result of the above provision in the UFOC, there was no meeting of the minds on the forum selection provision, or, in essence, there was no agreed upon term for the court to enforce under the FAA. The court relied heavily on *Alpha Ggraphics Franchising, Inc. v. Whaler Graphics, Inc.*, supra, which held that although the FAA preempted the prohibition against forum selection clauses under Michigan law, the arbitration agreement

could be voided on the basis of fraud in the inducement, which was a recognized defense to enforcement under section 2 of the FAA (9 U.S.C. § 2). *Id.* at 711. The Alpha Graphics court held that the franchisor had fraudulently induced the franchisee into entering into the franchise agreement by not disclosing to the franchisee its intent to enforce the forum selection clause at the same time as it provided the franchisee with a notice required by Michigan law that the out-of-state forum selection clause was void. The court also held that there was no meeting of the minds on the arbitration clause due to the undisclosed intent of the franchisor. *Id.* at 711.

The court in *Laxmi* only went so far as to hold that there was no meeting of the minds. It held open the possibility that if the franchisor indicated at the outset that it would insist on enforcement of the arbitration venue provision as written, the venue provision might be enforced. "The salient point is that just as in *Alphagraphics*, there is no evidence that Golf USA ever indicated that it would insist upon an out-of-state forum despite the contravening California law." *Id.* at 1097. A troublesome part of the court's holding is its determination that there was no meeting of the minds. While the opinion is somewhat unclear in this regard, it appears that the "may not be enforceable" language was in the UFOC and not the franchise agreement. Assuming that the franchise agreement was integrated and unambiguous on the place of arbitration, the parol evidence rule would seem to preclude consideration of language in the UFOC, and there would be an objective meeting of the minds with respect to the place of arbitration. The *Alphagraphics* case recognized this as a problem, and side-stepped it by finding fraud in the inducement. The *Alphagraphics* UFOC stated that the forum selection clauses were not enforceable, thus making it somewhat easier for the court to make the leap that there was fraudulent inducement by not disclosing an intent to enforce them. In *Laxmi*, the language in the UFOC was that such clauses "may" not be enforceable, which should make it harder to show fraudulent inducement. But the court in *Laxmi* brushed aside the distinction between the language as "a distinction without a difference", although it did not reach the fraudulent concealment issue. *Id.* at 1097.

Before *Laxmi* was decided and notwithstanding the decision in *Alphagraphics*, a district court in California granted a motion to transfer a California case to Pennsylvania. *Duarte v. GNC Franchising, Inc.*, *Bus. Fran. Guide (CCH)* ¶ 11815 (C.D. Cal. January 28, 2000). There, the court granted the motion to transfer venue pursuant to 28 U.S.C. § 1404(a), noting that under

Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988), "notwithstanding the existence of a state law deeming such a forum selection clause unenforceable . . . the district court is to consider the existence of the forum selection clause as part of its balancing of both public and private considerations under Section 1404(a)". Id. at 32,913. The Court also brushed aside the franchisee's argument that the forum selection clause was unenforceable because of language in the UFOC that specified that the provision was enforceable "except where individual state laws supercede."

Even if such an attachment [a state specific attachment] did exist, the parties' acknowledgement that the enforceability of the forum selection clause was uncertain does not mean that the parties did not agree to that provision. Id. at 32,913.

An interesting twist on Laxmi occurred in Kim v. Colorall Technologies, Inc. C-00-1959-VRW (N.D. Cal. August 18, 2000). There, an arbitration was initiated in California, and moved by the AAA to Florida after a motion to transfer by the franchisor was granted by the AAA. The franchisee petitioned the federal court in San Francisco to compel the arbitration in California, relying on Laxmi and section 20040.5 of the Cal. Bus. & Prof. Code. The Court denied the petition on several grounds, concluding, in part, that since the parties (per Laxmi) did not reach a meeting of the minds on forum selection, the franchise agreement was "silent" on venue. Since the AAA commercial arbitration rules (see, e.g. R-11--incorporated into the franchise agreement) gave the AAA final power to determine the locale, the decision of the AAA would thus be given effect. The Court did say, however, that the franchisee was not precluded from filing an action against the AAA alleging that the venue determination was not made in accordance with a "minimum standard of fair dealing." See, Aerojet-General Corp. v. American Arbitration Association, 478 F.2d 248, 251 (9th Cir. 1973). In an earlier decision by the same court, a motion to dismiss for improper venue was denied based on Laxmi, and mediation and arbitration were ordered to be held in California. Schwartz v. Colorall Technologies, Inc. Bus. Fran. Guide (CCH)¶ 11,814 (N.D. Cal. February 22, 2000). The difference in Schwartz and Kim was that the franchisee in Schwartz filed a lawsuit first rather than an arbitration, so there was nothing pending before the AAA at the time the motion was heard by the Court. Nonetheless, the logic of Kim should result in a court permitting the AAA to resolve venue issues regardless of whether the matter is currently in arbitration or not.

On the other hand, again at the opposite ends of the country, another district court refused to enforce an arbitration forum selection clause based on the same reasoning as *Laxmi*. *Great Earth Companies, Inc. v. Simons*, Bus. Fran. Guide (CCH) ¶ 11,823 (S.D.N.Y., March 24, 2000).

The State of Washington has imposed a similar provision to § 20040.5 through a "policy statement" promulgated by the Washington Securities Administrator as an interpretation of Washington's requirement that franchisors deal "in good faith" and declaring it an "unfair act or practice" to impose on a franchisee by contract "an unreasonable standard of conduct". Wash. Rev. Code §§ 19.100.180(1). This statement was not given any effect in *In Management Recruiters Intern., Inc. v. Bloor*, 129 F.3d 851 (6th Cir. 1997), where the franchise agreement required that arbitration take place in Ohio. A petition to compel the Washington franchisee to arbitrate in Ohio was filed by the franchisor in Ohio. The franchise agreement contained a rider, which stated essentially that arbitration would take place in Washington "to the extent [it is] then [a] valid requirement[s] of the statute." The court held that the advisory opinion of the Washington Securities Administrator was not the equivalent of a statute, and upheld the Ohio forum selection clause. The court also noted that if there were a statutory provision, its validity would be "in serious doubt as a result of the preemptive effect of the FAA." *Id.* at 856.

Enforcement of Non-Compete Clauses in Franchise Agreements

California law voids provisions in contracts which prohibit a party from competing. See, California Business & Professions Code §§ 16600 et seq., which provides: "Every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void . . ." Most franchise agreements contain provisions, which restrict the franchisee from competing both during the term ("in-term") and after termination ("post-term") of the franchise agreement. The distinction between whether a provision is deemed an in-term or post-term covenant may be important in California, because an "in-term" covenant may not be viewed as restraining the franchisee from engaging in a lawful trade, profession, or business.

Section 16600, *supra*, does not on its face distinguish between in-term or post-termination covenants; it simply strikes down "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind. . ." However, an in-term covenant operates while the person subject to the restraint is gainfully employed. It thus does not have the same

effect as a post-term covenant in prohibiting someone from pursuing a lawful profession, trade, or business. It could thus be viewed as a partial restraint, and easily justified on the basis that a franchisor would expect the franchisee to be devoting his or her full time to the business and/or not share the secrets of the franchise with a competitor, which conduct is not barred by § 16600.

In *Broughton v. Socony Mobil Oil Co.*, 231 Cal.App.2d 188, 192 (1964), the court made it clear that "where one is barred from pursuing only a small or limited part of a business, trade or profession, the contract has been upheld as valid." The partial restraint doctrine was recently applied in *Great Harvest Franchising v. Artim*, Bus. Fran. Guide (CCH) ¶ 11,259 (E.D. Cal. June 23, 1997) and *Great Harvest Franchising v. McKinley et al.*, Bus. Fran. Guide (CCH) ¶ 11,260 (C.D. Cal. June 26, 1997). The covenant involved there prohibited the franchisees after termination from baking wheat bread or rolls containing 25% or more whole wheat. In *McKinley*, supra, the court indicated that a factual determination would have to be made as to the nature of the baking business sought to be restrained. If the bulk of the business was bakery products containing 25% or more whole wheat, then the restraint would not be viewed as partial.

The application of the partial restraint doctrine is, however, limited by the definition of "profession." A person's "profession" under section 16600 does not include all work for which he or she is qualified. "One may, by devoting all of his energy to a specialty with a traditional profession, limit his 'profession, trade, or business' under § 16600 to that specialty." *Campbell [v. Trustees of Leland Stanford Jr. Univ]*, 817 F.2d at 503. Therefore, depending on a defendant's particular circumstances, a restrictive covenant may be valid if applied to one person or business but invalid if applied to another.

Both *Great Harvest* cases relied on the recent Ninth Circuit decision in *General Commercial Packaging v. TPS Package*, 114 F.3d 888 (9th Cir. 1997), which followed *Broughton v. Socony Mobil Oil Co.*, supra. In that case, the plaintiff hired defendant, an independent contractor, to assist with certain work in California for plaintiff's long-standing customer. The defendant entered into a contract with plaintiff agreeing to not "back-solicit or otherwise deal directly" with the long-standing customer or other companies which plaintiff introduced to and contracted with defendant to perform services for a period of one year. Defendant subsequently began work directly for the customer and plaintiff sued for breach of contract and tortious interference with

contractual and business relationships. The issue was whether this contract violates California's prohibition against covenants not to compete. The Ninth Circuit Court of Appeals held that California law does not impair the contract at issue ". . . unless it entirely precludes (the defendant) from pursuing its trade or business" (at p. 1132), citing both *Broughton* and a later Ninth Circuit case, *Campbell v. Board of Trustees of Leland Stanford Junior Univ.*, 817 F.2d 499 (9th Cir. 1987) as its authority. The court in *General Commercial Packaging* recognized, by way of dicta, however, that a contract can effectively preclude a person from pursuing its trade or business by ". . . placing a substantial segment of the market off limits" (at p. 1133) and that it is not necessary to literally bar all forms of competition to violate California's law on the subject.

As *Great Harvest v. McKinley* pointed out, the determination of whether a restraint is partial or complete depends upon a factual determination of the business at hand. Past examples can help in this determination. The restraint involved in *Broughton v. Socony Mobil Oil Co.*, was considered a partial restraint. The restriction operated only at the particular property, and essentially restricted the owner of the property from operating a service station on the premises. If that was the only business that the owner of the property could operate on the property, then the restraint might be viewed as complete, but obviously the owner could not put the property to other uses. In *Great Harvest*, if the heart of the business was products with more than 25% or more whole wheat, then the restraint might be viewed as complete. Many restrictions in franchise agreements would be considered "partial" if they only focused on particular aspects of the franchised business. For example, a restriction in a pizza franchise might be deemed partial if it only applied to the conduct of a delivery business, when the franchisee could still operate a sit-down or take-out business. Or a restriction on selling frozen yogurt might be deemed partial if the franchisee operated an ice cream store, which sold primarily ice cream.

The partial restraint doctrine raises interesting questions as to whether a non-compete which prohibits a franchisee from competing only within a certain geographic area and/or for a limited time would be viewed as a partial restraint. After all, such a restraint would not preclude the franchisee from competing in another area or after a certain period of time elapsed. Some franchise agreements not only preclude the franchisee from competing in an area near its former location, but any franchised location. See, *Dunkin' Donuts Inc. v. Shivem, Inc. Bus. Fran.*

Guide (CCH)¶ 10,681 (D.N.J. May 4, 1995) (Not for Publication). Such a clause might be viewed as involving a total or complete restraint.

Quite often, enforcement of a covenant not to compete will arise when the franchisee decides to "breakaway", i.e., where the franchisee essentially ceases to operate the franchise but continues in the same business without using the trademarks, for instance. A franchisor's success to enjoin the franchisee from competing in California could well depend on whether the court views the franchise agreement as having been effectively terminated or not. If the agreement is not considered as terminated by the franchisee's actions, then enforcement of the covenant will likely be viewed as "in-term". If the franchisee is held to have terminated the agreement, then its actions will be governed as though they were post-term, making it more difficult for the franchisor to enforce the non-compete.

California cases recognize that it is not against public policy as embodied in § 16600, supra, to prohibit an employee from assisting competitors during the term of his employment. See, e.g., *Fowler v. Varian Associates, Inc.*, 196 Cal.App.3d 34, 44 (1987); *Shaklee U.S. Inc. v. Giddens* (Not for Publication), 934 F.2d 324 (table), 1991 WL 90003, *3 (9th Cir. 1991), cert. denied, 502 U.S. 1033, 112 S.Ct. 876, 116 L.Ed.2d 781 (1992). See, also, *Adcom Express, Inc. v. EPK., Inc.*, Bus. Fran. Guide (CCH)¶ 10,953 (Minn. Ct. Ap. May 21, 1996) (Not for Publication); *Great Frame Up Systems v. Jazayeri Enterprises*, 789 F.Supp. 253 (N.D. Ill. 1992). In *Fowler v. Varian Associates, Inc.*, supra, an employee was discharged for refusing to disclose information about, or assisting in, the obtaining of financing for a prospective competitor of the employer during the term of his employment. The employee claimed that the discharge constituted punishment in violation of § 16600. The court rejected the argument that § 16600 was violated, saying: "In its typical application, section 16600 invalidates certain far-reaching post-employment covenants not to compete." 196 Cal.App.3d at 44.

There are many occasions when the franchisor decides to terminate the franchise agreement based on breaches of the franchisee. If the franchisee continues to operate the business, the franchisor will have a difficult time in California enforcing the post-term covenant, unless it can show that the covenant is only a partial restraint. Of course, the franchisor will still be able to obtain relief to prevent the franchisee from using trade secrets, confidential information, or the

franchisor's trademark. But it will probably not be able to prevent the franchisee from "fairly" competing. See, e.g., *Scott v. Snelling and Snelling*, 732 F.Supp. 1034 (N.D. Cal. 1990). The franchisor may choose not to terminate the franchise agreement for fear that if it does so, it may not be able to recover future royalties [see, *Postal Instant Press v. Sealy*, 43 Cal.App.4th 1704 (1996)]. The franchisor may also choose not to terminate because it will want to preserve the argument that it is enforcing an in-term covenant.

A non-compete given by the seller of a business is enforceable in California since it is normal for the purchaser to expect some degree of protection from competition from the seller after having invested money to purchase the goodwill of an existing business. In a leading California federal case, the court rejected arguments by the franchisor that the sale of a franchise should be treated as a sale of goodwill and ruled that a post-term covenant in a franchise agreement was unenforceable. *Scott v. Snelling and Snelling*, supra. *Scott* has not been followed in other states having similar statutes. See, e.g. *Domino's Pizza, Inc. v. El-Tan, Inc.*, Bus. Fran. Guide (CCH)¶ 10,676 (N.D. Okla. Apr. 28, 1995); *I Can't Believe It's Yogurt v. Gunn*, Bus. Fran. Guide (CCH)¶ 11,197 (D. Colo. April. 15, 1997). *Scott* is also not the final word on California law; the court had diversity jurisdiction and applied what it believed to be California law. The final word will come from a California court.

After the decision in *Scott*, the franchisor added two provisions to accomplish many of the same things as a non-compete: 1) a lease assignment clause by which the franchisee was required to assign its lease to the franchisor in the event of termination; and 2) a right to purchase the assets of the business at a favorable price on termination. This clause was enforced by a California federal court. *Snelling and Snelling v. Martin*, Bus. Fran. Guide (CCH)¶ 11,384 (N.D. Cal. Jan. 28, 1998). The court reasoned that such clause did not illegally restrain trade, since the franchisees were "free immediately to set up a competing operation in the very same building and to seek to attract their former clients."

V. Jury Waiver Clauses

As a general matter, contractual jury waiver clauses are enforceable in California. See *Trizec Properties, Inc. v. Superior Court*, 229 Cal. App. 3d 1616 (1991). *Trizec* involved a breach of a commercial lease that contained a jury waiver clause. Plaintiffs, without explanation,

unsuccessfully sought relief from the waiver. Yet in upholding the validity of the clause, the Trizec court made it clear that jury waivers will not always be upheld. For example, the right to a jury trial will not be taken away from a party who unknowingly signs a document purporting to exact such a waiver. See *id.* at 1618.

The issue of jury waiver clauses in franchise agreements was examined in *MZ Ventures v. Mitsubishi*, *Bus. Fran. Guide (CCH)* ¶ 11,692 (C.D. Cal. 1999). There the plaintiff franchisee brought suit against a franchisor under claims of, among other things, fraudulent nondisclosure and fraudulent inducement. Plaintiff claimed that because he was fraudulently induced into entering the franchise agreement as a whole, the jury waiver clause was tainted and therefore unenforceable. Similar arguments made with regards to arbitration clauses have failed. The rule in arbitration cases is that the clause will be enforceable unless the clause itself was the product of fraud. If not, the case is arbitrated. But the *MZ Ventures* court did not adopt the general rule of arbitration clauses in its decision.

In fact, the court left open the possibility that there may be instances where a jury waiver clause fails because the contract was fraudulently induced.⁽¹⁷⁾ The court's refusal to use arbitration principles in deciding the case was governed by policy considerations. Specifically, the court noted that while there is a policy preference in California for arbitration, there is also a strong preference for jury trials. To rely on the jurisprudence of one to prove the other would not stay true to either policy.

With that in mind, the court took the opportunity to outline four factors for determining the validity of a jury waiver clause: (1) the relative bargaining powers of the parties; (2) the franchisee's understanding of the provisions; (3) whether the waiver was negotiated; and (4) the conspicuousness of the provision.

Other courts have taken a similar approach. See *Cottman Transmission Systems v. Melody*, *Bus. Fran. Guide* ¶ 10,662 (E.D. Penn. 1994). In *Cottman* as in *MZ Ventures*, the court outlined four similar factors that must be proven for a jury waiver clause to be held invalid: (1) whether there was gross disparity in bargaining power between the parties; (2) the business and professional experience of the party opposing the waiver; (3) the negotiability of the contract; and (4) the conspicuousness of the waiver. There, the court held that there was no gross

disparity between the parties because the franchisee was a sophisticated businessman who had his lawyer review the agreement. Furthermore, the provision was conspicuous because it was on the signature page and was brought to the franchisee's attention prior to the execution of the agreement. Thus the provision was upheld.

1. 756 F.Supp 543 (S.D. Fla. 1991), reconsideration denied, 798 F.Supp. 692 (S.D. Fla. 1992).

2. Scheck, 756 F.Supp. at 548.

3. *Id.*

4. Scheck, 798 F.Supp. at 696 (emphasis in original).

5. See, e.g., *Burger King Corp. v. Weaver*, Bus. Fran. Guide (CCH) ¶10,762, page 27,251 (S.D. Fla. 1995), *aff'd* *Burger King Corp. v. Weaver*, 169 F. 3d 1310 (11th Cir. 1999), *reh'g* denied, 182 F.3d 938 (June 1, 1999); *Barnes v. Burger King*, 932 F.Supp. 1420 (S.D. Fla. 1996) (The UFOC in *Barnes* was presumably written after *Scheck* and stated: "A franchisee receives no radius, area or territorial exclusivity. BKC may, in its discretion, establish additional Burger King restaurants operated by BKC and/or other BKC franchisees in the vicinity of a franchisee's restaurant.")

6. *Payne v. McDonald's Corp.*, 957 F.Supp. 749 (D.Md. 1997); *Lindquist & Craig Hotels & Resorts, Inc. v. Holiday Inns Franchising, Inc.*, Bus. Fran. Guide (CCH) ¶ 11,514 (C.D. Cal. Sept. 24, 1998) (where franchise agreement had provisions negating exclusivity and reserving the right of franchisor to license anywhere, refusing to apply either *Scheck* or *Vylene*);

7. *Chang v. McDonald's Corp.*, 105 F.3d 664 (9th Cir. (Cal.) 1996) (unpublished disposition); *Vylene Enterprises, Inc. v. Naugles, Inc.*, 90 F.3d 1472 (9th Cir. 1996); *Camp Creek Hospitality Inns, Inc. v. Sheraton Franchise Corp.*, 139 F.3d 1396 (11th Cir. 1998).

8. *Id.* at 2.

9. 169 F.3d 1310 (11th Cir. 1999), *reh'g* denied, ___ F.3d ___ (11th Cir. June 1, 1999).

10. 169 F.3d at 1317.

11. 719 F.Supp. 791 (D. Minn. 1989).

12. *Id.* at 817-18.

13. *Id.* at 818-19.

14. Bus. Fran. Guide (CCH) ¶¶ 11,208 (D.Conn. July 22, 1997)

15. 110 F.3d 295 (5th Cir. 1997).

16. See, e.g., *Jerome-Duncan, Inc. v. Auto-By-Tel, L.L.C.*, 989 F.Supp. 838 (E.D. Mich. 1997) (stating the INTERNET was a new form of distribution).

17. Indeed, other state courts that have been confronted with the issue note that if the claims of fraud in the inducement were accepted, the provision for a waiver of a jury trial were as invalid as the other provisions. See, e.g., *Federal Housecraft, Inc. v. Faria*, 216 N.Y.S.2d 113 (1961) (holding that where there is a claim for fraudulent inducement of a contract, the party resisting the claim should be afforded the privilege of a preliminary trial by jury on the defense of fraud); see also, *Gardner v. North Roofing & Siding Corp. v. Champagne*, 285 N.Y.S.2d 693 (1967) (despite a jury waiver clause, defendants were entitled to a jury trial solely on the issue of whether the entire contract was voidable as it was entered into because of fraud on the part of the contractor). Notice, however, that in both cases a separate jury trial was held beforehand to determine whether the contract was fraudulently induced. If it was fraudulently induced all provisions, including the jury waiver clause, fail. If it was not fraudulently induced, the case continues but this time in front of a jury.