

PRESENTATION

Perhaps You Are Your Brothers' & Sisters' Keeper

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Baker Donelson

- **Joel Buckberg**
 - Formerly with Days Inns and Cendant Corp.
 - Practice has included franchise and hospitality law since 1985
 - Primarily transactional and regulatory
- **Ted Raynor**
 - Formerly with Hilton Hotels Worldwide
 - Practice has included franchise and hospitality law since 1992
 - Primarily litigation and dispute resolution

Franchise Update

- Recent decisions affecting franchising and the interplay of franchisor and franchisee responsibility to guests, patrons, third parties, and employees
- Franchise cases do not routinely produce published opinions in Tennessee
- Tennessee has franchise legislation in Title 47, Chapter 25:
 - Part 6: Petroleum Dealers and Distributors
 - Part 13: [Retailers of] farm implements and machinery, construction, utility and industrial equipment, outdoor power equipment, attachments or repair parts
 - Part 15: Liquor wholesalers licensed under §57-2-203
 - Part 25: Dealers of motorcycles, off-road vehicles, attachments and repair parts

Franchise Update 2013

- No legislation covering business format franchising in Tennessee for registration and disclosure or franchise relationships
- Delaware follows Georgia to enact law affirming that franchisees are independent contractors, not employees:
 - “Individuals or entities who are parties to a franchise agreement as set out by the Federal Trade Commission shall not be deemed employees for purposes of Chapter 11 of Title 19 of the Delaware Code”
- Other franchise-related legislation not forthcoming until next year
 - Maine comprehensive relationship law

Franchise Legal Update

- CA SB 610, as amended:
 - Section 20016: These parties shall deal with each other in good faith in the performance and enforcement of the franchise agreement. "Good faith" for purposes of this subdivision means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.
 - Section 20017: A franchisee may bring an action against a franchisor or subfranchisor who offers to sell, sells, fails to renew or transfer, or terminates a franchise in violation of Section 20016 for damages caused thereby, and for temporary and permanent injunctive relief, and for costs and attorneys fees.
 - Section 20018: A franchisor cannot mandate a waiver of Sec. 20017 as a condition of doing business.

Franchise Update

Russell v. Happy's Pizza Franchise, LLC, 2013 U.S. Dist. LEXIS 6390 (W.D. Mich. Jan. 16, 2013)

- Employees of a pizza franchisee against both the franchisee and its franchisor seeking overtime wages under the Fair Labor Standards Act (FLSA)
- Franchisor was denied summary judgment
- Discovery on franchisor's actual control of hours and compensation was allowed

Franchise Update

Ross v. Choice Hotels Int'l, Inc., 882 F. Supp. 2d 951 (S.D. Ohio 2012)

- African-American patron sued Choice Hotels, its franchisee and the franchisee's management company for discrimination under 42 U.S.C. § 1981
- Choice motion for summary judgment denied on the basis of apparent agency or agency by estoppel



Franchise Update

Gray v. McDonald's USA, LLC, 874 F. Supp. 2d 743 (W.D. Tenn. 2012), attempt by a franchisee's employee to hold McDonald's liable for an alleged racial assault at franchised restaurant. Fourth Amended Complaint asserted claims against McDonald's for:

- 1) negligent failure to ensure an adequately safe workplace and adequate management;
- 2) discriminatory practices, employment-related discrimination, and malicious harassment in violation of Tennessee Human Rights Act (THRA);
- 3) discrimination in violation of 42 U.S.C. § 1981;
- 4) hostile work environment in violation of 42 U.S.C. § 1981;
- 5) outrage and intentional infliction of emotional distress against;
- 6) negligent infliction of emotional distress;
- 7) negligent training, supervision, and discipline; and
- 8) premises liability.

Franchise Update

- McDonald's provided training on Title VII
- No evidence of franchisor control over hiring, supervision, discipline, compensation of franchisee employees
- No apparent authority or agency
- Test: “whether two entities are so interrelated that they may be considered a ‘single employer’ or an ‘integrated enterprise’ and therefore liable under Title VII . . . ,
 - (“single employer” test adopted in *Swallows v. Barnes & Noble Book Stores, Inc.*, 128 F.3d 990,992-93 (6th Cir. 1997)



Franchise Update

Patterson v. Domino's Pizza, LLC, 207 Cal. App. 4th 385 (2d Dist. 2012)

- 16-year-old minor, claimed that she was sexually harassed by her direct supervisor at a Domino's Pizza franchise
- Language of the franchise agreement was not sufficient to overcome evidence that Domino's asserted significant control over the franchisee's employee management
- Factual issues as to how much control Domino's actually asserted over the franchisees' ability to hire, train, manage and fire employees



Franchise Update

Difederico v. Marriott International, Inc., 713 F.3d 796 (4th Cir. 2013)

- Estate of American citizen living in Marriott in Pakistan killed by terrorist bombing brings suit in Bethesda, Maryland where Marriott headquarters are located
- 56 killed; 266 injured
- Trial court dismissed on basis of “forum non conveniens” and held that Pakistan was an adequate and more convenient location to hear the case
- This essentially meant that Mary Difederico and her three sons were without a venue because the S/L had already run in Pakistan
- Fourth Circuit reversed and ordered a trial in MD



Franchise Update



Franchise Update

- Plaintiff did not sue the franchisee, a Pakistani company
- Alleged that Marriott controlled all aspects of anti-terrorism security at the hotel
 - Security standards and protocols
 - Specific staffing; an international crisis management team that assessed risk and prescribed security measures and procedures for all Marriott branded hotels
 - Multi-tiered threat level system
 - Required installation of security equipment
 - Advanced training for hotel security officers
- Claimed that Marriott corporate knew the threat level at hotel

Franchise Update

Fourth Circuit:

- “... a perversion of justice to force a widow and her children to place themselves in the same risk-laden situation that led to the death of a family member.”
- “To the extent that Americans recognize and utilize the Marriott brand, Americans have a localized interest in resolving a dispute related to Marriott.”
- “This is a case of American citizens suing an American corporation. The defendant is a corporate member and employer within the community where this case would be tried.”

Franchise Update

Launch Fitness, LLC, Ryan Leffel, and Richard Leffel, v. GoPerformance Franchising, LLC and Jared Kuka, CCH BFG ¶15,035; 2013 WL 241650 (D.NJ 2013)

- Franchise Agreement for New Jersey franchise provided for arbitration under FAA (added at request of franchisee) to be held in Nashville; Tennessee law selected as governing law
- Case filed by franchisee in New Jersey state court, claiming fraudulent inducement and unconscionability of arbitration clause, removed to US DC
- Franchisor motion to dismiss granted for leave to pursue arbitration
- Unconscionability to be decided by arbitrator in arbitration

Franchise Update

Shoney's North America LLC v. Vidrine Restaurants, Inc., et al.
CCH BFG ¶14,990; 2013 WL 1288253 (M.D. TN 2013)

- Franchise Agreement provided for mandatory detailed dispute resolution procedure and seven-day delay prior to initiating litigation
- Franchisor filed suit after franchise agreement terminated and informal negotiations over resolution of claims failed
- Dispute resolution procedures found to survive termination of franchise agreement
- Middle District stayed suit pending completion of agreed dispute resolution procedure



Questions?



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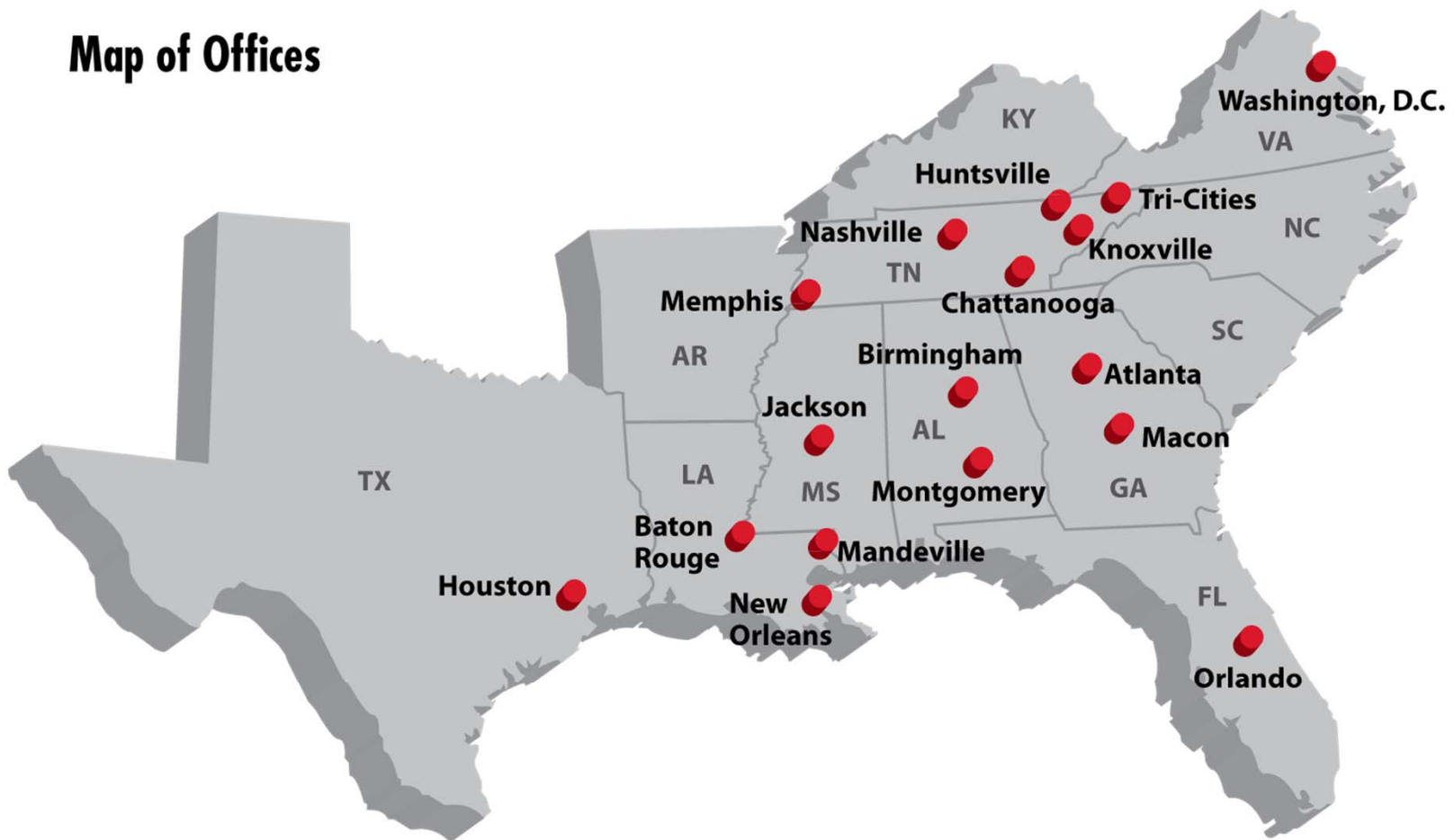
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Thanks!



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