PUBLICATION

Failure to Follow Franchising Disclosure Laws Isn't Necessarily Unfair Trade Practice

Authors: Alexander M. McIntyre, Jr.
February 08, 2018

The recent *Cooper v. Primary Care Solutions* considered, among other things, franchising law in the context of the Louisiana Unfair Trade Practice Act (LUTPA), which punishes unfair and deceitful conduct in the conduct of trade and commerce, whether in the retail context or concerning the relationship among and between businesses. As shown below, the court ultimately decided that violations of state or federal franchising law do not necessarily include the intent or level of deceit required for a violation of the LUTPA.

Defendant Primary Care Solutions, Inc. (PCS) provides services for individuals with severe emotional, behavioral and developmental disabilities. Until May 2015, PCS operated a facility in Baton Rouge, Louisiana. William Bullock is the CEO of PCS and Monica Lewis and Kim Roundtree are managing directors of PCS, all located at the company's headquarters in Charlotte, North Carolina. In April 2014, PCS entered into a Site Director Consultant Agreement with Tammy Cooper, the sole member of plaintiff Cross Over Therapy, LLC, whereby Cooper was to serve as director of a new PCS site in Donaldsonville, Louisiana, approximately 40 miles south of Baton Rouge. In July 2014, Kendall Brown executed an agreement to serve as site director for a new PCS site in St. Francisville, approximately 30 miles south of Baton Rouge.

As plaintiffs in a suit against PCS, Cooper and Brown alleged that the named officers of PCS (Bullock, Lewis and Roundtree) engaged in a "fraudulent franchise investment scheme" to cause Cooper and Brown to purchase equity interests in the company by establishing and operating the Donaldsonville and St. Francisville PCS locations, when in fact the company was undercapitalized and insolvent. These plaintiffs alleged that, in furtherance of the fraudulent scheme, the defendants did the following:

- held themselves out as offering franchising opportunities but failed to provide franchise disclosure documents;
- created false spreadsheets misrepresenting the amount of monthly income that could be generated by the St. Francisville and Donaldsonville locations;
- coerced the plaintiffs to subsidize PCS's operations by using their own money to operate the PCS facilities while also charging the plaintiffs administrative fees;
- traveled to Louisiana and made numerous misrepresentations directly to the plaintiffs concerning various aspects of the business; and
- sold PCS's Louisiana operations to another behavioral health care and treatment company without consulting the plaintiffs, thus breaching the defendants' obligations to Cooper and Brown concerning their operations of the St. Francisville and Donaldsonville facilities.

The defendants' Motion to Dismiss the plaintiffs' original complaint was granted in large part with leave to amend. The plaintiffs then filed an amended complaint alleging six causes of action:

- unfair and deceptive practices in violation of LUTPA;
- breach of contract;
- tortious interference with contract;

- conversion;
- unjust enrichment and
- violations of the Fair Labor Standards Act (FLSA).

The defendants again moved to dismiss the complaint, arguing that the court did not have personal jurisdiction over Bullock, Lewis and Roundtree; the complaint failed to state causes of action against the individual defendants for breach of contract and tortious interference with contract; the complaint failed to state a claim against any of the defendants for violations of LUTPA or FLSA; and, the plaintiffs failed to state a claim against any defendant for unjust enrichment or conversion.

Addressing the jurisdictional issues, the court rejected the plaintiffs' attempt to base personal jurisdiction on the theory that Bullock, Lewis and Roundtree were "alter egos" of PCS, and so individually liable for the company's actions. However, the court also rejected the defendants' argument that the "fiduciary shield doctrine" applied, and that specific personal jurisdiction could not be asserted over Bullock, Lewis and Roundtree because all of their activity in Louisiana was undertaken solely in their capacities as officers of PCS.

The court ultimately ruled that the plaintiffs had made a sufficient showing that Louisiana courts could exercise specific personal jurisdiction over Bullock, Lewis and Roundtree. However, the court also found that the plaintiffs' allegations were insufficient to infer that the individuals – as opposed to PCS – directly benefited from the alleged wrongdoing, and because Bullock, Lewis and Roundtree were neither parties to the contracts with the plaintiffs nor "alter egos" of PCS, none of the asserted causes of action stated a claim against any of the individual defendants. Bullock, Lewis and Roundtree were thus dismissed from the lawsuit.

PCS, however, did not fare as well. It is now well established in the jurisprudence that mere breaches of contract will not suffice to make out a claim under the LUTPA, and many of the allegations in the complaint related to failure to meet contractual obligations. In addition, the court noted that the only other Louisiana court to consider the legal ramifications of the failure to provide franchise disclosure documents held that even willful inattention to franchise disclosure law does not amount to an unfair trade practice absent accompanying fraud, deception or unethical conduct. However, the court did find that, "[w]hile the majority of Plaintiffs' specific allegations are directed to a traditional breach of contract claim," the plaintiffs had sufficiently alleged fraudulent and deceitful conduct to state a claim against PCS. Similarly, the court ruled that there were sufficient allegations concerning PCS to survive the Motion to Dismiss plaintiffs' claims for LUTPA violations, conversion, breach of contract, interference with contract and, although only as an alternative to their contract claims, unjust enrichment. Finally, the court noted that, at least in the Fifth Circuit, under appropriate circumstances, a franchisor can qualify as the FLSA employer for a franchisee's employees. Given that authority, and "[i]n light of the remedial purpose of the FLSA and plaintiffs' (albeit weak) allegations of PCS's supervision and control," the court allowed the FLSA count against PCS to stand.

While this is a lengthy and involved opinion largely focused on the issue of whether the Louisiana court had personal jurisdiction over the individual officers and employee of the North Carolina franchisor (as opposed to jurisdiction over the company itself), a few other points are worthy of note. For example, the opinion underscores how important it is to tend to corporate niceties to clearly delineate between corporate, as opposed to individual, acts and to thereby avoid individual liability. Additionally, the opinion makes clear that fraudulent or deceitful conduct are foundational to a successful LUTPA claim, and that no matter how egregious a breach of contract is, if the facts do not sufficiently describe some pattern of significant delusive behavior a plaintiff cannot make out a LUTPA violation. Finally, the opinion shows how weak a plaintiff's allegations of control and supervision can be to state an FLSA claim – although, of course, far more is required to actually prove an FLSA violation.