My Addenda Say What?

A Review of State Mandated FDD and Franchise Agreement Addenda
Agenda

• How to draft addenda in general
• Using state addenda to respond to comments from examiners
• *Dickey’s Barbecue* and other noteworthy cases
• Best practices in drafting state addenda
General Addenda Issues

- FDD vs. Franchise Agreement Addenda
- Mandatory vs. optional addenda
- Mandatory by statute/regulation
- Mandatory in practice
Unusual Addenda Requirements

• FDD Item – Different Disclosures
• Disclaimers/Legends
• Copies of Escrow/Surety Bonds
Business Opportunity Laws

• Easy to overlook them
• Certain exemptions are available for franchise programs
• For states without such exemptions, the FDD may be used with the state-specific addendum language
• Look for certain limited rescission rights
Franchise Relationship Laws

• State-specific addenda are not mandatory
• Usually concerns appropriate notice requirements for termination or nonrenewal of the Franchise Agreement
• Consider pros and cons of using addenda in this context
Exempt Franchisors

• Check each statute and regulation to determine whether:
  • exemption criteria are in fact satisfied and
  • inclusion of the particular addendum is required
• Many exempt Franchisors exclude them
• When in doubt, leave it out?
• Inclusion of the addenda may be prudent in certain situations
When Several State Laws May Apply

• When are State Franchise Laws triggered
• Good rule of thumb
• Make sure applicable state addenda is provided and signed
Financial Assurances

• Risk Factors
• Quarterly Unaudited Financial Statements
• Surety Bonds
• Removal of escrow, deferral, surety bond from state addenda
Negotiating with Examiners

• Ordinary vs. unusual comments from examiner
• Changes requested in state addendum vs. body of FDD
• Communicate and have discussions with examiners
• Examiners are gatekeepers for all franchise filings
Dickey’s Barbeque

• A standard drafting issue leads to an unusual result
• Franchise Agreements provisions required Texas arbitration
• Maryland addenda language required resolution of Maryland franchise claims in Maryland state court
• Federal Arbitration Act preemption questioned
• Presents several questions including how to avoid draft addenda so as to not conflict with otherwise appropriate venue and forum provisions
Should Franchisors Include Addenda Voluntarily

Minimalist Approach:
• *Defazio v. Expetec Corp.*

Inclusionary Approach:
• *Great Earth Companies, Inc. v. Simons*

Inbetween:
• *Hengel, Inc. v. Hot N’ Now, Inc.*
Best Practices for State Addenda

• Analyze the consequences of your choices
• Draft narrowly to avoid inadvertently including franchisees not otherwise covered
• Preserve Federal Arbitration Act claims, if possible
  • Long John Silver’s, Inc. et al. v. Nickleson, et al.,
Rhode Island Franchise Agreement Addendum:

Drafting Examples

Rhode Island Franchise Agreement Addendum:

Notwithstanding the foregoing, Rhode Island law governs any claim arising under the Rhode Island Franchise Investment Act.
Drafting Examples

Rhode Island Franchise Agreement Addendum:

Any provision in the Franchise Agreement which designates the governing law as that of any state other than the State of Rhode Island is deleted from Franchise Agreements issued in the State of Rhode Island.
Drafting Examples

Rhode Island Franchise Agreement Addendum:

[NOTHING]
Questions?

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