In August, I became Chair of the Forum on Franchising. I am mindful of the rich legacy that precedes me in this position. From the immediate past chair, Joe Fittante, through the past chairs with whom I have had the pleasure of working, Ron Gardner, Jack Dunham, Dennis Wieczorek, Steve Goldman, Susan Grueneberg, John Dienelt, Rick Asbill, Shelley Spandorf, Brett Lowell, Rupert Barkoff, Andy Selden, and Lee Abrams, all have made their mark on the Forum. Their insights, dedication, and plain old hard work have raised the bar for the Forum and for each successive Chair. I am humbled, but motivated, by that precedent.

Our actions are guided by the mission of the Forum: “to be the preeminent forum to study and discuss the legal aspects of franchising.” The Forum’s goals to achieve this mission are: to provide high quality educational programs and publications on franchising; to stimulate discussion of the legal aspects of franchising; to promote full and equal participation of diverse members and women in Forum activities; and to enhance the professional growth of Forum members. We have already taken many steps to ensure that we continue to uphold this mission and these goals.

Last year, under Joe’s leadership, the Governing Committee prepared a five-year strategic investment plan designed to ensure that the Forum continues to uphold its mission and goals while using its resources to benefit its members. After months of discussion and redrafting, the initial practical strategies of the Five-Year Plan are being implemented. I want to explain a few of them in this column.

Incentives for Newer Members
The Forum is continuing its first- or second-time attendee/under 36 discount for our Annual Meeting. Several years ago, we identified the “graying” of the Forum as one of the main challenges in maintaining a vibrant group of franchise practitioners in the future. Lowering the cost of attendance at our annual signature event appears to be one of the steps we can take to attract and keep younger members. We need new members to sustain a succession plan, and we want to encourage their participation.

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Run a Google search for the phrase “minimum advertised price policy” and you will find hundreds of sample policies, posted on a variety of manufacturers’ websites. Interest in minimum advertised price (“MAP”) policies has skyrocketed in recent years. Why? The answer dates back to a watershed antitrust decision issued by the United States Supreme Court six years ago.

In Legin Creative Leather Products, Inc. v. PSIS, Inc., 551 U.S. 877 (2007), the Supreme Court overruled a century-old precedent and held that minimum resale price maintenance (“RPM”) is not per se illegal under Section 1 of the Sherman Act and should instead be subject to the antitrust rule of reason (which requires a case-by-case analysis of whether a challenged practice unreasonably restrains competition). After Legin, one might have expected RPM provisions to appear in franchise and distribution agreements with regularity, but that did not happen. Instead, Legin has had a decidedly small impact on actual business practices in the franchise world.

For good reason: In the wake of Legin, several states—including New York, Illinois, Michigan, Maryland, and California—have stated that minimum RPM remains per se illegal under their state antitrust laws. See generally Michael A. Lindsay, Overview of State RPM, ANTITRUST SOURCE (April 2011).

Moreover, Congress has also proposed (and continues to debate) legislation to overturn Legin. See, e.g., Discount Pricing Consumer Protection Act of 2011, H.R. 3406, 112th Cong. (1st Sess. 2011).

The uncertainty created by the current patchwork of state laws that deem minimum RPM agreements per se illegal, as well as a desire to protect brand image and ameliorate “free riding” by internet and other discounters, have caused MAP policies to proliferate in recent years. As this has occurred, courts have been asked to determine whether and how MAP policies should be analyzed in light of Legin.

What is a MAP Policy?

MAP policies impose restrictions on the price at which a product or service may be advertised, without restricting the actual sales price. MAP policies usually concern only off-site advertising, such as in flyers or brochures. They do not restrict the in-store advertising or sales price offered at a retailer’s “brick and mortar” locations. Often, manufacturers implementing MAP policies also provide retailers with some cooperative advertising funds to contribute to the costs of advertising.

Although RPM may be per se illegal under certain state laws, MAP policies are generally analyzed under the antitrust rule of reason. As long as a retailer remains free to sell a product at any price, the restriction on advertising is deemed to be a non-price restraint. See, e.g., Lake Hill Motors, Inc. v. Jim Bennett Yacht Sales, Inc., 246 F.3d 752, 757 (5th Cir. 2001) (applying the rule of reason to a dealer’s challenge to Yamaha’s cooperative advertising program, which reimbursed dealers for advertising only if the advertising stated either Yamaha’s suggested resale price or no price at all); Cumfill v. Scott & Fetzer Co., 773 F. Supp. 943, 951 (E.D. Tex. 1991) (holding that the rule of reason applies where a dealer admittedly could charge any price for a product).

“Whether and how the standard rules for MAP policies may apply in the digital age are topics of some debate and litigation.”

Some courts have relied on the fact that advertising restrictions are funded, at least in part, by the manufacturer through cooperative or other advertising funds, and that retailers remain free to advertise discounts with their own funds. See, e.g., In re American Cyanamid Co., 123 F.T.C. 1257, 1265 (1997); In re The Advertising Checking Bureau, Inc., 109 F.T.C. 146, 147 (1987). Courts have also dismissed challenges to MAP policies on the ground that the manufacturer instituted and implemented the policy unilaterally, and therefore, there was no agreement or conspiracy that would trigger liability for vertical price-fixing. See, e.g., Holubird Sports Discounters v. Tennis Tutor, Inc., 993 F.2d

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The result was largely dictated by the facts of the case: because the MAP policies were implemented by all five distributors at or about the same time, and apparently at the urging of retailers that were concerned about “discounters,” the FTC viewed the policies as horizontal agreements that were per se illegal. Moreover, the MAP policies each prohibited all advertising below a certain price, including in-store advertising as well as advertising paid for entirely by the retailers. Although the facts of the CD MAP case were unique, the clear lesson is that a MAP policy should be unilateral and should apply only to off-site advertising to which the manufacturer contributes funding.

MAP Policies in the Internet Age

Whether and how the standard rules for MAP policies may apply in the digital age are topics of some debate and litigation. Starting around the time of Leegin, WorldHomeCenter.com (“WHC”), an online retailer of home improvement products, filed several lawsuits against manufacturers with MAP policies. In each case, WHC asserted that internet retailers were different because they did not have a “brick and mortar” location; therefore, advertising on the WHC website was akin to advertising in its “store.”

In WorldHomeCenter.com, Inc. v. L.D. Kichler Co., 2007 WL 963206 (E.D.N.Y. March 28, 2007), the district court denied a motion to dismiss federal and state antitrust claims challenging an internet MAP (“IMAP”) policy that restricted the prices at which products could be advertised on the internet. The court was convinced by WHC’s argument that “essentially, the advertised price is the retail price for an internet shopper. Thus although facially the IMAP restricts only advertising prices, construing Plaintiff’s allegations as true, it has the concomitant effect of restricting retail prices for internet retailers as well.” Id. at *5; see also WorldHomeCenter.com, Inc. v. Thermasol, Ltd., 2006 WL 1896344, at *1–2 (E.D.N.Y. July 10, 2006) (denying a motion to dismiss federal and state antitrust claims where WHC alleged that the MAP policy posed a significant obstacle to the distribution of Thermasol products at lower prices over the internet, and that the policy was instituted in response to complaints by traditional “brick and mortar” distributors about the impact of internet discounters).

Other courts have reached the opposite conclusion. For example, in WorldHomeCenter.com, Inc. v. Franke Consumer Products, Inc., 2011 WL 2565284 (S.D.N.Y. June 22, 2011), the court granted a motion to dismiss state antitrust and other claims arising out of Franke’s Unilateral Suggested MAP policy (“USMAP”). The court reasoned,

Unlike the prior cases cited by Plaintiff where an advertising policy was held to restrain prices, the USMAP policy here provides internet retailers with more than one way to communicate lower prices to clients, either by allowing customers to call or email for a price quote or by offering a coupon to be applied at checkout. Further, the policy applies to all retailers, not just online sellers. While the Court recognizes that the policy may burden internet retailers slightly more than “brick and mortar” sellers, Franke offers internet retailers viable strategies to provide online customers with reduced prices.

Id. at *5 (internal citation omitted).

Similarly, in WorldHomeCenter.com, Inc. v. KWC America, Inc., 2011 WL 4352390 (S.D.N.Y. Sept. 15, 2011), the court granted a motion to dismiss a state antitrust challenge to an Internet Advertising Policy (“IAP”), for two reasons: First, the IAP provided that “[a]ctual prices charged customers may be provided by telephone, e-mail response, and product purchase confirmation webpages or communications.” Id. at *1. Second, the IAP is a unilateral policy, without any evidence of any agreement, which is a prerequisite for a vertical price-fixing antitrust claim. Id. at *7; see also WorldHomeCenter.com, Inc. v. PLC Lighting, Inc., 851 F. Supp. 2d 494, 502 (S.D.N.Y. 2011) (granting motion to dismiss and rejecting claim that UMAP policy was per se unlawful price-fixing).

MAP Directions

Even though MAP policies are generally upheld under the rule of reason, the cases discussed above illustrate that it is important to draft and implement these policies with care. Some guiding principles follow:

- **Advertising Only.** A MAP policy should expressly state that the policy in no way limits a retailer’s right to set its own prices. Including provisions that allow internet retailers to
Surveys: Business Tools and Valuable, But Often Overlooked, Evidence

By Keith D. Klein, Bryan Cave LLP
R. Andrew Chereck, Bryan Cave LLP

Surveys have changed the landscape of valuable data held by consumer-facing businesses. Both franchisors and franchisees are using surveys more and more, as they have become increasingly easy to access and increasingly sound in their methodology. Franchisors retain professional survey companies to independently assess the experiences of their franchisees’ customers, the efficacy of their own marketing, and the quality of their system-wide product offerings. Franchisees conduct their own surveys at the cash register, through e-mails, or through online services such as SurveyMonkey to assess customer service, store cleanliness, and the effectiveness of their local marketing efforts. As a result of these and many other surveys, millions of data points are collected daily around the world.

From a business perspective, the practical benefits of consumer surveys are easy to see. But where does all of this valuable data go when litigation unfolds? Most often, it sits on the virtual shelf gathering micro-dust. When this happens, a valuable resource is lost. Consumer surveys, when properly conducted, can be effective weapons in litigation, for franchisors and franchisees alike.

Courts have shown a willingness to allow triers of fact to hear survey results and then determine the weight they should be afforded based on the methodology they use.

The Admissibility of Surveys

Practitioners are likely most familiar with the use of consumer surveys in trademark cases, to prove or disprove a likelihood of confusion between rival marks. But consumer surveys were not always considered trustworthy or admissible. Courts in the first half of the twentieth century treated them as inadmissible hearsay. See, e.g., DuPont Cellophane Co. v. Waxed Products Co., 6 F. Supp. 859, 884 (E.D.N.Y. 1934), modified, 85 F.2d 75 (2d Cir. 1936) (refusing to admit survey because court could not “see how plaintiff could even test the facts, as it had no opportunity for cross-examination of those who were supposed to have answered the questions”); Elgin National Watch Co. v. Elgin Clock Co., 26 F.2d 376, 376-77 (D. Del. 1928) (refusing to admit survey because survey constituted hearsay). By the early 1950’s, however, the tide began to turn. Since the seminal decision in Zippo Manufacturing Co. v. Rogers Imports, Inc., 216 F. Supp. 670 (S.D.N.Y. 1963), the trend has been to admit properly conducted consumer survey evidence.

In 1999, now United States Supreme Court Justice Sotomayor authored one of the leading federal court opinions on the modern approach to the admissibility of surveys. Schering Corp. v. Pfizer Inc., 189 F.3d 218 (2nd Cir. 1999). In Schering, the trial court denied Schering’s motion for a preliminary injunction against Pfizer and UCB Pharma. In support of its motion, Schering offered the results of five surveys in which physicians were asked to provide their recollections, and in some cases their impressions, of communications that the defendants’ sales representatives made to physicians during sales calls. Justice Sotomayor analyzed two of the most often-cited grounds on which such evidence is now admitted: the state of mind exception to hearsay under Federal Rule of Evidence (“F.R.E.”) 803(3) and the residual hearsay rule, F.R.E. 807.

F.R.E. 803(3) excepts any “statement of the declarant’s then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant’s will.” Schering, 189 F.3d at 227. As Justice Sotomayor explained, surveys, if properly conducted, “poll individuals about their presently-existing states of mind to establish facts about the group’s mental impressions,” and should therefore be admitted. Id. Accepting surveys as evidence under this hearsay exception, “obviates the need to examine [survey] methodology before overruling a hearsay objection.” Id. at 227-28. Instead, “errors in methodology . . . go only to the weight of the evidence.” Id. at 228 (citing Grotrian, Hellferich, Schulz, Th. Steinweg Nachf. v. Steinway & Sons, 523 F.2d 1331, 1341 (2d Cir. 1975)).

If survey results are also offered to show actual facts recalled or believed (as opposed to the mere existence of a statement of mind), the evidence would not be admissible under F.R.E. 803(3).
Thus, the Schering opinion next analyzes the residual hearsay rule, F.R.E. 807, as a second basis on which such evidence may be admitted. Id. at 230-31. This rule allows the introduction of an otherwise inadmissible hearsay statement if the statement satisfies the following five elements: trustworthiness; materiality; probativeness; importance; and the interests of justice and notice. Id. at 231.

Justice Sotomayor’s opinion emphasizes certain survey methodologies that can be used to increase the “trustworthiness” factor of a survey, which case law reflects is one of the more scrutinized of the five requirements. See, e.g., Baumhauer v. Amex Coal Co., 630 F.2d 550, 552 (7th Cir. 1980) (“To qualify a study or opinion poll for admission into evidence, there must be a substantial showing of reliability.”); Zippo, 216 F. Supp. at 684. First, insincerity or “untrustworthiness” can be reduced if the interviewees lack knowledge of the subject litigation. Schering, 189 F.3d at 233. Second, clear and non-leading survey questions further reduce the risk of “faulty narration.” Id. The trustworthiness element is “for the most part satisfied if the [survey] is conducted in accordance with generally accepted survey principles, and if the results are used in a statistically correct way, since proper survey and statistical methods are intended to assure a poll’s reliability.” Id. at 235 (quoting Pittsburgh Press Club v. United States, 579 F.2d 751, 758 (3d Cir. 1978)).

Surveys in Franchise Litigation

Vehicle dealers, whose relationships with manufacturers and distributors are often governed by state and federal relationship statutes similar to franchise relationship statutes, have successfully used survey evidence to prove the unlawful conduct of their manufacturer or distributor. In Randy’s Studebaker Sales, Inc. v. Nissan Motor Corp., 533 F.2d 510 (10th Cir. 1976), for example, a Nissan franchisee, Randy’s Studebaker Sales, Inc. (“Randy’s”), alleged violations of the Sherman Antitrust Act and federal Automobile Franchise Act, 15 U.S.C. §§ 1221-25, in connection with Nissan’s refusal to renew Randy’s automobile franchise unless Randy’s acquired larger facilities, hired additional personnel, and increased working capital and sales performance.

To help prove that Nissan’s conditioned renewal was unlawful under the Automobile Franchise Act, Randy’s introduced a questionnaire, prepared after litigation had begun, in which select customers attested to the quality service that Randy’s provided. In appealing the damages awarded to Randy’s in the trial court under the Automobile Dealers Franchise Act, Nissan challenged the court’s admission of the questionnaire. The appellate court determined that “the questionnaires were properly admitted [under F.R.E. 803(3)] to reflect the then-existing state of mind of the customers.” Id. at 520. Although Randy’s did not poll all of its customers, “the surveys of customers during a particular period of time without restriction as to the group was used and so there is little basis for objection.” Id. at 521. In any event, the court noted, “technical inadequacy” bears on the weight of the evidence, not its admissibility. Id.

Auto manufacturers and distributors, akin to franchisors, also have used surveys to prove the lawfulness of their own conduct. In Tappan Motors, Inc. v. Volvo of America Corp., 74 A.D.2d 846, 425 N.Y.S.2d 970 (N.Y. App. Div. 1980), a Volvo distributor successfully used surveys showing customer dissatisfaction to obtain a preliminary injunction preventing a dealer from continuing its automobile franchise prior to trial. To prove its likelihood of success in showing that it terminated the dealer for cause in accordance with New York’s motor vehicle franchise statute, the distributor used a survey of purchasers showing dissatisfaction with the dealer and its customer service. See Tappan Motors, Inc. v. Volvo of America Corp., 102 Misc. 2d 570, 573, 423 N.Y.S.2d 819, 821 (Sup. Ct. 1980) (denying application for preliminary injunction), rev’d, 74 A.D.2d 846, 425 N.Y.S.2d 970 (N.Y. App. Div.); see also Ed Koch Nissan, Inc. v. Nissan Motor Corp., 1994 U.S. Dist LEXIS 11575 (W.D. Mich. June 22, 1994) (manufacturer’s refusal to allow dealer to relocate its dealership based, in part, on market survey showing that the proposed market area was not desirable was deemed reasonable and not in violation of the Michigan Motor Vehicle Act).

At least one court has even endorsed the use of consumer satisfaction surveys by manufacturers...
Post-Termination Non-Competes in the European Union

Dr. Mark Abell, Bird & Bird, London

U.S. franchisors looking to expand into Europe may think of the European Union (“EU”) as having a single legal system, or at least a relatively homogenous set of legal systems. They would be mistaken. Although the EU aspires to be seen as a single economic unit, its 28 member states take a wide range of different approaches to legal issues that affect franchising. This is certainly true regarding the member states’ different approaches to the enforcement of post-termination covenants against competition.

At a basic level, these differences can be divided into the civil law approach, found in countries such as Germany and France, and the common law approach, found in the UK and Ireland. Even within the civil law jurisdictions, however, significant differences exist on how post-termination covenants are addressed. U.S. franchisors entering the EU must be aware of these differences and accommodate them in their franchise agreements.

The Civil Law Approach

Germany

In Germany, the law of commercial agency is applied by analogy to franchise agreements. This means that a franchisor seeking to enforce a covenant against competition after a franchise agreement terminates may have to pay the franchisee post-termination compensation, known as contract indemnities. The franchisee may agree to be bound by post-termination non-compete obligations for a maximum of two years after termination. In return, the franchisee may claim compensation under the commercial agency laws. See Handelsgesetzbuch [HGB] [Commercial Code], § 90a (3).

Notably, a former franchisee’s right to claim compensation pursuant to Section 90a does not exclude the right to claim compensation upon termination under Section 89b of the Commercial Code. See Hopt, in: Baumbach/Hopt, HGB Kommentar, 33rd ed., 2008, § 90a Rn. 18. This section allows compensation for loss of business opportunities.

A franchisor can avoid the obligation to pay compensation if it waives the non-compete restriction in writing at least six months before the end of the contract term. If the franchisor gives less than six months’ notice of the waiver, it must pay compensation for each month’s difference between the mandatory six-month period and the actual notice period given. If the franchise agreement is terminated for material breach, however, the non-breaching party may waive the non-compete restriction on one month’s written notice. Any contract terms that exclude these rights of the franchisee are null and void. See Cass. Soc., 10 July 2002, Dr. Soc., November 2002, n° 11, p. 949; Cass. Com., 1 July 2003, JCP, n° 22,27 May 2004, p. 869.

Austria

In Austria, there are limits to the enforcement of post-term termination covenants based on the country’s antitrust laws. Austrian courts sometimes view franchisees as agents of the franchisor and analyze the franchise relationship in the context of agency legislation. Under this analysis, post-termination covenants against competition are null and void. See Handelsvertretungsgesetz [HVertG] [Commercial Agent Act] § 25.

France


Trends in court judgments suggest that France in the future will follow the German example and rule that a franchisor may not enforce a non-compete covenant against a franchisee unless it compensates the franchisee, as is currently required with post-termination non-competes in the employment context. For now, however, this is not yet the law. In 2002, the Supreme Court ruled that a franchisee is an ongoing business, not an employee. Thus, in that case, the franchisee was barred from...

**Czech Republic**
The laws of the Czech Republic provide that although the parties can decide the grounds on which a franchise agreement may be terminated, post-termination restrictions must comply with the limitations set forth in the EU VABE Regulation. See Reg 330/2010 of 20 April 2010 (OJ 2010 L102/1.23.04.2010) (discussed below), and may not exceed one year after the termination of the agreement.

**Finland**
Finnish law provides that a contract that unreasonably prevents or restricts competition through a post-term non-compete covenant will not be effective against the party that accepted the obligation. See Sec. 38 of the Contracts Act (228/1929).

**Greece**
In Greece, after the expiration or termination of a franchise agreement, the franchisee may no longer take advantage of the franchise system, see Section 719, Greek Civil Code, and the franchisee’s freedom to compete is subject to Greek law on unfair competition, see Article 919, Greek Civil Code; Law 146/14 on Unfair Competition. Covenants not to compete are prima facie valid unless they are contrary to public policy. See Article 178, Greek Civil Code. Greek courts will enforce non-compete provisions as long as they are considered reasonable and in accordance with general principles of law, such as good faith, ethical conduct, and protection from abuse of rights. Because there is no definition of what is “reasonable” in this context, courts will determine reasonableness on a case-by-case basis. As long as a covenant not to compete is of limited duration and applies only to a specific restricted territory, it should be valid under Greek law. See F.I.C. of Athens 11486/80 JCL (1981) 50,131, F.I.C. of Athens 14284/81, JCL (1982) 144, F.I.C. of Heraklion 158/86, JCL (1987) 38.

After termination of a franchise agreement, the franchisor may be required to repurchase some of the franchisee’s inventory. The franchisee is barred from disclosing confidential information by an implied duty of confidentiality that continues after termination, based on the principles of good faith, commercial practice, and the special nature of the franchise relationship.

**The Common Law Approach in the UK**
Courts in the UK will enforce post-termination covenants against competition in franchise agreements if they are reasonable in both duration and geographic scope. In Dyno-Rod plc and Zockoll Group Ltd v. Reeve, [1999] FSR 148, the court upheld a restriction against competition that lasted one year and covered the original territory granted to the franchisee. This was also considered reasonable by the Court of Appeal in Office Overload Ltd v Gunn [1977] FSR 39. See also Prontaprint plc v. Landon Litho Ltd [1987] FSR 315 (upholding restriction against competition lasting three years and covering half a mile); KallKwik Printing (UK) Ltd v. Bell, [1994] FSR 674 (upholding restriction against competition lasting 18 months and covering radius of 700 meters from the franchised unit). The franchisor bears the burden of proving that a restriction is reasonable.

“The EU has no uniform law across the 28 member states regarding post-termination covenants against competition in franchise agreements.”

If a covenant against competition is stricken, that does not invalidate the remainder of the contract. See Wallis v. Day [1835–42] All ER Rep 426. There is debate, however, regarding whether portions of a covenant that are deemed unreasonable can be severed, so that the remainder of the covenant is enforceable. In some cases, courts have achieved this by construing the covenant according to circumstances existing when the contract was made, rather than relying on the contract’s literal meaning. See Littlewoods Organisation Ltd v. Harris [1978] 1 All ER 1026.

**The EU’s Vertical Agreements Block Exemption**
Enforcement of post-termination non-compete covenants in franchise agreements also may be affected by the EU’s Vertical Agreements Block Exemption (“VABE”) Regulation, see Regulation 330/2010 of 20 April 2010 (OJ 2010 204).
Counsel’s Role in Re-Imaging, Remodeling, and Refurbishment of Franchise Systems

By Andrew P. Bleiman, Marks & Klein, LLP

Franchisors more and more are implementing mandatory re-imaging, remodeling, and refurbishment programs as they look to reinvigorate their systems, increase market share, and boost unit sales. These programs often involve substantial capital expenditures, strict deadlines, and disruptions to business operations. Franchisees may be hard pressed to find the desire or capital to fund such projects, particularly when faced with the requirement to address multiple outlets at the same time. This, in turn, can dramatically impact a franchisor’s ability to successfully implement its plans for the system. Franchise counsel can play a significant role in helping franchisors and franchisees avoid conflicts and work cooperatively to implement re-imaging, remodeling, and refurbishment programs.

Counseling Franchisors

From the franchisor’s perspective, the Franchise Disclosure Document (“FDD”) and franchise agreement should specifically address the right to implement re-imaging, remodeling, and refurbishment requirements and should give the franchisor broad, explicit rights and controls over these matters, to avoid complications and impediments years later. From a practical standpoint, counsel should advise franchisor clients implementing such programs to consider issues such as these:

• Is the program consistent with the provisions of the franchise agreements across the system?
• Have the franchisees bought into the program from a business perspective – based, for example, on return on investment from prior programs involving company-owned outlets?
• Can accommodations be made to help franchisees with implementing the program, including, for example, financial incentives or financing?

If remodeling is anticipated without closure of the outlet during construction, there may be additional concerns. For example, clients should be counseled to consider and assess local health and safety issues and ordinances and to develop programs that minimize business interruption and customer inconvenience.

Finally, franchise counsel should carefully assess whether the program to be implemented violates any state relationship laws. For example, does the re-imaging or refurbishment plan constitute an “unreasonable standard of performance” on the franchise under the New Jersey Franchise Practices Act? A careful assessment and analysis of each of these issues is imperative before implementing a re-imaging, remodeling, or refurbishment program.

Counseling Franchisees

Similar considerations apply when counseling franchisees about re-imaging, remodeling, or refurbishment programs. Counsel for prospective franchisees should consider whether limitations and modifications to the franchise agreement concerning re-imaging, remodeling, and refurbishment can be negotiated. When negotiating franchise agreements, counsel should consider issues such as:

• How often may such projects be required?
• Will there be any cap on the expenditure required?
• Will any creative means of funding (such as deferred royalty payments or reduction in advertising fund contributions) be offered to offset any of the expense?

Franchisee counsel whose clients are faced with re-imaging projects should also analyze whether the program being implemented is permitted under the terms of the client’s franchise agreement and whether it violates applicable state relationship laws. For example, if the project is contemplated for Minnesota franchisees, counsel should evaluate whether it runs afoul of the Minnesota Franchise Act, Rule 2860.4400(G), which prohibits a franchisor from imposing “any standard of conduct that is unreasonable” on a franchisee.

Re-imaging, remodeling, and refurbishment programs are becoming more and more common, and in a tough economy, they are likely to be more and more controversial and contentious. Franchise practitioners should work proactively to counsel and assist clients on issues that arise as they draft and review their FDDs, as they draft and negotiate franchise agreements, and as they prepare to implement such programs.
How Does the Americans with Disabilities Act Affect Both Franchisors and Franchisees?

By Amy L. Albright, ABA Commission on Disability Rights; Aaron S. Blynn, Genovese Joblove & Battista, P.A.; Maral Kilejian, Mullin Law, PC; Jonathan E. Perlman, Genovese Joblove & Battista, P.A.; Amy F. Robertson, Civil Rights Education and Enforcement Center; Stephanie Russ, Mullin Law, PC; and Andra Terrell, Pearle Vision

In the 23 years since it was signed into law, the Americans with Disabilities Act (“ADA”) has helped break down barriers, discrimination, and prejudices that deny individuals with disabilities an opportunity to participate equally in all aspects of society. To reaffirm the ADA’s promise of equal access for individuals with disabilities to education, employment, housing, transportation, public accommodations, telecommunications, and government programs and services, Congress implemented the ADA Amendments Act of 2008 (“ADAAA”), which took effect January 1, 2009. The ADAAA expanded the definition of the term “disability” to provide individuals with a broad scope of protection. See 29 C.F.R. § 1630.1. This expanded definition applies to all titles of the ADA, including Title III, which governs public accommodations and commercial facilities.

What Does the ADA Require for Compliance?
The ADA regulations provide guidance for new construction as well as requirements for alterations to existing facilities. Successfully implementing ADA-compliant alterations appears to be more problematic for business owners than ensuring ADA-compliance in new construction. In general, compliance with the architectural requirements of the ADA necessitates access and attention.

Access
Title III of the ADA prohibits discrimination on the basis of disability in places of public accommodation, as, for example, in retail stores, restaurants, and theaters. See 42 U.S.C. § 12182(a). It applies to those who own, operate, lease, or lease to such businesses. See id. Title III requires reasonable accommodations in rules and policies where necessary to avoid discrimination, and effective communication, for example, with blind or deaf customers. Compliance with Title III is measured against the DOJ’s Standards for Accessible Design, which provide detailed, code-like criteria. (The DOJ also provides technical assistance on its website at www.ada.gov, including information geared toward specific groups, such as small businesses.) The architectural component of Title III has impacted the franchising industry in recent years.

Title III requires different things of old, new, and altered facilities. A store built after January 26, 1993, must be in full compliance with the DOJ’s Standards; the only exception is for rare instances of structural impracticability based on extreme terrain. See 42 U.S.C. § 12183(a)(1). In stores built before that time but altered since, the altered portion must comply to the maximum extent feasible, and the path of travel and other amenities serving the altered portion must be accessible to the extent it costs less than 20 percent of the project total. See 42 U.S.C. § 12183(a)(2). In stores built before January 26, 1993, and not altered since (or in unaltered portions), barriers must be removed where it is “readily achievable” to do so, taking into account the cost of providing access and the resources of the business. 42 U.S.C. § 12181(9); id. § 12182(b)(2)(A)(iv).

The DOJ adopted revised standards in 2010. See 28 C.F.R. § 36.406. It is crucial in designing and altering facilities to ensure that the proper standards are applied. For example, the path of travel to an altered portion of a facility only has to be brought into compliance with the standards if the alteration affects a primary function and to the extent the cost of bringing the path of travel into compliance is less that 20 percent of the project total. See 28 C.F.R. § 36.403. If a private entity undertakes an alteration to a primary function area of the facility, the only required elements of the travel path to that area that are subject to the safe harbor are those that already comply with the 1991 ADA compliance standards. See id. But if a private entity undertakes an alteration to a primary...
function area and the required elements of the travel path to the altered area do not comply with the 1991 standards, then the private entity must bring those elements into compliance with the 2010 compliance standards. See id.

Many states have accessibility laws that are either broader, longer-standing, or both. For example, California has required basic access since 1970 and has had a well-developed set of standards since 1982. See Moller v. Taco Bell Corp., 2007 WL 2301778, at *6 (N.D. Cal. Aug. 8, 2007). So while California buildings built in the 1970s or 1980s would only be subject to readily achievable barrier removal under the ADA, they would be subject to a new construction standard — that is, full compliance — under state law. See, e.g., id. at *22 (insufficient accessible seating in restaurants built after 1981).

Attention
The most meticulously designed facility can be rendered inaccessible through ignorance, inattention, and inadequate policies. The ADA’s regulations require that access be maintained. See 28 C.F.R. § 36.211(a). The following are real examples of accessible designs rendered inaccessible to use:

- Turning space in an accessible restroom is occupied by a trash can or decorative furniture;
- The aisle next to an accessible parking space is blocked by a cart return or dumpster;
- Accessible counters are covered with promotional materials and games;
- Accessible fixtures are broken and are replaced with inaccessible fixtures or left in disrepair, making them difficult or impossible for customers with disabilities to use. Examples include: doors too heavy for customers in wheelchairs to open; parking lot striping faded to the point that it is difficult to see where accessible spaces are located; and carpet and floor mats frayed to the point that they become trip hazards.

Burger King Castaneda Cases
The best known recent litigation regarding franchisor liability for accessibility issues is the class action lawsuits filed in the Northern District of California against Burger King Corporation, styled Vallabhupunpu v. Burger King Corp., 11-cv-00667, and Castaneda v. Burger King Corp., 08-cv-4262 (collectively, the “Castaneda Cases”). The plaintiffs in these cases challenged accessibility barriers at certain Burger King restaurants in California for people who use wheelchairs or scooters, including doors, narrow queue lines, restrooms, service counters, dining areas, and parking areas.

In July 2010, the court approved a $5 million settlement to the class covering 10 Burger King restaurants in the Castaneda class action, requiring Burger King to maintain access at the covered restaurants in three primary ways: by requiring the franchisees to perform a checklist of access-related tasks before opening each day; by surveying each of the 10 restaurants at least once every three years using an agreed-upon form and requiring franchisees to take any required corrective action; and by requiring the franchisees to hire registered architects to survey each restaurant every time the lease agreement is renewed and then resurveying to ensure that the remodeled restaurant complies. See Joint Notice of Motion and Motion for Final Approval of Stipulation and Settlement Agreement, Castaneda v. Burger King Corp., No. C-08-04262 (N.D. Cal. July 12, 2010).

In October 2012, the court approved a settlement for an additional 86 Burger King restaurants in the Vallabhunpenu class action. See Order Granting Motion for Final Approval of Class Settlement; Motion for an Award of Attorney’s Fees and Costs, Vallabhunpenu v. Burger King Corp., No. C-11-00667 (N.C. Cal. Oct. 29, 2012). The Vallabhunpenu settlement included essentially the same injunctive relief as in the Castaneda settlement, but the Court in Vallabhunpenu also approved an award of $19 million for damages, attorneys’ fees, and costs. Some have characterized these cases as the largest per-person and per-facility monetary recovery ever in a disability rights class action involving a public accommodation.

The recent cases against Burger King show that when owners of businesses that provide a service to the public are altering facilities, they must conduct a thorough analysis to ensure that the alterations comply with the 2010 standards and determine whether the safe harbor applies to the path of travel. Additionally, franchisors that impose remodeling or other construction work on facilities must be mindful of the interplay between the 1991 compliance standards and the current standards.

How Far Should a Franchisor Go?
Courts are divided on a franchisor’s liability for ADA compliance. Compare, e.g., United States v. Days Inns of America, Inc., 151 F.3d 822, 824 (8th Cir. 1998) (holding franchisor liable where it designed and built non-compliant new facility), with Neff v. American Dairy Queen Corp., 58 F.3d 1063, 1068-69 (5th Cir. 1995) (holding franchisor not liable where franchisor exercised no control over barrier removal). There is no question, however, that the franchisee that operates the store or restaurant is responsible for compliance.

A franchisor must walk a fine line between exerting too much and too little control over its franchisees. If the franchisor exercises too much
control, it may find itself subject to vicarious liability for franchisees’ conduct. If it does not exercise enough control, the brand and system may suffer. In the context of Title III of the ADA, a franchisor-landlord is expressly forbidden from disclaiming an obligation to ensure compliance with accessibility laws. How then can the franchisor limit its exposure?

The Burger King cases brought this question to the fore, because the plaintiffs sued only the franchisor, Burger King Corporation. In separate litigation, Burger King Corporation sued the franchisees of the restaurants involved, putting at issue provisions of the franchise agreement addressing liability for legal compliance.

Contractual provisions in franchise agreements offer one way of limiting exposure. Beyond the typical provision requiring franchisees to “abide by any and all applicable laws,” ADA-specific provisions may require, for example, that franchisees certify to a franchisor that their franchised business is designed, constructed, and/or altered in accordance with all laws, regulations, statutes, codes, rules, and standards, including the ADA. A franchisor may make this certification a condition of approval for the franchisee to begin operation, whether the establishment is newly opening to the public or has been refurbished. By whatever provisions are necessary, the franchise agreement should include strict obligations for the franchisee to comply with the ADA.

A franchisor also may choose to include provisions in its franchise agreement that expressly limit its involvement, and therefore its control, over the design and construction process. Mark A. Kirsch, Franchising Compliance with the Americans with Disabilities Act, General Practice, Solo & Small Firm Division Magazine, Vol. 17, No. 6 (September 2000). The franchisor may, for example, provide contractual disclaimers regarding any prototype drawings provided to franchisees. Id. No matter the contractual disclaimers, provisions, and certification requirements, however, the franchisor’s actions also will play a part in minimizing its potential liability.

Franchisor-lessees should consider ADA compliance when requiring franchisee-tenants to place new technology in their stores. Self-service touchscreen kiosks, which may be difficult for people with certain disabilities to use, illustrate the need to consider the ADA. The law requires that these devices be accessible, but no specific accessibility regulations have been promulgated for them yet. See Nondiscrimination on the Basis of Disability by State and Local Governments and Places of Public Accommodation; Equipment and Furniture, 75 Fed. Reg. 43452-01 (proposed July 26, 2010) (to be codified at 28 C.F.R. pts. 35 & 36). Failure to ensure access may well subject franchisors to individual and class action lawsuits, both for injunctive relief and damages under certain state laws.

In conclusion, to ensure accessibility and avoid liability, it is important for franchisors and franchisees alike to understand the ADA; to build and alter facilities to comply with accessibility standards; and to encourage communication between design and headquarters personnel and store-level personnel who will manage, operate, and maintain franchised facilities. Good communication and training can make franchised facilities both more inviting to customers and less inviting to the plaintiff’s bar.

The ABA’s Commission on Disability Rights

The Commission on Disability Rights is one of the four diversity groups in the American Bar Association (“ABA”) that works to foster the inclusion of lawyers with all types of disabilities—both apparent and hidden—in the ABA and the legal profession as a whole. To participate in this effort, you can:

- Encourage your law firms, corporations, judiciaries, state bars, law schools, and other legal employers to sign the Commission’s Pledge for Change and incorporate disability as a key component of their diversity activities;
- Share their progress and successes on the Commission’s website;
- Nominate employers for the Commission’s Champions for Disability Inclusion in the Legal Profession Award; and
- Use resources, including the Commission’s toolkit on planning accessible meetings and events, that can help employers ensure that their facilities, websites, meetings, events, and materials are accessible to persons with disabilities.

See the following links for more information:

Pledge for Change at http://www.americanbar.org/groups/disabilityrights/initiatives_awards/pledge_for_change.html

Award at http://www.americanbar.org/groups/disabilityrights/initiatives_awards/champions.html

Toolkit at http://www.americanbar.org/content/dam/aba/administrative/mental_physical_disability/Accessible_Meetings_Toolkit.authcheckdam.pdf
Planning for Franchisee Succession, Asset Protection

By Edward A. Gramigna, Jr., Drinker Biddle & Reath LLP
Kristen A. Curatolo, Drinker Biddle & Reath LLP

Unlike a couple on their first date, a franchisor and franchisee should start discussing the trajectory of their relationship from the very beginning. Franchisors want to create a network of loyal, profitable franchisees. Franchisees want to enjoy and safeguard the fruits of their labor. This article offers suggestions about how franchisors and franchisees can work together to plan a future that is rewarding for each of them.

Succession planning is one way for a franchisor to demonstrate its commitment to its franchisees, even in the early stages of their relationship. Franchisors can discuss with franchisees important considerations in transitioning their business when they are ready to exit the system or retire, as well as financial planning techniques that will help them preserve their financial gains.

Franchisor-Created Succession Programs

Typically, franchisees are responsible for finding a buyer when they want to sell their franchises. The franchisor in these circumstances may have limited time and opportunity to evaluate and approve the buyer. But when a franchisor short-changes this vetting process, it is taking a gamble with its future revenue stream. By contrast, if a franchisor works with its existing franchisees on succession planning, rather than merely reacting to a pending resale, many of the problems that typically arise with changes in ownership can be avoided.

Succession planning may involve a franchisee identifying a successor (in some cases, a family member or key employee), a franchisor evaluating and approving the successor, and both franchisor and franchisee working jointly to educate and train the successor in operating a successful franchise. Training provided by a franchisee that understands the customer base and market area can be far more beneficial than training provided by a franchisor alone.

A franchisor-created succession program can be an effective tool for recruiting new franchisees as well. An essential part of a prospective franchisee’s due diligence is learning how the franchisor relates with its franchisees. When a franchisor is known for working with franchisees to their mutual benefit on initiatives such as succession planning, this can positively reinforce the franchisor’s brand.

Joint Ventures with Key Employees

With a franchisor’s approval, franchisees may eventually transfer their business to one or more key employees through a joint venture arrangement. In this arrangement, a franchisee would identify one or more key employees who are interested in acquiring the franchise in the future. The franchisee would grant the employees some form of “sweat equity” and the right eventually to purchase the franchise based on a prearranged price or formula.

At the end of the joint venture arrangement, all parties benefit. The franchisor has a new franchisee. The franchisee has an exit strategy that will allow for a seamless transfer of the business. And the key employees take over a business that they have experience operating. During the sweat equity period, this also provides for loyal, motivated key employees who will continue in a franchisee’s employ so that they can obtain the promised equity.

Wealth Transfer Planning

Another way for a franchisor to demonstrate its commitment to its franchisees’ success is to discuss with them wealth transfer planning techniques that can help them protect their financial gains.

Irrevocable Life Insurance Trusts

The death of a business owner can threaten the survival of virtually any business. If the owner dies without adequately planning for the payment of estate taxes and the inclusion of the decedent’s ownership interest in his or her estate generates an estate tax, then that ownership interest may have to be liquidated just to pay the estate taxes owed.

An Irrevocable Life Insurance Trust ("ILIT") is designed to provide the liquidity to pay the estate tax, as well as to provide funds for the franchisee’s family. For those owning a large life insurance policy, the face value of the policy will be included in the franchisee’s estate (along with the franchise and any other assets the franchisee may own), increasing the size of the estate and the possibility of owing estate taxes. Not all...
estates are likely to owe federal estate taxes because under the current federal exemption, only estates
with assets greater than $5.25 million are subject to
federal estate taxes. But some states, such as Connecticut, Delaware, Massachusetts, New Jersey, New York
and Pennsylvania, to name a few, levy estate or inheritance taxes (or both) on lower exemption amounts
– some as low as $675,000.

Franchisees with substantial life insurance policies
may consider structuring their policies into an ILIT to
avoid federal and state inheritance tax implications. This
technique may be used without a franchisor’s approval.
To create an ILIT, an irrevocable trust is created, with
someone other than the insured named as trustee. The
policy is transferred to the trust, and the trust becomes
the owner and beneficiary of the policy. Because the
policy is owned by the trust, the franchisee will no
longer have any control over the policy. Through the
terms of the trust, however, the franchisee can deter-
mine who will have control, how premiums will be
paid, who will benefit from the trust, and how pay-
ments should be made to beneficiaries. If an existing
policy is transferred from the franchisee to the trust,
the franchisee must live for at least three years from the
date of the transfer for the policy to be excluded from
his or her estate. If the trust is established and the
trust purchases a new life insurance policy, then the
three-year rule can be avoided.

Grantor Retained Annuity Trust
A Grantor Retained Annuity Trust ("GRAT") is a
wealth transfer technique created under section
2702 of the Internal Revenue Code. GRATs are irre-
vocable trusts that are structured to allow the creator
of the trust (the “grantor”) to transfer assets to fam-
ily members with minimal gift tax implications.
This works by having the grantor transfer assets
to a GRAT and retain an interest in the GRAT for a
number of years. The retained interest is structured
as the right to receive certain predetermined pay-
ments (“annuity payments”) from the trust over a
specified time (typically, three to 10 years). This
“retained interest” is typically a significant portion
of the value of the asset transferred to the GRAT.

The remaining balance of the value transferred
to the GRAT – the “remainder interest” – is typically
only a fraction of the value transferred. This remain-
der interest is considered “transferred” for gift and
estate tax purposes at a value that is not subject to
gift taxes. Once the annuity payments have been
made to the grantor from the GRAT, the remainder
passes to the grantor’s family without an additional
gift or estate tax. The value of the asset transferred
to the GRAT, including the appreciation, is also
excluded from the grantor’s net worth for estate
tax purposes. This can be an ideal plan for some-
one who is contemplating retirement at the end of
the selected term of the GRAT. For this technique to
work, the franchisee must survive the GRAT term.

With the approval of a franchisor, a GRAT can
be a good mechanism for wealth transfer. A fran-
chisee would create a family limited partnership
or corporation (if one does not already exist), to
hold the franchisee’s shares of the business and
transfer some or all of the franchisee’s shares to the
GRAT for a specified term. This allows a franchisee
to pass on the appreciation of his or her interest
in the franchised business with minimal gift and
estate tax implications. The franchisee can retain
control over the business throughout the GRAT
term without causing inclusion of the value of the
business in his or her estate. A GRAT may also be
advantageous for a franchisee holding property
that is appreciating because a transfer to a GRAT
effectively “freezes” the value of the property at
the date of the transfer and insulates the apprecia-
tion from gift and estate taxes.

Communication and Planning
When franchisors and franchisees communicate
and plan for business succession and financial pro-
tection, the results can be mutually beneficial. For
franchisors, this can foster goodwill among fran-
chisees and lead to fewer surprises and smoother
transitions when franchisees leave the system. For
franchisees, this can mean more predictability and
greater opportunity to enjoy the financial rewards
of their hard work and resulting success.
MESSAGE FROM THE EDITOR-IN-CHIEF

By Corby Anderson, Nexsen Pruet, LLP

I enjoy having written,” Mark Twain said.

Some credit the line to literary critic Dorothy Parker instead — but whatever the source, the thought rings true with me. I wrote my first article for a Forum publication, the Franchise Law Journal, more than a decade ago, with another lawyer who was then a client and is now my law partner. Just as our deadline approached, I was beset with a perfect storm of work, of the billable kind. In those low-tech days, as I stood at a phone booth during a break in an out-of-town deposition trying to phone in the last edits to our article, I vowed never again to take on another project like that. But after the article was published, “birth amnesia” set in almost immediately. I forgot the worst of it, basked in the best of it, and was ready to write again.

What was the best of it? First of all, I cemented wonderful friendships with my co-author and my editor — friendships I enjoy to this day. Secondly, I started building a “brand” in the franchise bar by showing that I wanted to be an active participant in the Forum and was willing to work hard at it. Third, I learned a lot. No matter how much you think you know about a topic, the process of putting pen to paper (or fingertips to keyboard) quickly teaches you what you still need to learn. And beyond what I learned about my topic, I learned that members of the Forum are generous and encouraging to those who want to take an active role. People I had never met before our article was published went out of their way to show me that. So, did I enjoy having written? Without a doubt, I did.

What Topic Beckons You?

I invite you to find out for yourself what Mark (or Dorothy) meant, by writing an article for The Franchise Lawyer. Our current issue shows the wide range of topics that we cover: from minimum advertised price policies to uses of surveys in business and in litigation; from post-term non-competes in the European Union to brand re-imaging, remodeling, and refurbishment programs; from compliance with the Americans with Disabilities Act to franchise business succession techniques.

What topic beckons you? If you are not certain, that is not a problem. Many prospective authors approach us with a topic in mind, but others come with simply a desire to write. We keep an open topics list and can work with you to develop a topic based on your interests and experience. The Franchise Lawyer serves both franchisor and franchisee audiences, and our articles reflect the breadth of our readership. If you write about a topic or matter in which you or your clients are personally involved, you must disclose that in your article.

Meet Our Deadlines

The Franchise Lawyer is published quarterly, in both print and electronic editions. Deadlines for submitting articles are:

- December 15, for the Winter Issue;
- March 15, for the Spring Issue;
- June 15, for the Summer Issue; and
- September 1, for the Fall Issue.

Articles typically are 800 to 1,600 words long, although some, including “pointers and pitfalls,” may be 300 to 400 words long. Personal analysis and “lessons learned” are welcome in our articles. Footnotes, on the other hand, are not.


Meet Our Editors

Authors work closely with an editor of The Franchise Lawyer from the beginning to the end of the process. In addition to the Editor-in-Chief, we have three talented Associate Editors:

- Kevin M. Shelley, of Kaufmann Gildin Robbins, in New York. Kevin may be reached at kshelley@kaufmannrobin.com.
- Himanshu Patel of Zarco Einhorn Salkowski & Brito, in Miami. Himanshu may be reached at hpatel@zarcolaw.com.

Please look for us at the Forum in Orlando and talk with us about writing opportunities, topics you would like to see covered in the publication.

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What is LADR?

By LADR Chair Julie Lusthaus, Einbinder & Dunn, LLP

Did you know that as a member of the ABA Forum on Franchising, you are also a member of LADR? What, you may ask, is LADR? It is the Forum’s Litigation and Dispute Resolution Division. LADR has three primary objectives: to serve the Forum’s membership by studying and presenting both traditional and non-traditional approaches to resolving legal disputes in franchising; to increase Forum members’ receptiveness to non-traditional approaches to problem solving; and to enhance Forum members’ skills in applying such approaches.

Some of LADR’s activities include:
• Authoring articles on litigation and dispute resolution for publication in the Franchise Law Journal and The Franchise Lawyer;
• Submitting programming ideas for future Forums on litigation and dispute resolution;
• Planning litigation and dispute resolution webinars; and
• Developing proposals and projects related to both traditional and non-traditional approaches to resolving legal disputes in franchising.

Would you like to learn more about how to become involved in LADR? Do you have ideas for programs or articles on litigation and dispute resolution that may be of interest to the Forum? Would you like to network with other Forum members who share your interest in litigation and dispute resolution? If the answer to any of these questions is “Yes,” then be sure to join us for LADR’s cocktail reception at this year’s Forum in Orlando, on Thursday, October 17, from 5:00 until 6:15pm. You may also contact me at jcl@ed-law-firm.com. I look forward to hearing from you and seeing you in Orlando.

Message From the Chair
Continued from front cover

e-Publishing
We have converted, and now offer, the majority of our publications as e-Books. We are one of the first groups in the ABA to do so. Of course, many of our members will continue to enjoy our books and monographs in paper form, but they now have the option of accessing these materials online as e-Books as well. This includes our newly published franchise textbook, Franchising: Cases, Materials, and Problems.

Annual Meeting Innovations
This year, we are placing all of the Annual Forum materials on a USB flash drive, rather than on a CD. We also will continue to offer the app for the Annual Meeting. The USB flash drive and the app, along with our e-Books, allow us to reach all members of the Forum with our excellent, well respected publications while using the most current media.

Marketing Initiatives
To help us reach other potential members, the Forum has engaged an outside marketing firm to produce advertising and promotional pieces and provide consultation regarding marketing approaches. We believe there are practitioners who could use our assistance -- the solo practitioner who is drafting her first FDD, or the opposing counsel who does not understand what a financial performance representation is, much less the problems associated with it. The Forum has many benefits to offer these lawyers. We’d like to identify and reach them.

More International Programming
We are considering adding a more robust international component to our Annual Meeting. We are testing the waters for this by holding a dinner on Tuesday night, prior to the International Intensive at the 2013 Forum. If you sign up for the International Intensive on Wednesday, October 16, please sign up for the dinner on Tuesday night.

Enhanced Activities at the Annual Meeting
Finally, we have allocated additional funds to underwrite enhancements of certain of the activities at this year’s annual meeting. These include the Thursday night event at the Wizarding World of Harry Potter®, the Wednesday night Welcome Reception, and the food service during networking lunches on Thursday and Friday.

All of these projects and initiatives are designed to ensure that the ABA Forum on Franchising is “the preeminent forum to study and discuss the legal aspects of franchising.” Please feel free to email me at deborah.coldwell@haynesboone.com if you have any comments, suggestions, or questions.
When I was asked to pen this column for The Franchise Lawyer, my first reaction was to find some reason to say “no” and hope the topic would be forgotten. Why?

Well, bluntly put, the value of membership in the ABA Forum on Franchising remains the best kept secret in the international franchise bar. Truth be told, I cannot imagine why any franchise lawyer in any country would hesitate to make the relatively modest investment of time and money necessary to become an associate member of the American Bar Association, join the Forum on Franchising, and participate actively, by seizing opportunities to speak or write and by attending the annual conference in October. This investment – especially for lawyers outside the United States – is time and money well spent.

Through my own participation in the Forum, I have formed tremendous friendships and relationships with literally hundreds of in-house and outside franchise counsel, both in the United States and in other countries. Many U.S. franchisors look around the world for international expansion opportunities. And when those franchisors enter a market, their U.S. lawyer knows that they almost always need the advice and assistance of local counsel. There is no better way to become known to the U.S. franchise bar than by becoming an active member of the Forum. There is also no better way to stay informed about legal developments and trends.

The Forum offers opportunities to learn and stay current through leading-edge publications such as The Franchise Lawyer and the Franchise Law Journal and through its annual meeting, which includes various international workshops among its wide range of offerings. The Forum actively seeks contributions from lawyers on developments all around the world, both for its publications and for its annual meeting.

So through the Forum, international lawyers have opportunities to develop their practices by writing and speaking, as well as by meeting lawyers who are potential clients and sources of referral work. In these ways, an international franchise lawyer can become a go-to resource for matters related to his or her country.

Without a doubt, the commitment of my firm’s franchise lawyers to the Forum has been a boon to our practice. Of course, I would be delighted for you to forget everything I have said here and leave these opportunities to us. But now that I have given away our secret, I know you will join the ABA Forum on Franchising. And I will look forward to seeing you there.

Larry Weinberg, Cassels Brock & Blackwell, LLP, Toronto
Minimum Advertised Price Policies

Continued from page 4

communicate an actual sales price in a different manner—such as “Call for Pricing” or “Add to Cart to See Price”—can be a critical component of any MAP policy.

• No Agreement. MAP policies should expressly state that they are unilateral and do not constitute an agreement. Questions may arise when traditional “brick and mortar” retailers encourage or support the adoption of an IMAP policy. Manufacturers should resist the temptation to implement a MAP policy in response to complaints from retailers about a discounting competitor.

• Broad Application. Policies that apply to all off-site advertising, no matter what form, are more likely to be upheld than policies that are specifically directed at internet retailers.

• Advertising Funds. Restrictions on advertising are more likely to be upheld if the manufacturer funds the advertising in whole or in part. Whether funding is an actual requirement before imposing MAP restrictions, and what ratio of funding should be provided (full or partial), remain unclear from the case law. Interestingly, the MAP policies in the recent WorldHomeCenter.com cases, discussed above, did not provide for any funding, and the courts did not mention this as a required element for a MAP policy.

• Clarity. A MAP policy should be user-friendly and easy to understand. It should include a Frequently Asked Questions guide to clarify how the policy works.

Surveys

Continued from page 6

In determining a dealer franchisee’s eligibility for performance-based incentives. In Colonial Imports Corp. v. Volvo Cars of North America, Inc., 2001 WL 274808 (D.N.H. Jan. 9, 2001), a dealer argued that Volvo’s decision to tie dealer eligibility for cash incentives to the results of subjective consumer surveys was arbitrary and, thus, unlawful under New Hampshire’s Vehicle Franchise Act, which makes it unlawful for motor vehicle manufacturers and dealers to “engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage.” N.H. Rev. Stat. Ann. § 357-C:3, I (2000). Specifically, the dealer argued that because the surveys were subjective and manipulable, their use was arbitrary. Colonial Imports Corp., 2001 WL 274808, at *6. But the court rejected the dealer’s argument, holding that “subjective” does not necessarily lead to arbitrary. “Given the inherently subjective nature of customer satisfaction and its importance to any commercial endeavor, it was not unreasonable for Volvo to base dealer incentives on the results of surveys that attempted to measure customer satisfaction.” Id. at *6.

Lessons Learned

Now that courts are willing to allow the introduction of consumer survey results into evidence, what steps can franchisors and franchisees take to ensure that their survey results are both admissible and afforded the greatest evidentiary weight?

At the outset, franchisors and franchisees not already doing so should consider implementing consumer satisfaction surveys as part of their regular business practice—not only to benefit their business operations, but to provide valuable evidence if litigation ever arises. Second, when preparing their surveys, franchisors and franchisees should consider consulting counsel and survey providers familiar with the issue of survey admissibility. At a minimum, franchisors and franchisees should consider using quick and inexpensive (or sometimes free) survey resources available to the general public, such as SurveyMonkey, Google* Consumer Surveys and Usamp™ to name a few, while keeping in mind that careful survey preparation and methodology are critical.

In preparing and implementing surveys, franchisors and franchisees should keep the following in mind:

1. Don’t wait until litigation arises. As Justice Sotomayor noted, surveys of interviewees that lack knowledge of the litigation or “purpose” of the survey results are inherently less biased.

2. Frame survey questions to inquire about the interviewee’s present impressions, rather than recollections of past events. This is easier to accomplish if the surveys are conducted as part of a company’s day-to-day operations, rather than as part of litigation.

3. Frame survey questions that are “clear, precise, and non-leading.”

4. If there is risk that consumer-interviewees will lie for personal reasons, consider making the survey anonymous to reduce that risk.

5. Make the sample size statistically significant.

6. Do not limit the survey arbitrarily. Limitations as to a certain geographic area or specific period of time, for example, may be appropriate restrictions.
L102/1.23.04.2010), and accompanying Guidelines on Vertical Restraints. This Block Exemption provides that for a franchise agreement to come within the exemption to Article 101 of the Treaty on the Functioning of the EU (the EU’s primary anti-trust provision, which prohibits any conduct that “prevents restricts or distorts competition or may have such an effect”), certain conditions must be satisfied, including a maximum post-term non-compete clause of one year.

This limit is not relevant to most franchise agreements, given the European Court of Justice’s judgment in Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgallis, (Dec. 17, 1986; OJ EEC L 13/39, Jan. 15, 1987) (holding that restrictions in a franchise agreement that are strictly necessary to preserve the unique nature of franchising are justified). Nevertheless, the courts of the member states have jurisdiction to apply EU competition law, and, as commentators have noted, some national courts seem to miss this point and use the one-year threshold as a starting point when considering post-term non-competes in franchise agreements. (Editor’s Note: The block exemption is discussed in detail in “The New Vertical Agreements Block Exemption Regulation,” in our Fall 2010 issue, Vol 13, No. 4.)

Conclusion
The EU has no uniform law across the 28 member states regarding post-termination covenants against competition in franchise agreements. Covenants can be much more difficult to enforce in Germany and Austria than they are in the UK, for example. As a result, covenants must be carefully considered in light of the law of the member state that governs the franchise relationship.

or anything else on your mind. If we miss you there, contact any one of us by email or by phone. I may be reached at canderson@nexsenpruet.com or by phone in Charlotte at 704.338.5331.

Finally, this message would not be complete without a huge thanks to Max J. Schott, II, of Gray Plant Mooty in Minneapolis, who served for the past three years as Editor-in-Chief of The Franchise Lawyer. Max’s talent and smarts are exceeded only by his patience and generosity as he passed the baton to me. Many thanks also to Beata Krakus of Greensfelder, Hemker & Gale in Chicago for her terrific work as Associate Editor until she recently stepped down from that position.

As Max has been known to say, “The Franchise Lawyer is only as good as the articles we receive from Forum members like you.” So write an article for us! You will enjoy having written. We guarantee it.

Look for us at the Forum...

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...or call or email us to talk about writing opportunities or suggested topics for The Franchise Lawyer!
Fundamentals of International Franchising, 2nd Edition

Edited by Will K. Woods

Franchising continues to be a global phenomenon as U.S. companies continue to expand their brands outside of the United States. Providing you with the most updated information in this area of the law and to help you plan and prepare for global expansion, this resource guides you through the critical aspects of effectively and efficiently expanding a franchise beyond the United States.

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