The Governing Committee and Senior Leadership have been hard at work planning the 40th Annual Forum on Franchising, which will be held this year at the JW Marriott in Palm Desert, California, October 18-20, 2017. This year’s co-chairs, Dawn Newton and Ron Coleman, have selected this year’s theme, Franchising: an Oasis of Opportunity. More to come as the Forum on Franchising turns 40!

I did want to make Forum Members aware of certain changes the American Bar Association (“ABA”) is requiring relating to pricing Forum events (such as the Annual Meeting) and products (such as our publications and webinars). The ABA has adopted a consistent, three-tiered pricing structure that all ABA entities will be required to use. Mandated tiers are a Non-Member Rate, an ABA Member Rate, and a Sponsor Group Member Rate (Forum rate) for all ABA events and products. The ABA will also permit each ABA entity to select three additional special rates for meetings and products.

The ABA’s rationale for this change is that a simplified pricing structure will improve the ABA website’s user experience by making various pricing structures less confusing to members and making it easier for people to purchase ABA products and services. This structure is also designed to reduce the workload of ABA staff by reducing the amount of time it takes to input multiple prices, as opposed to the current process where as many as 20 prices are assigned to a single event/meeting. The ABA is optimistic that a three-tiered pricing structure will help drive membership conversion and retention and increase dues-paying members. While reasonable minds can differ on whether the ABA’s rationale is correct, or whether members would prefer to have a more complex pricing structure and pay less money to purchase ABA products and services, the Forum on Franchising is required by the ABA to reduce the number of promotional rates offered by the Forum.
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Ever since Congress enacted the Federal Arbitration Act, it has been the national policy of the United States to favor arbitration. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). Where an agreement contains an arbitration clause, there is little a party can do to resist or avoid arbitration; however, this strong presumption of arbitration may have a small kink that is allowing parties to end up in court, despite the presence of a valid arbitration clause. The Ninth Circuit’s recent decision in *Tillman v. Tillman*, 825 F.3d 1069 (9th Cir. 2016), has caused some to question if there is a new way for parties to avoid the power of an arbitration clause: simply refuse to pay a party’s share of the arbitrator’s fees.

At first glance, *Tillman* reads like a plaintiff who successfully gamed the system. After Tillman sued her former law firm for legal malpractice, the law firm invoked an arbitration clause in her retainer agreement, and the court granted the law firm’s motion to compel arbitration, staying the case until such time as the arbitration “has been had in accordance with the terms of the agreement,” 9 U.S.C. § 3. Tillman eventually ran out of funds to pay the arbitrator. The arbitrator asked the law firm if it wanted to advance funds to cover the full costs of the arbitration, and the law firm declined. The arbitrator terminated the arbitration proceedings for failure to pay the fees, which Rule 57 of the AAA Commercial Arbitration Rules expressly allowed him to do.

Notably, the arbitrator could have also (i) agreed to proceed at a reduced fee equal to whatever the law firm was paying, or (ii) suspended the arbitration period in order to give the plaintiff an opportunity to secure funding for the remainder of the case.

After the parties went back to the district court, the law firm sought to lift the stay and dismiss the case under Federal Rule of Civil Procedure 41(b) for failure to prosecute or obey a court order. The court found that Tillman was unable to pay and declined to dismiss the case under Rule 41(b). Although the court dismissed the case on other grounds, the Ninth Circuit reversed, holding that the stay should be lifted because the arbitration was technically “‘had’ in the sense that the parties engaged in arbitration until the arbitrator terminated those proceedings.” *Tillman*, 825 F.3d at 1073. Importantly, the Ninth Circuit held that a plaintiff cannot avoid arbitration by simply refusing to pay; rather, the plaintiff must convince the arbitrator or court that it is unable to pay for the arbitration. As described by the Ninth Circuit:

> If Tillman had refused to pay for arbitration despite having the capacity to do so, the district court probably could still have sought to compel arbitration under the FAA’s provision allowing such an order in the event of a party’s “failure, neglect, or refusal” to arbitrate. 9 U.S.C. § 4.

*Tillman*, 825 F.3d at 1075 (quoting 9 U.S.C. § 4) (emphasis added) (footnote omitted). Notwithstanding this apparent limitation, Tillman has led some to ask if the law firm should have simply paid Tillman’s share of the arbitrator’s fees.

As a threshold matter, Tillman suggests that a franchisor should at least consider the financial condition of a franchisee before moving to compel arbitration. The plaintiff in Tillman could not have claimed poverty early in the proceedings because she had recently obtained the proceeds of a wrongful death lawsuit and had hired counsel to defend against claims by an omitted heir. However, a franchisee experiencing genuine financial difficulty could attempt to oppose a motion to compel arbitration on the ground that...
the franchisee cannot afford the costs and fees of arbitration. This issue has come up when the franchisee claims that the arbitration provision is unconscionable because of the high AAA fees imposed. See, e.g., Clark v. Renaissance W., LLC, 307 P.3d 77, 78 (Ariz. Ct. App. 2013) (upholding trial court’s determination that an arbitration agreement was substantively unconscionable because the arbitration would be “prohibitively expensive”).

"If a franchisor is not prepared to advance the costs of arbitration, it runs the risk of losing the ability to arbitrate."

But even if a franchisee claims it is financially distressed, a court might nevertheless compel arbitration and leave it to the arbitrator to decide whether to proceed in light of the financial condition of one of the parties. See, e.g., Grigsby v. DC 4400, LLC, 2016 WL 7115903, at *5 n.3 (C.D. Cal. Dec. 5, 2016) (rejecting plaintiffs’ argument that a motion to compel arbitration should be denied because the action “will inevitably return in light of their inability to pay”). As the District Court in Grigsby noted, an arbitrator may determine to reduce the amount of deposits required in advance or allow one party to pay the others’ share. Id.

There are several other factors one should consider in determining how to react to the non-payment of the arbitrator’s fees. First, the party bringing or defending the action needs to be clear about its goals in pursuing the dispute. If the issue is simply a matter of damages, then a franchisee’s inability to pay arbitration fees is a good indicator that a franchisor might not be able to recover the full amount of any arbitration award. In this situation, litigating the dispute in federal or state court – or even deciding to forego a claim – might be a more cost effective avenue than arbitration. On the other hand, if the goal is to enforce some non-monetary contractual provision, then it may make sense for a franchisor to advance the arbitrator’s fees and proceed with arbitration.

Second, the party should consider the advantages arbitration might offer in light of the goals of the dispute. One benefit of arbitration is the possibility that the arbitrator might have franchise experience. If the dispute turns on any of the many specialties and nuances of franchising, the parties might be better served by a knowledgeable arbitrator than a judge who may or may not have any experience in the franchise world. Another possible benefit depending on the circumstances is that arbitration allows parties to avoid a jury trial. Put another way, depending on the nature of the dispute, arbitration might be a better venue for resolving an otherwise meritorious case with challenging facts. Finally, arbitration often, though certainly not always, provides for a more streamlined resolution of the dispute, with quicker disposition, less discovery, and less expense. In fact, some arbitration provisions limit the number of experts and the amount of depositions and written discovery parties can conduct.

Finally, a franchisor should consider including language in its standard franchise agreement to address the issue of a franchisee failing to pay the required arbitration fees. For example, a franchisor might include a provision requiring that any fees advanced by the franchisor must be taken into consideration by the arbitrator when making its award, even if there is a prevailing party provision. Such a provision might contain an offset clause, so that if the franchisor ultimately is found at fault in the arbitration and monetary damages are awarded to the franchisee, any arbitration award is offset by the advanced fees. Additionally, a franchisor might include a provision addressing the number of required arbitrators. For instance, if a three-person panel is required, the panel could be reduced to one arbitrator in the event the franchisee establishes it cannot afford to pay the on-going fees.

The bottom line is that if a franchisor truly wants arbitration, it should be prepared to pay for it. If a franchisor is not prepared to advance the costs of arbitration, it runs the risk of losing the ability to arbitrate. ■
The spousal consent form is a standard exhibit in virtually all franchise agreements. It protects the franchise interest from becoming implicated in a property dispute during a divorce. In short, this form is designed to protect franchisors from ending up in business with an ex-spouse of a franchisee. But, is the standard form getting this done? There are important business reasons to take a fresh look at this document.

**Definition of Spouse and Corresponding Rights**

Who is a “spouse?” Seems simple enough – a spouse is a partner in marriage. Traditionally, this meant that when two people married, they joined their households – and finances – and thus enjoyed state-recognized rights because of that marriage. In the current legal landscape, however, things are a little more complicated.

For example, the meaning of “spouse” and the consideration of marriage is particularly complex when considering same-sex couples. Since the Supreme Court’s decision in Obergefell v. Hodges, 135 S. Ct. 2584 (2015), same sex couples may be married and have their marriages recognized in all US states and territories. However, there are vast discrepancies across the states regarding whether sexual orientation is a protected classification for employment and housing discrimination laws. For example, twenty-eight states do not have laws prohibiting housing discrimination based on sexual orientation, and twenty-eight states do not have laws prohibiting employment discrimination based on sexual orientation. See http://www.hrc.org/state_maps. In addition, state courts are still grappling with whether same-sex couples in long term relationships before Obergefell are eligible for common law marriage recognition. See G.M. Filisko, After Obergefell: How the Supreme Court ruling on same-sex marriage has affected other areas of law, A.B.A. JOURNAL (Jun. 1, 2016). http://www.abajournal.com/magazine/article/after_obergefell_how_the_supreme_court_ruling_on_same_sex_marriage_has_affe. These considerations often weigh heavily in marriage decisions for same-sex couples.

Moreover, there are legal and economic considerations that affect the decision to marry and what it means to be a “spouse” for couples of all orientations. For example, there are federal programs that still look to state definitions of who is a spouse for determining benefits eligibility. Accordingly, many couples are looking more closely at the economic implications of their family decisions. Some couples choose to rely on (the less formal and public) common law marriage statutes to commemorate their unions. Other couples choose to be in domestic partnerships. With the multiple options available for couples when considering their unions, it is crucial for all parties entering into franchise agreements to make sure that they are broadly protected.

**Business Purpose – Call it What It Is**

The purpose of the “spousal consent” form is to provide some predictability to the franchise relationship. However, with all the factors complicating even the definition of a spouse, this form may provide less predictability than the parties intend. Where marriage grants spouses property rights to commonly held marital property, most franchisors either require the spouse of an individual franchisee to guarantee the obligations of the franchise – to join the deal – or disavow any interest. This is the document by which a spouse gives up his or her rights to an interest in the franchise. This means that the spousal consent form is actually a post nuptial property transfer. Making some relatively small changes to the form will help clarify the parties’ intent, broaden protection for franchisors, and lower the risk of challenge to its validity. Calling the document a “Property Interest Consent and Waiver” form also aligns with the goal of providing appropriate disclosure to prospective franchisees.

**Practice Considerations**

Consider the following practice considerations for revising the spousal consent form to a “Property Interest Consent and Waiver” form in Franchise Agreements:

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By Susan Meyer and Colleen M. Raimond, Nixon Peabody

**Spousal Consent – What Does That Mean?**

**DEALMAKER’S CORNER**

Susan Meyer
Nixon Peabody

Colleen M. Raimond
Nixon Peabody
• Identify what it is – a property transfer.
• Provide notice to the “spouse” about what the form does and what interests are being waived.
• The waiver should be witnessed.
• The waiving party’s signature should be notarized.
• The franchisor should maintain the original signed document with the franchise files.
• Consult with your estate planning and family law colleagues to tailor your forms to your particular state law.

Sample Language
Below is language that was accepted in a franchise registration last year in California. The regulator requested that we continue to use the term “Spousal Consent” so that people encountering this form are not confused.

PROPERTY INTEREST (SPOUSAL) CONSENT AND WAIVER
The purpose of this waiver is to affect your property rights. This waiver operates effectively as a post-nuptial agreement as it supersedes and amends any prior understanding or agreement between you and the Franchise Owner (as defined below), whether written or oral. You are advised to consult with counsel of your choosing before executing this Waiver.

Initials: ______
I hereby represent that I reside in ________________ (the state where you reside) and am the spouse, partner, civil union participant, (however our relationship may be defined under applicable state law) or recognized spouse under common law marriage of ____________________________ (“Franchise Owner”).

I acknowledge and understand that Franchise Owner or a corporation, partnership, or limited liability company in which Franchise Owner is a principal owner (the “Franchisee”), will be entering into, or has already entered into a Franchise Agreement with [Franchisor] (“Franchisor”) to acquire a [Franchise] franchise and operate a [Franchise] location. I hereby waive any right, now or in the future, to assert a community property or quasi community property interest in the franchise, the Franchise Agreement, the [Franchise] location, or in the Franchisee entity. I understand that in the absence of this Property Interest (Spousal) Consent and Waiver, the Franchisor, as a condition of granting the [Franchise] franchise to Franchise Owner, would have required me to personally enter into the Franchise Agreement or to execute a personal guaranty of all of Franchisee’s obligations under the Franchise Agreement. I represent and agree that the waiver of this condition by Franchisor is sufficient consideration for this Property Interest (Spousal) Consent and Waiver. I understand that if I did not wish to provide this Property Interest (Spousal) Consent and Waiver, I could have agreed to personally execute the Franchise Agreement or the personal guaranty. I hereby represent and acknowledge that I knowingly and deliberately elected not to do so and to instead provide this Property Interest (Spousal) Consent and Waiver.

If, notwithstanding this Property Interest (Spousal) Consent and Waiver, I claim or am awarded in a legal action a community property interest, quasi community property interest, or other ownership interest in the franchise, the Franchise Agreement, the [Franchise] location, or in the Franchisee entity, other than by way of a transfer approved in writing by Franchisor as provided in the Franchise Agreement, that I hereby agree, without further action or execution of further instruments, that at the Franchisor’s option, (i) I will be personally bound by all of the terms of the Franchise Agreement and be liable for the performance of all obligations thereunder, or (ii) the claim or awarding of such interest in the franchise, the Franchise Agreement, the [Franchise] location, or in the Franchisee entity constitutes grounds for termination of the Franchise Agreement as an unapproved transfer.

Conclusion
The definition of a family is evolving and the agreements used by those selling franchises need to adapt to these changes. With an additional layer of state-specific nuances impacting the rights and obligations of the parties to the franchise relationship, prudent franchisors will revisit the “spousal consent” form and make its terms more universal. The best way to protect all parties to the franchise agreement is to follow three simple steps: 1) call it what it is – a Property Interest Consent and Waiver; 2) follow the formality rules for your jurisdiction (or the most restrictive one); and 3) consider the laws of the state where the franchise agreement will be enforced. The business benefits of these changes are well worth the effort.
Control Use or Lose It!
Wild Turkey Bourbon Owners Lose Australian Wild Geese Trademarks
By Iain Irvine, KHQ Lawyers

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S-based and other international franchisors with franchisees in Australia should take note of a recent decision of Australia’s Full Federal Court that examined the circumstances in which trademark licensors can rely on use by their licensees when resisting applications to remove their registrations for non-use. Should these licensors fail to exercise “actual” control over use of their Australian registered trademarks, those marks could be deregistered. The case also calls into question whether corporate structures used by franchisors internationally that include the use of IP holding companies require review to limit the risk to any Australian trademarks held within those structures.

Non-use and Authorised Use
Section 92(4)(b) of the Trade Marks Act 1995 provides that an application may be made to remove a trade mark from the register if that trade mark has remained registered for a continuous period of 3 years, ending one month before the day on which the non use application is filed, and, at no time during that period, the person who was then the registered owner, used the trade mark in Australia in relation to the goods and/or services to which the application relates.

Section 7(3) provides that an authorised use of a trade mark by a person is taken, for the purposes of the Act, to be a use of the trade mark by the owner of the trade mark.

“Authorised use” is defined under section 8 as use under the control of the owner. This expressly includes, but is not limited to: (1) the owner exercising quality control over goods or services dealt with or provided in the course of trade in relation to which the mark is used; and (2) the owner exercising financial control over such trading activities.

Lodestar Anstalt v Campari America LLC [2016] FCAFC 92 examined the control required under a trademark licence such that the licensor can rely on the licensee’s use in defending a non-use application.

Wild Geese vs Wild Turkey
The producer of Wild Geese Rare Irish Whiskey, Lodestar Ansalt, registered the mark WILD GEESE in Australia in 2000. Around the same time, Wild Geese Wines Pty Ltd (“WGW”) began operating a vineyard under its name in South Australia.

In 2005 WGW sought to register WILD GEESE WINES and WILD GEESE as Australian trademarks. WGW filed a non-use application with respect to the existing WILD GEESE mark held by Lodestar Ansalt. The owners of the Wild Turkey Bourbon brand, a predecessor of Campari America LLC (“Wild Turkey”), also filed a non-use application. There was an initial dispute between the two applicants, WGW and Wild Turkey. However, in 2007, they reached a settlement the terms of which included:

• transfer by WGW to Wild Turkey of whatever interest WGW had in the trademarks WILD GEESE WINES and WILD GEESE and the non-use application against Lodestar Ansalt; and
• grant of a perpetual licence, for a nominal licence fee, of the trademarks WILD GEESE WINES and WILD GEESE from Wild Turkey to WGW.

Wild Turkey then secured removal of the Lodestar Ansalt mark for non-use and successfully registered the marks WILD GEESE WINES and WILD GEESE.

In 2010, Lodestar Ansalt made a non-use application against Wild Turkey in relation to the same marks. During the time that it held the trademarks for WILD GEESE WINES and WILD GEESE, Wild Turkey had not used the marks itself. Thus, the Court needed to decide whether Wild Turkey could rely on the use by winemaker WGW of the marks under the licence agreement for the purpose of defending against an allegation of non-use.

The licence agreement between Wild Turkey and WGW contained quality control provisions. WGW was required to ensure the wine was of sufficient quality to obtain export approval from the Australian Wine and Brandy Corporation (“AWBC”). Further, on request, WGW was required to supply samples for testing to ensure ongoing compliance with the AWBC standards. If these standards were not met, the licence provided the wine would be withdrawn and not marketed under the marks. Wild Turkey could terminate the licence for any material breach by WGW.
The licence also contained typical provisions relating to not amending the marks, not using them in a scandalous fashion and only using them in relation to the agreed upon goods and services (in this case, wine).

Other relevant evidence in the case included:
• Although WGW was aware of its obligations under the licence they did not impact on how it made wine;
• No wine samples were provided within the relevant 3 year non-use period (although they were provided after that period); and
• Testing against the AWBC standard had a low failure rate.

As a threshold matter, the primary judge found that there was no actual control over the use of the marks or the quality of the wine to which they were applied. His honour’s view was that control under section 8 meant actual control and not the mere possibility of legal control. Despite this, he decided in favour of Wild Turkey, based on his reading of the earlier decision Asia Television Ltd & Another v Yau's Entertainment Pty Ltd., [2000] FCA 838, which he understood he was bound to follow.

On appeal, the court considered earlier caselaw and the Second Reading Speech for the legislation. In the leading judgment, Judge Besanko reasoned:

The meaning of “under the control of” in Section 8 is informed by the principle stated by Aickin J in Pioneer [Kabushiki Kaisha v Registrar of Trade Marks, [1977] HCA 56]… that the trade mark must indicate a connection in the course of trade with the registered owner. The connection may be slight, such as selection or quality control or control of the user in the sense in which a parent company controls a subsidiary. It is the connection which may be slight. Aickin J was not saying the selection or quality control or financial control which may be slight.

The court went on to say:

I think control in Section 8 means actual control in relation to use of the trade mark and it means actual control in relation to the trade mark from time to time…. Control involves questions of fact and degree as does the notion of sufficient connection. There must be control as a matter of substance.

The court, therefore, focused on the terms of the licence agreement and conduct of the parties during the relevant 3 year period prior to the non-use application. The evidence was that the quality control provisions of the licence had little impact on the manner in which WGW made its wine. WGW took little notice of the relatively low AWBC standard and sought to make good to high quality wine. No monitoring was undertaken by Wild Turkey and the samples to which it was entitled were never obtained. The court disagreed with the primary judge’s interpretation of Yau and found the use by WGW was not authorised use.

Leave to appeal the decision to the High Court was refused November 16, 2016 as “there is no reason to doubt the correctness of the decision of the Full Court.”

Lessons from the Case

In light of this decision, all owners of Australian trademarks whose use is limited to licensing of the marks should ensure:

Licence agreements contain robust provisions for control of use of the marks by the licensee which may include provisions permitting: quality control of goods and services provided by the licensee under the marks; and/or financial control over the licensee’s trading of goods or services in relation to which the marks are used.

Actual monitoring of compliance with conditions for use of the marks and in the event of breach, enforcement of the same.

Although the terms of the licence from Wild Turkey to WGW were less than “commercial,” the parties were at arm’s length. A question the case raises is what if any weight would be given to corporate control of a parent company licensor over its licensee subsidiary for the purposes of assessing whether the licensee’s use is authorised use by the licensor for the purposes of section 8. This and other intra-group arrangements such as trademark licences between companies under common control should be reviewed in response to this judgement.

This judgement is important for franchisors based in the USA and other jurisdictions who have licensed their systems, including trademarks, into Australia. Those franchisors should ensure that the entity that holds the Australian trademark registrations has an adequate level of control over the use of the trademarks to satisfy the definition of authorised use. Failure to do so may leave the marks open to attack on the basis of non-use.

Franchise agreements often have one or more conditions precedent that a franchisee must satisfy before commencing arbitration or litigation. This article discusses the general state of the law with regard to these conditions precedent, and provides franchisor and franchisee counsel with practical advice relating to such provisions.
Common Forms of Pre-Litigation/Pre-Arbitration Dispute Resolution Conditions Precedent

There are generally three different types of dispute resolution conditions precedent in franchise agreements: (1) notification to the other side, in writing, of potential claims; (2) direct, face-to-face negotiations to resolve a dispute; and (3) participation in a mediation conducted by a neutral. All three types of conditions precedent have been found to be enforceable.

For example, in *Ohio Power Co. v. Dearborn Mid-West Conveyor Co., Inc.*., the United States District Court for the Northern District of West Virginia grappled with whether to dismiss the case on account of the parties not having engaged in mediation. See No. 5:11CV164, 2012 WL 2522960, at *7 (N.D. W.Va. June 29, 2012). The parties’ agreement read, in pertinent part: “[t]he parties shall settle any dispute arising out of or relating to this Contract through the step negotiation and non-binding mediation set forth herein prior to the initiation of any litigation. Good faith participation in these procedures shall be a condition precedent to any litigation.” Id. at *3.

The court, applying Ohio law, decided to dismiss the matter, even though the plaintiff admitted that it would suffer “significant prejudice” through the defendant’s intended assertion of a statute of limitations defense. See id. at *7. The court, applying Ohio law, decided to dismiss the matter, even though the plaintiff admitted that it would suffer “significant prejudice” through the defendant’s intended assertion of a statute of limitations defense. See id. at *7. The court, applying Ohio law, decided to dismiss the matter, even though the plaintiff admitted that it would suffer “significant prejudice” through the defendant’s intended assertion of a statute of limitations defense. See id. at *7.

The United States District Court for the Eastern District of Virginia wrestled with the same issue in *Dominion Transmission, Inc. v. Precision Pipeline, Inc.*, No. 3:13cv442-JAG, 2013 WL 5962939 (E.D. Va. Nov. 6, 2013). The applicable dispute resolution process in that case had four parts: (1) notifying the other side of the dispute; (2) a meeting of project managers to discuss, and hopefully resolve, the dispute; (3) a meeting of senior officers, if the project managers were unable to resolve the dispute; and, if the dispute remained unresolved, (4) mandatory mediation in accordance with the standards of the American Arbitration Association (“AAA”). See id. at *1. The court decided to dismiss the action on account of the plaintiff’s failure to meet the last criterion. See id. at *4-5, *6. In reaching this decision, the court specifically pointed to a number of express clauses within the contract that made mediation a condition precedent to litigation. See id. at *4-5. For instance, § 23.3 of the contract, entitled “Litigation”, provided that “the ‘Parties may pursue litigation’ only ‘[i]f, despite the Parties’ attempts to mediate a dispute, such dispute remains unresolved’ (emphasis added).” See id. at *4. As a result of this “valid, agreed-upon contractual remedy”, the court found that dismissal of the action was appropriate. See id. at *6.

These decisions, and those like them, do not, however, stand for the proposition that a court will always enforce a condition precedent that is clear and reasonable on its face. In *Coyote Portable Storage v. PODS Enters., Inc.*, for example, the Eleventh Circuit Court of Appeals assessed a Northern District of Georgia’s summary judgment decision that found in favor of franchisees involved in a contractual dispute with their franchisor. 618 F. App’x 525, 528 (11th Cir. 2015). The Eleventh Circuit, as part of its review of the award of damages and attorneys’ fees, analyzed whether a particular claim was barred on account of the failure of one of the franchisees to meet a notice requirement found in their franchise agreements. See id. at 534-37. Applying Florida law, the court found that while “a notice provision in a franchise agreement may be valid[,]” that does not, in and of itself, foreclose a plaintiff from proceeding with a claim. See id. at 536-37. The court went on to find that “a claim is waived only if the failure to give notice prejudices the opposing party[.]” and here, there was no prejudice because such a contractual provision typically served to “lead the defaulting party to change course” and not “to foreclose claims . . . .” See id. The court thus refused to enforce the notice requirement, for if it did, it would have given the franchisor “an undeserved windfall.” See id. at 537.

The takeaway here appears to be that a condition precedent will typically be found enforceable where it: (1) has specific, unambiguous requirements that are reasonable in nature; and (2) results in prejudice...
to a party if unenforced. A dispute resolution section with one or more conditions precedent should, among other things, be clear about the time associated with each condition precedent, the manner in which the expense associated with a condition precedent is allocated, and the "outside vendor(s)" (e.g., mediation service) that may be involved in fulfillment of a given condition precedent. See, e.g., Free Range Content, Inc. v. Google Inc., No. 14-cv-02329-BLF, 2016 WL 2902332, at *13 (N.D. Cal. May 13, 2016) (finding that "the contract placed no time limit on when such mediation could be initiated and therefore did not bar later suit"). Put differently, there should be no confusion over how a franchisee is to meet any condition precedent, that a particular requirement is indeed a "condition precedent", and that the failure of a court to enforce the condition precedent would cause prejudice.

The Franchisor Perspective

A franchisor has much to gain from inserting one or more conditions precedent into its franchise agreements. To begin with, these provisions provide a franchisor with the opportunity to settle a dispute early and without an adversarial process. A franchisor, in this scenario, would have the chance to repair relations with the aggrieved franchisee(s) and not let a dispute permeate the entire franchise system. Further, and of equal importance, such prerequisites provide a franchisor with the opportunity to resolve a dispute before becoming subject to a demand for arbitration or lawsuit that would trigger an Item 3 disclosure in the franchisor's Franchise Disclosure Document. The Federal Trade Commission's Franchise Rule (16 C.F.R. Part 436) Compliance Guide explains, in pertinent part, that "[o]rdinarily, mediations need not be disclosed, unless the mediation results in the settlement of an ongoing lawsuit that must be disclosed in Item 3." One or more conditions precedent may thus give the franchisor the opportunity to avoid the airing of "dirty laundry" in public by way of an early settlement.

There is another potential benefit for a franchisor that decides to insert pre-litigation (or pre-arbitration) dispute resolution provisions into its franchise agreements: a claim may be foreclosed on account of the statute of limitations having run before the conditions precedent are met. A case may be subject to dismissal where a claimant or plaintiff has not met the conditions precedent that are set forth in a franchise agreement, which in some cases may place the claimant or plaintiff outside of the applicable limitations period(s) after dismissal. Indeed, some courts will dismiss an action "even when a party is left without recourse." See, e.g., Golden State Foods Corp. v. Columbia/Okura LLC, No. CV 13-8150 RSWL (VBKx), 2014 WL 2931127, at *7 (C.D. Cal. June 26, 2014) (granting summary judgment on two claims where the plaintiff had failed to satisfy "a condition precedent to seeking arbitration or legal or equitable remedies in litigation: submission of the claims to mediation"). Pre-litigation or pre-arbitration provisions may therefore insulate a franchisor, in certain circumstances, from liability completely.

Finally, these kinds of conditions precedent may have the practical benefit of challenging a franchisee's wherewithal to prosecute its claims. Mediation, for example, can require the expenditure of significant funds by the franchisee while providing the franchisor with an advance look at the "franchisee's hand." Conditions precedent can thus indirectly impede a franchisee's quest for relief.

The insertion of one or more conditions precedent is not without drawbacks for a franchisor. For starters, certain conditions precedent, such as mediation, may require the franchisor to spend substantial time and money on something that will not resolve a dispute. A franchisor also stands to lose if it abuses the dispute resolution process found in its franchise agreements. If, for instance, a franchisor attends a mediation simply to financially drain a franchisee and does not meaningfully participate, it could find itself facing a claim for breach of contract or breach of the covenant of good faith and fair dealing for failing to mediate pursuant to the agreement. A franchisor should keep these considerations in mind before setting out conditions precedent in its franchise agreements.

The Franchisee Perspective

Franchisees and their counsel have good reason to be skeptical of such provisions. As explained above, conditions precedent, at their worst (from the franchisee perspective), may fully insulate a franchisor from liability on statute of limitations grounds. And even if they do not fully insulate the franchisor, they may seriously hinder the advancement of claims by draining the franchisee's dispute resolution budget with conditions precedent that are not likely to lead to a settlement. After all, a franchisee bringing certain claims may need, at a minimum, proper discovery before a negotiation or mediation could be productive. Franchisee counsel should therefore consider attacking an agreement's conditions precedent.
A franchisee targeting the conditions precedent in light of the statute of limitations, especially one shortened by a franchise agreement, must establish the unconscionability associated with time that must be devoted to complying with the conditions precedent under the applicable limitations period. For instance, while negotiation and mediation are widely accepted forms of alternative dispute resolution, they may, if embedded with draconian requirements, be found unconscionable. See, e.g., Garrett v. Hooters-Toledo, 295 F. Supp. 2d 774, 782 (N.D. Ohio 2003) (explaining, in an employment dispute, that “[t]here can be no doubt that the mediation requirement and the ADR Agreement as a whole are written to discourage potential claimants from pursuing their claims; the agreement’s rules impose burdens and barriers that would routinely deter . . . [parties] from vindicating their rights”). In such an instance, the court may refuse to enforce the conditions precedent, or, in the event that the matter so as to not lead to a violation of the statute of limitations. Such an outcome is by no means uncommon. See, e.g., Getchell v. Santtrust Bank, No. 6:15-cv-1702-Orl-TBS, 2016 WL 740603, at *3 (M.D. Fla. Feb. 25, 2016) (“Although dismissal is warranted [by the virtue of the contractual language] . . ., the Court finds that a stay is more appropriate. . . [T]o stay the case instead of dismissing it fulfills the interests of justice and fairness”) (citations omitted).

Similarly, a franchisee targeting the cost of complying with a condition precedent must establish that the expense would deter him or her from vindicating important rights. See Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549, 558 (4th Cir. 2001) (explaining, in part, that “this case presents a paradigmatic example of why fee-splitting should not be deemed to automatically render an arbitration agreement unenforceable . . .”). A court or arbitrator should not invalidate a condition precedent where the “risk” that a party will incur prohibitive costs is speculative. See Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 91 (2000) (focusing on arbitration costs). To meet its legal burden, a franchisee will need to produce substantive affidavits, likely with supporting exhibits, explaining his or her present financial reality and how such expense is prohibitive. This burden may be quite onerous with respect to mediation expense, for “the AAA charges no administrative fees for mediation and the parties can select a lower cost mediator.” See Sanchez v. CleanNet USA, Inc., 78 F. Supp. 3d 747, 756 (N.D. Ill. 2015).

**Practical Advice**

A franchisor, in sum, has good reason to strongly consider the insertion of one or more conditions precedent to franchisee initiated litigation or arbitration. Such conditions precedent could aid a franchisor in resolving a dispute early. They could also help a franchisor escape liability under a statute of limitations defense. Their insertion into a franchise agreement under language that mimics, or closely parallels, the contractual language highlighted in this article, should merit careful consideration.

By comparison, franchisee counsel, when turned to by a client with a potential claim, should consider from the outset whether a given condition precedent is valid or whether it is susceptible to a legal challenge. Courts and arbitrators will not enforce conditions precedent that purely serve to harass. In the event that a franchisee turns to counsel with little time left to both meet one or more conditions precedent and to file a claim, it is advisable for counsel to file a lawsuit and then move to stay the action until completion of any condition precedent that the court finds enforceable. Alternatively, franchisee counsel could seek to obtain a tolling agreement from franchisor counsel, which would enable the franchisee(s) to complete the conditions precedent before commencing an action. Such positions may save the franchisee(s) from having the claim(s) dismissed.

For additional information relating to pre-litigation or pre-arbitration dispute resolution provisions, practitioners should consult two publications of the ABA Forum on Franchising. One, authored by Peter Klarfeld, Michael Lewis, and Peter Silverman in connection with the 32nd Annual Forum on Franchising, is titled: “Mediating Franchise Disputes”. The second, authored by Elizabeth Weldon and Patrick Kelly for the Summer 2011 edition of the Franchise Law Journal, is titled: ”Prelitigation Dispute Resolution Clauses: Getting the Benefit of Your Bargain”. Although both works are over half a decade old, they continue to merit careful consideration by both franchisor and franchisee counsel.

As is always the case, clear, reasonable contractual terms are generally enforceable. Others that are imprecise and ambiguous are not. Franchisors and franchisees – beware.
Recent Changes to the European Code of Ethics for Franchising

By Nicola Broadhurst, Sterns & Bolton LLP

The regulation of franchising in Europe is not harmonised to the same extent as certain other industry sectors. As a result each EU Member State has adopted its own approach towards franchising within the confines of relevant applicable European law (primarily the Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices and its Guidelines on Vertical Restraints). In addition, many EU Member States do not even have an independent code of practice governing franchising. Instead, the European franchise industry has largely relied on self regulation and, as a result, the European Franchise Federation ("EFF"), a not-for-profit international association based in Brussels, Belgium, was established on 23rd September 1972 to be the self regulatory organisation for this purpose. The mission of the EFF is stated both on its website and in its Code of Ethics and can be summarised as follows: to be the single authoritative voice for European franchising, both in the world community of franchising and to European institutions; to protect the franchise industry and its members by promoting an evolving European Code of Ethics; and to share best practice between its members. Its members are a mixture of national franchise associations and federations across Europe and as at January 2017 has 20 members. The British Franchise Association is one of these members.

When it was established, the EFF published its European Code of Ethics for Franchising ("the “Code”). The Code sought to enshrine and establish a set of guidelines and principles for both Franchisors and Franchisees and set the standard for good and ethical franchising practice across Europe. Although the Code does not have the authority of law, it does represent best practice, and the members of the EFF are required to adopt it for the benefit of their members via their own membership rules. The EFF delegated the responsibility to its members to interpret and adopt the Code as each thought best, in order to accommodate the differences in national laws and approach. Whilst a member cannot delete or amend the Code, it can extend and interpret it by adding provisions, provided these do not conflict with or detract from the Code and are attached to the Code in a separate document. As a result, the Code has been widely adopted and implemented by those national franchise associations and franchise federations that are members.

Although not all franchisors (or franchisees) are members of national franchise associations and franchise federations which have adopted the Code and, therefore, are not required to comply with the Code, it is still significantly influential in providing a moral code of conduct which national courts or regulatory authorities can reference for guidance in franchising matters and disputes. It can also assist potential franchisees in the evaluation of a franchisor, as it effectively sets a benchmark by which a franchisor’s working practices can be measured.

Last year, the EFF amended the Code and each of its members are now required to adopt and implement these revisions. The revised Code was adopted by the British Franchise Association at its Annual General Meeting on 8th December 2016.

In order to assess and evaluate the changes to the Code, it is important to place the decision to revise it in context. Although the self-regulatory approach towards franchising in Europe has worked well for the main part, it has recently been subject to challenge at a European level. In April 2016 the Internal Market and Consumer Protection Committee (IMCO) of the European Parliament commissioned a study on the regulatory framework and challenges for franchising in the EU, and hosted an IMCO Workshop to discuss the issue on 12th July 2016. The study assessed the impact of the current EU regulatory environment on the development of franchising in Europe. It concluded that the lack of uniformity in EU franchising was a significant factor in preventing franchising from fulfilling its potential in the EU and also helped to perpetuate certain unfair
trade practices within franchise networks to the disadvantage of European franchisees. It was further suggested that in order to address these issues, a specific franchise law should be considered at a European level to address this issue. So far, this has yet to find favour with the European Commission. The Commission remains unconvinced that, even if unfair trade practices exist in franchise networks that such practices affect trade between member states. Therefore, the Commission believes that these practices remain a domestic issue to be addressed by national courts.

It is likely that franchising challenges will persist in Europe, at least in the near future, particularly given that the Block Exemption dealing with Vertical Agreements (Commission Regulation (EU) No 330/2010 of 20 April 2010) (which is the key piece of EU legislation affecting franchise agreements) is due to expire on 31st May 2022 and will need replacing. This provides a key opportunity for proponents of greater regulation of franchising at an EU level to push for a franchise-specific law. Therefore, in order to help stave off such further regulation of franchising at an EU level, it is important that the EFF can be seen to be an effective self-regulator with a dynamic, relevant Code that is widely adopted and implemented. Although not necessarily the sole factor in prompting a change to the Code, this has clearly been a contributory factor in prompting the EFF to seek to place itself at the forefront of franchise practice in Europe as an all-inclusive and proactive voice for franchising. The revised Code reflects this desire.

Whilst not entirely a re-positioning, it is clear from the changes to the Preamble to the Code that there is a new emphasis on a few key elements. Paragraph 4 of the Preamble states that the Code is there “for all stakeholders in the franchise industry in Europe to look to for guidance on franchising generally” and paragraph 8 refers to the multi-stakeholders approach, representing both franchisors and franchisees. This helps to address one of the criticisms of franchising in the IMCO’s Study which highlighted the fact that franchisees as a body appeared to be underrepresented in Europe. Paragraph 10 of the Preamble specifically states that the Code is being updated in part to meet “the recommendations of the European Commission on matters of Self-Regulation”.

However, the EFF states that it’s most important role is to promote the adoption of the Code “to secure the development in the EU of proper and ethical franchising”. As a result the revised Code now places a greater emphasis on its members not only to adopt, but to promote the Code nationally and to ensure it is publically available. This shifts the focus of the EFF from a narrow regulation of its membership to a wider duty to help ensure that the Code is seen as the franchise industry’s benchmark for ethical franchise practice available to all for guidance, and not just its members. If successful, this will strengthen the EFF’s position and give credence to its claim to be the self-regulatory body for franchising in Europe.

Throughout the revised Code there is a greater emphasis on the overarching principles of good faith in dealings between franchisors and franchisees. Whilst many countries in Europe, particularly those with a civil law jurisdiction, already acknowledge an implied duty of good faith in franchise agreements, in the UK this is not the case. Prior to the adoption of the revised Code by the British Franchise Association (“BFA”) the most recent judicial attempts to imply a duty of good faith into franchise contracts have been either rejected or confined (CareWatch Care Services Ltd v Focus Caring Services Ltd & Ors [2014] EWHC 2313). It will be interesting to see if this position now changes given the greater emphasis on just such a duty in the Code.

The definition of “Know-How” in the Code has also been changed from meaning “information which is indispensable” to information which is “significant and useful to the buyer for the use, sale or resale of the contract goods or services”. This provides a wider scope and reduced threshold, but reflects the practical reality of many franchise systems. The requirement that a franchisor describe the know-how in the franchise agreement or elsewhere has now been removed, provided it is present generally. Therefore it is no longer necessary to record the know-how in writing. This reflects the fact that much of the valuable know-how imparted to franchisees by franchisors is through experience and training, not all of which can be captured in writing. However, given that lack of valuable know-how could potentially be used as an argument to defeat the application of any post-termination restrictive covenants in a franchise agreement by a franchisee, it would be sensible to record any know how as far as possible to avoid such a challenge.
There is a greater emphasis in the revised Code on ensuring that the franchisor’s business concept is proven before franchising and that the franchisor maintains a vested interest in the continued success of the franchised business. Franchisors are therefore required to have operated for at least one year in the relevant market before franchising and must maintain and develop the know-how and transfer this, as well as encourage feedback from, their franchisees in order to assist in the development of the know-how. In addition, the Franchisor must promote the brand. This helps address the issues that sometimes arise when a franchisor is a passive participant in the franchise relationship and fails to maintain a competitive place in the market, as a result devaluing a franchisee’s investment.

In addition, franchisors are required to recognise their franchisees as independent entrepreneurs and not directly or indirectly subordinate them as employees. This recognises that there are some franchise arrangements which rely heavily on the sub-contracting of work by franchisors to franchisees under national account arrangements. Where there is an over-dependence on such subcontracted work, franchisees can fail to develop the market independently, which in turn can result in the relationship being scrutinised and found to be something other than a franchise.

Franchisors are now also required to provide information on the franchisor’s internet, commercial and/or sales policies and safeguard the franchise network’s interest in the development of such policies. As e-commerce becomes ever more popular, it can provide an inherent tension in the relationship if a franchisor’s online or sales strategy is unaligned with its franchisees’ businesses, particularly if rewards are not shared from online sales by the franchisor. However, it is arguable whether this statement in the Code by itself is sufficient to address this very real and growing concern in franchise relationships, particularly as this was one of the areas where unfair trade practices were observed in the IMCO’s Study.

Pursuant to the revised Code, Franchisees are also subject to additional obligations and must “collaborate loyally” with their franchisors and fellow franchisees, and each franchisee must be responsible for its own acts and for staffing and financing its own business. Although franchisees are required to supply financial data to their franchisors, the requirement that franchisors must be allowed to gain access to the franchisees’ premises to obtain such information has been removed. A franchisee must also allow the franchisor to maintain the quality and image of the franchise concept. This is a broad statement, but would enable a franchisor to ensure that any websites established by its franchisees and use of social media by franchisees are controlled to ensure that the brand reputation is maintained.

Further, franchisees are now required to adopt a multi-tiered approach to dispute resolution and are therefore now required to seek mediation in good faith before initiating litigation or arbitration. This statement helps pave the way for EFF members to introduce compulsory dispute resolution schemes for their own members. For example, the BFA is currently proposing to introduce a compulsory arbitration scheme for its members, with the aim of offering a quick and affordable alternative to other forms of dispute resolution. The scheme would be administered by the BFA and would provide access to a panel of industry experts to help ensure just and fair results in quicker time periods than would otherwise be achievable. If successful, such a scheme could help cement the position of BFA (and other member associations or federations who follow suit) as an effective franchise self-regulator without the need for further regulation either nationally or at the EU level.

Under the revised Code, Franchisors must ensure that they provide a copy of the Code to their franchisees or provide public access to it. However, the onus is now placed on prospective franchisees to analyse material and obtain professional advice. There is an additional requirement for franchisors to provide contractual documentation in a language in which the franchisee formally declares itself competent. How such formal declaration should be made, however, will be up to each member of the EFF to interpret and provide members with guidance accordingly.

The Code provides for certain contractual terms that must be included as a minimum. Many of these are re-statements of previous guidance. However, there are a few amendments.
For example, a franchisor must ensure that its intellectual property rights can be established for as long as the term of the franchise agreement. The Code also applies to the relationship between a master franchisee and its franchisees (although not between master franchisees and their franchisor). Therefore a master franchisee will need to ensure that it has secured a sufficiently long licence of the relevant intellectual property rights from its franchisor to last the duration of the franchise agreements the master franchisee issues. Additionally, both parties are now required to grant notice for renewal (rather than just the franchisee as was formerly the case) and a franchisee must now have a right to sell his business as a franchised going concern, subject to the franchisor’s approval, rather than the discretionary right contained in the previous version of the Code.

The revised Code is more reflective of current practice, but perhaps could have gone further. While it is stated to be the all-inclusive voice of both franchisors and franchisees, and does represent progress in addressing some of the key concerns of franchisees as highlighted in the IMCO Study, the revised Code does not by any means address all such concerns. It remains to be seen how EFF members will choose to adopt (or not adopt) the guidance contained in the revised Code.

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**Does a Product Withdrawal or a Market Withdrawal Constitute Statutory Good Cause for Termination?**

By Jeffery S. Haff and Serena I. Chiquoine, Dady & Gardner

Through a midnight announcement on January 9, 2017, Polaris Industries, Inc. announced that it would “wind down Victory motorcycle operations” in an effort at “strengthening its position in the powersports industry.” Many dealers have carried Polaris’s Victory line of product for many years, putting their time, effort and money into selling and representing the product. But, then, in the middle of the night, Polaris announced that, although Polaris has not claimed that its dealers have done anything wrong, the following would happen:

1. The dealers will no longer be receiving any more new motorcycles;
2. Polaris has already told the entire universe of consumers that it will not be making or selling the Victory product line anymore; and
3. Polaris will not compensate the dealers for their lost future cash flow or other financial losses the dealers will suffer from the loss of the product line.

Although Polaris has subsequently provided two alternatives to dealers – stay on as a parts and service only dealer with no new units to sell, or exercise their state “buy back” rights and exit from Polaris.

These remedies are insufficient for many dealers. A Polaris dealer who pulls out and reads his or her written dealer agreement will see that the agreement is generally not favorable to the dealer. These agreements often include an acknowledgement that a product may be withdrawn by the manufacturer without liability to the dealer. These same agreements may include a “no damages” clause, which states that the dealer has no remedy at all upon termination, or the sole remedy is to seek reinstatement as a dealer. The dealer agreement may require arbitration in the manufacturer’s backyard and may limit the arbitrator’s ability to award damages. What is a dealer with such an agreement to do?

First, a dealer needs to obtain legal advice as to the dealer’s federal and state statutory rights. For example, motor vehicle dealers generally are not required to arbitrate legal disputes unless the dealers agree to do so after the dispute has arisen. See 15 U.S.C. § 1226(a)(2); see also Champion Auto Sales, LLC v. Polaris Sales, Inc., 943 F. Supp. 2d 346 (E.D.N.Y. 2013) (finding that 15 U.S.C. § 1226 rendered pre-dispute arbitration clause in motorcycle dealer agreement unenforceable). Therefore, the arbitration clause in
a standard dealer agreement may not be enforceable. Further, many state dealer statutes contain non-waiver language and require that a manufacturer prove that “good cause” exists under state law before a termination of a dealer’s right to continue as a dealer for a particular product line may occur. Courts generally will apply these dealer protection statutes, notwithstanding any clauses to the contrary in a written dealer agreement. See e.g., Tractor & Equip. Co. v. Zerbe Bros., 199 P.3d 222 (Mont. 2008) (holding statutory prohibition of termination without good cause could not be waived by contract allowing for termination upon 30-days’ notice).

Therefore, while an auto dealer in Ohio may have signed a dealer agreement saying: (1) he must arbitrate in Minnesota; (2) only

“Courts have been split on whether an actual “product withdrawal” or “market withdrawal,” even for some legitimate business reason, constitutes proper legal cause for termination.

Minnesota law applies; and (3) the dealer may be terminated without “good cause” and without any compensation, the actual result under applicable law may differ. For instance, it may be that this dealer may sue in an Ohio court and may be protected by an Ohio statute against termination without “good cause.” The dealer may, in fact, have a viable claim to recover all damages from loss of the product line, plus his costs of collection and attorneys’ fees.

Two more difficult legal issues to consider are: (1) does the announced behavior of the manufacturer actually constitute a “product withdrawal” or a “market withdrawal”? and (2) if it is either type of withdrawal, does that product withdrawal or market withdrawal meet the statutory definition of “good cause” for termination?

Courts have been split on whether an actual “product withdrawal” or “market withdrawal,” even for some legitimate business reason, constitutes proper legal cause for termination. See Wright-Moore Corp. v. Ricoh Corp., 908 F.2d 128 (7th Cir. 1990) (system-wide change to regional distributorships not “good cause”); Larry Hobbs Farm Equip., Inc. v. CNH Am., LLC, 291 S.W.3d 190 (Ark. 2009) (market withdrawal not “good cause” since it was not listed among the enumerated circumstances constituting “good cause” under Arkansas Franchise Practices Act); Satellite Receivers, Ltd. v. Household Bank (Illinois) N.A., 922 F. Supp. 174 (E.D. Wis. 1996) (no “good cause” under Wisconsin Fair Dealership Law without showing of complete market withdrawal based on economic necessity, dealer’s bad faith, or failure to comply with grantor’s essential and reasonable requirements); Duarte & Witting, Inc. v. New Motor Véhicle Bd., 104 Cal. App. 4th 626 (2002) (good cause found as a matter of law when “franchisor is discontinuing manufacture of the product and the franchise agreement allows for termination upon such discontinuation”); V. Suarez & Co. v. Dow Brands, Inc., 337 F.3d 1 (1st Cir. 2003) (finding manufacturer’s sale of product line constituted “good cause” for termination).

As this wide variety of cases demonstrates, the case law generally indicates that a withdrawal of a product from a market only constitutes “good cause” if there is a “total market withdrawal” that is “economically necessary.” For example, continuing to sell the product to certain dealers or selling it under a different name may defeat a “product withdrawal” argument, and the existence of other economically viable alternatives to a total market withdrawal may render that market withdrawal not “economically necessary.” Therefore, just because a product manufacturer or supplier says that it is withdrawing a product, this does not necessarily mean that the dealer has no legal recourse. In the final analysis, a dealer who is damaged by a “product withdrawal” or “market withdrawal” may very well have viable arguments on both liability and damages issues. The dealer should not assume that either his or her dealer agreement or the manufacturer’s termination letter accurately or adequately describe the dealer’s legal rights. At the very least, the damaged dealer should seek legal counsel to determine its legal rights to recover damages for what may be (or may not be) a wrongful termination under applicable state law and should not rely on their manufacturer for their legal advice.
Including Inclusiveness: CLE Becomes More Diverse

By Mark T. Clouatre, Jake Fischer, and Pattie Nelson, Nelson Mullins

Forty-five states have mandatory continuing legal education (CLE) requirements, and every practicing attorney in those states is familiar with the many types of classes available to fulfill those requirements. Whether fulfilled through lunch-hour seminars, special events, online courses, or paid, all-day lectures on the last day of the reporting cycle (we’ve all been there), there are a variety of ways to meet the requirements. Yet although the routine may feel familiar, change is coming.

In February 2016, the American Bar Association adopted a resolution calling for an addition to the minimum CLE requirements. The current framework varies by state, but typically attorneys must complete a mix of CLE courses during each reporting cycle, some of which are discretionary and some of which must be in specified categories such as ethics and/or professionalism. For example, in our home state of Colorado, we must earn 45 credits every three years, 7 of which must be ethics credits.

The ABA resolution suggests a new, mandatory category of CLE credits be added to these existing rules aimed at promoting diversity and combating bias. Specifically, the ABA resolution suggests each state adopt “separate credit programs regarding diversity and inclusion in the legal profession of all persons regardless of race, ethnicity, gender, sexual orientation, gender identity, or disabilities, and programs regarding the elimination of bias.” ABA Resolution 107 (Feb. 8, 2016), http://www.americanbar.org/content/dam/aba/images/abanews/2016hmymres/107.pdf. The ABA resolution declines to suggest a specific minimum number of hours for this category, but does state that the overall CLE credits requirement for each state should not be increased to account for the change.

This “diversity and inclusion” ("D&I") CLE requirement was formulated by the ABA’s Diversity & Inclusion 360 Commission, created in August 2015 to “formulate methods, policy, standards and practices to best advance diversity and inclusion over the next ten years. See Proposed Resolution and Report, ABA Resolution 107, http://www.americanbar.org/content/dam/aba/directories/policy/2016_hod_midyear_107.docx, at 1. The Commission’s charge to improve diversity and inclusion extends across the legal profession, including to the judicial system and the ABA itself, and the decision to build these requirements into a CLE requirement suggests that the issue is being taken seriously.

The D&I CLE recommendation is based on CLE requirements that already exist in several states. Two states, California and Minnesota, already require D&I credits, albeit as a small component of their overall CLE scheme: California requires one hour every three years, while Minnesota requires two. In addition, some states, including Hawaii, Kansas, Illinois, Maine, Nebraska, Oregon, Washington, and West Virginia, allow D&I credit to fulfill existing ethics and/or professionalism requirements. Although the ABA Commission considered both models, they ultimately concluded in their Proposed Resolution that the “California and Minnesota models best advance the goal of diversity and inclusion by ensuring all attorneys actually receive D&I CLE.”

While some may not see the need for CLE courses specifically aimed at diversity and bias, social science has increasingly demonstrated the power of “implicit” biases, preferences which shape our decision-making on an unconscious level. Every person has implicit biases, although they aren’t always harmful; for example, the preference for chunky over smooth peanut butter, or vice-versa, has little effect on the people around you.

Unfortunately, implicit biases are not always so benign. Numerous studies have demonstrated that implicit biases frequently create negative judgments based on race, gender, age, sexual orientation, disability, or other characteristics. Crucially, such biases can be hidden even from the people that hold them, even though they may insist they are free from prejudice or implore the results of biased decision-making. See, e.g., Jonathan Feingold & Karen Lorang, Defusing Implicit Bias, 59 UCLA L. Rev. Disc. 210, 221-223 (2012). The effect of such biases may individually be small, but across society, the cumulative power is vast, detrimental and damaging.
In the legal profession, implicit biases can and do result in unequal and unfair treatment for diverse attorneys, including female, minority, disabled and LGBT attorneys. Whether in the interview, board or court rooms, implicit bias can infect even the most objective decision-making. See, e.g., Myer J. Sankary, Eliminating Bias in the Legal Profession: Lessons from the Cognitive Sciences, Valley Lawyer, Feb. 2014, at 20-21.

Our clients as well may face additional challenges. For example, research has shown that implicit biases affect determinations regarding the credibility and likability of criminal defendants. The result is an increased likelihood of false conviction: according to the Innocence Project, for example, 70 percent of the 349 people exonerated by DNA testing have been people of color. Innocence Project, DNA Exonerations in the United States, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/.

Teaching lawyers to recognize and overcome their own biases is an important step towards true equality, and the ABA’s resolution is already starting to show an impact. In New York, for example, bar associations called for the state to adopt diversity and inclusion CLE credits as a requirement last summer. The state solicited comments this winter, and a final determination will likely be made soon. As this scenario plays out across the country, expect to hear more about diversity and inclusion soon. The first step in combating the negative impacts of implicit bias is awareness, and the new wave of CLE requirements will surely help that cause.

Message from the Chair
Continued from front cover

from 11 to 6, beginning on September 1, 2017. This will impact the 2017 Annual Meeting and the Forum’s publications going forward.

Please note that the Governing Committee has made every effort to retain as many of the rate categories as possible, and to include as many Forum Members in each rate category as possible, so the net cost of the meeting either does not increase or only increases marginally. We have also been working hard to ensure that the expenses of the Annual Meeting are held in check, while still delivering first rate legal programming and networking opportunities. Please stay tuned for additional information on pricing in the brochure for the Annual Meeting which will be coming soon.

I am also pleased to announce that the 2017 ABA Forum on Franchising Nominating Committee has been selected. In accordance with the Forum’s By-Laws, the annual Governing Committee election process begins with the appointment of a Nominating Committee (“Committee”) by the Forum Chair. The Committee, which is headed by the Forum’s Immediate Past Chair, is responsible for recommending candidates to fill open positions on the Governing Committee.

The following Forum Members have been appointed to the 2017 Nominating Committee:

Deborah S. Coldwell
Haynes and Boone, LLP

Richard M. Asbill
Asbill Dispute Resolution

Harris J. Chernow
Reger Rizzo & Darnall LLP

Jane W. LaFranchi
Hershey Entertainment & Resorts

Keri McWilliams
Nixon Peabody, LLP

This year’s Nominating Committee will recommend candidates for four Member-at-Large positions on the Governing Committee, all beginning August 2018, when Will K. Woods and Natalma (Tami) McKnew complete their second terms, and Michael Gray and Dawn Newton complete their first terms, as Governing Committee members.

An election to fill these positions will take place at the Forum’s Annual Business Meeting, which will be held in conjunction with the 40th Annual Forum on Franchising. This meeting will take place on Thursday or Friday, October 19 or 20, in Palm Desert, California. Forum members wishing to recommend candidates to fill these positions should convey their comments to Deb Coldwell no later than June 1, 2017.

Deb’s email address is deborah.coldwell@haynesboone.com.

As always, if you have any suggestions, comments or questions, please do not hesitate to reach out to me at Karen.Satterlee@hilton.com.
Message from the Editor in Chief
Heather Carson Perkins, Faegre Baker Daniels

In this issue of The Franchise Lawyer, we cover a broad range of topics touching a number of topics in litigation and arbitration, drafting franchise agreements, international law, and a recently adopted ABA resolution recommending that states adopt a new, mandatory category of CLE credits aimed at promoting diversity and combating bias.

Since I stepped into the role of the Editor in Chief of The Franchise Lawyer, I have been delighted that so many members of the Forum are willing to volunteer their time and creativity to write. In fact, every article in this issue was authored by one or more contributors who conceived the topic and then reached out to the Editorial Board to propose the topic. On behalf of the Editorial Board, I hope you find this issue enjoyable and useful.
Know the Essential Franchise Issues

Edited by Christopher Prine Bussert & James R Sims III

Offering practical guidance to non-IP specialists who encounter these issues in their legal practice, this book provides specific and useful information on areas where business interests intersect with intellectual property issues, including trademarks, copyrights, patents, trade secrets, domain names, technology, and more.

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