Message from the Chair
By Deborah Coldwell, Haynes and Boone, LLP
Forum Chair

The Forum actively seeks your involvement in, and contribution to, its activities. This engagement provides not only a pathway to leadership in the Forum, but opportunities for Forum members from all over the country—and the world—to get to know one another and work together in ways that build professional relationships and friendships.

To engage fully in the Forum, there are specific steps members can take. For example, there are several Forum divisions, including the Corporate Counsel Division (contact Ali McElroy at amcelroy@snapfitness.com), the Litigation and Dispute Resolution Division (contact Julie Lusthaus at jcl@ed-lawfirm.com), and the International Division (contact Kerry Olson at kerry.olson@idq.com). Each division has a director and a six-member steering committee. The division directors are always looking for new members to assist with their work for the Forum.

In addition, several other committees are looking for working members: Programs (contact David Oppenheim at oppenheimd@gtlaw.com), Membership (contact Tami McKnew at Tami.McKnew@smithmoorelaw.com), Technology (contact Jim Goniea at JGoniea@wiggin.com), Diversity Caucus (contact Leslie Curran at lcurran@plavekoch.com), Women’s Caucus (contact Diane Green-Kelly at DGreennKelly@ReedSmith.com), Marketing (contact Will Woods at Will.Woods@bakermckenzie.com), and Young Lawyers Division (contact Darcy Cohen at dcohen@gib-law.com). If you are interested in assisting the Forum on any of these committees or caucuses, please let these committee leaders know. We need your energy and commitment.

Another important Involvement opportunity is to write or co-author a full-length article for the Franchise Law Journal (contact Bethany Appleby at BAppleby@wiggin.com), a shorter article for The Franchise Lawyer (contact Corby Anderson at CAnderson@nexsenpruet.com), or a chapter for a Forum book, monograph, or other publication (contact Karen Satterlee at karen.satterlee@hilton.com). Typically, the Forum members who write and speak at the Annual Meeting are selected from the list of authors who have written an article, a book chapter, or a paper.

Annual Meeting
The upcoming Annual Meeting from October 15 – 17 at the Sheraton Seattle Hotel in Seattle, Washington, presents a key opportunity to...
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On July 29, 2014, the National Labor Relations Board (NLRB) announced that its General Counsel has authorized the issuance of complaints against franchisor McDonald’s and its franchisees in 43 cases asserting that their actions in response to employee protests violated the National Labor Relations Act (NLRA). “If the parties cannot reach settlement in these cases,” the NLRB warned, “complaints will issue and McDonald’s, USA, LLC will be named as a joint employer respondent.” (The full text of the NLRB’s announcement appears on page 7.)

This news caused sufficient outcry on the ABA Forum on Franchising Listserve that it nearly required cessation of trading in the Forum’s stock. The consensus of the cacophony was that this could be a harbinger of doom for franchising, an intergalactic event for which there is no ready defense. Demurring, a leading franchisee organization remarked that the sky was not falling, and will not fall, regardless of how the NLRB or the courts ultimately rule.

The NLRB said 181 cases involving McDonald’s have been filed with its Office of the General Counsel since November 2012. Of those cases, it has found that 68 have “no merit,” 64 are currently pending investigation, and, as announced, 43 have merit.

We are only at Stage One here. And if settlements are reached, there may not be a Stage Two. Nevertheless, it is fair to say that if franchisors were found to be joint employers, with their franchisees, of the employees who work in their franchised stores, then many aspects of franchising would change. Franchise agreements and operations manuals would be amended significantly. Franchisors would have to assume legal obligations of employers, and they would be subject to laws concerning wages and hours, unemployment benefits, workers’ compensation, health insurance, discrimination, government contracting, and collective bargaining. Yet, it is the avoidance of such vertical integration, and the promotion of a profitable system of entrepreneurial independent-contractor franchisees, that are the raisons d’être of the franchise model.

Under the NLRB’s current definition of joint employer (and under slightly different definitions in wage-and-hour and anti-discrimination statutes), a franchisor may, in theory, be deemed a joint employer of a franchisee’s employees if it asserts control over major aspects of the relationship that impact the franchisee’s independence. To date, however, cases asserting this theory are few, and franchisors have fared well in them. But if the NLRB broadens its current definition of joint employer, as discussed below, franchisors may face a far greater threat.

‘Joint Employers’ under the NLRA
The U.S. Supreme Court ruled on the NLRB’s “joint employer” test in Boire v. Greyhound Corp., 376 U.S.473 (1964). It reversed a Fifth Circuit ruling and remanded for a determination of whether a facilities owner possessed sufficient “indicia of control” to be an employer. Id. at 481. Under the Board’s current “indicia of control” standard, entities are considered joint employers for purposes of the NLRA if they “share or codetermine those matters governing the essential terms and conditions of employment.” TLI, Inc. (TLI), 271 NLRB 798 (1984); Laerco Transp. (Laerco), 269 NLRB 324 (1984). The Board stated that it adopted this standard from the Third Circuit’s decision in NLRB v. Browning-Ferris Indus., 691 F.2d 1117, 1123 (3d Cir. 1982), cited in TLI, 271 NLRB at 798.

The Board added to the Browning-Ferris standard a requirement to show that the employer meaningfully affects matters relating to the employment relationship, such as hiring, firing, discipline, supervision, and direction. TLI, 271 NLRB 798; Laerco, 269 NLRB 324. Significantly, the definition does not require exclusive, direct, or immediate control over terms and conditions of employment. Nor does it require that control be exercised over all terms and conditions of employment. See Sun-Maid Growers of Cal., 239 NLRB 346, 351 (1978), enforced 628 F.2d 56 (9th Cir. 1980) (for one employer to share or co-determine conditions of employment with another employer does not require that it “exercise the full panoply of power over the [joint employees]
The Franchise Lawyer

... [s]o long as it possessed ‘an area of effective control over labor relations’

The NLRB’s consideration of the McDonald’s complaints coincides with its review of a decision in Browning-Ferris Indus. of Calif., Inc. (B-F), NLRB case 32-RC-109684, in which a Regional Director ruled Browning-Ferris was not a joint employer with a staffing agency. The Teamsters Union is seeking reversal of that ruling based on the NLRB’s current joint employer standard, or, alternatively, is urging the Board to adopt a new standard.

In an amicus brief in B-F, the NLRB’s General Counsel has argued that “the Board should abandon its existing joint-employer standard because it undermines the fundamental policy of the Act to encourage stable and meaningful collective bargaining.” The General Counsel advocates a return to the “traditional” approach, in which an entity was deemed a joint employer “where it exercised direct or indirect control over significant terms and conditions of employment of another entity’s employees, where it possessed the unexercised potential to control such terms and conditions of employment, or where ‘industrial realities’ otherwise made it an essential party to meaningful collective bargaining.” General Counsel’s Amicus Brief in B-F, at 2, 4. And the General Counsel urged that franchising is an example in which technology now permits “franchisors to exert significant control, e.g., through scheduling and labor management programs that go beyond the protection of the franchisor’s product or brand.” Id. at 16.

This “industrial realities” test would require an assessment of the degree of “economic dependence” between the companies. The focus would shift from whether a franchisor exercises control through direct “hiring, firing, discipline, supervision and direction” of the other company’s employees, to whether the franchisor imposes its own, highly standardized operational requirements and monitors and retains effective control over those operations. The General Counsel asserts that companies may effectively control wages by controlling every other variable in the business. Id. at 7.

Indicia of control, according to the General Counsel, include: tracking data on sales, inventory, and labor costs; calculating labor needs; setting and policing employee work schedules; tracking wage reviews; tracking time needed for employees to fill customer orders; accepting employment applications through company systems; reimbursing wages; retaining the right to approve employees; requiring the company and its employees to follow safety rules; and making recommendations during the collective bargaining process or retaining the right to provide such input. Id. For franchisors, this broader definition would mean increased uncertainty and increased risk of being tagged with “joint employer” status.

In response to the General Counsel’s pronouncement, McDonald’s stated that it “does not direct or co-determine the hiring, termination, wages, hours, or any other essential terms and conditions of employment of our franchisees’ employees – which are the well-established criteria governing the definition of a ‘joint employer.’”

The State of the Law in Franchisor ‘Joint Employer’ Cases

Both the “single employer” and “joint employer” concepts developed in the labor relations context. See Radio & Television Broad. Technicians Local 1264 v. Broad. Serv. of Mobile, Inc., 380 U.S. 255 (1965) (per curiam) (single employer); Boire, 376 U.S. 473, supra (joint employer). These concepts then were imported into the civil rights context. See Armbruster v. Quinn, 711 F.2d 1332, 1336–37 (6th Cir. 1983).

The definition of “joint employer” in the franchise cases is, not surprisingly, similar to the NLRB’s current definition and the definitions in federal wage-and-hour and anti-discrimination statutes.

In the most recent case, Cordova v. SCCF, Inc., 2014 WL 3512838 (S.D.N.Y. July 16, 2014), involving the Fair Labor Standards Act (FLSA) and New York wage-and-hour law, the court acknowledged that proving joint employer status is difficult. Nevertheless, the court refused to grant a motion to dismiss. After citing the FLSA’s expansive definition of an “employer” as “any person acting directly or indirectly in the interest of an employer in relation to an employee,” 29 U.S.C. § 203(d), the court held:

[E]ven when one entity exerts “ultimate” control over a worker, that does not preclude a finding that another entity exerts sufficient control to qualify as a joint employer under the FLSA. Barfield v. N.Y.C. Health & Hosps. Corp., 537 F.3d 132, 148 (2d Cir. 2008). . . . The [U.S. Supreme] Court has instructed that the determination of whether an employer-employee relationship exists for purposes of the FLSA should be grounded in economic reality rather than technical concepts . . . determined by reference not to isolated factors, but rather upon the circumstances of the whole activity.” Barfield, 537 F.3d at 141 (internal quotation marks and citations omitted).
Id at 3. The Cordova court then identified the factors the Second Circuit considers to determine the requisite control over employees, including hiring and firing, supervision of work, payment decisions, record keeping, and “functional control” (that is, on which premises the employee works, how integral the employee’s work is to the operation, who supervises the employee’s work, and whether the employee works predominantly for one company or another). Id., citing Carter v. Dutchess Cmty. Coll., 735 F.2d 8, 12 (2d Cir. 1984).

The court noted that although the Second Circuit has not yet considered whether a franchisor can qualify as a joint employer, other circuits, using versions of the U.S. Supreme Court’s “economic reality” test, have generally concluded that franchisors are not employers within the meaning of the FLSA. A brief look at these cases, as analyzed in Cordova, id. at *4, provides a good indicator of the evidence courts consider in making joint employer determinations:

A franchisor must be permitted to retain such control as is necessary to protect and maintain its trademark, trade name and good will.

- In Singh v. 7-Eleven Inc., No. C05-04534-RMW, 2007 WL 715488, at *3-6 (N.D. Cal. Mar. 8, 2007), after examining the franchise agreement and deposition testimony, the court concluded that 7-Eleven’s control of store hours, uniforms, and food service and deliveries and its ability to terminate franchise agreements for certain breaches did “not permit 7-Eleven to interfere with day-to-day operations of the Store.” Even 7-Eleven’s control over ministerial functions such as payroll, time records, and withholding and payment of federal and state taxes was not sufficient to establish that 7-Eleven was plaintiffs’ employer.

- In Reese v. Coastal Restoration and Cleaning Services, Inc., No. 10CV36-RHW, 2010 WL 5184841, at *3-5 (S.D. Miss. Dec. 15, 2010), relying on the terms of the franchise agreement and the defendant’s affidavit, the court held that a franchisor did not have sufficient power to fire and hire or supervise and control employees that it could be considered an employer under the FLSA.

- In Hatcher v. Augustus, 956 F. Supp. 387, 391-92 (E.D.N.Y. 1997), based on the franchise agreement, the court found that a franchisor was not a joint employer for the purpose of Title VII liability, given that the franchisor did not operate the store and the franchisee “exclusively possessed the rights and responsibilities regarding all employment matters and the day-to-day operations in his store, and his relationship with the plaintiff as his employee.”

The court in Cordova, found these cases distinguishable, however, because all were decided on motions for summary judgment after the completion of discovery, while Cordova was decided on a motion to dismiss before any discovery was conducted. Thus, the issue was whether the allegations pleaded were sufficient to state a claim for relief. The Cordova court identified a “more analogous” situation in Cano v. DPNY, 287 F.R.D. 251, 260 (S.D.N.Y. 2012), which granted a motion to amend an FLSA claim against a franchisor. The Cano court observed that cases in which summary judgment is granted in favor of franchisors highlight the problems of proof involved in establishing that a franchisor is a joint employer. Id. at 259.

Franchisors have prevailed on the joint employer issue in several other cases in recent years. In an FLSA case, Orozo v. Plackis, 2014 WL 3037943 (5th Cir. July 3, 2014), the court granted summary judgment in favor of a franchisor, holding that the plaintiff failed to produce legally sufficient evidence to satisfy the economic reality test. The court was careful to add, however, that “[w]e do not suggest that franchisors can never qualify as the FLSA employer for a franchisee’s employees. Id. at *5.

In a case challenging the franchisor’s payroll system as “unlawful and unfair” under California’s Business and Professions Code Sec. 17, 200, Aleksik v. 7-Eleven, Inc., 205 Cal. App. 4th 1176, 140 Cal. Rpt. 3d 796 (Ct. App. 4th Dist. 2012), the court affirmed summary judgment for 7-Eleven after finding that its franchisee was responsible for “overall store operations. There, the court noted that “a franchisor must be permitted to retain such control as is necessary to protect and maintain its trademark, trade name and good will.” Id. at 1189-90.
In a Title VII case, Kearney v. Kessler Family LLC and Friendly Ice Cream Corp., 2011 WL 2693892 (W.D.N.Y. July 11, 2011), the court granted the franchisor’s motion to dismiss after concluding that the franchisee did not allege the “commonality of hiring, firing, discipline, pay, insurance, records, and supervision” that were necessary to determine whether an entity is a joint employer. Id. at *5.

Subway Decision Hinges on Control Over the Issue in Dispute

On the other hand, franchisor Subway lost its motion for summary judgment on the joint employer issue in EEOC v. Pepin Enterprises, Inc., Pepin, Inc., and Doctor’s Associates, Inc. (DAI), 2009 WL 961108 (M.D. Fla. April 7, 2009). In DAI, the court concluded that although Subway did not control the franchisee in general, it did exercise sufficient control over the resolution of the specific issue in dispute – whether any Subway employee was allowed to wear a nose ring. Id. at *8.

The court in DAI relied on Virgo v. Riviera Beach Assocs., Ltd., 30 F.3d 1350, 1361 (11th Cir. 1994), which noted that a joint employer relationship can be found where “one employer[,] while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer.” Id. at 1360 (quoting Browning-Ferris, 691 F.2d at 1122), supra.” “[T]he joint employer concept recognizes that the business entities involved are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment.” Id. (quoting Browning-Ferris, 691 F.2d at 1122). The matter of whether the asserted joint employer “retained sufficient control is essentially a factual question.” Id.

To show that it was not a joint employer, DAI relied on two provisions of its franchise agreements:

• Paragraph 5(c) provides: “The Franchisee shall be solely responsible for recruiting, hiring, terminating and supervising all employees for the operation of his business and for setting employee pay rates, and for making payment of all wages and amounts due related to wages, including any employment benefits, unemployment insurance, and required federal, state or local withholding of taxes or other sums.”

• Paragraph 11(a) provides: “The Franchisee is, and shall be, identified at all times during the terms of this Agreement, as a natural person, an independent contractor and not an agent or employee of the Company.”

DAI, 2009 WL 961108 at *8.

The court was not persuaded. It concluded there was a factual dispute regarding the degree of control DAI exercised over the employment practice and decision at issue in this case. DAI asserted that the franchisee was not required to consult the franchisor regarding a waiver of its no-facial-jewelry policy unless the franchisee could not resolve the issue with the employee on its own. The court concluded that because the franchisee did not have the authority to grant a waiver but instead had to consult the franchisor, a ruling on summary judgment that DAI lacked the requisite amount of control to qualify as a joint employer would be inappropriate. Id.

DAI also relied on the franchise agreement’s requirement that the franchisee comply with all laws, including Title VII, as evidence arguing against joint employer status. But the court viewed this provision through a different lens, concluding that DAI may have effectively prevented the franchisee from complying by restricting its ability to address requests for religious accommodations or waivers on its own. Id.

Nor was the court persuaded by the fact that the franchisee maintained that the decision to terminate the employee was his alone. Citing Virgo, 30 F.3d at 1361, the court noted that “actual control is a factor to be considered when deciding the ‘joint employer issue, but the authority or power to control is also highly relevant.” In this situation, the court found, there was “evidence that the franchisor had some power over, and became involved in, a specific dispute regarding terms and conditions of employment.” DAI, 2009 WL 961108 at *8.

What does the NLRB’s McDonald’s Pronouncement Augur?

For McDonald’s, and for other franchisors, is it premature to conclude, as Bob Dylan might say, that the times they are a-changin’? In the NLRB’s recent pronouncement, the General Counsel has stated that McDonald’s merits joint employer status, albeit perhaps with respect to a particular level of control in the specific area of employee protests. But contrast this position with the Tenth Circuit’s ruling in a Title VII sexual harassment case against McDonald’s from the early 1990s, Evans v. McDonald’s Corp., 936 F.2d 1087 (10th Cir. 1991).

In Evans, the court affirmed summary judgment for McDonald’s, holding that the franchisor “did not exert the type of control that would
make it liable as an employer under Title VII.” The court acknowledged that McDonald’s “may have stringently controlled the manner of its franchisee’s operations, conducted frequent inspections, and provided training for franchise employees.” But it emphasized that McDonald’s did not have control over the franchisee’s labor relations with its franchise employees and did not have financial control over the franchises. “Outside of the necessary control over conformity to standard operational details inherent in many franchise settings,” the court concluded, “McDonald’s only real control over [the franchisee] was its power to terminate his franchises.” Id. at 1090.

The holding of Evans is consistent with other joint employer cases to date, in which franchisors have fared well. Logically, if the definition remains the same, the trend should continue, especially because the franchise model is antithetical to—and indeed is designed to avoid—the “franchisor as employer.”

Although a final decision from the courts is years away, franchisors are already contemplating how to prepare for the potential fallout if the NLRB succeeds in its efforts to change the joint employer standard. But there is no reason for franchisors to re-invent a time-tested, reliable wheel. Franchise agreements normally state—or at least should state—that franchisees are independent contractors, that their employees work only for the franchisees, and that they alone control their employees’ wages, hours, assignments, hiring, firing, and benefits. Franchisors have been, and should be, vigilant in requiring franchisees to make their independent status clear to consumers and employees alike. Training and other activities necessary to maintain system standards should not be abandoned simply for the sake of avoiding the specter of joint employer liability. A franchisor must protect the integrity of its brand. As always, however, the key is to do what is necessary for the system without overreaching. With great power comes great responsibility. Franchisors may fear that with great power comes great liability as well. But if they use their power judiciously, that should not be the case.

Logically, the risk for franchisors will be greater if the General Counsel succeeds in convincing the Board in B-F or McDonald’s to expand the definition. But how much greater? A reasonably prudent crystal-ball-gazer might well reach several conclusions: First, if the NLRB does not adopt a new, more expansive definition of joint employer, franchisors need lose no sleep. Moreover, whatever decision the NLRB makes in McDonald’s under the current definition, the appellate courts likely will rule in favor of franchisors. Second, if the NLRB does adopt a new definition, the terrain becomes more uncertain. Even so, however, it is likely that most (not all) franchisors will be able to convince the courts that they are not joint employers under the new definition. And unless the definitions of joint employer in the anti-discrimination and wage-and-hour statutes also change, few franchisors will be deemed joint employers under those either.

Chicken Little may well be a hyperbolic hen. Still, we would all do well to check occasionally for asteroids.

Full Text of the NLRB’s Announcement

NLRB Office of the General Counsel Authorizes Complaints Against McDonald’s Franchisees and Determines McDonald’s, USA, LLC is a Joint Employer

The National Labor Relations Board Office of the General Counsel has investigated charges alleging McDonald’s franchisees and their franchisor, McDonald’s, USA, LLC, violated the rights of employees as a result of activities surrounding employee protests. The Office of the General Counsel found merit in some of the charges and no merit in others. The Office of the General Counsel has authorized complaints on alleged violations of the National Labor Relations Act. If the parties cannot reach settlement in these cases, complaints will issue and McDonald’s, USA, LLC will be named as a joint employer respondent.

The National Labor Relations Board Office of the General Counsel has had 181 cases involving McDonald’s filed since November 2012. Of those cases, 68 were found to have no merit. 64 cases are currently pending investigation and 43 cases have been found to have merit. In the 43 cases where complaint has been authorized, McDonald’s franchisees and/or McDonald’s, USA, LLC will be named as a respondent if parties are unable to reach settlement.
In Memoriam: Dennis E. Wieczorek (June 4, 1952 - July 13, 2014)

“If there be any truer measure of a man than by what he does, it must be what he gives.” (Robert South)

By Ronald K. Gardner, Jr., Dady & Gardner, P.A.

On July 13, 2014, franchising lost one of its true giants. Dennis Wieczorek’s untimely and unexpected passing is a loss to his family, his friends, his colleagues, and the entire world of franchising.

Dennis earned his B.A. from Washington University in St. Louis in 1974 and his J.D. from Duke University in 1977. He then spent his entire career practicing franchise law, starting with Rudnick & Wolfe, and remaining with the firm as it evolved into part of DLA Piper. For 37 years, Dennis was instrumental in helping to mold the Franchise and Distribution Group at DLA Piper into the world’s most respected and formidable “franchisor firm.”

Building his own practice, however, was only a small portion of what Dennis “did” for franchising. Following in the footsteps of his friends and partners Harry and Lew Rudnick and Phil Ziedman, Dennis was extremely active in the International Franchise Association. He testified and lobbied on its behalf for more than two decades, served as the IFA’s General Counsel, and participated in its legal/legislative committee.

For those things that he “did,” Chambers USA noted that Dennis was widely recognized as “a giant in the industry,” “one of the premier transactional lawyers in the USA,” “a powerhouse of a lawyer,” and a “fantastic lawyer who is very skilled.”

But those of us who truly knew Dennis understood that his measure was, like Robert South said, not only what he did, but what he gave.

A Man Who Gave Freely

Dennis gave freely of his time. For more than 20 years, Dennis served as a member, Chair, and ultimately the Chairman Emeritus of the North American Securities Administrators Association (NASAA) Franchise and Business Opportunities Project Group. The NASAA Project Group is a select group of volunteer lawyers who give of their time to help train state franchise examiners and to help NASAA formulate legislation, regulation, and commentary related to franchising and franchise law. Indeed, perhaps no single individual in history has done more than Dennis to help state governments define the regulatory balance between the appropriate amount of disclosure and the freedom to contract.

Dennis gave as a mentor, teacher, and leader in the Forum. He made at least 11 presentations at our Annual Meetings, teaching literally thousands of lawyers about the intricacies of our area of practice. He joined the Governing Committee in 2000, and served as the Marketing Committee Chair prior to becoming the Chair of the Forum in 2005. He wrote some 12 articles for our publications and was a co-author and speaker for our signature Annual Developments Program in 2002. He was also the co-chair of the 2005 Orlando Forum.

During his time as Chair, Dennis led the Governing Committee in establishing our teleseminar/webinar programs. He helped create the “Fundamentals on the Road” program, and he developed and shepherded the initiative to expand the Governing Committee from nine to 12 members (as the demands

Perhaps no single individual in history has done more than Dennis to help state governments define the regulatory balance between the appropriate amount of disclosure and the freedom to contract.
on our all-volunteer leadership grew). Dennis conceived of, developed, and brought into existence our robust and growing International Division. And perhaps most importantly, Dennis, in tribute to his friend Lew Rudnick and in conjunction with then-Chair Jack Dunham, created the Lewis G. Rudnick Award — the Forum’s highest honor. The Rudnick Award recognizes those who have given the gift of mentorship that Dennis so freely gave himself. Ironically, Dennis told Jack and me that he never believed that he was worthy of the Rudnick Award, in part, because he didn’t want the award to simply go to prominent people who didn’t also embody the spirit of mentorship he perceived to be honoring by naming this award after Lew. This is one of the rare instances where Dennis was simply wrong. Few people mentored others like Dennis.

But there is so much more that Dennis gave.

**Loyalty, Devotion, and Love**

To his family he gave his undying loyalty, devotion, and love. Married to his closest friend, Marla, for 38 years, Dennis was happiest when he was spending time traveling with her to great restaurants (with great wine lists) in cities all over the world. Dennis loved researching to find the best restaurants in the many cities he travelled to around the world, and he and Marla loved to share stories of their adventures (and the adventure itself, if possible) with their friends.

He was equally fond of sitting at home with his kids, Joey (Dr. Joanna Davidson), Allie Wieczorek, and Nick Wieczorek. He told anyone he knew or met about his kids and their accomplishments and aspirations. More recently, Dennis had dived headlong into the role of Dziadz, or grandpa, to Joey’s son, Jack. Dennis loved getting down on the ground with Jack, being silly, and sharing the gift of laughter with Jack. Dennis loved to laugh.

To his colleagues and clients, he gave his time, his wisdom, and his zealous advocacy. He was the very best at what he did, but he was humble about it. In the most recent Listserv exchange about his passing, more than one person noted how Dennis would always share a kind word and some helpful advice. He was a true professional.

To his friends, he gave his incredibly sharp wit and sarcastic sense of humor. You knew you had become endeared to Dennis when he bestowed one of his “insulting” nicknames on you—mine was Schmendrick. But his sarcasm was transparent and never hurtful. For me, Dennis was, in an enigmatic way, the curmudgeon who loved to laugh. He relished a well-reasoned debate about law, politics, or sports — but he took as good as he gave. In the midst of one of these debates, he’d call you an “idiot,” all with a twinkle in his eye that told you how much he was enjoying the banter and camaraderie of friendship. Indeed, under his sarcasm was a man who cared deeply for his friends and loved his family more than can adequately be described.

He was the very best at what he did, but he was humble about it.

In 2009, in writing about the passing of his friend and partner, Dennis said this about Lew Rudnick:

> “Those of us lucky enough to have known Lew were given a gift. His memory is something to be saved, gently unfolded, and used every day.”

In writing about my friend and mentor, I dare say I could never be as eloquent. His tribute to Lew speaks of the way so many of us will forever think of Dennis. For the measure of Dennis as a man, based on the gifts he gave, is so large, so meaningful, and so powerful, that these gifts can simply never be taken from us — nor should they ever go unused.
CJEU Rules Retail Store Layouts Can Be Protected as Trademarks

By Victoria Hobbs and Hilary Atherton, Bird & Bird LLP

The European Union’s highest court ruled on July 10, 2014, that Apple may register the layout of its stores as a trademark. This decision by the Court of Justice of the European Union (CJEU) is significant not only for retailers but also for businesses operating under a franchise model. See Apple Inc. v Deutsches Patent- und Markenamt Case C-421/13 Request for a preliminary ruling under Article 267 TFEU from the Bundespatentgericht (Germany), made by decision of 8 May 2013.


Background

Apple obtained a trademark registration from the U.S. Patent & Trademark Office (U.S. PTO) of a 3-D mark consisting of the representation of its flagship stores, as shown below.

See U.S. Reg. No. 4,277,913. Apple sought to extend the U.S. trademark internationally, and that extension was accepted in some jurisdictions but refused in others. Germany refused the extension on the ground that the store layout space was nothing other than the representation of an essential aspect of Apple’s business, that is, the sale of its products. The German Registry considered that while consumers might view the layout of such a retail space as an indication of the quality and price bracket of the products sold, they would not see it as an indication of their commercial origin (which is an essential element of a trademark registration). It also considered that the layout of the Apple store was not sufficiently distinguishable from the stores of other providers of electronic products. Apple appealed to the Federal Patent Court of Germany, which referred certain questions to the CJEU.

Summary of the CJEU’s decision

The CJEU ruled in Apple’s favor and held:

- A layout design of a retail store can be registered as a trademark within the EU if the design is capable of distinguishing the services of the trademark applicant from those of other businesses, and if the mark meets the other requirements for registration.
- A layout design of a retail store is capable of distinguishing the products or services of one business from those of other businesses if the layout design departs significantly from the norm or customs of the business sector concerned.
- Assuming the conditions set out above are satisfied, a layout design of a business’s flagship stores may be registered not only in connection with the goods themselves but also in connection with services, even where those services do not form an integral part of
the offer for sale of the goods. The example of services given in the Apple case involved carrying out in-store demonstrations of the products on display.

Comparison to the USPTO’s Position
It is notable that the U.S. PTO initially refused Apple’s trademark application for its layout design on the basis that it was non-distinctive and would be perceived as a decoration or ornamentation rather than an indicator of origin. The mark was registered only after Apple filed evidence that its layout design had acquired distinctiveness through use. This included lists of Apple’s U.S. retail stores, store revenue figures, press articles covering store grand openings, volumes of traffic to its website, on which images of its stores appeared, and even a press article reporting that a miniature Apple store had been incorporated into a train set.

Unless a trademark is inherently distinctive, it is likely that similar evidence of acquired distinctiveness will be required by trademark registries in the EU. This may lead many already well-established chains to adopt more standardized interior designs in order to maintain a strong identity in their current layouts, and to closely monitor franchisees’ premises to ensure compliance with these standardized designs. New entrants to the market may seek to devise increasingly innovative layout designs that are arguably inherently distinctive.

Franchisors that have registered trademarks in the U.S. for the interior layouts of their establishments in recent years include Potbelly Sandwich Shop, Genghis Grill, and the gentlemen’s club Spearmint Rhino. See U.S. Reg. No. 3,494,208, U.S. Reg. No. 4,170,356, and U.S. Reg. No. 3,713,935, respectively.

Relevance to Franchisors in the EU
The CJEU’s ruling will be welcomed by franchisors that operate commercial establishments with distinctive layouts that are not solely functional, and thus, it is likely to be of particular significance for those in the retail and food and beverage sectors.

Franchisors often rely on post-termination restrictive covenants to prevent former franchisees from competing through use of the franchisor’s design elements, but such restrictions are prima facie unenforceable in the EU, as they are in restraint of trade. Only if the contractual restrictions are limited in time and geographical scope and go no further than is reasonably necessary to protect the franchisor’s legitimate business interests (including the franchisor’s goodwill) will they be enforceable in the EU. The possibility of trademark protection for distinctive layouts of commercial establishments now offers franchisors an additional level of protection against former franchisees who seek to operate in violation of post-termination restrictive covenants, as well as against “copycat” competitors.

The ruling in the Apple case will apply throughout the EU. But the courts of the EU member states will interpret the ruling differently, depending on each state’s local statutes and (in the common law jurisdictions) case law. Thus, it remains to be seen whether there will be a rush to apply for registration of interior layouts as trademarks and how far the courts of the member states will go to protect such registrations from potential infringers.

The authors thank Lynda Zadra-Symes of Knobbe Martens for her contributions to this article.

Candidates Nominated for Leadership Roles
In accordance with the Forum’s by-laws, the candidate results of the 2014 Forum Nominating Committee (led by Joe Fittante and assisted by Susan Grueneberg, Amy Cheng, Justin Klein, and Sarah Yatchak) are as follows:

- Karen Satterlee, Chair
- Mike Gray, Member-at-Large
- Tami McKnew, Member-at-Large
- Dawn Newton, Member-at-Large
- Will Woods, Member-at-Large

An election to fill these positions will take place at the Forum’s Annual Business Meeting, which will be held in conjunction with the 37th Annual Forum on Franchising. This meeting will take place on Friday, October 17, 2014, in Seattle, Washington.
Hundreds of franchise concepts are launched each year by entrepreneurs who envision a franchise system with limitless potential. What factors contribute to the growth and success of a franchise system, and what factors stand in the way? Examining lessons learned from systems with a track record of growth and success can help franchise counsel advise “young” franchisors eager to take their systems to the next level.

**Choosing the Right Franchisees**

Choosing the right franchisees is one of the most important steps a franchisor can take to ensure success. A system’s franchisees are its biggest asset and its most effective marketing tool. Unfortunately, new franchisors sometimes make the costly mistake of not investing the time and effort needed to thoroughly vet prospects to ensure that a franchisee is a good fit and well-qualified. In their haste to launch their franchise operations and, sometimes, to obtain much-needed capital, young franchisors may make the mistake of accepting prospects that do not fit the culture or share the vision they hope to create for the franchise system. Even more problematic, some young franchisors will overlook their prospects’ marginal financial capacity or insufficient operational expertise.

As counsel to young franchisors, we can offer guidance on the franchisee selection process. We can help clients set up a checklist or questionnaire that allows them to thoroughly vet prospects and to understand their business personality and approach and their financial and operational capabilities. Many of the more established franchise systems use personality testing to gauge prospects and determine whether they would be a good fit.

We can also help our clients understand the long-term consequences of making bad choices when accepting new franchisees. Among these are the risks of litigation, in the worst case scenario, and the risk of draining limited resources in addressing the problems that arise in the daily operation of the franchise. There is also the risk of damage to the brand among existing franchisees, prospective franchisees, and customers. These problems can impede the growth and vitality of the franchise system.

Thriving franchise systems understand how vital it is to choose franchisees wisely. The qualities of such franchisees will vary from system to system, depending on factors such as: the amount of the initial investment needed to commence operations; the culture the franchisor hopes to establish (for example, a structured, regimented system versus a more fluid system that encourages franchisee input); and the franchisor’s goal for each franchisee (including, for example, whether the franchisor hopes to grow the system by having existing franchisees become multi-unit owners); and the role franchisees are expected to play as a referral source for prospective new franchisees.

**Multi-Unit Versus Single-Unit Franchisees**

To attract prospects that fit the profile they want, many franchisors, even early on, decide to adopt the multi-unit approach, as opposed to allowing franchisees to purchase the rights to a single unit. Multi-unit developers tend to have more business sophistication, experience, and financial resources. Additionally, because their financial investment is greater, their commitment to the concept may be stronger.

Requiring multi-unit investment raises the barrier to entry for franchisees, however, reducing the...
POOL OF POTENTIAL FRANCHISEES. MOREOVER, MULTI-UNIT OPERATORS OFTEN WANT A GREATER SAY IN HOW AND WHY THINGS ARE DONE. BECAUSE THEY HAVE GREATER LEVERAGE, THEY MAY TRY TO PUSH BACK AGAINST THE FRANCHISORS’ EFFORTS TO EXERT CONTROL AND MAKE DISCRETIONARY DECISIONS FOR THE SYSTEM. AS COUNSEL, WE CAN ADVISE YOUNG FRANCHISORS ON THE TRADEOFFS BETWEEN MULTI-UNIT AND SINGLE-UNIT STRATEGIES FOR GROWTH.

**Brand Strength**

An established franchisor is likely to understand that a strong brand is key to the success of the system. A strong brand attracts new franchisees, and that, in turn, increases the brand’s market share. A franchisor can strengthen its brand by ensuring that its trademarks and other intellectual property are properly protected, by enforcing the franchisor’s rights in the brand if infringement occurs, by routinely monitoring the quality of its branded products and services, by developing new concepts for the brand, and by updating the brand to keep it fresh.

Successful franchisors understand the importance of advertising and use their advertising funds to strengthen and maintain their brands. New franchisors sometimes make the mistake of not requiring franchisees to contribute to an advertising fund, succumbing to pressure from franchisees to waive the requirement to pay these fees at the start of the relationship. This is likely a mistake for any franchisor that wants to strengthen and develop its brand and grow its franchise system.

As counsel for a franchisor striving to reach the next level in franchising, we can explain that strengthening and maintaining the brand is important to franchisor and franchisees alike. It is in the franchisor’s best interest to show franchisees the value they receive from a strong brand. A franchisor that can show it is using advertising fees to strengthen the brand is more likely to have franchisees that see the benefit of paying their advertising fees. On the other hand, a franchisor that has waived or deferred the requirement to pay advertising fees has sent a signal that the fees are not important, and is likely to meet with resistance when it tries to enforce a fee requirement after the relationship has already begun.

**Infrastructure, Organization**

A young franchisor must have the right people and structure in place to administer operations, sell franchises, and respond to the needs of franchisees. All too often, problems arise simply because of a failure to timely address an issue. Successful franchise systems have an organization in place that can respond quickly and credibly to the needs of the franchisor and the franchisees, including franchisees’ calls, emails, and other requests for help.
Lessons to be Learned from Puerto Rico’s Law 75

By Manuel A. Pietrantoni, O’Neill & Borges, LLC

When considering whether to enter into a distribution or franchise relationship in Puerto Rico, it is important to consider the effects of Puerto Rico’s “Law 75,” P.R. Laws Ann. Title 10 § 278 et seq. This statute was enacted to enforce Puerto Rico’s strong public policy to protect dealers and franchisees from termination or impairment of their contractual rights without just cause after they have created goodwill for the supplier or franchisor. Medina & Medina (Medina & Medina I) v. Country Pride Foods, Ltd., 858 F.2d 817, 820 (1st Cir. 1988).

One court described the statute as “very much a ‘one-way street’ designed to protect dealers from the unwarranted acts of termination by suppliers.” Nike Int’l Ltd. v. Athletic Sales, Inc., 689 F. Supp. 1235, 1237 (D.P.R. 1988). The statute is intended to safeguard franchisees’ “legitimate expectations” that their contractually acquired rights will be adequately protected. See Medina, 858 F.2d at 820 (citing legislative reports preceding the statute’s approval). This article identifies three fundamental provisions of Law 75, and the case law interpreting the statute, that franchisors and suppliers should consider when developing a franchise or supplying to dealers in Puerto Rico.

Contractual Choice of Law Trumped

Law 75 provides at Section 3B that “[t]he dealer’s contracts… shall be interpreted pursuant to and ruled by the laws of the Commonwealth of Puerto Rico, and any other stipulation to the contrary shall be void.” P.R. Laws Ann., tit. 10 § 278b-2; see A.M. Capen’s Co., Inc. v. Am. Trading & Prod. Corp., 202 F.3d 469, 473 (1st Cir. 2000) (“Although [Law 75] does not explicitly require a dealer to be a resident of Puerto Rico, to be authorized to do business in the Commonwealth, or to have a place of business such as an official showroom or warehouse on the Island,… it does strongly suggest that the dealer must operate in Puerto Rico under similar requirements”) (internal quotation marks and citation omitted). Moreover, the statute states that its “provisions… are of a public order and therefore the rights determined by such provisions cannot be waived.” P.R. Laws Ann., tit. 10 § 278c. These provisions invalidate choice of law clauses in distribution or franchise agreements that designate laws from other jurisdictions to apply to disputes between the parties, whether arising under the agreements or otherwise.

Exclusivity Must Be Clear

Law 75 “does not operate to convert non-exclusive distribution contracts into exclusive distribution contracts.” Borschow Hosp. & Med. Supplies, Inc. v. Cesar Castillo Inc., 96 F.3d 10, 14 (1st Cir. 1996) (citations omitted). The statute does, however, “protect against detriments to contractually acquired rights.” Id. (citation omitted). Thus, the statute protects any territorial or other exclusivity granted to dealers or franchisees under their agreements.
Controversies regularly arise, however, concerning the existence and scope of exclusivity granted to a franchisee when the written agreement is silent on this issue or when the parties are operating pursuant to an oral agreement. Courts have held that “oral testimony and evidence of course of dealing” may be sufficient to prove that a dealer has been granted exclusivity when the parties do not have a written agreement directly addressing the issue. Homedical Inc. v. Sams/3M Health Care, Inc., 875 F. Supp. 947, 951 (D.P.R. 1995), citing, R.W. Intern. Corp. v. Welch Food, Inc., 13 F.3d 478, 483 (1st Cir. 1994); Systema de Puerto Rico, Inc. v. Interface Int., Inc., 123 D.P.R. 379 (PR. 1989); but see, Innovation Mktg. v.Tuffcare Inc., 31 F. Supp. 2d 218, 222-223 (D.P.R. 1998) (holding that relationship was non-exclusive because sales representative agreement did not expressly provide exclusivity, despite extrinsic evidence of exclusivity).

The federal district court in Puerto Rico recently held that an “upgraded version” of a product for which the dealer had exclusivity also fell within the exclusivity granted by the principal. Medina & Medina, Inc. v. Hormel Foods Corp., Civil Case No. 09-1098 (JAG) (D.P.R. Sept. 30, 2013) (unreported). Specifically, the court held “that the principal, under its agreement with the distributor, was bound to protect its distributor, and sell through the distributor the upgraded version of a product for which the distributor had developed the market.” Id. at *41-42.

On the other hand, the court also held that the principal was not obligated to sell to the dealer every new product that it wished to introduce into the Puerto Rico market, because the dealer had proffered no evidence that the principal had agreed to do so. Id. at *44. In that vein, the court noted that the Dealers’ Contracts statute only protects dealers’ “contractually acquired rights.” Id., citing, Vulcan Tools of Puerto Rico v. Makita U.S.A., Inc., 23 F.3d 564, 569 (1st Cir. 1994).

Thus, the parties should specify in their distribution or franchise agreements whether exclusivity is granted and whether it is limited in scope to certain markets, territories, products, or brands.

**Damages Can Be Substantial**

Law 75 provides that “[i]f no just cause exists for the termination of the dealer’s contract, damages may be awarded for the dealer’s investment, inventory, [goodwill], and five times the average annual profit.” La Playa Santa Marina, Inc. v. Chris-Craft Corp., 597 F.2d 1, 4 (1st Cir. 1979), citing, P.R. Laws Ann., tit. 10 § 278b.


**Proving just cause for impairment or termination is a heavy burden, and failure to do so may result in an assessment of substantial damages.**

Damages for wrongful termination in the amount of a franchisee’s lost profits and goodwill can be substantial and are subject to a jury’s determination. For example, in Ballester Hermanos, the court held that the computation of lost profits, including whether lost profits take into account fixed expenses, is an issue for the jury. Id. at *5. If the annual profit determination does not include an allocation of all expenses attributable to the line, and instead only contains an allocation of variable expenses (“the expenses directly related to the sale by the” dealer, Id. at *4), then accordingly the damages would be larger.

Damages for goodwill are also available pursuant to the statute. Id. at *6, citing inter alia, Pan American Computer Corp. v. Data General Corp., 562 F. Supp. 693, 700 (D.P.R. 1983). In Ballester Hermanos, the court emphasized the all-encompassing nature of the damages available under Law 75: “[t]he dealer can also suffer additional, consequential losses… [i]t can lose clients who shift their purchasing to the entity which has assumed distribution of the lines… [i]t can suffer a resulting decline in reputation… [t]he dealer must be indemnified for all of these damages.” Id.

**Conclusion**

Law 75 is a public policy statute intended to safeguard Puerto Rico franchisees and dealers. Proving just cause for impairment or termination is a heavy burden, and failure to do so may result in an assessment of substantial damages. When entering into agreements in Puerto Rico, franchisors and suppliers should strive to be as detailed as possible to reduce the risk of liability and damages under Law 75.
EB-5 Investor Program Offers Source of Funding for Franchises

By Eli Maroko and David L. Steinberg, Jaffe Raitt Heuer and Weiss, P.C.

An immigration program created to encourage capital investment in the United States by foreign nationals, the "EB-5" program, has gained increasing attention from franchisors as fertile source for franchise sales.

Foreign nationals seeking permanent U.S. residency rights apply through different categories, known as "preferences." The fifth category, for immigrant investors, is known as the EB-5 program.

The EB-5 program has become so popular, particularly among Chinese nationals seeking a long-term home for their wealth, that a backlog is threatened.

Essentially, the program requires an investment of $1 million (which may be reduced to $500,000, as explained below) in a new commercial enterprise that will create at least 10 new jobs in the United States during the first two years of operation. The immigrant investor must establish that the funds have been obtained through lawful sources. When these criteria are met, the investor receives a two-year conditional green card from the U.S. Citizenship and Immigration Services (USCIS). A second filing with the USCIS is made at the end of the two years to secure unconditional green card status. Through the EB-5 program, green cards become available not only for the individual investor, but for immediate family members as well.

The EB-5 program has become so popular, particularly among Chinese nationals seeking a long-term home for their wealth, that a backlog is threatened. Although there has never been a waiting list since the EB-5 program was created in 1990, the U.S. Department of State’s Visa Office is now predicting a backlog of two years or longer, based on current use of the program by Chinese applicants. No more than 10,000 immigrant visas may be granted annually to EB-5 investors. Given the number of EB-5 petitions now pending with USCIS, if approval rates remain constant, this annual quota will be exceeded in 2015, according to the Visa Office.

Franchisors that can establish contacts with immigrant or foreign national groups connected to individuals who are motivated to obtain U.S. residency may be able to tap a significant "source" for marketing franchises through the EB-5 program.

The investment can happen in two ways. First, the individual foreign national may invest directly with the franchise company. Alternatively, the individual may invest through a regional center (RC). The USCIS defines an RC as an economic entity, public or private, involved with promoting economic growth, improved regional productivity, job creation, and increased domestic capital investment.

Using an RC for franchise investment offers two important advantages:

• The franchisee/investor may count jobs created "indirectly" through the investment toward fulfilling the requirement of creating at least 10 U.S. jobs;
• The investor may qualify for green card status based on a minimum investment of $500,000, rather than $1 million, if the jobs are created in a targeted employment area (TEA), and most RC’s are located in TEAs. (Michigan’s state-sponsored RC boasts that the majority of the state qualifies for TEA status.)

The EB-5 program offers an attractive source for franchise sales. But EB-5 filings should be prepared and submitted as early as possible, given the current demand for participation in the program.

For more information on this and other immigration-related programs, see also Cheryl Mullin, Kimberly Kinser, and Rivann Yu, New Kids on the Block: Awarding Franchises to Immigrant Franchisees, 15 The Franchise Lawyer No. 4.
May you live in interesting times” is a curious expression. Some attribute it to the Chinese, others to the British. Some describe it as a curse, others as a blessing. Whatever your view, one thing is certain: in the world of franchising, we do indeed live in interesting times.

This issue of The Franchise Lawyer brings you news and insights into these interesting times. The National Labor Relations Board’s latest pronouncement on joint employer status is but one example. In this issue, you can read about that, as well as the NLRB General Counsel’s argument in another case that the current joint-employer standard should be abandoned. You can also read about the latest expansion of U.S.-style protection for trade dress to other countries, with the European Court of Justice’s decision on Apple’s store layout. (And, by the way, you can learn more about each of these topics in presentations at the Annual Meeting in Seattle.)

This issue of The Franchise Lawyer also offers practical advice on a wide range of subjects: steps counsel can take to help emerging franchisors thrive; risks to anticipate and address when entering into franchise and distribution relationships in Puerto Rico; and benefits franchisors can realize from an immigration program designed to encourage capital investment in the United States.

Finally, in this issue you can get up to date on the latest news of the Forum, from nominations for leadership roles to plans for this year’s community service event. You will see how a “recently young” lawyer introduces newcomers to the benefits of membership in the Forum. And you will find a heartfelt tribute to a giant of the franchise bar, Dennis Wieczorek.

What “interesting times” would you like to read about – or write about – in the next issue of The Franchise Lawyer? Let us hear from you!

By Corby Anderson, Nexsen Pruet, LLP

Message from the Editor-in-Chief

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reach out to the Governing Committee, senior leadership, division directors, Annual Meeting speakers, and the Franchise Law Journal and The Franchise Lawyer’s editorial staffs to volunteer or ask questions about further involvement in the Forum. At the Annual Meeting, you will be able to identify these members by the bright ribbons attached to their name tags. It is not too late to sign up for the Forum. Simply visit www.ambar.org/cuttingedge.

Just a reminder that the second edition of the popular Forum book, Mergers and Acquisitions of Franchise Companies, is now available for purchase. This edition, expanded since its original release in 1996, takes a fresh look at key issues that franchisors face when they buy and sell franchise companies. Among these are franchise system management before and after the acquisition, best practices related to due diligence, tax issues impacting mergers and acquisitions, trademark issues, and real estate considerations.

The book also explores several new topics, including negotiating purchase and sale agreements, the rapid expansion of international mergers and acquisitions, the purchase of franchise companies out of bankruptcy, and valuation of franchise companies. In addition, the book contains valuable checklists and a CD with sample forms. Our thanks again go to Christina Noyes and Len Vines, co-editors of this book, and to all of the authors who worked so zealously to create this great resource for all of us. Order your copy (hard copy, e-book, or both) on the Forum’s website (http://www.americanbar.org/groups/franchising/publications.html) today.

Dennis Wieczorek

I must add a final note here about the untimely passing of Dennis Wieczorek. Ron Gardner’s eulogy in this issue perfectly captures our thoughts about Dennis. (See page 8.) Dennis was funny, intelligent, down to earth, thought-provoking, and selfless. We will all miss seeing his silver hair and tall frame moving through the crowd at the Annual Meeting. We will all remember the many contributions Dennis made to our Forum.

I am looking forward to seeing many of you in Seattle.

Message From the Chair

Continued from front cover
Pointers & Pitfalls
Continued from page 13

The operations manual should routinely be updated. The operations manual should serve as the foundation for the franchisor’s relationship and communications with franchisees.

Setting clear expectations and guidance from the beginning and providing open channels of communication throughout the relationship will go a long way toward averting problems and helping the system grow and thrive. Developing alternative channels of communication becomes increasingly important as the number of franchisees grows – one-on-one communication will be far more challenging with 50 franchisees than with 15 franchisees.

Sufficient Capital
Large, established franchisors understand the costs of expansion and the need for funding to effectively grow their systems. For a young franchise system to grow to the next level, the system must have the financial ability to take on the additional costs of growth while still meeting all of its obligations to franchisees.

As counsel, we should help our growth-minded young franchisors to understand how their obligations under the franchise agreement may require them to incur additional costs as they expand the number of franchisees in the system. Expansion may require the franchisor to add employees or to change processes or systems to ensure that contractual obligations to franchisees continue to be met.

If the franchisor does not have sufficient operating capital to expand, it should look for additional capital through investors or wait to implement its plan until it has reserved enough capital to cover the costs of expansion.

Focus on Franchisees’ Retrun On Investment
Successful franchise systems make their franchisees’ profits a priority. If the franchisees succeed, the franchise system is more likely to succeed. By focusing on ways to improve franchisees’ bottom line, whether through new or improved products and services offered, new ways of attracting customers, or more efficient and cost-effective methods of operation, a franchisor will increase its chances of having loyal franchisees who are ambassadors for the brand.

Vision for the Future
Finally, established franchisors understand that the market is a constantly changing landscape, and the franchise system must keep pace with those changes. As counsel, we can help young franchisors anticipate changes in both law and business and make adjustments that will keep their systems on track to thrive and grow.

A Forum Legacy: Community Service Project at Mountains to Sound Greenway

By Beata Krakus, Greensfelder

Every year at the Forum conference, we get together to give back to the community that serves as our host. This year, on Saturday morning, we will work with the Mountains to Sound Greenway Trust to plant trees and remove invasive plants in a fun and rewarding project that will help enhance the local landscape.

The Mountains to Sound Greenway is an iconic 1.5 million-acre landscape that runs from Puget Sound to central Washington. It connects alpine peaks, lakes, and forests with parks, farms, and cities. Bills are pending in both houses of the U.S. Congress to designate the Mountains to Sound Greenway a National Heritage Area.

The Mountains to Sound Greenway Trust works to conserve and enhance the greenway by preserving the regional trail system, leading educational programs, and improving recreation areas.

If you have any questions regarding this event, please contact Beata Krakus at bk@greensfelder.com.
The Benefits of Membership For Young Lawyers and Newcomers

By Andrew Beilfuss, Quarles & Brady LLP

I remember it like it was yesterday. I was fresh out of law school and had been on the job for all of two days when a partner knocked on my office door. “I’ve got a great opportunity for you,” he said. “A client just called and needs help with a franchise dispute. This file contains the UFOC, the franchise agreement, and information regarding defaults. Look these over and determine whether the franchisor has a right to terminate. The client wants to discuss this tomorrow afternoon.” Wanting to impress, I eagerly accepted the assignment, all the time thinking to myself, “What the heck is a UFOC?”

That afternoon, I went through the file and quickly became overwhelmed. As afternoon turned to evening, I started to feel desperate. So I went up to the firm’s library (yes, at that time it was an actual library) and started to dig. That was when I was first introduced to the ABA Forum on Franchising. I found books, presentations, articles, and even checklists that were right on point. Using those materials, I completed the assignment and had it on the partner’s desk first thing the next morning. The Forum saved me that evening. It gave me the resources I needed to understand the issues and complete the assignment. It made me look good in front of my client (at that time, the partner), who would later become one of the mentors who helped shape my career. Little did I know it at the time, but the Forum would save me many times in the years to come.

A Foundation of My Practice

More years have gone by since that first assignment than I would like to admit, and it has been a few years now since I have met the Forum’s definition of a “young lawyer.” But the benefits I receive through the Forum are still a foundation of my practice today.

The Forum provides individuals new to franchising the resources they need to become effective franchise practitioners. It offers numerous educational programs, including intensive programs at the Annual Meetings, webcasts, and other seminars. These programs take you step-by-step through franchise law, from the very definition of a franchise to significantly more sophisticated issues.

The Forum also has a wealth of publications to help you grow your franchise law expertise. The Fundamentals of Franchising and The Franchise Law Compliance Manual are “must haves” for young franchise lawyers, as are publications on practice-specific issues. The Forum has published hundreds of law review-type articles on virtually every topic affecting franchise entities. And last, but not least, are periodicals like the one you are reading now, The Franchise Lawyer, and the Franchise Law Journal, which provide insights on new and developing issues in franchising. As a senior partner once told me, reading these publications is “how you get smart” on franchise issues.

The Most Valuable Benefit

These materials are essential for developing a franchise practice, but they are not the most valuable benefit of the Forum to a young lawyer. As with anything in practice (or in life, for that matter), the personal relationships you form are the true measure of your success. To that end, I can say without hesitation that the Forum is the most friendly, collegial organization you could hope to find.

The Young Lawyers Division (YLD) provides several opportunities for newcomers to establish relationships with colleagues in franchising, at all levels of practice. For instance, the YLD Committee hosts a Newcomer’s Event at the Annual Meeting that is planned around a fun activity and structured to help people connect. This year’s event, at Teatro ZinZanni, a club that is part circus, part dinner theater, is sure to be well attended. I have met some of my best friends in the franchise world at these events, and I highly recommend them to any lawyer who is new to the Forum. The YLD Committee has also established a mentoring program, “Friends of the Forum,” that pairs newcomers with attorneys who have attended numerous Forums over the years. Having served as a mentor in this program, I can say from experience that it is a wonderful way to get integrated into all that the Forum has to offer.

Forum Membership is a must for any franchise lawyer, and especially for young lawyers. So join the Forum. Use its resources. Attend its events. Get involved. You will not regret it.
Collateral Issues in Franchising: Beyond Registration and Disclosure

Edited by Kenneth R. Costello

In addition to counseling their clients on disclosure, registration and other basic franchising concepts, franchise attorneys handle a wide variety of “collateral,” but essential, areas of law on a daily basis. These can range from internet communications to advertising programs to supply chain issues. In this book, each chapter addresses a category of concerns and offers insightful analysis of important aspects of the franchisor-franchisee relationship.

Topics include social media, search-engine optimization and other internet concerns; franchise sales relationships; third-party financing; the franchisor’s corporate and business structure and intellectual property; real-estate issues such as zoning, permits, building code compliance, signs, environmental issues and due diligence, and real estate financing; regulation of advertising and telemarketing; and supply chain management and logistics; among others.

To order, call the ABA Service Center at (800) 285-2221, visit our website at www.ShopABA.org or www.americanbar.org/groups/franchising/publications.html