This is my last opportunity to address you in this space as Chair of the Governing Committee of your ABA Forum on Franchising. My two-year term comes to a close on August 31. In reflecting on my experience, the idiom "Time flies when you're having fun" certainly comes to mind.

Serving in this position has been the highest honor of my professional career. It has also brought me great joy and fulfillment. For that, I thank each and every one of you.

The greatest hallmark of our Forum on Franchising is its consistent and rigorous adherence to the highest standards of scholarship and writing. We strive every year to maintain and improve the quality of our books, periodicals, webinars and Annual Forum workshops and plenaries. It has been a privilege to be surrounded by like-minded colleagues, willing to offer their wisdom, experience and effort for the benefit of their fellow practitioners. This has made it possible to fulfill our mission to be the preeminent forum for the study and discussion of the legal aspects of franchising.

During my tenure, we have honored the past but looked to the future, taking a series of steps to ensure that the Forum on Franchising continues to be the leading provider of continuing education in the franchise sector:

• Our 2016 Membership Survey told us that while our members rate what we do very highly, they want to know more about how the Governing Committee carries out its responsibilities. Thus, we created the Transparency Initiative, publishing a series of presentations and articles on the demographics of our membership, the finances of the Forum (including sources of revenue and allocation of expenses), and how we choose presenters for Annual Forum.

• We created a new Information Officer position to find ways to use the information that we
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The following scenario is a common one when it comes to trademark enforcement. Butter Udder Franchising is an emerging ice cream franchise concept. Since its inception two years ago, it has grown to fifteen franchise locations in Georgia, Alabama, and South Carolina. The principals of Butter Udder have been well schooled on the benefits of protecting the concept’s intellectual property rights and, to that end, Butter Udder has recently obtained a federal trademark registration for its BUTTER UDDER house mark. One of the benefits Butter Udder has been advised flows from federal registration is “nationwide priority” against subsequent users of confusingly similar marks.

While on vacation in Jackson Hole, Wyoming, one of Butter Udder’s franchisees discovers that an ice cream/dessert purveyor has just opened there under the name Butter Udder’s Dessert Emporium (“Butter Udder’s Wyoming”). The franchisee contacts Butter Udder about this third party and asks what Butter Udder is going to do about Butter Udder’s Wyoming’s use. After verifying that the nationwide priority date of its federal trademark registration predates Butter Udder’s Wyoming’s date of first use, Butter Udder is weighing whether to institute immediate legal action to address Butter Udder’s Wyoming’s activities. Should it do so? Will it be successful?

Without more helpful facts, the answers to both questions are likely “no and no.” Although a federal registration does give Butter Udder nationwide priority vis a vis subsequent users of confusingly similar marks, it does not relieve Butter Udder’s burden to establish in litigation that consumers in the geographic area in which Butter Udder’s Wyoming operates are likely to believe, mistakenly, that Butter Udder’s Wyoming’s operations are affiliated or associated with or licensed or endorsed by Butter Udder. To make that showing, Butter Udder must demonstrate either: (a) that its reputation extends to Jackson Hole; or (b) that it has definitive concrete plans to expand there. Unless Butter Udder can satisfy either or both of these requirements, a court will likely conclude that there is no likelihood of consumer confusion in Butter Udder Wyoming’s territory and the litigation will be unsuccessful. However, once Butter Udder expands to the disputed territory, it should be entitled to an immediate injunction. This principle is known as the “Ripeness Doctrine” or “Dawn Donut Rule,” named after the Second Circuit’s landmark decision in Dawn Donut Co. v. Hart’s Food Stores, Inc., 267 F.2d 358 (2d Cir. 1959).

The Dawn Donut Rule has formed part of the law for nearly sixty years, and it has shown remarkable resilience. All Circuits except for the Sixth have adopted the Dawn Donut Rule and, despite at least one commentator’s suggestion that the significance of the Dawn Donut Rule may diminish in light of the rise of the internet, courts today still routinely take into account the Dawn Donut Rule in assessing infringement. See, e.g., Paleteria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. de C.V., 188 F. Supp. 3d 22, 118-19 (D.D.C. 2016), aff’d, No. 17-7075, 2018 WL 3894587 (D.C. Cir. Aug. 10, 2018); Russell Rd. Food & Beverage v. Spencer, No. 2:12-CV-01514-LRH-GWF, 2013 WL 3216666, *3 (D. Nev. Jan. 28, 2013). However, there is no question that the extent of the trademark owner/federal registrant’s internet-related activities is having an increasing influence both on the issue of whether the reputation of the mark extends to the disputed area and, in some cases, on the scope of injunctive relief.

So, what does that mean for Butter Udder? Butter Udder has now approached you with the following questions about its options and next steps:
Laches/Acquiescence:
Butter Udder is concerned that now that it is aware of Butter Udder’s Wyoming’s activities, the clock has started running on laches and acquiescence and that, if Butter Udder does not take legal action now, it may be precluded from taking action later. Here is one instance in which the Dawn Donut Rule helps Butter Udder. Because there is arguably no infringement during the period of time the parties’ activities are geographically distinct, courts have held that a failure to take immediate action or, for that matter, any action prior to the trademark owner/federal registrant’s expansion into the disputed territory does not result in acquiescence or laches. See, e.g., Paleteria La Michoacana, Inc. v. What-A-Burger, Inc. of Corpus Christi, Tex., 357 F.3d 441 (4th Cir. 2004); Synergistic Int’l, Inc. v. Windshield Doctor, 66 U.S.P.Q.2d 1936 (C.D. Cal. 2003).

Concrete Intent to Expand:
Butter Udder advises you of its rapid expansion to date throughout Georgia, Alabama, and South Carolina, that it plans to expand nationwide in the next couple of years and would consider selling a franchise now or itself opening a location in or around Jackson Hole, Wyoming if the right opportunity presented itself. Is this sufficient evidence of a concrete intent to expand to institute successful trademark infringement action against Butter Udder’s Wyoming?

The answer is probably no. Courts have been relatively strict in construing the concrete intent to expand requirement of the Dawn Donut Rule. For example, courts have rejected naked assertions that a trademark owner/federal registrant is willing to sell a franchise or initiate operations itself, or is ready to begin selling product into the junior user’s territory, for failing to establish sufficient concreteness. See, e.g., Paleteria La Michoacana, 188 F. Supp. 3d at 119 (finding both that these alleged facts were insufficient and unsupported by the record). In another case, a trademark owner/federal registrant’s assertions that it had traveled to the junior user’s territory, consulted with real estate agents, organized investor meetings, and attempted to establish local relationships was held insufficient to demonstrate a sufficiently concrete likelihood of entry. See Russell Rd. & Beverage at *3-4.

Activities by Butter Udder that might establish a sufficiently concrete intent to expand to be successful in a trademark infringement action include instances in which (a) it has itself leased premises in Jackson Hole, Wyoming and is ready to begin sales; (b) it has entered into a franchise agreement covering the disputed territory; or (c) it has been in negotiations with a prospect to enter into a franchise agreement and that prospect has balked at purchasing the franchise because of the trademark conflict in the disputed territory.

Scope of Injunctive Relief:
Suppose Butter Udder advises you that it has just sold a franchise covering Jackson Hole that is due to open within the month, but that it has now just discovered that Butter Udder’s Wyoming has also recently opened locations in Minnesota, Colorado, and Arizona. Butter Udder wants to institute a trademark infringement action but would like to enjoin Butter Udder’s Wyoming’s non-Wyoming locations as well. Will it be successful in doing so?

This presents a hard question and more detailed fact gathering will be necessary to answer the question. At the outset, several recent decisions addressing a junior user’s multistate operations often do so under a strict Dawn Donut analysis. For example, in Bros. of the Wheel M.C. Exec. Council, Inc. v. Molohon, 909 F. Supp. 2d 506, 520-21 (S.D. W.Va. 2012), aff’d, 609 Fed. Appx. 149 (4th Cir. 2015), the court found that although the trademark owner/federal registrant had established a likelihood of confusion with defendant’s activities in Kentucky, Ohio, and West Virginia, it declined to issue a nationwide injunction under a Dawn Donut analysis because the trademark owner/federal registrant’s physical operations were limited to the foregoing three states and it could not demonstrate the probability of confusion elsewhere.

On the other hand, two other recent cases found that a nationwide injunction was appropriate despite the fact that the trademark owner/federal registrant’s physical operations were geographically limited. Boldface Licensing + Branding v. By Le Tillett, Inc., 940 F. Supp. 2d 1178 (C.D. Cal. 2013), involved a trademark infringement action between competitive cosmetic companies. The trademark owner/federal registrant Tillett sold its products over the internet and in stores in Florida, California, New York, New Jersey, Hawaii, South Carolina, Pennsylvania, and Connecticut. In contrast, the junior user Boldface had begun selling its products nationwide through more than 5,000 stores as well as on the internet. After Tillett established liability for trademark infringement, Boldface argued that the injunction should be limited to the states in which Tillett had physical locations.
The court declined to do so for two reasons. First, the court noted that Tillett’s internet sales included customers nationwide and that Tillett had actively promoted its products in nationwide media. These facts, among others, demonstrated a present likelihood that Tillett would expand nationally into areas occupied by Boldface.

Perhaps more importantly, the court found that a limited injunction was inappropriate because this case involved “reverse confusion,” i.e. where a substantially larger junior user’s allegedly infringing use dwarfed the activities of the trademark owner/federal registrant and threatened to destroy the trademark owner/federal registrant’s business. Id. at 1199-1200. The court added that if Boldface was barred only in the areas where Tillett was doing business, Boldface’s activities might eliminate Tillett’s identity, goodwill, and reputation even in Tillett’s geographic area given the size of Boldface’s operations. And a more limited injunction could serve as a disincentive to Tillett’s attempting to expand its business into areas already occupied by Boldface and even though Tillett may well be able to enjoin those activities, as it would likely incur significant expense in doing so. Id. at 1200.

Similarly, in Guthrie Healthcare Sys. v. ContextMedia, Inc., 826 F.3d 27 (2d Cir. 2016), a case involving two entities in the medical field, the Second Circuit reversed a district court’s decision limiting preliminary injunctive relief for trademark infringement to the trademark owner/federal registrant’s existing geographic service area. In doing so, it limited the application of the Dawn Donut Rule on the issue of injunctive relief. According to the court, although a trademark owner/federal registrant was required to prove a probability of confusion in the first instance in some geographic area as a prerequisite to any injunctive relief, once it did so it did not have to show the same probability of confusion to extend that injunction to other geographic areas. Rather, the injured trademark owner/federal registrant was required only to present adequate evidence of “plausibly foreseeable confusion” beyond its main area of injury to merit the granting of a broader, and possibly a nationwide, injunction. Id at 48. The court added that its conclusion was bolstered by the fact that the trademark owner/federal registrant recruited nationwide, disseminated information over the internet to a nationwide audience and received referrals nationwide, all of which increased the risk of confusion and harm with the alleged infringer whose activities were nationwide. Id at 48-49.

Other Advice:
Although frustrated, Butter Udder appreciates your advice and has reluctantly agreed not to institute litigation immediately. But then it inquires what additional steps should be taken as it develops expansion plans for Jackson Hole. One tactic the author has found helpful is to send a demand letter to the alleged infringer notifying it of: (i) the trademark owner/federal registrant’s superior rights in the trademark at issue; (ii) the black letter law spelling out the trademark owner/federal registrant’s entitlement to injunctive relief; and (iii) the trademark owner/federal registrant’s intent to expand to the disputed territory. Such a letter may then suggest that the alleged infringer begin now taking steps to transition to a non-infringing mark. Sometimes this results in a cooperative transition by the alleged infringer without the need for litigation. If the alleged infringer fails to cooperate or ignores the demand letter, then the letter might help the trademark owner/federal registrant build a case for willful infringement that may entitle it to enhanced remedies in the event litigation becomes necessary. See Synergistic Int’l, LLC v. Korman, 402 F. Supp. 2d 651 (E.D. Va. 2005), aff’d in part and vacated in part, 470 F.3d 162 (4th Cir. 2006), on remand, No. CIV 2:05CV49, 2007 WL 517677 (E.D.Va., Fed. 8, 2007).

Conclusion
Convincing a trademark owner/federal registrant that delaying a trademark infringement action against a known third-party use of a confusingly similar trademark is often a tough sell. But reminding the trademark owner/federal registrant that by deferring the institution of litigation until the parties’ geographic areas of operation converge, the third party’s use will be enjoined at least in the disputed territory makes that pill much easier to swallow. As perhaps best said by Judge Chamberlain Haller of My Cousin Vinny fame, the Dawn Donut Rule or Ripeness Doctrine at most operates as a “stay of execution” for the alleged infringer. My Cousin Vinny (Twentieth Century Fox 1992).
The Rejection Of Franchise Agreements In Bankruptcy: Effects of the Supreme Court’s Mission Product Holdings Opinion

By Kyle R. Hosmer, Faegre Baker Daniels LLP

Fortune is sometimes unkind to a franchisor. Business slows, liabilities accumulate, and assets dwindle. To right the ship—or liquidate the business—the franchisor may file for bankruptcy. Bankruptcy is a powerful tool. It pauses creditors’ collection efforts. It enables the restructuring of debts. And, notably, it allows the franchisor to break certain contracts.

Section 365 of the Bankruptcy Code empowers a debtor to “reject” executory contracts—in other words, contracts that neither party has finished performing. The Bankruptcy Code further defines the effect of rejection: it constitutes a breach of the contract that occurred the day before the debtor filed for bankruptcy. The counterparty to the rejected contract is generally left with a claim for damages against the estate (which usually returns pennies on the dollar).

Outside of bankruptcy, franchise agreements operate a little differently than run-of-the-mill commercial contracts. That is, franchise agreements typically grant the franchisee the right to use the franchisor’s trademarks, trade secrets, and other brand-centric business necessities. Importantly, if a franchisor breaches a franchise agreement, the franchisee can typically continue using this proprietary information.

Franchise agreements are not sui generis in this respect. Trademark licensing agreements operate in similar fashion. It was in the trademark context that a significant question at the intersection of bankruptcy law and licensee rights arose before the Supreme Court this term. Specifically, in Mission Product Holdings, Inc. v. Tempnology, LLC, 587 U.S. __, 139 S. Ct. 1652 (2019), the Court considered what happens to a licensee’s usage rights when a licensor-debtor rejects a trademark license agreement under section 365 of the Bankruptcy Code.

Defendant Tempnology, LLC (“Tempnology”) manufactured clothing and accessories designed to stay cool during exercise. In 2012, it entered into a license agreement under which it granted Mission Product Holdings, Inc. (“MPH”) an exclusive domestic right to distribute its products and a non-exclusive global right to use its trademarks. Tempnology filed for bankruptcy in September 2015. Soon after, it moved to reject the license agreement under section 365 of the Bankruptcy Code.

The bankruptcy court granted Tempnology’s motion. That decision in hand, Tempnology then asked the bankruptcy court to declare that its rejection of the license agreement terminated MPH’s right to use its marks. The bankruptcy court granted that motion, too. MPH appealed the decision to the Bankruptcy Appellate Panel for the First Circuit, which reversed. Tempnology next appealed to the First Circuit, which also reversed.

The Supreme Court granted certiorari to resolve the circuit split on whether a debtor-licensor’s rejection of a trademark licensing agreement deprives the licensee of its rights to use the trademarks. Stated differently, the Court considered whether a debtor-licensor’s rejection of a contract in bankruptcy rescinds the contract. The Supreme Court held that it does not, and that a non-debtor party to a rejected contract retains the rights it would have outside bankruptcy.

The Court began its analysis with the text of the Bankruptcy Code’s “principal provisions on rejection[,]” finding that “it does much of the work.” As described above, the Bankruptcy Code provides that when a debtor rejects a contract it is deemed to have breached the contract the day before filing for bankruptcy. Congress did not define “breach” in the Bankruptcy Code, though. Rather, Congress incorporated the term’s established, non-bankruptcy meaning.
As a result, “breach” means the same thing in bankruptcy as it means outside of bankruptcy, and the non-breaching party to a rejected contract has the same rights in bankruptcy as it has outside bankruptcy. So while a licensor-debtor can stop performing its obligations under a trademark license agreement through rejection, it can’t rescind the license or otherwise preclude the non-debtor licensee from exercising its contractual rights.

The simplicity of Mission Product Holdings belies its significance. Franchise lawyers should take note for three reasons. First, though the case arose in the trademark context, the Court issued a broad ruling. It spoke in general terms, declining to limit its holding to trademark licensing agreements. Thus, absent Congressional action granting special status under the Bankruptcy Code—like for patents—all executory contracts receive the same treatment.

Second, Mission Product Holdings essentially affirms the status quo. Simply, the Court held that licensees maintain the same contractual rights in bankruptcy as they have outside bankruptcy. Justice Sotomayor’s concurrence confirms this point. She wrote that the “baseline inquiry” in which courts must engage is whether a licensee would have the right to continued use under non-bankruptcy law. The onus, then, is on drafters of trademark licensing (and franchise) agreements to carefully consider the parties’ respective rights and remedies in the event of a breach. Drafters, in a sense, can define what “breach” means for trademark and franchise agreements rejected in bankruptcy.

Finally, the practical reality raised at oral argument but largely unacknowledged in the opinion is that Mission Product Holdings is a decision based on economics and equity. As to economics, a trademark licensor has certain maintenance obligations. Upkeep can be costly—and is therefore an obligation a licensor-debtor either doesn’t want to or can’t satisfy. In this respect, allowing a licensee to continue using marks in the event of a licensor breach forces an efficient allocation of resources. It incentivizes the party that finds the marks most valuable to invest in them.

Put another way, if the licensing agreement is valuable to the estate it will maintain the marks. If not, the estate won’t perform maintenance and the marks will return to the public domain. On the other hand, if the licensing agreement is valuable to the licensee, it will devote resources to continued use of the marks. And if the agreement is not valuable to the licensee, it can treat the agreement as terminated and the estate is free to re-market it to another buyer.

And as to equity, the Court stressed the general bankruptcy principle that an estate cannot possess anything more in bankruptcy than the debtor possessed outside of it. Allowing an estate to rescind trademark licenses through rejection would embellish its contractual rights. Conversely, allowing an estate to rescind contracts through rejection would frustrate the Bankruptcy Code’s ordered structure for avoidance actions (an estate’s ability to unwind prepetition transfers).

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**Business Opportunity Traps For Franchisors with Unregistered Marks**

By Jonathan Barber, Barber Power Law Group, PLLC, and Emily Bridges, Fox Rothschild LLP

Attorneys who represent franchisors must stay up to date with the different state laws affecting the sale of franchises. Not only must practitioners account for the various “registration state” requirements, but twenty-six other states have business opportunity laws that affect the offering of franchises within those states. While the definition of a “business opportunity” varies from state to state, it generally includes the sale of a product or service that is sold for the purpose of enabling the purchaser to start a business if the seller represents that it will provide a sales or marketing program to the purchaser.

Franchises frequently fall into that category, and may be subject to these laws. The states with business opportunity laws each have
unique filing requirements and fees, and some require proof of a significant surety bond or an escrow account. However, six particular states—Connecticut, Georgia, Louisiana, Maine, North Carolina, and South Carolina—may exempt a franchise offering from their business opportunity laws, and registration under such laws, if the franchisor has some type of registered trademark. Accordingly, franchisors that have not secured a federal registration for their trademarks must be particularly cognizant of these laws.

This article focuses on these six states that permit such trademark-based exemptions from their respective business opportunity statutes. These laws vary, and a full description of each state’s laws would be lengthy. However, this article discusses some common features of each state, namely: (1) the location of the applicable statutes; (2) the statutory requirements and any application requirements; (3) whether a bond is required or if there are other restrictions on the collection of fees; and (4) a description of the trademark exemption requirements. Several articles on business opportunities have been published in the Franchise Law Journal and more in-depth papers have been presented at the ABA Forum on Franchising. We recommend that readers turn to these for a deeper dive into the various state laws.

**Connecticut**

The Connecticut Business Opportunity Investment Act ("Connecticut Act") is found in Chapter 672c of the Connecticut General Statutes. Under the Connecticut Act, a business opportunity seller must file an application along with a consent to service of process form, appointing the “Banking Commissioner” as the seller’s agent for service of process, and pay a filing fee of $400. Additionally, the seller must submit a disclosure document that complies with the federal franchise or business opportunity laws, financial statements, certain contracts, agreements and promotional materials, and they must provide a bond or proof of a trust account of at least $50,000.

The Connecticut Act specifically exempts the “sale of a marketing program” so long as it is made in conjunction with a federal trademark. If a franchisor has a federal trademark registered after October 1, 1996, it must file an exclusion notice with the State of Connecticut Department of Banking Securities and Business Investment Division. The franchisor must provide a copy of the trademark registration certificate and a copy of a trademark licensing agreement, if the trademark is not directly owned by the franchisor. There is no fee to file the exclusion notice; and it is a one-time filing unless the trademark or franchisor information changes.

**Georgia**

Georgia’s Multilevel Distribution and Sale of Business Opportunities statute ("Georgia Law") is codified at Sections 10-1-410 through 10-1-417 of the Official Code of Georgia Annotated. If an offering or agreement qualifies as a business opportunity under the Georgia Law, the seller of such business opportunity is required to have an agent in Georgia authorized to receive service. Additionally, if the seller represents that it will refund any money or repurchase inventory from dissatisfied purchasers, the seller must obtain a surety bond in the amount of $75,000. Georgia does not permit the seller of a business opportunity to collect the full amount of the purchase price right away. Instead, a seller may initially collect no more than 15% of the purchase price, with the balance being paid into an escrow account established with a bank or attorney. The remaining 85% percent of the purchase price is payable to the seller sixty days following the start of the purchaser’s business.

Franchisors with a registered trademark are excluded from the definition of a “business opportunity” under the Georgia Law. A franchisor need not have a federally registered mark; marks registered with the state of Georgia are also sufficient. To obtain a Georgia trademark registration, the state requires that the trademark be used somewhere in the state of Georgia, the submission of three examples of the trademark being currently used in commerce, and payment of a registration fee of $15 per application.

**Louisiana**

Louisiana’s business opportunity law ("Louisiana Law") is codified at Title 51, Section 1821, Chapter 23 of the Louisiana Revised Statutes. If a franchise qualifies as a business opportunity under Louisiana’s definition, the franchisor must appoint the Louisiana Secretary of State as its agent for service of process, and is required to maintain a surety bond of $50,000. If a franchise offering qualifies as a business opportunity under the Louisiana
Law only because the franchisor represents that it “will provide a sales plan or marketing program which will enable the purchaser to derive income from the business opportunity which exceeds the price paid for the business opportunity,” then the franchise offering is exempt if it includes a federal or state registered trademark. The filing fee for a Louisiana trademark is $75.

**Maine**

Title 32, Chapter 69-B of the Maine Revised Statutes (“Maine Law”) regulates business opportunities in Maine. Under the Maine Law, business opportunity sellers are required to register by paying a $25 filing fee, filing a copy of a disclosure document that complies with the federal franchise or business opportunity laws, and providing evidence of a bond or escrow account in the amount of $30,000. If a franchise offering qualifies as a business opportunity under the Maine Law only because the franchisor represents that it “will provide a sales program or marketing program,” then the franchise offering is exempt if it includes a federally registered trademark.

**North Carolina**

North Carolina’s Business Opportunity Sales Act (“North Carolina Act”) is found in Article 19, Chapter 66 of the North Carolina General Statutes. Under the North Carolina Act, the seller of a business opportunity is required to register by paying a $250 filing fee, filing a copy of a disclosure document that complies with the federal franchise or business opportunity laws, appointing the Secretary of State as its agent for service of process, and providing evidence of a bond or trust account in the amount of $50,000. If a franchise qualifies as a business opportunity under the North Carolina Act because the franchisor represents that it “will … enable the purchaser to derive income from the business opportunity that exceeds the price paid for the business opportunity,” then the franchise offer is exempt from the North Carolina Act if it is made “in conjunction with the licensing of a federally registered trademark or a federally registered service mark.” Therefore, a franchise that includes a federally registered trademark or service mark is exempt from registration as a business opportunity in North Carolina.

**South Carolina**

The South Carolina Business Opportunities law (“South Carolina Law”) is found at S.C. Code Ann. §§ 39-57-10 et seq. If the franchise qualifies as a business opportunity, then the Secretary of State’s office requires the submission of a registration fee of $100 and a financial statement not older than thirteen months. However, if the franchise qualifies as a business opportunity because the franchisor represents that it will “provide a sales program or marketing program which will enable the purchaser to derive income from the business opportunity which exceeds the price paid for the business opportunity,” then the South Carolina Law does not apply if the sale if the franchise is in conjunction with the licensing of a “registered trademark or service mark.” This means that a franchise could be exempt based on either a federally-registered mark or a South Carolina mark. The application fee for the state mark is $15.

**Conclusion**

Business opportunity laws vary widely, with nuances in just about every relevant statute. However, as discussed above, there are many opportunities for franchisors to be exempt from these complex registrations. Navigating these business opportunity laws can be onerous, time-consuming, and expensive, so it typically will benefit a franchisor to determine how it can obtain an exemption. The easiest exemptions are available to franchisors with a federal trademark. As franchisors expand into new states, it is critical for practitioners to be cognizant not only of the registration states, but also states that have different, but just as specific, filing requirements for business opportunities.
Liquidated Damages and Security Deposits: Useful Tools for Franchise Enforcement or Unenforceable Sources of Franchisor Liability?

By Mary Beth Gettins, Gettins’ Law

The integrity and viability of a franchise brand are built on standard uniformity and franchise agreement compliance. Franchisees’ failure to adhere to system standards and failure to comply with post-termination covenants and obligations weaken the franchise brand integrity and viability. Liquidated damages provisions and security deposits can be useful tools for ensuring franchisee compliance. Before implementing these tools, however, there are several call-outs and considerations a franchisor should evaluate, including disclosure requirements, accounting rules, and legal enforcement.

Liquidated Damages
Liquidated damages provisions establish a preset dollar amount for a contractual violation. Liquidated damages may be contractually imposed for post-termination breaches or interim violations. In the context of post-termination obligations, the term “liquidated damages” is sometimes described as a fee. In the case of interim violations, the fees are not commonly referred to as liquidated damages, but often do meet the definition of liquidated damages.

Legal Enforcement and Limitations
The general requirements for an enforceable liquidated damages provision are fairly uniform across the states and a good example can be found in Maryland law, which provides three essential elements: (1) the clause must provide in clear and unambiguous terms for a sum certain; (2) it must reasonably compensate for damages anticipated by the breach; and (3) it may not be altered to correspond to actual damages determined after the fact. Midas Int’l Corp. v. Poolah Investors, LLC, No.GJH-15-2240, Bus. Franchise Guide (CCH) ¶15,811 (D. MD, Aug. 29, 2016).

Liquidated damages clauses may be found to be unenforceable as unreasonable. “Reasonable” means the preset sum must be reasonable relative to the actual damages at the time that the agreement is signed. Caudill v. Keller Williams Realty, Inc., 828 F.3d 575 (7th Cir. 2016). Reasonableness is a question of fact determined by the circumstance of a particular case. Red Lion Hotels Franchising, Inc. v. First Capital Real Estate Inv., LLC, No. 2:17-CV-145-RMP 2018 WL 2324439 (E.D. WA, Sept. 6, 2018). In the franchise realm, where franchise agreements are commonly for a 10-year term, this could mean determining a liquidated damages preset amount as much as a decade before breach or violation occurs, making the burden of establishing reasonable compensation of anticipated damages a difficult task. Indeed, establishing a relative dollar value of actual damages before a violation occurs can be speculative.

If a liquidated damages amount is found to exceed the relative actual damages, it is considered unconscionable and an unenforceable penalty. Caudill, 828 F.3d at 577. It is the burden of the liquidated damages payor (commonly the franchisee) to challenge the liquidated damages clause as unconscionable and, therefore, an unenforceable penalty. Westco Petroleum Distribs., v. Huntington Beach Indus., No. B264846, 2017 WL 3431732 (Cal. Ct. App., Aug. 10, 2017).

In the situation of a post-termination obligation, the actual damages for a violation may be a straight forward calculation. However, in the situation of interim standard violations, the determination of the liquidated damages amount may not be easy. There may be no readily-identifiable actual damages for the violation. Therefore, establishing a preset amount of liquidated damages for interim standard violation runs a stronger risk of being considered an unenforceable penalty. Without readily-identifiable damages, the liquidated damages provision is not enforceable. Priebe & Sons v. United States, 332 U.S. 407, 413 (1947). Another legal consideration for a liquidated damages clause is the interplay between equitable relief, such as an injunction, and liquidated
damages. Commonly, equitable damages are only available if money damages are insufficient. Ledo Pizza Sys. v. Singh, 983 F. Supp. 2d 632 (D. Md. 2013). By expressly providing a monetary liquidated damages amount for certain breaches, equitable relief may be found unavailable by law unless there is an explanation as to the inadequacy of the liquidated damages in the agreement.

**Disclosure Requirements**

Liquidated damages must be disclosed in Item 6 (Other Fees) of the franchise disclosure document (FDD). 16 C.F.R. § 436.5(f). As part of the disclosures, the type and amount of liquidated damages must be stated and when, as well as under what circumstance, the liquidated damages are required to be paid.

**Security Deposits**

A security deposit is the payment of monies as assurance for future performance. Security deposits are commonly accessed in landlord-tenant, equipment rental, and supplier relationships.

**Legal Enforcement and Limitations**

Security deposits are disfavored under the law. There are state consumer statutory limitations and prohibitions against security deposits. These state statues center around the purpose of, use of, and retention of the security deposit funds. By contrast, there are few security deposit limitations and prohibitions in the context of business relationships.

In addition, a a number of franchise-specific statutes addressing security deposits. For example, Minnesota’s franchise bill of rights prohibits security deposits except for the purpose of securing against damage to property, equipment, inventory, or leaseholds. Minn. R. 2860.4400(K) (2018). California law has a prohibition against ‘key money’ security deposits. Key Money is money paid for renewal or continuation of a lease. Cal. Civ. Code § 1950.7 (West 2018).

When crafting a security deposit provision, it is imperative for the drafter to state the purpose of the security deposit, what deposit funds may be used to cover, and when and under what conditions unexpended deposited funds must be returned. If the security deposit is characterized as refundable, refund obligations should be adhered to closely. Failure to refund as provided may be seen as an “unfair or deceptive acts or practices in or affecting commerce” in violation of the Federal Trade Commission (FTC) Franchise Disclosure Rules.

**Accounting Rules**

Under accounting rules, a security deposit can be considered revenue at the time of payment if the security deposit is not refundable and viewed as a prepayment of future monies owing and not security for contractual obligations. The treatment of a security deposit as a prepayment affects tax liability and, if applicable, can accelerate equipment depreciation. Anthony F. Walsh, A Security Deposit by Any Other Name…, Equipment Leasing Today 13 (Nov./Dec.1999).

**Conclusion**

Liquated damages and security deposits can be viable tools for furthering franchise compliance. However, care needs to be taken when drafting liquated damage and security deposit provisions. There are numerous legal enforcement considerations and limitations with regards to liquated damages and security deposits. In addition, the amounts of any liquated damages and security deposits required to paid by the franchisee to the franchisor or its affiliates along with the refundability of and revenues derived from any liquated damages and security deposits must be disclosed in the franchise disclosure document.
The Professors Committee's Initiatives to Advance Teaching of Franchise Law

By David Gurnick, Lewitt Hackman, and Peter Lagarias, Napell & Dillon, LLP

The Forum Professors Committee’s goals are to increase teaching of franchise law at law schools; provide tools and resources to professors and those who would like to teach; and provide collegiality, information resources, and ideas for professors of franchise law. The Committee has taken several steps to accomplish its mission.

At each annual Forum, the Committee hosts an open house for professors and Forum members who think they may be interested in teaching franchise law. The Committee has also developed a library of resource materials for professors and potential professors. The library’s centerpiece is the textbook, Franchising: Cases, Materials and Problems, edited by Committee Co-Chair Alexander Meiklejohn and featuring 15 chapters with text, cases, questions and a separate instructors manual, written mainly by Forum Members. The textbook is an excellent resource for use in a law school course on Franchising Law.

Other library materials include several syllabi used in actual franchise law courses. These are available for professors and potential professors to use or modify and tailor to their own classes. The Committee has a list of tips and suggestions how to introduce the idea of a franchise law course at a local law school and a sample letter to a law school dean or other administrator, proposing the course. Finally, the Committee co-chairs authored an article in the Franchise Law Journal on the role that adjunct professors can perform in law schools and reasons why law schools may want Forum members to teach a franchise law course. Gurnick and Meiklejohn, Teaching Franchise Law in Law Schools: A Role for Experienced Franchise Lawyers, 36 ABA Fran. L.J. 505 (2017).

There are many good reasons to teach a course as an adjunct professor at a law school. Doing so is a contribution to the future of the legal profession and to the field of franchising law. It is also a service to the school itself. There is an increased demand from law schools for adjunct professors and a concern in legal academia for the need to offer courses to produce practice-ready graduates having skills associated with the actual practice of law. See Catherine A. Lemmera and Michael J. Robak, So, You Want To Be An Adjunct Law Professor? 86 N.Y. St. B.J. 10, 12, July-August, 2014. The process of teaching also benefits the practitioner in another way: it calls for the practitioner to perform deep study of the subject to be taught.

Informal surveys indicate that Franchise Law has been offered as a course at more than 20 law schools around the United States and in Australia and Canada. The Committee recently announced some new initiatives to get franchise law courses offered at more law schools and support Forum members in proposing and teaching these courses. Outreach is planned to the hundreds of law student members of the Forum on Franchising. The Forum has also sponsored a webinar on careers in franchise and distribution law in conjunction with the ABA Careers Section. The webinar is available online at: www.americanbar.org/careercenter/career-choice-series/franchise-law/.

To introduce the franchise law at more law schools, the Committee encourages Forum members to give individualized or single-occasion talks on franchise law or related subjects at law schools in their communities, whether as a guest speaker for another course, at a law school organization’s event or as a speaker at a career day. The Committee believes that introducing the subject of franchise law at schools will help generate more awareness and interest, facilitating opportunities to offer full courses in the subject.

Another Committee initiative is to encourage franchise companies and law firms
with franchise practices to offer externships (or internships, depending on a school’s terminology) to students who have completed courses in franchise law. These students have shown an interest in the subject, and, in completing the course, gained knowledge that gives them a head start in providing useful service to franchising companies and franchise law firms.

The Committee meets regularly. Forum members who have thought about possibly teaching franchise law, or may be interested to participate in the Committee, and anyone who would like copies of any of the resource materials, should contact Alexander Meiklejohn at: alexander.meiklejohn@quinnipiac.edu, David Gurnick at dgurnick@lewitthackman.com, or Peter Lagarias at pcl@franchiselawadvocates.com.

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Precision in Drafting Provision for Mediation and ADR Procedures Before Seeking Preliminary Injunctive Relief

By Nina Greene, Genovese, Joblove & Battista

As the potential for litigation and arbitration continues to impact business decisions of franchisors and franchisees alike, more and more franchisors are including pre-suit mediation provisions in their franchise agreements. These provisions typically require, at a minimum, that before any party may bring any action in court against the other or commence any arbitration, the parties must first mediate a dispute. And, these provisions likewise require that a complaining party submit the claims to mediation within a certain number of days after providing notice of the claim to the other party, the location where the mediation shall take place, and the rules under which the mediation will proceed.

Mandatory pre-suit mediation provisions contained in franchise agreements have many potential benefits for franchisors and franchisees. Foremost, a mandatory pre-suit mediation clause may lead to the ultimate resolution of claims between the franchisor and franchisee without the issues ever resulting in the filing of litigation or an arbitration demand. Further, if the issues are resolved, the franchisor will not have triggered its potential obligation to disclose the dispute in Item 3 of the franchise disclosure document, which may be required in the event of a lawsuit, as well as the associated disclosure requirement if litigation is settled with a payment or other material consideration provided by the franchisor. See Marisa Faunce & Michael D. Joblove, Dispute Resolution, in The Annotated Franchise Agreement, 232 (Nina Greene, Dawn Newton & Kerry Olson eds., 2018) (citing 16 C.F.R. §436.5). Even if pre-suit mediation does not ultimately resolve the issues prior to litigation or arbitration, the non-complaining party will have been provided notice that there is an issue being raised by the other party.

Additionally, the failure to comply with a pre-suit mediation obligation may result in the dismissal or alternatively stay of proceedings pending such mediation. See, e.g., 3-J Hospitality, LLC v. Big Time Design, Inc., No. 09-61077, 2009 WL 3586830, at *2 (S.D. Fla. Oct. 27, 2009) (dismissing case in favor of mediation where the parties’ agreement included provision requiring mediation as a condition precedent to arbitration or litigation and the scope of the mediation was broad enough to cover all claims in action); N–Tron Corp. v. Rockwell Automation, Inc., No. 09–0733–WS–C, 2010 WL 653760, at *7–8 (S.D. Ala. Feb. 10, 2008) (staying rather than dismissing action in which plaintiff failed to mediate, which was condition precedent to filing lawsuit, because the statute of limitations had run).

Even with these noted benefits, mandatory pre-suit mediation provisions typically provide

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A LITIGATOR’S PERSPECTIVE

Nina Greene
Genovese, Joblove & Battista
for carve-outs of certain claims that will not be subject to pre-suit mediation. For example, franchise agreements often except from mandatory mediation actions for declaratory or equitable relief, including claims for preliminary or permanent injunctive relief, and specific performance regardless of whether other alternative dispute resolution proceedings are pending. The limitation of the application or scope of the pre-suit mediation provisions typically makes sense if the need arises for the parties to obtain equitable relief quickly to prevent harm under certain circumstances. However, the precision in which a franchise agreement defines the interaction between the mandatory pre-suit mediation, the exceptions from mandatory mediation and how these provisions interact with the rest of the alternative dispute resolution procedures can themselves present differences of opinion, which may have the unintended result of delaying the legal process and causing the parties to bear additional legal fees and costs.

In seeking preliminary injunctive relief pursuant to the terms of franchise agreements—whether to prohibit a former franchisee from improperly holding over and infringing on the franchisor’s trademarks, to enforce covenants not to compete in-term or post-term, to prevent the unlawful use of confidential information, or any number of other examples—the question of whether the parties must comply and/or have complied with pre-suit mediation requirements contained in the parties’ franchise agreements can often be at issue, especially where a franchisor desires equitable relief quickly because it will arguably suffer irreparable harm. The franchisee might contend that the franchisor has no right to seek preliminary injunctive relief despite anything else in the agreement, including the mediation requirement. The franchisor would likely argue that the request for injunctive relief until the mediation has occurred. The franchisor would likely argue that the request for injunctive relief may proceed, because the terms of the franchise agreement have been met.

An example of this tension comes from the Eleventh Circuit Court of Appeals for the United States. In World of Beer Franchising, Inc. v. MWB Dev. I, LLC, 711 Fed. Appx. 561 (11th Cir. 2017), the Eleventh Circuit was called upon to decide whether the district court had erred in interpreting the franchise agreements’ dispute resolution provisions after it had denied World of Beer Franchising, Inc.’s (“WOBF”) request for a preliminary injunction, because WOBF had not complied with the mediation provisions set forth in the parties’ agreements. In that case, WOBF and its former franchisees agreed to a consensual termination of their three franchise agreements after a dispute occurred over whether the franchisees had failed to “acquire all services, supplies, materials, ingredients, food and beverage products” from WOBF approved suppliers. While the former franchisees de-branded the locations, the principal of the franchisees immediately formed CraftHouse, LLC, and reopened the franchisees’ former World of Beer restaurants as CraftHouse restaurants, competitive businesses, at the same locations.

Upon discovering the opening of the CraftHouse restaurants, WOBF filed suit in federal district court against the former franchisees, alleging infringement of its trademarks and trade dress, unfair competition, and violation of the non-compete provisions in the franchise agreements. Some of the claims were covered by an arbitration provision, which WOBF purportedly acknowledged, and stated it would initiate simultaneously with filing suit in the district court. WOBF sought a preliminary injunction to enjoin the former franchisees from infringing the World of Beer trademarks and trade dress, engaging in unfair competition, and violating the covenants not to compete. The former franchisees opposed the motion for preliminary injunction, arguing that WOBF failed to comply with the mandatory pre-suit mediation provision contained in the parties’ franchise agreements by filing suit before commencing mediation or arbitration. The district court directed the parties to mediate in accordance with the franchise agreements and denied the motion for preliminary injunction without prejudice. WOBF appealed.

WOBF argued that the court misinterpreted the franchise agreements and failed to consider the provision of the franchise agreements that allowed WOBF to obtain a preliminary injunction despite anything else in the agreement, including the mediation requirement. The franchise agreements contained alternative dispute resolution provisions requiring arbitration and mediation under certain circumstances. The parties agreed that each party was required to submit
disputes to non-binding mediation “before commencing any arbitration proceeding,” although both parties had “the right in a proper case to obtain temporary restraining orders and temporary or preliminary injunctive relief from a court of competent jurisdiction.” The franchise agreements required, however, that “the parties must immediately and contemporaneously submit the dispute for non-binding mediation” and that the parties would submit the dispute to arbitration if not resolved through mediation within 60 days of the mediator’s appointment. The agreements also contained an arbitration requirement for disputes except for those “related to or based on” the trademarks. Finally, the agreements provided that either party could seek a temporary restraining order or preliminary injunctive relief from a court of competent jurisdiction provided that the dispute must be contemporaneously submitted for arbitration on the merits.

WOBF took the position that based on the dispute resolution provisions it was only required to mediate when arbitration was required and that, because the case related to WOBF’s trademarks, the case fell outside the arbitration clause. Thus, according to WOBF, no mediation was required. WOBF also contended that the provision allowing the parties to obtain temporary restraining order or preliminary injunctive relief overrode and controlled the arbitration and mediation requirements.

The Eleventh Circuit disagreed, finding that the provision did not limit mediation to only those disputes that were subject to arbitration. Rather, the court found that the provision had a temporal requirement that the parties mediate before commencing arbitration proceedings, and broader language requiring that, to obtain preliminary injunctive relief, the parties must submit immediately and contemporaneously to mediation, regardless of whether the dispute is arbitrable.

The court rejected WOBF’s reading of the franchise agreements’ alternative dispute resolution provisions that the parties need not immediately and contemporaneously submit the matter to mediation when seeking preliminary injunctive relief, because that would not give effect to all provisions of the agreements, which the court concluded could be read together. From the court’s perspective, the parties were required to submit disputes for mediation “immediately and contemporaneously” with a motion for preliminary injunction, and submit disputes to arbitration at the same time as the motion if the disputes were arbitrable. And, temporally, the parties were required to mediate before commencing arbitration.

Specifically, the court found that, as to mediation, the parties were required to submit disputes to non-binding mediation prior to commencing any arbitration. The mediation provision also noted that the parties had the right to obtain temporary restraining orders and temporary or preliminary injunctive relief from a court of competent jurisdiction provided that the dispute must be contemporaneously submitted for arbitration on the merits.

Precise choices with regard to wording of pre-suit mediation provisions, especially when it comes to scope of application and timing, must be considered at the outset when drafting the franchise agreement to prevent potentially costly and time consuming delays that run counter to the desired effect of such provisions.

and temporary or preliminary injunctive relief from a court of competent jurisdiction, but that, contrary to WOBF’s arguments, the parties must immediately and contemporaneously submit the dispute to non-binding mediation. The alternative dispute resolution section also made plain, according to the court, that the parties must submit arbitrable disputes to arbitration at the same time. Thus, reading the provisions as companions from a timing perspective, to obtain a preliminary injunction, a party must contemporaneously submit the dispute to mediation and arbitration, and if mediation failed
to resolve the dispute within the stated time in the franchise agreements, the dispute must then be submitted to arbitration, if the issues are arbitrable. And, the alternative dispute resolution provision in the franchise agreements obligated the parties to submit their disputes to arbitration unless they were related to or were based on WOBF’s trademarks, which the court found that in this case, WOBF had alleged matters that were not just related to the WOBF trademarks. Thus, the court found that WOBF had not followed the procedures to submit a claim to mediation under the requirements in the parties’ agreement, and the request for preliminary injunction had correctly been denied without prejudice.

This case teaches that a pre-suit mediation provision that is included in a franchise agreement to decrease the risk of litigation or arbitration and reduce attorneys’ fees and costs may not produce its intended results if the circumstances in which the mediation must take place are not clearly spelled out up front to cover all appropriate circumstances. As a franchisor, in drafting pre-suit mediation provisions that will allow the parties to carve-out certain disputes from such mediation, care must be given to draft the provisions using precise language so that the carve-outs and exceptions are applicable in all the appropriate and desired circumstances. At the same time, franchisees should carefully review and assess whether they are able to negotiate for narrower exceptions so that they may ultimately argue that the exceptions to the pre-suit mediation provisions are narrower than the circumstances provide. Regardless, precise choices with regard to wording of pre-suit mediation provisions, especially when it comes to scope of application and timing, must be considered at the outset when drafting the franchise agreement to prevent potentially costly and time consuming delays that run counter to the desired effect of such provisions.

Rupert Barkoff, Through the Eyes of a Colleague

By Christopher P. Bussert

In the spring of 1985, I had made the decision to practice exclusively in the intellectual property area. I was aware of Kilpatrick & Cody’s lofty reputation in the area and soon focused my efforts in securing employment there. The hiring partner at the time was Rupert Barkoff and my positive interactions with him caused me to choose to come to Kilpatrick & Cody.

My interactions with Rupert did not end there. Although we were initially in different practice groups, I learned that Rupert had a need for trademark related advice for a number of his franchise clients, which I was happy to fill. Many years later, I recognized that what Rupert had done was to “bait the franchise hook” and it was not long before I had taken that bait hook, line, and sinker. I was pleased to turn the tables on him much later when I recruited Rupert to join me in the firm’s trademark group.

Over the next 30 years, Rupert and I enjoyed not only a thriving franchise practice, we also became great friends. Indeed, I considered him my best friend at the firm. As my career developed in franchising, Rupert was there every step of the way. He was available 24/7 to discuss any issue and every time I asked him to go with me to meet with a client or participate in a pitch or presentation, he did so without question or complaint. I cannot imagine having a better mentor or colleague.

What I learned through these and other interactions is that Rupert was the consummate people person. He loved interacting with all members of the franchise bar, whether friend or foe. He was most interested in learning about your practice and interests and what made you tick. I often joked with Rupert that his professional CV was the longest I had ever seen (17 pages). Of course, the reason for this is that he was one of the most recognized and prolific writers and speakers ever in the field of franchising. Despite all of this, as well as his numerous accolades and recognitions, Rupert never took himself too seriously. In his mind, it was all about what he could do for others and, in
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time I was interviewed for one article on Rupert’s passing, I expressed the best single word to describe him was that he was a true “Mensch.” I was pleased to see that others have described him using that exact term. Stated another way, Rupert was a great lawyer, but he was an even better person. His gentleness, intelligence, and sense of humor will be missed by all but never forgotten.

Message from the Chair

collect from a variety of sources to make sure that we are providing the most current and useful information to our members.

• For the first time, we are conducting a top-to-bottom review of the Annual Forum, the crown jewel of our organization, which over the last three years has averaged 850 attendees—more than 55% of our lawyer membership. The 2018 Nashville Forum had the best attendance in the history of our organization.

• We engaged an outside meeting planning and management firm, with deep experience in the representation of membership-based associations, to provide additional help to make the member experience as productive, collegial, enjoyable and seamless as possible.

• We celebrated our 40th anniversary in Palm Desert in 2017, honoring all of our Past Chairs for their wisdom, insight and leadership that sustained and strengthened the Forum and brought us to that important milestone.

• A new Task Force on Balance created an Editorial Policy which for the first time provides guidance to our editors and writers, so that all of our written work reflects a fair balance of viewpoints among the various constituencies within our Forum and creates value for every member, whether they represent franchisees, franchisors, or both, or whether they are in private practice or serve as corporate counsel or as a state or federal regulator.

• Finally, in light of the membership and financial challenges faced by the ABA at large, we are implementing a variety of measures to make the Forum on Franchising as self-sustaining as possible.

My work as Chair has been greatly aided by my good friend, Karen Satterlee, Immediate Past Chair. Her experience, sound judgment and deep commitment to our mission have been an invaluable and indispensable resource. No one could have asked for a better partner in this endeavor. I am grateful for Karen’s guidance and deeply in her debt.

And I am supremely confident in my successor, Will Woods, who hit the ground running months ago, and is fully engaged. His wealth of experience in a wide variety of roles at the Forum will put him and the Forum in good stead as he moves forward. I have pledged to Will, with Karen as my role model, whatever assistance is needed as he assumes the role of Chair.

I also want to thank the hundreds of members of the Forum, too many to list in this space, who over the last two years have served on the Governing Committee, as Senior Appointed Leadership, a member of a division, caucus or committee, an Annual Forum presenter, an editor of or the author of an article in The Franchise Lawyer or the Franchise Law Journal, an editor of one of our books or an author of a chapter in one of those books, or a presenter at a webinar. Your willingness to contribute and participate is the engine that runs the Forum.

At the outset of my all-too-fleeting time as Chair, my goal was very simple: leave the Forum on Franchising even better than I found it. I hope that goal has been fulfilled, but I leave that judgment to you.

I look forward to seeing all of you at the 42nd Annual Forum on Franchising in Denver, Colorado, October 16-18, 2019.

Thank you and best regards to all.
FRANCHISING AT THIS PEAK
42nd Annual Forum on Franchising

OCTOBER 16-18, 2019
HYATT REGENCY AT THE COLORADO CONVENTION CENTER
DENVER, CO
Nominating Committee Report

We are pleased to announce that Karen Satterlee, Chair of the 2019 Nominating Committee, has reported the results of the Committee’s deliberations. The nominees for the Governing Committee, with three-year terms commencing August 2020 are:

Bethany L. Appleby  
Franchise World Headquarters, LLC (Subway)  
Milford, Connecticut

Nicole Liguori Micklich  
Urso | Liguori | Micklich  
Westerly, Rhode Island

Benjamin B. Reed  
Plave Koch PLC  
Reston, VA

Jason Adler  
Cellairis Franchise, Inc.  
Alpharetta, GA

Congratulations to the nominees. Forum members will vote on these nominations during our annual business meeting on Friday, October 18, 2019, in Denver, Colorado.

Thanks to Karen, Susan Grueneberg, Ann Hurwitz, Mark Forseth and Caroline Fichter for their exemplary service on the 2019 Nominating Committee.

Message from the Editor in Chief

Heather Carson Perkins, Faegre Baker Daniels LLP

In this issue, our contributors offer pieces on subjects from a recent United State Supreme Court decision in the franchise-adjacent Mission Products Holdings case, to trademark issues, to liquidated damages and security deposits to tips on drafting provisions requiring ADR or mediation prior to seeking injunctive relief. We also have reports from the Nominating Committee and the Professors Committee. Last, and far from least, you will see a heartfelt tribute to Rupert Barkoff.

It’s hard for me to believe that I am writing my swan song as Editor in Chief of The Franchise Lawyer. My three years as EIC have been among my best as a franchise lawyer. I have had the singular privilege of working with the sharpest minds in franching. Editing this publication has given me the chance to learn about new areas of law and challenged me to look at legal issues from a different perspective—one as an editor charged with maintaining the excellence and balance of this publication, rather than my usual perspective as an advocate for my clients. Sure, there have been some bumps along the way, but I have loved every minute of it.

I leave this publication in the able hands of Karen Marchiano of DLA Piper, who has served for several years as an Associate Editor. She will do a terrific job. And I offer my thanks to the many members of the Forum who have been generous with offered their support, their feedback and (most importantly) their writing over the last three years. I could not have done it without you. I hope to see many of you at the Forum in my hometown in October—look for me at Punchbowl Social after Annual Developments on Thursday night!
An essential reference to the text of generally applicable franchise registration, disclosure and relationship statutes and the accompanying regulations, this updated edition also includes annotations of reported and unreported cases arranged and keyed to important topics such as franchise fees, exemptions from registration, and more. The unique annotation system designed especially for franchise lawyers helps put your finger on cases that focus upon the issues that matter most.

http://ambar.org/FranchiseDeskbook3rd