Message from the Chair
Will K. Woods, Baker & McKenzie LLP

Having just returned from the Forum’s 42nd annual meeting in Denver, all I can say is WOW and THANK YOU!! The turnout for this year’s meeting was phenomenal with a record-smashing 927 attendees, marking the first time that we have crossed over the 900 attendee threshold. The number of attendees is impressive (particularly since this represents over 60% of the total Forum membership).

But, what is more impressive than the numbers to me is the quality and engagement of the lawyers and other franchise professionals who participated in the three intensive programs on Wednesday, the workshops and AB5 special session on Thursday and Friday, and all of the great social and networking events held during the meeting. After spending a few days with so many good friends and colleagues, I always feel so energized, and I expect many of you feel the same way.

A big thank you again to the meeting co-chairs, Bethany Appleby and K Whitner, as well as to the rest of the planning committee and the Governing Committee for all of their hard work in developing the meeting and executing so well. We owe a huge debt of gratitude to our tremendous speakers, all of whom work very hard to develop top-notch papers and presentations. Finally, thank you to all of you for attending and for doing your part in making this year’s meeting special.

And now, on to Phoenix! Next year’s meeting will be held October 28-30, 2020 at the JW Marriott Phoenix Desert Ridge Resort & Spa. The co-chairs for next year’s meeting (Elizabeth Weldon and Gary Batenhorst) are already hard at work, developing what promises to be another great annual meeting. The planning committee for the 2020 meeting is carefully reviewing the input from the 2019 meeting survey as part of our efforts to continually improve the meeting experience. So, mark your calendars now and make plans to join us next year in Phoenix.

The Forum’s annual meeting is, of course, the engine that drives the Forum on Franchising and

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Successful Discrimination Claims Require More Than Different Treatment of Franchisees

By Megan B. Center, Fox Rothschild LLP

Each time a franchisor treats one franchise differently from another, there is the very real risk that a lawsuit may ensue. But not all claims of discrimination are created equal, and courts in a handful of key states have provided helpful guidance on how to determine when different treatment will be deemed unlawful.


Beyond state franchise statutes, franchisees may be able to redress discrimination through state “Little FTC Acts,” which generally prohibit unfair and deceptive conduct or unfair competition, or “Little Robinson-Patman Acts,” which prohibit discrimination in the pricing of commodities. Additionally, franchisees in certain states may be able to claim that a franchisor breached the implied covenant of good faith and fair dealing. Further, under federal law, franchisees have the opportunity to bring race discrimination claims under the Civil Rights Act, codified at 42 U.S.C. § 1981.

To prove unlawful franchise discrimination—whether it be under statutory or common law—a franchisee will generally have to establish: 1) that it is “similarly situated” to other disparately treated franchisees; 2) that the discrimination affected a material aspect of its franchised business; and 3) that the discrimination was “arbitrary” or “unfair.” Although some discrimination claims certainly have merit and the standards for recovery vary by state, the trend in the courts is to place a heavy burden on the complaining franchisee to prove discrimination.

**Discrimination Requires Similarly Situated Franchisees**

By statute and through case law, discrimination claims typically must be based on similarly situated franchisees. For example, by statute, Michigan prohibits a franchisor from including a provision in its franchise agreement that “permits a franchisor to refuse to renew a franchise on terms generally available to other franchisees of the same class or type under similar circumstances.” **Mich. Comp. Laws Ann. § 445.1527 (emphasis added).** Similarly, Wisconsin has built the “similarly situated” concept into its statutory anti-discrimination protections against non-renewal or termination. Wisconsin’s statute provides that a franchisor cannot “terminate, cancel, fail to renew or substantially change the competitive circumstances of a [franchise] agreement without good cause.” **Wis. Stat. Ann. § 135.03.** The Wisconsin law defines “good cause” as failing to “comply substantially with essential and reasonable requirements . . . which requirements are not discriminatory as compared with requirements imposed on other similarly situated dealers.” **Wis. Stat. Ann. § 135.02 (emphasis added).**

Courts regularly apply the “similarly situated” requirement to franchise discrimination claims. For example, an Indiana court recently held that a franchisor of non-medical senior home care businesses did not run afoul of the law when it chose to allow only some franchisees to offer certain additional services (such as transportation) to their home care clients through separate medical home care businesses. **See Elder Care Providers of Indiana, Inc. v. Home Instead, Inc, No. 1:14-cv-01894-SEB-MJD, 2017 WL 1106093 (S.D. Ind. March 24, 2017).** The franchisee in this case was using a
trade name for their secondary business that was very similar to that of the franchise brand—Home Again vs. Home Instead. The court found that this factor alone distinguished the franchisee’s situation from that of other franchisees who had been allowed to operate secondary businesses, making the franchisee not “similarly situated”, and thus not the victim of illegal discrimination.

Similarly, in Minnesota, a franchisor was found not to be discriminating where it required one franchisee to pay franchise fees and buy a new point-of-sale system while excusing others from those obligations. See Kieland, et al. v. Rocky Mountain Chocolate Factory, Inc, Bus. Franchise Guide (CCH) ¶ 13,481 (D. Minn. 2006). In this case, the court found that the franchisee failed to provide evidence that it and the other franchisees were similarly situated based on similar financial and marketing conditions. Further, the court reasoned that the franchisor had reasonable grounds to grant concessions in certain circumstances.

In the same way, in Deutchland Enter., Ltd. v. Burger King Corp., 457 F.2d 449 (7th Cir. 1992), the Seventh Circuit held that a franchisor did not engage in discriminatory behavior when it threatened to terminate a franchisee’s franchise agreement for violation of the in-term non-competition covenant, despite waiving such restriction for other franchisees. The court reasoned that the franchisees were not similarly situated because the plaintiff was a small company while the other franchisees were large public corporations listed on the New York Stock Exchange and eventually sold their competing restaurants.

**Discrimination Requires “Arbitrary” Disparate Treatment**

Indiana has the most robust case law interpreting the meaning of discrimination under its statute, the Deceptive Franchise Practices Act (the “Indiana Act”), which prohibits a franchisor from discriminating unfairly among franchisees or unreasonably failing or refusing to comply with any terms of a franchise agreement. Ind. Code. § 23-2-2.7-2(5). Despite the breadth of apparent coverage of the Indiana Act, the Seventh Circuit has demanded a relatively high showing for franchisees alleging discrimination, stating that proof of discrimination requires a showing of “arbitrary” disparate treatment among similarly situated franchisees. Andy Mohr Truck Center, Inc. v. Volvo Trucks North America, 869 F.3d 598, 603 (7th Cir. 2017).

In accordance with this standard, in Andy Mohr, the Seventh Circuit held that a franchisor did not discriminate against a franchisee despite granting less favorable price concessions to the plaintiff franchisee than to other franchisees. Mere differences in pricing, the court noted, is insufficient to prove unfair discrimination. Relying on employment discrimination statutes, the Andy Mohr court stated that the burden was on the franchisee to prove “unfairness” in the disparate treatment. Even though the defendant franchisor failed to provide a reasoned explanation for the different prices, the court nevertheless found that the franchisee had failed to prove how this was “unfair” and granted judgment in the franchisor’s favor on the unfair discrimination claim.

**“Reasonable” Conduct is Not Discriminatory**

By statute and by caselaw, “reasonable” conduct is not unlawfully discriminatory. For example, Hawaii’s statute provides that franchisors are prohibited from “discriminat[ing] between franchisees in the charges offered or made for royalties, goods, services, equipment, rentals, advertising services, or in any other business dealing …” Haw. Rev. Stat. § 482E-6(2)(C). While a franchisee may consider this language broad enough to cover nearly every area of concern, the statute provides that any such discriminatory actions will not be violations of the underlying statute if the alleged discriminatory actions:

1) apply to franchises granted at materially different times; 2) relate to making franchises available to certain franchisees that lack the normal qualifications; 3) relate to local or regional experimentation with products, services, business formats, or designs; 4) relate to a franchisee’s cure efforts; or 5) are based on other reasonable distinctions. As a result, while Hawaii’s statute appears at first glance to be broad, the scope of coverage for franchisees is actually quite limited, and even includes an express catchall defense based on reasonableness.

Similarly, in a Washington federal court, a franchisor that acquired a competitor franchise system did not discriminate against its current franchisees by providing reduced rates to the competitor’s franchisees and waiving enforcement of the non-compete covenant against certain
franchisees. See Precision Enterprises, Inc. v. Precision Tune, Inc., Bus. Franchise Guide (CCH) ¶ 10,472 (W.D. Wash. 1993). The court reasoned that the franchisor’s provision of additional consideration was a reasonable business decision, and not discriminatory, as it was appropriate as a means of inducing the competitor franchisees to convert their businesses to using the franchisor’s name and operating system. The court supported this conclusion by noting that the added exposure and additional revenues from the converted fees would ultimately benefit the entire franchise system. Further, the franchises were granted at materially different times under different terms. Accordingly, the decision to change the rates was neither arbitrary nor discriminatory.

**Differences Based on Changes Over Time Are Not Discriminatory**

Changes over time can also provide a defense to discrimination claims. For example, a Wisconsin court found that a franchisor that terminated a franchisee’s development agreement for lack of compliance with its development obligations had good cause to terminate, despite the franchisor giving less time to the franchisee to cure its default than the franchisor had given to other area developers who missed their quotas in the past. See Brown Dog, Inc. v. Quizno’s Franchise Co. LLC, No. 04-C-18-X, 2005 WL 3555425 (W.D. Wis. Dec. 27, 2005). The franchisor successfully argued that it evaluated each developer separately and that it had changed its policy in a way that necessarily meant previous low-performing area developers were held to a different standard. The court found that the anti-discrimination provisions of Wisconsin law did not prohibit a franchisor from changing a business practice where it helps one dealer and hurts another. As evidenced by the Brown Dog ruling, even if a franchisor has forgiven certain franchisee conduct in the past, a franchisor’s implementation of a new business policy, even if it harms some franchisees, will not be discriminatory so long as such policy is uniformly imposed.

Similarly, the Seventh Circuit has held that a franchisor had good cause to refuse to renew a licensee’s license agreement where the licensee refused to agree to a new program with the licensor’s national customers. Wisconsin Music Network, Inc. v. Munk Ltd. P’ship, 5 F.3d 218 (7th Cir. 1993). The franchisee argued that the franchisor’s non-renewal was discriminatory because the franchisor was not requiring licensees with unexpired contracts to comply with the new policy. The court found this argument unpersuasive, finding, “[i]t is not unreasonable for [licensor] to rewrite its license agreements in an orderly fashion, incorporating new terms as the agreements require renewal.” Wisconsin Music Network, Inc. v. Munk Ltd. P’ship, 5 F.3d 218 (7th Cir. 1993).

**Discrimination Claims Can Succeed**

Despite the many cases providing broad leeway to franchisors against anti-discrimination claims by franchisees, franchisees’ discrimination claims can succeed. For example, a Wisconsin court of appeals held that the termination of a franchise agreement based solely on the violation of a net worth requirement was unlawful because the franchisor, “in the course of its conduct, had come to tolerate a certain level of insolvency and negative net worth.” Open Pantry Food Marts of Wisconsin, Inc. v. Howell, et al., Bus. Franchise Guide (CCH) ¶ 8072 (Cir. Ct. Wis. 1983). Specifically, the franchisor previously permitted noncompliance with the net worth provision in 23 out of 29 franchise agreements. The court held that termination on this ground alone was discriminatory in violation of Wisconsin’s state statute. Ultimately, however, the franchisor was permitted to terminate this franchisee for substantial insolvency when the two-year decline in the franchisee’s net worth was more than what a reasonable franchisor should be forced to tolerate. Termination based on insolvency was not discriminatory because the franchise agreement and applicable state law each contained a provision that provided for termination separate from that of the net worth requirement.

Other courts have allowed a franchisee’s claim of discrimination to survive at least the initial motion phase. For example, a Washington court refused to dismiss a franchisee’s claim where the franchisor extended financial assistance to certain franchisees and not others. D & K Foods, Inc. et al v. Bruegger’s Corp., et al., Bus. Franchise Guide (CCH) ¶ 11,506 (D. Md. 1998). The franchisor could have breached the implied covenant of good faith and fair dealing with its lending practices and selective enforcement. The court concluded that it could not make any decision as to whether the franchisor’s lending policies were reasonable or discriminatory until after discovery.

Similarly, a franchisee’s claim that a franchisor had violated Michigan law survived summary

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Loyalty programs are popular with consumers and increasingly used by global franchise systems in promoting their brands. Surveys show these programs are effective: an IRI Consumer Survey and Hawk Intensives Research found that more than 70% of consumers look for loyalty and rewards before making a purchase.

As Galina Grigorava describes in What Loyalty Program is Right for Your Business, (Forbes, March 23, 2018), there are several loyalty program models to choose from, including points, card, tiered, fee-based, and coalition loyalty programs. Unlike many traditional programs, however, app-based and other digital loyalty programs present unique challenges, particularly for international systems, which can only be overcome through a careful legal review.

Is the Program the Right Fit for Both Franchisees and the Franchisor?

From a practical point of view, for the program to be successful, franchisees should be generally supportive, and participation should be high. Low franchisee participation may jeopardize goodwill, since customers could become frustrated if they expect to receive loyalty benefits at every location, but that expectation is not met. And if the program is to be self-funded, low franchisee participation threatens the program’s financial viability.

Prudent franchisees will question program costs, including whether they must provide free product and discounts to all participating customers, and who will bear those costs. Franchisees should also know the anticipated benefits of the program, including the program’s impact on sales or frequency of visits, the expected advertising and marketing support, and how data gathered can be used to profile customers for targeted offers. If franchisees can opt out of a new program, participating franchisees should wonder about the effects of other franchisees’ non-participation. For example, how will customers know which locations are, and are not, participating? Most consumer protection laws that forbid misleading consumers will apply to the advertisement of loyalty programs. Of course, many franchise systems use disclaimers advising consumers that participation may vary. But if participation is too low, that disclaimer may be deemed ineffective notice to consumers. Further, some countries, like Germany, require specific disclosure of participation. In some countries, a brand can comply by providing a link to a webpage listing participating franchisees. South Africa’s Consumer Protection Act, Section 35, goes a step further and specifies that loyalty programs cannot be offered with the intention of not providing it as offered nor can it limit or make it difficult for consumers to seek their loyalty certificate, discount, or reward.

Can the franchisor require franchisee participation? The first place to look is the franchise agreement. Do the terms of the agreement specifically anticipate new programs? If not, provisions allowing changes to operations manuals, system standards, or rules of operation may provide a mechanism for establishing loyalty programs after agreements are executed. Alternatively, participation could be voluntary. Interested franchisees could enter into separate participation agreements, or franchise agreement amendments or addenda. Franchisors might incentivize voluntary franchisee participation by waiving certain costs associated with the program. Regardless, a robust dialogue between franchisors and franchisees about new loyalty programs can ease franchisees’ concerns and increase participation.

Over time, program terms may change, and fees may need to be added or increased. If the franchisor has not reserved sufficient discretion, it may be powerless to make these changes. In Bird Hotel Corp. v. Super 8 Motels, Inc., No. CIV 06-4073, 2010 WL 572741 (D.S.D. Feb. 16, 2010), the court determined that, while the franchisor had the right to change the system and standards of operation, the franchisor could not impose new fees. Had the right to increase fees been expressly addressed in writing, Bird Hotel would likely have been decided differently.
What Corporate Structure is Needed and How Should the Vendor be Selected?

Franchisors with a significant international footprint may wish to establish a separate legal entity to act as the face of the digital loyalty program. In the event of a dispute, a separate entity keeps the program’s liability and finances distinct from the franchisor’s licensing and royalty income streams. Many loyalty programs are self-funding, so it makes sense to establish an entity capable of entering into contracts and paying its own administrative expenses.

The next step is to determine who will create the loyalty app, administer the program, and handle the program’s data. Third-party vendors are often the best choice. These contractors should take responsibility for legal compliance. They should also maintain adequate levels of insurance, indemnifying and naming franchisors and participating franchisees as additional insureds. The vendor contract must also address data ownership, and what occurs in the event of a data breach. Savvy franchise systems will work only with contractors that can effectively manage these risks and have a good track record for compliance in the country in which they are being contracted to operate. While many multinational franchisors would like to partner with one contractor to provide services in multiple countries, it may be best to utilize a separate contractor that fully understands the legal landscape of the country in which it will operate.

What about Privacy and Data Security?

More traditional loyalty programs (punch cards, for example) do not raise significant privacy or data security concerns. Digital programs, in contrast, involve the collection of significant consumer data, implicating a myriad of privacy and data security laws. While an app is being designed, franchisors should review laws affecting use of consumers’ personal information, and their ability to opt in or opt out. Terms of use should explain how to enroll, and how points or rewards are earned and redeemed. Franchises familiar with the U.S. and Canadian requirements will likely default to an express-consent model to ensure legal compliance, but that may not be necessary or expected everywhere. A careful review of the specific language and screen display requirements should be conducted for each country.

New loyalty or rewards app users are expected to accept several legal documents upon first use, such as terms of use (both for the app and the program itself) and a privacy statement that advises consumers what information is being collected, how it is being used, and by whom. In addition to the E.U.’s General Data Protection Regulation (“GDPR”), many countries have specific data rules and regulations. For example, the Japan Act on Protection of Personal Information, the India Privacy Rules, and the Singapore Data Protection Act require specific disclosure of how information is being stored and used. Some countries severely limit information that can be transferred out of the country. For instance, the Singapore Data Protection Act and the Australia Privacy Act impose specific legal requirements prior to transferring data outside of the country where it originated. And in Russia and China, data must be retained in-country, meaning franchisors may need to set up country-specific entities to house program data.

As this is a challenging topic and requires in-country expertise, franchise systems should seek appropriate counsel to advise on each country’s laws. Depending upon the loyalty program’s structure, advice may also need to encompass how information can be shared among entities in the franchising system, such as the vendor developing the app, advertising and marketing agencies, and franchisees. The terms of use must identify who is allowed access to private information, and use of the information must be both appropriate and subject to consumer consent. Further, program administrators must have a process to unsubscribe former participants in a timely fashion. The requirements for this vary by country.

Is the Program Accessible?

In Robles v. Domino’s Pizza, LLC, 913 F.3d 898 (9th Cir. 2019), the United States Court of Appeal for the Ninth Circuit held that the Americans with Disabilities Act (“ADA”) applies to the development of private websites and mobile applications, despite the lack of clear guidance from the government on accessibility standards. Beyond legal requirements, there is a societal expectation that loyalty programs will be accessible to the visually impaired and other individuals with disabilities, as Melissa Landau Steinman explains in Risk vs Reward: Loyalty Programs and the Law (20190510A NYCBAR 59).

U.S.-based franchisors may be familiar with Web Content Accessibility Guidelines (“WCAG”), including the release of WCAG 2.1 in June 2018, which sets out standards for accessibility of loyalty programs to disabled individuals. While internationally there is not much law in this area
yet, international franchises should consider applying U.S. standards to ensure alternative means of access to serve all consumers, such as allowing plastic cards as an alternative to online access. Companies with existing websites and loyalty applications should consider whether to audit those programs to address accessibility concerns. Finally, contact links and other mechanisms allow consumers to raise questions, concerns, or suggestions about accessibility.

What about Taxes?
Loyalty programs must be analyzed from a tax and accounting perspective. If the program awards a loyalty certificate with a monetary value rather than product driven rewards (such as “x” points equals one free food or beverage item), the tax consequences can differ substantially. Further, understanding the juncture at which tax attaches can be important. For example, under the Singapore Payment Systems Oversight Act, if the program provides a certificate with a monetary value, the certificate may be treated like money.

If franchisees provide free products as part of a rewards program, franchisees—and franchisors—should know the goods and services and value-added tax implication of those free goods. Foreseeing tax implications in each jurisdiction not only helps the program run smoothly, but helps franchisees manage a new program’s effect on their business and customers.

What about Old Programs and Expired Points?
If an existing program is being replaced with a new one, franchise systems must decide how to wind down the old program and transfer participants to the new program. An unsuccessful transition to a new program can have negative impacts on a brand, as suggested by the Business Insider article Starbucks’ Controversial New Rewards Program Launches Today: Here Are The Major Changes You Should Know About (April 12, 2016).

Consumer consent may also be required for those migrating from a prior version of a program. Consumers migrating to the new program should expressly opt-in and accept the new terms of use. Consumers must be advised, specifically and transparently, about what will become of their data and existing rewards or points under the wind-down provisions of the old program’s terms of use. Consumers not migrating to the new program should be provided with reasonable notice, in compliance with the terms of use and local law, that their rewards under the old program will expire.

Indeed, all users with points or rewards of value will need a reasonable notice that an expiration (“use it or lose it”) time period applies, and terms of use should explain what happens when points or rewards expire or become suspended. Some geographies have specific requirements, while other geographies ban expiration of loyalty points, with limited exceptions, as discussed in Ana Badour’s article Ontario Ban on Expiry of Rewards Points Now in Effect (McCarthy Tétrault, January 1, 2018).

How Should Consumer Disputes be Resolved?
No matter how thoroughly vetted a program might be, conflicts may be inevitable. Therefore, dispute resolution processes should be considered. International franchises can mitigate the risk of litigation by focusing on three key strategies: clarity of terms of the program throughout all materials, such as terms of use and frequently asked questions; consistency in implementing and marketing by advertising agencies and franchisees; and resolution of consumer concerns through customer care at either the franchisee level (which requires franchisees to understand the program and their role in signing up participants, and be able to properly answer questions) or franchisor level.

In addition, terms of use for digital programs can include venue-selection, arbitration, choice-of-law, and class action waiver provisions. Whether these provisions will be enforced often depends on how conspicuous and clear the waiver provisions are. In many countries, the enforceability of these provisions has not been exhaustively litigated. For example, the articles Arbitration Clause Struck Out on Grounds of Consumer Protection (Int’l Law Office, February 1, 2001) and Wellman v. TELUS: Supreme Court Emphasizes Enforceability of Arbitration Provisions (Craig Lockwood & Louis Tsilivis, Osler, April 5, 2019) discuss developments in the United Kingdom and Ontario, Canada in these areas.

Conclusion
As more consumers expect to be rewarded for their loyalty, global franchise systems must consider digital loyalty initiatives. By properly addressing legal concerns, with the assistance of legal advisors in the countries where loyalty programs will operate, brands can avoid pitfalls and realize the positive, system-wide benefits loyalty programs can have on goodwill, customer traffic, and revenues.
Contributory Liability — An Underutilized Trademark Remedy for Franchisors

By Bryan Huntington, Attorney, Larkin, Hoffman, Daly, & Lindgren, Ltd.

Franchise systems often confront the situation of a terminated franchisee who has failed to remove the franchisor’s signage from the franchisee’s leased location. This can be especially frustrating when the franchisee is insolvent and has little to risk by continuing to operate, or when the franchisee has simply abandoned the location. There may be another way to have those marks removed, without having to sue the franchisee.

Any person or entity that enables or assists another in infringing a federally-protected trademark may be held liable under the Lanham Act, 15 U.S.C. § 1051, et seq., under a theory commonly referred to as contributory trademark liability. Federal law allows treble damages or minimum statutory damages and attorneys’ fees to the prevailing contributory liability claimant. The cause of action affords franchisors powerful leverage against third parties, such as landlords, who provide aid or assistance to a former franchisee that misuses the franchisor’s trademarks.

Elements of Claim

The U.S. Supreme Court established the test for contributory liability in *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844 (1982). The Court concluded that liability may attach when the defendant: (1) intentionally induces another to infringe a trademark, or (2) continues to supply goods to a party whom it knows, or has reason to know, is engaging in trademark infringement. Subsequent federal decisions recognize that contributory liability may extend to the franchise relationship. See *Mini Maid Services Co. v. Maid Brigade Systems, Inc.*, 967 F.2d 1516 (11th Cir. 1992) (holding that “[a]lthough a franchisor may not be held liable for a single franchisee’s infringement solely because the franchisor failed to exercise reasonable diligence to prevent the violation, a franchisor might be liable for contributory trademark infringement, even if the franchisor did not itself perform any infringing acts.”); see also *Mister Softee, Inc. v. Amanollahi*, No. 2:14-CV-01687, 2014 WL 3110000, at *6-8 (D.N.J. July 1, 2014) (recognizing that contributory liability may apply within context of franchisee/franchisor relationship).

To establish a claim for contributory liability, the claimant must prove four factors:

1. The defendant had sufficient control over the instrumentality used to infringe;
2. The defendant possessed the requisite knowledge of trademark infringement activity;
3. The defendant continued to supply its service despite said knowledge; and
4. The defendant failed to take sufficient remedial steps to stop the infringing activity.


Contributory Liability Allows Franchisors to Compel Third Parties to Take Remedial Action to Stop Infringing Conduct

Franchisors have used the theory of contributory liability effectively against former franchisees and against entities and persons related to the franchisees. For example, in *Mister Softee, Inc. v. Amanollahi*, the franchisor secured a preliminary injunction against a terminated franchisee that purportedly transferred franchises to four other people without the franchisor’s consent. See 2014 WL 3110000, at *6-8. In *Tropical Smoothie Franchise Dev. Corp. v. Hawaiian Breeze, Inc.*, the franchisor defeated a motion to dismiss its contributory liability claim asserted against a former franchisee and related entity where the newly-formed entity was operating a similar business in the former franchisee’s location. See No. 804CV0054417, 2005 WL 1500886 (M.D. Fla. June 23, 2005). And in *Ramada Franchise Sys., Inc. v. Boychuk*, the franchisor prevailed on a contributory liability claim against an unlicensed...
entity operating at the former franchised location using the franchisor's trademarks. 283 F.Supp.2d 777 (N.D.N.Y. 2003).

The theory can also be applied against landlords and listing agencies, as well. Landlords who allow a terminated franchisee to continue to maintain the franchisor's signage on the leased premises and listing agencies that allow the terminated franchisee to continue to advertise the business under the franchisor's trademarks, can be seen as providing services to the infringing party in the form of space, amenities, or advertising. A franchisor is within its legal rights and would certainly want to put the third party on notice that continued use is an infringement of valuable trademark rights in the hope that the notice alone would accomplish the objective of motivating the landlord or listing agency to remove the signage or offending listings. However, from a legal standpoint, this may not even be necessary, as a franchisor need not prove that the third party had actual knowledge of the infringing activity; rather, the franchisor need only establish the defendant's constructive knowledge of the infringing conduct. See Lusottica Grp., S.P.A. v. Airport Mini Mall, 932 F.3d 1303 (11th Cir. 2019). As the court in Lusottica held, willful blindness—where a person "suspects wrongdoing and deliberately fails to investigate"—is sufficient to demonstrate constructive knowledge. See id.

The recent Lusottica case gives precedent for a claim against landlords. Plaintiff Lusottica manufactured sunglasses and owned trademarks for Ray-Ban and Oakley products. The defendant landlord operated an indoor flea market in a shopping center and leased space to several vendors. Lusottica investigators found that vendors in the shopping center were displaying and selling counterfeit merchandise. Law enforcement officials seized the counterfeit goods and arrested the vendors. Despite these actions, sales of counterfeit Lusottica merchandise continued at the flea market. Lusottica sent a cease and desist letter to the landlord, notifying it that certain tenants were selling counterfeit merchandise. The landlord's property manager (1) gave each tenant a notice about counterfeit sales; (2) directed the tenants to stop selling counterfeit merchandise; and (3) instructed the tenants that the sale of counterfeit goods violated their leases. Despite these actions, further counterfeit sales continued.

Lusottica brought suit alleging the landlord was contributorily liable under the Lanham Act. The trial court denied the landlord's summary judgment motion. The jury found in favor of Lusottica and awarded $1.2 million in damages based upon twelve counterfeit sales. The landlord then moved for judgment notwithstanding the verdict, arguing that it did not have sufficient notice of counterfeit sales because the cease and desist letters did not specify the individual tenants responsible for the counterfeit activity. Lusottica argued that the duration, frequency, and visibility of law enforcement raids established the landlord's actual or constructive knowledge of the tenants at issue. Lusottica contended this prior knowledge was relevant to the landlord's contributory liability. The trial court held there was sufficient evidence for a reasonable jury to find that the landlord:

a. Played a major role in the operation and management of the flea market;
b. Had the ability to take steps under its leases and state law to halt the counterfeit sales;
c. May have had reason to suspect infringement by the tenants;
d. May actually have known of the counterfeit sales; and

e. Deliberately failed to investigate and take corrective action.

The district court found that a landlord could be contributorily liable under the Lanham Act even without actual knowledge of infringement by tenants. It observed that courts have ruled landlords liable if they have reason to know of trademark violations or if they are willfully blind by deliberately failing to investigate suspected infringement by tenants. The court therefore denied the landlord's motion for judgment as a matter of law. The Eleventh Circuit Court of Appeals affirmed the landlord's liability in August 2019. See also Century 21 Real Estate Corp. of Northern Illinois v R.M. Post, Inc. (CCH) Bus Franch Guide ¶ 9429 (N.D. Ill., August 8, 1988), for an example of a claim being made against a listing agency that allowed a former franchisee to continue using the franchisor's trademark in a directory listing.

Franchisor Contributory Liability for Infringing Acts of Franchisees

When it comes to contributory liability, what is good for the goose is good for the gander.
Just as third persons can be held liable for the infringing conduct of the former franchisee, a franchisor can similarly be liable for the infringing acts of its franchisees. In *Mini Maid Services*, the Eleventh Circuit concluded that a franchisor was not liable for the trademark infringement of a franchisee solely on the basis that the franchisor failed to exercise reasonable diligence to prevent the infringement. However, the Court held that a franchisor might be liable in such a case, even if the franchisor itself performed no infringing acts, if the franchisor intentionally induced the infringement, or knowingly participated in a scheme of trademark infringement carried out by a franchisee. See *Mini Maid Services*, 967 F.2d at 1522. Liability may also attach to the franchisor’s officers and agents depending upon their knowledge of the infringement.

**Conclusion**

Contributory liability provides powerful leverage against third persons who are aiding and abetting a former franchisee’s trademark infringement. In the franchise context, the theory could be applied against entities related to the franchisee, the franchisee’s officers or agents, landlords, management companies, listing agencies, and others who are knowingly aiding and abetting trademark infringement. To the extent these third parties have more assets at risk than the franchisee, a well written letter may accomplish the franchisor’s objective.

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**Successful Discrimination Claims Require More Than Different Treatment of Franchisees**

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judgment in *General Aviation, Inc. v. Cessna Aircraft Co.*, 13 F.3d 178 (6th Cir. 1993). The Michigan statute voided any provision in a franchise agreement “that permits the franchisor to refuse to renew a franchise on terms generally available to other franchisees of the same class or type under similar circumstances”. Id. In *General Aviation*, the franchisee demonstrated that the franchisor had in fact denied renewal of its agreement while granting other franchisees’ renewals. The Sixth Circuit remanded to the district court to determine whether the circumstances of the relationship with GA were similar to those of its relationships with the other dealers.

**Conclusion**

While courts will not tolerate a franchisor’s unlawful discrimination amongst its franchisees, franchisees are required to meet a high bar in order to survive a motion to dismiss and eventually recover for franchise discrimination. An aggrieved franchisee must provide evidence that it is similarly situated to other franchisees and establish that any discrimination was unfair and material. A franchisor can likely avoid liability if it can proffer a reasonable justification for the disparate treatment, provide evidence of uniform enforcement of a new policy or show that the franchisees were not similarly situated. The consistent theme from state to state is that courts allow franchisors to operate their respective franchise systems within the bounds of fairness and reasonableness.
Hitting the Pavement: Legal and Practical Considerations for Expanding Food Businesses Beyond Traditional Brick-and-Mortar

By Brittany Johnson, Starbucks Corporation


Even some of the world’s most well-known brick-and-mortar concepts entered this emerging channel. For example, Starbucks utilizes a variety of mobile formats, including a bicycle serving cold brew coffee and a Starbucks-branded mobile coffee truck. Chick-fil-A deployed mobile executions in Houston, Washington, D.C., and Nashville. Other brands, such as T.G.I. Fridays, Jack-in-the-Box, and Dairy Queen, embraced food trucks on a limited scale. This article explores the opportunities that mobile formats offer, as well as the legal and practical challenges that franchise brands may encounter when pursuing a mobile strategy.

Benefits of a Mobile Execution

Customer Access

Mobile executions allow retailers to meet customers where they are. As the landscape of retail shifts from large-scale shopping venues toward electronic commerce, mobile executions allow retailers to reach customers in their current environment. Mobile executions offer operators the option of connecting with customers near their homes, at their workplaces, and while they are on the go.

The mobile channel also allows operators to access venues where large groups of customers gather for a short period of time, but where building and maintaining a permanent location is impossible. Concert venues, festivals, stadiums, private events, and non-recurring large-scale events (like the World Cup or Super Bowl) are all locations where masses of customers need and want food, but where it can be difficult or impossible for retailers to invest in a permanent, full-scale location. The flexibility offered by a mobile execution makes it a perfect option for satisfying short-term, but potentially lucrative, customer demand.

Marketing

A mobile execution can serve as a powerful marketing tool for a brand. Whether it’s a truck, bike, cart, or trailer, the vehicle usually prominently bears the brand’s marks and serves as a kind of roving billboard, bringing in new customers and helping the brand connect with its existing customer base. For some brands, the benefit of a mobile execution is measured by the number and quality of positive marketing impressions driven by the mobile execution itself.

Mobile executions allow brands to cultivate direct digital connections with customers. Many mobile food businesses exclusively use social media to advertise current and upcoming locations and menu offerings. For many customers, the best way to engage with a mobile execution is to “follow” the business’s social media account. In doing so, the mobile execution and the customer create a digital connection that allows the business to have an ongoing relationship with its customer base and to capitalize on low-cost, direct-to-consumer marketing.

Mobile executions are also attractive marketing tools for brands seeking to reach...
millennials, the largest age demographic in the United States. See Cara Rosenbloom, 9 Ways Millennials Are Changing the Way We Eat, WASH. POST (Feb. 21, 2018), https://www.washingtonpost.com/lifestyle/wellness/9-ways-millennials-are-changing-the-way-we-eat/2018/02/20/6bb2fe60-11eb-11e8-8ea1-c1df9f8e3f_story.html?utm_term=.c8a3d9048568. Mobile food executions are well-positioned to meet millennials’ demand for quick meals on the go.

Mobile executions can also serve as innovation incubators, allowing brands to test on a small-scale new product lines, marketing tools, equipment, technology, and operating methods. For example, a brand could test a new beverage item for a short period of time at a mobile location without the added cost of changing a permanent menu or training an entire staff on the new beverage. Customers may accept that offerings available at a mobile execution differ from those offered at a brand’s traditional retail location and, as a result, may be more open to trying limited-time, test-phase products. Similarly, mobile executions may allow operators to test consumer demand in a geographic market before investing in a fullsize, permanent location.

Franchisee Access
While the cost of developing a mobile execution varies widely, the cost may be substantially lower than the cost of developing a permanent retail space. In addition, the time period in which it takes to prepare a mobile business for opening can be significantly shorter when compared to a traditional brick-and-mortar location. Reduced cost and a shortened development timeframe make mobile executions attractive to franchisors and franchisees alike. See Jason Daley, Curbside Enthusiasm: A Look at Mobile Franchises, ENTREPRENEUR (Mar. 29, 2015), https://www.entrepreneur.com/article/243562.

Authorized Operating Areas and Encroachment
Franchisors of mobile executions should carefully consider the application of franchise agreement provisions typically tied to the geographic location of sales. Franchisors obviously cannot treat mobile executions like brick-and-mortar locations and define a single location from which the mobile execution can operate. Instead, franchisors...
must define a general geographic area in which each mobile execution is authorized to operate and clearly note its boundaries. In addition, to avoid inadvertently creating unpermitted intra-system competition, franchisors exploring expansion to the mobile channel should carefully examine the rights and territories granted to existing franchisees and the rights reserved by the franchisor. Franchisors expanding to the mobile channel may also consider incorporating language into future franchise agreements expressly permitting competition by mobile executions. Finally, franchisors should also be aware that, given the transitory nature of mobile businesses, territorial encroachment can be more difficult to monitor and enforce.

**Operational Requirements**

Expanding a system to include mobile executions may also require revisions to agreement terms and operations manual requirements relating to the day-to-day operations. For example, mandated operating hours need to be flexible enough to account for time spent in transit moving the mobile execution from one location to the next or for periods when a mobile execution is out of service for maintenance, repairs, or inclement weather. Required staffing levels may need to be revised to reflect the mobile location’s limited staff. Mandated product offerings may need to be streamlined if not all products are available at a mobile location. Point-of-sale system, equipment, and design specifications may need to account for space constraints unique to the mobile environment.

**Licenses and Permits**

Operators of mobile executions may need to maintain various licenses and permits in order to lawfully operate the business within certain locations. See Ibboston & Weinberg, Steering Franchisors Through the Mobile Truck Trend, 14 THE FRANCHISE LAW. No. 3, Summer 2011 (citing licensure requirements and restrictions imposed on mobile food trucks in various jurisdictions). New York City is a good example of a jurisdiction with multilayer licensure requirements. The city requires operators to obtain a “Mobile Food Vending License” issued by the local health department. After securing the license, the city requires operators to obtain the similarly-named “Mobile Food Vending Permit” before beginning operations. The number of permits is strictly controlled and the waitlist to obtain a permit is lengthy. Operators are responsible for paying related fees and tracking renewal deadlines.

In other locales, operators must obtain special parking licenses to park for extended time periods on public roads. Still other jurisdictions may require franchisors that sell a mobile truck directly to a franchisee to comply with motor vehicle dealer rules and regulations.

**Restrictions on Operation**


**Taxes**

Operators of mobile executions may find themselves responsible for navigating and complying with a patchwork of tax regulations. For example, if a franchisee operates the mobile execution in multiple geographic locations with varying tax structures, the franchisee will be responsible for ensuring its compliance with regulations in each location. Not only can this be difficult for operators to track, but it can also be challenging for franchisors exercising audit rights.

Mobile executions allow retailers to meet customers where they are.
Commissaries
Space constraints within mobile trucks and similar vehicles can make operating a full-size kitchen nearly impossible. To prepare the quantity and quality of food required, some franchisors may permit franchisees to prepare some items in a centrally-located commissary and use the mobile execution as a roving point-of-sale.

The commissary approach has its own complexities. First, the cost of a stand-alone commissary might affect the financial viability of the mobile model. Second, the commissary itself is likely subject to various food safety regulations and licensure requirements. Third, if operated by the franchisee, a commissary is an additional location for the franchisor to audit and inspect for compliance with system standards.

Conclusion
Expanding to the mobile channel can be attractive for brands and operators alike. However, successful expansion into the channel requires careful consideration of a myriad of legal and practical issues. Franchisors must revisit franchise agreements, disclosure documents, operations manuals, compliance programs, and general operating methods to establish a solid foundation for the brand to thrive in the mobile channel.
Enforcement of Non-Disparagement Clauses in Settlement Agreements

By John P. Mertens (Pia Anderson Moss Hoyt) and Mathilde Mounier

Many settlement agreements contain clauses which prevent the parties from making negative comments about one another. Through such provisions, the franchisor and franchisee may avoid a negative impact on their business or the spread of a bad reputation. Notwithstanding these advantages, several factors need to be considered when drafting a non-disparagement clause in order to ensure its enforcement in the event of a breach.

Valid Non-Disparagement Clauses Are Written Clearly

Settlement agreements, with or without non-disparagement clauses, are interpreted and enforced according to general principles of contract law. Accordingly, a court must be able to discern a clear meeting of the minds to enforce the contract, including a non-disparagement clause. Unlike defamation, there is no legal definition of the term “disparage,” and dictionaries vary as to the meaning they assign to it. This means that enforcement depends on the specific wording of the contract for the court to discern the intent. If the clause is not sufficiently detailed, for example only stating that the parties “will not disparage one another,” there will not only be uncertainty as to whether a certain behavior constitutes a breach, but also the court might find the term insufficiently clear to form a contract or enforceable clause. See, e.g., Santos v. Massad-Zion Motor Sales Co., 160 Conn. App. 12, 123 A.3d 883 (2015).

A more comprehensive and specific description of prohibited acts and the scope of the prohibition will also decrease the probability of inadvertent violations, as parties will have a better understanding of which acts from which to refrain. If the parties have some specific actions in mind, these can be spelled out (e.g. “parties shall not transmit messages in any medium offering facts, purported facts, or opinions on the other party,” or the parties might cite to a third-party source, such as “disparagement, as defined in Black’s Law Dictionary [current] edition.”) This can avoid another harm—a more aggressive Court adopting its chosen definition from the available options. See Sohal v. Michigan State Univ. Bd. of Trustees, No. 295557, 2011 WL 1879728, at *4 (Mich. Ct. App. May 17, 2011) (adopting the Black’s Law Dictionary definition of “a false and injurious statement . . .”; but see FreeLife Int’l, Inc. v. Am. Educ. Music Publications Inc., No. CV07-2210-PH XDG, 2009 WL 3241795, at *6 (D. Ariz. Oct. 1, 2009) (citing the Oxford English Dictionary and noting “the ordinary meaning of this term does not require that the disparaging statement be false.”)

Although non-disparagement clauses follow the rules of contract law, it must not be forgotten that their effect limits speech. As discussed below in the section on remedies, some remedies for breach of a non-disparagement clause can create a prior restraint in potential conflict with First Amendment rights. Courts have deemed it possible to waive constitutional rights; however, such a waiver will only be valid if it is clear, knowing, and voluntary. Leonard v. Clark, 12 F.3d 885, 889 (9th Cir. 1993), as amended (Mar. 8, 1994). The vagueness of the term “disparagement” will once again be an issue in determining whether these conditions are fulfilled. In addition to clear wording of the provision, other factors may impact the validity of the waiver. For example, courts will also look at the presence or absence of legal counsel in the negotiation and drafting, the balance in the parties’ bargaining powers, the public concern at issue, and the extent to which the clause advances the primary purpose of the agreement. Perricone v. Perricone, 292 Conn. 187, 209-221, 972 A.2d 666, 682-88 (2009). In addition, some contracts include an explicit waiver clause, to reduce prior restraint arguments barring future enforcement.
Regardless of how the non-disparagement clause is drafted, the parties will still have an absolute litigation privilege for allegedly disparaging comments made in the course of litigation. Rain v. Rolls-Royce Corp., 626 F.3d 372, 377-378 (7th Cir. 2010). Put differently, non-disparagement clauses will not effectively limit what parties can say in the course of litigation.

**The Employment Relationship Question**

In general, non-disparagement clauses will be enforceable to the extent they follow the general principles of contract law (including clearly stated intent) and constitute a valid waiver of First Amendment rights where necessary. This analysis should apply in the context of a settlement between a franchisor and a franchisee. However, there are added layers of review for employees settling certain employment-based claims, for example, under the Fair Labor Standards Act, 29 U.S.C.A. § 201 et seq. (“FLSA”). Given the blurring of lines in some recent cases where franchisees have argued that they should be qualified as employees and be able to file a claim under the FLSA (see, e.g., Patel v. 7-Eleven, Inc., 322 F. Supp. 3d 244 (D. Mass. 2018); In re Domino’s Pizza Inc., No. 16CV2492AJNKNF, 2018 WL 4757944 (S.D.N.Y. Sept. 30, 2018)), these standards potentially could be invoked in settling a claim by a franchisee. Accordingly, if found to be an employee, a franchisee would enjoy the same higher standards of review as any employee seeking approval of his or her FLSA settlement agreement. One of the two ways to settle an FLSA claim is to draft a judicially approved fair and reasonable agreement. Lynn’s Food Stores, Inc. v. U.S., 679 F.2d 1350, 1353 (11th Cir. 1982). (The second route to settlement is through the Department of Labor.) Non-disparagement clauses may not be deemed fair and reasonable because they go further than a simple claim release, and touch upon the employee’s fundamental rights. Certain precautions need to be taken when drafting these clauses, as the courts will use a balancing test to determine whether the weaker party has been granted enough protection, and to ensure that compliance with the FLSA has not been undermined. Although results are not always consistent, courts tend to be more friendly towards the enforcement of non-disparagement clauses that only benefit the employee or are mutual, that give additional monetary consideration to the employee, or that include a carve-out for truthful statements about the relevant litigation.

**Remedies Available for a Breach**

In an action asserting breach of a non-disparagement clause, in addition to the validity of the clause, the type of remedy is critical. Specific performance raises the issue of prior restraint on the right to free speech. Implicitly or explicitly, to enjoin prospective speech, the trial court is supposed to find a waiver of the First Amendment; otherwise the injunction is an impermissible prior restraint. In the Ninth Circuit, the Court has explicitly found a waiver through a settlement agreement. See Malem Med., Ltd. v. Theos Med. Sys., Inc., 761 F.App’x 762, 764 (9th Cir. 2019) (“Given the context in which the non-disparagement provision was negotiated, including Theos falsely claiming Malem’s products were dangerous, Theos clearly "voluntarily and knowingly" waived its First Amendment rights.”) Other courts find that where the rights are waived, it is not state action subject to the First Amendment. See United Egg Producers v. Standard Brands, Inc., 44 F.3d 940, 943 (11th Cir. 1995) (“Where two disputing parties in positions of equal bargaining power agree, through a Settlement Stipulation, to restrict, in a limited degree, their First Amendment rights on commercial speech as was done here, we hold that court enforcement of that agreement is not governmental action for First Amendment purposes.”) But see Shelley v. Kraemer, 334 U.S. 1 (1948) (holding that state court enforcement of racially restrictive covenants constitutes state action). In another case, a court found waiver implicitly in the discussion of the balancing of the equities prong of injunctive relief, reasoning that the “consequences of enforcing the non-disparagement provision were created by the defendants. SAVE agreed to it. Any limitation on SAVE’s advocacy during the proxy contest is of its own making.” USA Techs., Inc. v. Tirpak, No. CIVA. 12-2399, 2012 WL 1889157, at *7 (E.D. Pa. May 24, 2012).

In view of the importance of First Amendment freedom of speech, courts will be cautious in granting injunctive remedy. Indeed, even if the settlement agreement specifically identifies specific performance or a preliminary injunction as an available remedy, a court may not be willing to grant such relief if it deems the remedy inappropriate under the circumstances. Conversely, some courts will...
determine that the parties indirectly agreed to the possibility of injunctive relief, when contractually waiving their rights for the purpose of the non-disparagement clause, and grant an injunction even when not specified in the agreement. USA Techs., Inc. v. Tirpak, No. CIV.A. 12-2399, 2012 WL 1889157 (E.D. Pa. May 24, 2012). Consequently, what matters the most is whether the parties expressly agree to an injunctive remedy when drafting the settlement agreement, but whether they demand it after an alleged breach of contract. The other normal factors for the issuance of a preliminary injunction are also considered: likelihood of success on merits, threat of irreparable harm, balance of equities, and public interest. Id. at *2.

The most straightforward condition to fulfill in disparagement claims is the threat of irreparable harm, as it is nearly impossible to calculate the damages of disparagement. Although available as a remedy, an injunction is often of limited use to a harmed party. Indeed, the status quo will most likely be unrecoverable once a violation of the non-disparagement clause has occurred, and specific performance will be inadequate to remedy any economic loss caused by the breach. For this reason, a wronged franchisee or franchisor may prefer monetary damages. As the general principles of contract law apply to breaches of non-disparagement clauses in settlement agreements, a plaintiff needs to prove causation and loss in order to qualify for compensation. A plaintiff often argues that a violation caused it loss of business, but it is often difficult to prove correlation between the two events. Plaintiffs can also claim that disparagement created bad publicity or has had a negative effect on their reputation, which caused a loss of investment opportunities. This will also be a complicated claim to make, as it will not be easy to calculate the specific amount of money which could have been obtained had it not been for the disparagement.

Rather than burden themselves with the task of proving and calculating the monetary loss they have suffered, parties can include a liquidated damages clause in their settlement agreement. As is typical in the analysis of liquidated damages, the courts will evaluate certain conditions before granting the remedy. First, the amount provided for in the agreement needs to be reasonable, which means that it should not be extremely different from any foreseen loss. Second, the amount of money lost must be impossible or difficult to determine. Third, the clause should not conflict with any public policy grounds which would render it inapplicable, such as for example the prohibition of penalty clauses. Holloway Auto. Grp. v. Lucic, 163 N.H. 6, 9-10, 35 A.3d 577, 581 (2011). A liquidated damages remedy appears to fit breaches of non-disparagement clauses in franchise related settlement agreements particularly well. In such cases, the amount of the loss will be almost, if not completely, impossible to ascertain. This renders other money damages difficult to apply while it serves to strengthen the argument for an enforceable liquidated damages clause.

However, in the more sensitive FLSA context, employees may be unable to waive their right to determinate damages, and liquidated damages will in most cases only be available against the employer. See, e.g., Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199, 203 (2d Cir. 2015); Lopez v. Nights of Cabiria, LLC, 96 F. Supp. 3d 170 (S.D.N.Y. 2015) (approval of the settlement agreement was refused because it contained a non-disparagement and liquidated damages clause which could be enforced against the employee).

**Conclusion**

A settlement agreement is supposed to end litigation, not spawn it. When drafting a settlement agreement with a non-disparagement clause, parties should ensure its enforceability as much as possible beforehand. For regular franchise-franchisor relationships, it is important to clearly delineate the prohibition, making it clear enough to constitute a waiver of First Amendment rights, and consider whether liquidated damages are appropriate in case of a breach. If the substance of the relationship could be qualified as employee-employer however, several additional factors need to be considered. Where this is a risk, the parties should plan for monetary compensation and tailor the clause to their needs to ensure that it is a fair and reasonable resolution of their dispute.

Note: Mathilde Mounier is studying law in Maastricht, Netherlands, and spent the summer of 2019 as an intern with the firm of Pia Anderson Moss & Hoyt.
is greatly valued by our membership. However, the resources that the Forum provides, from case notes to periodicals to papers and PowerPoints to publications (and more!) going back many years, are also a hugely valuable element of the Forum. As I mentioned in my state of the Forum address in Denver, I have formed a committee to review and identify how we can maximize our resources and to make recommendations to the Governing Committee on making our valuable resources easier to find and more intuitive to access. We can all look forward to improvements in this area in the near future.

As always, feel free to contact me at will.woods@bakermckenzie.com or 214-978-3022, or any other Governing Committee member if we can be of service to you. A list of the current Governing Committee members and Senior Appointed Leadership can be found here: https://www.americanbar.org/content/dam/aba/events/franchising/2019/fr_full_roster_10_22_19.pdf. Thank you again for your engagement and participation in the Forum.

Message from the Chair
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Office location: office in San Rafael, CA, but I mostly work from my home office in Occidental, CA

Practice specialties: representing franchisees exclusively, in both litigation and transactional work

Hobbies: hiking, music festivals, woodworking & building (after foundation and rough framing, I built my own house and gained an enormous tool collection in the process)

Best-loved music: I have been to over 100 Grateful Dead concerts, and I frequently attend bluegrass and jam grass festivals. Billy Strings is my favorite new artist

Favorite thing about the Forum: It’s not just another CLE lecture. Instead, attendees get the expertise of the presenters along with the collective knowledge of the audience who actively participate in the presentations. Attendees gets to pick the brains of all the top practitioners.

Something people would be surprised to learn about you: (1) Ben Franklin is my 5x great-uncle; Ben’s older brother James (who had the printing press in Boston) is my 5x great-grandfather; (2) at age 15, I ran away from home to join the carnival; for the next four years, I traveled the country as a carny and often ran the Zipper ride; (3) I lived in the USSR for a semester in undergrad and witnessed the fall of the Soviet Union firsthand; I even had a Kalashnikov rifle jammed in my back when Yeltsin sent tanks to take back the Parliament building; (4) I have hiked to the top of Half Dome in Yosemite four times (and will be doing it again this year).
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